

# HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS—THE IMPACT OF THE JUDGMENT OF THE KOSOVO SPECIALIST CHAMBERS OF 26 APRIL 2017

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## INTRODUCTION

By their very nature, international criminal tribunals will in their operation impact individual rights, such as the right to liberty and the right to a fair trial. Without a constitution and without a history in developing due process norms, international criminal tribunals have to provide for instant incorporation of human rights in their respective criminal proceedings.

However, the circumstances under which international criminal tribunals are established are often complex, while at the same time their creation is considered to be a matter of urgency. As a result, there may not always be sufficient attention to human rights law's position and rank in the applicable sources of law during the creation of international criminal tribunals. In practice, the effect of human rights law in international criminal proceedings has proven at times to be problematic. Without elaborate written procedural rules, it may be uncertain what the precise scope of the proceedings' interference with individual rights and liberties is, or ought to be.

On April 26, 2017, the Constitutional Chamber of the Kosovo Specialist Chambers (KSC) reviewed the due process content of the KSC's newly drafted Rules of Procedure and Evidence (RPE).<sup>1</sup> It concluded that the RPE adopted by the Judges were inconsistent with human rights in a number of ways,<sup>2</sup> especially because of its lack of sufficiently detailed rules governing investigations which interfere with individual

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<sup>1</sup> Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ¶¶ 2, 5–6 (Apr. 26, 2017), <https://www.scp-ks.org/en/documents/judgment-referral-rules-procedure-and-evidence-26-apr-2017> [<https://perma.cc/3HAV-UCHG>] [hereinafter April 2017 KSC Judgment].

<sup>2</sup> *Id.* ¶ 215.

rights, such as search and seizure operations and wiretaps.<sup>3</sup> It raises the question—the subject of this Article—whether the KSC has raised the bar in terms of the principle of procedural legality and whether the current loose approach in international criminal proceedings to investigative powers is in violation of international human rights law. If this research question is answered in the affirmative, it would necessitate a significant overhaul of the organization of international criminal proceedings, especially in its pretrial phase.

In order to answer the aforementioned research question, I first provide an overview and analysis of the position of human rights in international criminal proceedings. Next, I examine how international criminal proceedings have been organized in relation to international human rights law. In Part III, my focus shifts to the KSC, where I first provide information and background on the creation of the KSC before ultimately analyzing the April 2017 judgment of the KSC's constitutional chamber. Its impact on the protection of rights and the organization of international criminal proceedings will be the subject of Section V.B. The Article ends with concluding observations.

## I. HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS— THEIR PLACE IN THE APPLICABLE SOURCES OF LAW

### A. *Applicability*

The main contemporary international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>4</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>5</sup> the International Criminal Court (ICC),<sup>6</sup> and the Special Court for Sierra Leone (SCSL)<sup>7</sup> were established and operate in an era in which international human rights law must be duly reflected and part of their applicable law. If this were not the case, many states would be prevented from ratifying or supporting this new criminal justice system.

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<sup>3</sup> *Id.* ¶¶ 76–95.

<sup>4</sup> See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993), adopted by S.C. Res. 827, ¶ 1 (May 3, 1993) [hereinafter *ICTY Statute*] (“[E]stablish[ing] an international [criminal] tribunal . . . in the territory of the former Yugoslavia.”).

<sup>5</sup> See S.C. Res. 955, ¶ 1 (Nov. 8, 1994) [hereinafter *ICTR Statute*] (“[E]stablish[ing] an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda.”).

<sup>6</sup> See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, art. 1 [hereinafter *Rome Statute*] (“Establish[ing]” “[a]n International Criminal Court.”).

<sup>7</sup> See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), Jan. 16, 2002, 2178 U.N.T.S. 137, art. 1 [hereinafter *SCSL Statute*] (“[E]stablish[ing] a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone.”).

As a result, the statutes of international criminal tribunals contain—or reflect—the majority of human rights standards that are relevant to criminal proceedings.<sup>8</sup> The right to a fair trial is at the heart of criminal proceedings and has, as incorporated in the law of international criminal tribunals, largely been based on Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>9</sup> It should be noted

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<sup>8</sup> Article 21 of the ICTY Statute, Article 20 of the ICTR Statute, Article 17 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and Article 67 of the Rome Statute contain the rights of the accused. See SCSL Statute, *supra* note 7, art. 17 (“Rights of the accused”); Rome Statute, *supra* note 6, art. 67 (“Rights of the accused”); ICTR Statute, *supra* note 5, art. 20 (“Rights of the accused”); ICTY Statute, *supra* note 4, art. 21 (“Rights of the accused”). RPE 42 common to the ICTY, ICTR, and SCSL encompass the rights of persons during investigation. See Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.50, r.42 (July 8, 2015) [hereinafter ICTY RPE]; Int’l Criminal Tribunal for the Prosecution of Persons Responsible for Genocide & Other Serious Violations of Int’l Humanitarian Law Committed in the Territory of Rwanda & Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Rules of Procedure and Evidence, r.42 (May 13, 2015) [hereinafter ICTR RPE], <http://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf> [<https://perma.cc/BJL9-FCNH>]; Special Court for Sierra Leone, Rules of Procedure and Evidence, r.42 (May 31, 2012), <http://www.rscsl.org/Documents/RPE.pdf> [<https://perma.cc/JU69-93V6>]. Note that the right not to be subjected to an unlawful arrest or detention is missing from the ICTY Statute and ICTR Statute. Compare ICTR Statute, *supra* note 5 (omitting such a right), and ICTY Statute, *supra* note 4, art. 2(g) (providing for prosecution of persons committing “unlawful deportation or transfer or unlawful confinement of a civilian,” but no corresponding right to release from unlawful confinement), with International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 9(4) [hereinafter ICCPR] (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”), and Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 5(4) [hereinafter ECHR] (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”). In that regard, the Rome Statute provides in Article 85 for compensation to a victim of unlawful arrest or detention, from which the right could be derived. See Rome Statute, *supra* note 6, art. 85(1) (“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”).

<sup>9</sup> See VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDERS’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 226 (1995) (“The International Tribunal must fully respect the rights of the accused set forth in Article 21 of the Statute, which is based largely on Article 14 of the International Covenant on Civil and Political Rights.”). Of the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the ICCPR, the ICCPR’s test regarding the right to a fair trial in Article 14 “is the most complete.” See David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT’L & COMP. L. Q. 352, 377 (1967) (“The three human rights treaty texts [the ECHR, the ACHR, and the ICCPR] between them define the right to a fair trial in criminal proceedings in full and basically satisfactory terms. . . . Of the three, the United Nations text is the most complete.”). This is also acknowledged in the case law of ad hoc tribunals. See,

that other rights relevant to criminal proceedings, such as the right not to be subjected to inhumane and degrading treatment<sup>10</sup> and the right to privacy,<sup>11</sup> are—as rights—not directly part of the applicable laws of international criminal tribunals. This raises the question of whether these rights still apply to the functioning of international criminal tribunals. In this regard, it should be mentioned that, not being states, international criminal tribunals are not parties to international human rights treaties.<sup>12</sup>

Starting with the ICTY and ICTR, their statutes do not contain any provision on the sources of law to be applied.<sup>13</sup> The inclusion of a provision as to the sources of law to be applied by the ICTY and ICTR would have offered guidance in the proper application and interpretation of sources of law, especially with respect to human rights law.<sup>14</sup>

However, it is clear from the drafting history of the ICTY and ICTR that they were nevertheless tasked to operate in full conformity with existing human rights law.<sup>15</sup>

*e.g.*, Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, ¶ 54, fn. 57 (Int'l Crim. Trib. for Rwanda, Appeals Chamber, June 1, 2001), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-95-1/appeals-chamber-judgements/en/010601.pdf> [<https://perma.cc/3J2C-AV29>] (“Article 20 [of the ICTR Statute] and various provisions of the Rules set forth the rights of the accused by echoing the guarantees contained in international and regional instruments[.]” including “Article 14 of the International Covenant on Civil and Political Rights[.]”); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/S524-JTPG>] (“The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute.”).

<sup>10</sup> See, *e.g.*, ICCPR, *supra* note 8, art. 7; ECHR, *supra* note 8, art. 3.

<sup>11</sup> See, *e.g.*, ICCPR, *supra* note 8, art. 17; ECHR, *supra* note 8, art. 8.

<sup>12</sup> See, *e.g.*, ICCPR, *supra* note 8, art. 1(3) (articulating the ICCPR's obligations as applying to “states parties to the present Covenant”); ECHR, *supra* note 8, at 222 (describing parties to the Convention as “Governments of European countries”).

<sup>13</sup> See ICTR Statute, *supra* note 5, ¶ 1 (making no mention of required sources of law to apply to cases other than explaining the purpose of the tribunal as “prosecuting persons responsible for genocide and other serious violations of international humanitarian law”); ICTY Statute, *supra* note 4, ¶ 1 (making no mention of required sources of law to apply to cases other than explaining the purpose of the tribunal as “prosecuti[ng] persons responsible for serious violations of international humanitarian law”).

<sup>14</sup> See Sergey Vasiliev, *General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW (Göran Sluiter & Sergey Vasiliev eds., 2009) (providing a comprehensive discussion of the treatment of sources by the *ad hoc* tribunals); see also Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121, 121–36 (2006).

<sup>15</sup> See U.N. Secretary-General, Letter Dated Oct. 1 1994 from the Secretary-General Addressed to the President of the Security Council, 2, U.N. Doc. S/1994/1125 (Oct. 4, 1994) (calling for ICTR to “appl[y] and adjudicat[e] . . . international law on individual responsibility for serious human rights violations”); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993).

This follows from the well-known Secretary-General's statement in its report on the establishment of ICTY:

It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.<sup>16</sup>

This statement, however, does not inform us as to how international human rights laws precisely enter the applicable laws of the ICTY and ICTR or how they bind the tribunals in their functioning.

The status of the ICTY and ICTR as subsidiary organs of the U.N. Security Council means that they do not operate in a legal vacuum.<sup>17</sup> It has been asserted that the tribunals are bound by "the general normative framework constituted by the international legal order."<sup>18</sup> In this regard, the obligation of international organizations to observe general international law,<sup>19</sup> including human rights standards, is currently regarded as resulting from the attribution of international legal personality to international organizations.<sup>20</sup> International organizations are created under international law, and thus, as subjects of international law, they are bound by general international law.<sup>21</sup> As subsidiary organs, the ICTY and ICTR have inherited their

<sup>16</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, *supra* note 15, ¶ 106.

<sup>17</sup> The U.N. Security Council established the ICTY and ICTR using its Chapter VII authority under the U.N. Charter. ICTR Statute, *supra* note 5, at 2; S.C. Res. 827, 2 (May 25, 1993).

<sup>18</sup> Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, 1 EUR. J. OF LEGAL STUD. 25, 27 (2007). *See also* Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 539 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

<sup>19</sup> For the purposes of this Article, "general international law" is regarded as customary law including the general principles of law, without excluding the possibility that conventional law can be regarded as general, insofar as it became a custom. *See* Grigory Tunkin, *Is General International Law Customary Law Only?*, 4 EUR. J. OF INT'L LAW 534, 538 (1993) ("Primarily as a result of the codification and progressive development of international law, a number of general multilateral treaties have become or are becoming part of general international law.").

<sup>20</sup> *E.g.*, C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS 399–400 (2005); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 46 (Philip Alston ed., 2005); Karel Wellens, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 1 (2002).

<sup>21</sup> The International Court of Justice (ICJ) in its opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, considered that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations

obligations under general international law from the obligations incumbent upon the United Nations as an international organization.<sup>22</sup> Moreover, Articles 1 and 55 of the U.N. Charter set forth the fundamental purposes and principles of the organization, which include respect for the “principles of justice and international law” and the promotion and encouragement of “respect for . . . human rights and fundamental freedoms,”<sup>23</sup> and the U.N. Charter enjoys primacy over all other obligations.<sup>24</sup> The importance of compliance of international criminal tribunals with international standards of human rights is furthermore stressed by the fact that the most important human rights instruments, such as the ICCPR, were developed under the auspices of the United Nations and adopted by the General Assembly.<sup>25</sup> In that regard, the fact that the catalogue of human rights in the statutes of the ICTY and ICTR is not complete does not imply that the Security Council had the intention to deviate from internationally recognized human rights.<sup>26</sup>

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incumbent upon them under general rules of international law. . . .” Advisory Opinion, 1980 ICJ 73, ¶ 37 (Dec. 20). Similarly, the European Court of Justice stated that “the European Community must respect international law in the exercise of its powers . . . .” Case C-286/90, *Anklagemyndigheden v. Poulsen*, 1992 E.C.R. I-6048, ¶ 9, *cited with approval in* Case C-162/96, *A. Racke GmGH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3688, ¶ 45. *See also* Case T-231/04, *Hellenic Republic v. Comm’n of the European Cmtys.* 2007 E.C.R. II-66, ¶ 85 (“[T]he principle of good faith is a rule of customary international law . . . which . . . is binding . . . on the Community . . .”).

<sup>22</sup> As previously noted, both the Statutes of the Yugoslavia and Rwanda Tribunals were adopted by the Security Council under Chapter VII of the U.N. Charter, thus constitute subsidiary organs of the U.N. Security Council. *See* ICTR Statute, *supra* note 5, at 2; S.C. Res. 827, 2 (May 25, 1993).

<sup>23</sup> U.N. Charter art. 1, art. 55(c), ¶1.

<sup>24</sup> *Id.* art. 103.

<sup>25</sup> The adoption of these important human rights instruments, such as the ICCPR, by the General Assembly shows the universal recognition of the importance of these human rights standards. *See* G.A. Res. 2200, ¶ 1 (Dec. 16, 1966).

<sup>26</sup> Consider also the dissenting opinion of Judge Pocar to the Appeals Chamber Judgement, where he states that:

ICCPR is not only a treaty between States which have ratified it, but, like other human rights treaties, also a document that was adopted—unanimously—as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly. Only a clear-cut decision to depart from it would lead to a different conclusion. But in this case, as mentioned, the intention of the Security Council to comply with the ICCPR was explicitly demonstrated through its approval of the Report of the Secretary General.

*Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, Dissenting Opinion of Judge Pocar, 2 (Int’l Crim. Trib. for Rwanda, App. Chamber May 26, 2003) <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-3/appeals-chamber-judgements/en/030526.pdf> [<https://perma.cc/2783-28KJ>].

It can thus convincingly be claimed that international human rights norms are binding on the ICTY and ICTR—even if the due process norms have not been fully incorporated in their statutes and RPE—as a matter of law, and not merely policy considerations.<sup>27</sup>

This has been acknowledged in practice. According to the judges of the ICTY, “[an international criminal court] ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments.”<sup>28</sup> Further, “it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”<sup>29</sup>

Contrary to the ICTY and ICTR, the Rome Statute contains a list of sources to be applied by the International Criminal Court. Article 21 of the Statute does not only exhaustively set out the applicable sources of law but also establishes some sort of hierarchical relationship among the different sources to be applied.<sup>30</sup> The applicable

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<sup>27</sup> See Salvatore Zappalà, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 5, 7, 47–48 (2003) (“[T]he starting point adopted in this book is that this is more a *policy* issue than a legal question. And the policy choice has been made in favour of an extension to international criminal proceedings of international human rights provisions on due process . . . . With regard to the extension of due process principles to *international* criminal trials, it is submitted that although there was no one specific rule imposing on States the obligation to extend human rights safeguards to the international level, there were (and are), nonetheless, several good reasons to support this extension. In particular, in the case of UN *ad hoc* Tribunals it would have been inconsistent for the Security Council not to impose respect for UN standards. . . . This extension has been realized by the express decision of the Security Council and the UN Diplomatic Conference to ensure the highest standards of fairness in international criminal proceedings.”).

<sup>28</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 42 (Int’l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/FN5Z-5R37>].

<sup>29</sup> *Id.* ¶ 45. See also Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶ 55 (Special Ct. for Sierra Leone, App. Chamber Mar. 13, 2004) (“[The Special Court] must be established according to proper international criteria; it must have the mechanisms and facilities to dispense even-handed justice, providing at the same time all the guarantees of fairness and it must be in tune with international human rights instruments.”).

<sup>30</sup> According to Article 21 of the Rome Statute:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction

sources of law have been set out in a hierarchical order in paragraph 1 of Article 21 of the Rome Statute, starting with the Statute itself as the most important source of law, followed by general principles of law as an intermediate source of law, and, finally national laws as the most subsidiary sources of law.<sup>31</sup> Paragraph 3 of the same article gives international human rights law the most prominent place among applicable laws to the ICC.<sup>32</sup> According to that section, “[t]he application and interpretation of [the] law . . . must be consistent with internationally recognized human rights, and be [non-discriminatory] . . . .”<sup>33</sup> This paragraph provides for a prioritized position of these norms above all others mentioned in the Article, including the Rome Statute.<sup>34</sup>

Consistent with this view, the ICC Appeals Chamber has acknowledged that “[h]uman rights underpin the Statute; every aspect of it,” and that “[i]ts provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights. . . .”<sup>35</sup> In other decisions, the Court has used the label of “general principle of interpretation” in reference to Article 21(3) of the Rome Statute,<sup>36</sup> which arguably refers to the status of “internationally recognized human rights” as not constituting the source of law *per se*.<sup>37</sup>

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over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Rome Statute, *supra* note 6, art. 21.

<sup>31</sup> See *id.* art. 21, ¶ 1.

<sup>32</sup> See *id.* art. 21, ¶ 3.

<sup>33</sup> *Id.*

<sup>34</sup> See Alain Pellet, *Applicable Law, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1051, 1080 (Antonio Cassese et al. eds., 2002) (“[T]hese ‘internationally recognized human rights’ [in Article 21(3) of the Rome Statute] take precedence over all other applicable rules.”).

<sup>35</sup> Prosecutor v. Dyilo, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 37 (Dec. 14, 2006).

<sup>36</sup> Prosecutor v. Dyilo, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, annex I, ¶ 2 (May 15, 2006). See also Prosecutor v. Dyilo, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 10 (Nov. 8, 2006) (“[T]he Chamber recalls the general principle of interpretation set out in article 21(3) of the [Rome] Statute . . . .”).

<sup>37</sup> See *Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the



What implications can be drawn from what appears to be a rather theoretical, even semantical, distinction? In light of the precedence of human rights norms, the interpretation and application of the applicable law of Article 21(1) and (2) of the Rome Statute cannot infringe on internationally recognized human rights norms. Furthermore, it is argued that the room for “contextual interpretation [and application] of the relevant provisions,” in accordance with “the need to safeguard the uniqueness of the criminal procedure of the International Criminal Court,”<sup>38</sup> is outlined by the above elaborated nature of human rights. In light of their minimum nature it is rather clear that the implementation of applicable law of the ICC can amount to more favorable results, in the sense of better individual protection. However, these protections cannot fall below the minimum prescribed by the international human rights standards.<sup>39</sup>

In the ICC’s practice, it remains uncertain whether human rights law, applying the priority rule of Article 21(3), can indeed set aside conflicting rules in the Rome Statute or Rules of Procedure and Evidence. In the case of *Prosecutor v. Ngudjolo*,<sup>40</sup> the Court was left to decide the fate of witnesses who had applied for asylum in the Netherlands; the witnesses’ goal of asylum came in direct conflict with the Court’s obligation to return them to Congo, pursuant to Article 93(7)(b) of the Statute.<sup>41</sup>

The ICC Appeals Chamber said the following on this matter:

First, article 21(3) of the Statute requires that article 93(7) of the Statute be applied and interpreted in conformity with internationally recognised human rights; it does not require the Court to *violate* its obligations pursuant to article 93(7)(b) of the Statute. Furthermore, such an interpretation would seriously damage the Court’s ability to enter into future cooperation agreements with States, which would undermine the Court’s ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.<sup>42</sup>

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Establishment of a Timetable, at annex I, ¶ 2 ; *Dyilo*, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, at ¶ 10.

<sup>38</sup> *Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, at annex I, ¶ 4.

<sup>39</sup> In other words, Article 21(3) of the Rome Statute has been interpreted by the ICC as providing a floor of minimum human rights protection, on top of which the ICC might afford individuals greater protection. *See id.* at annex I, ¶¶ 1–4.

<sup>40</sup> Case No. ICC-01/04-02/12-158, Order on the Implementation of the Cooperation Agreement Between the Court and the Democratic Republic of the Congo Concluded Pursuant Article 93(7) of the Statute, ¶¶ 2–5 (Jan. 20, 2014).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ¶ 26.

Rather, through means of harmonious interpretation, the Court will seek to respect human rights law, without setting aside its own applicable law.<sup>43</sup>

### *B. Content and Scope*

Some attention must be given to the matter of content and scope of human rights in the context of international criminal proceedings. Two matters need to be discussed. First, there is the question of how limitation clauses in human rights apply to international criminal justice. Second, attention will be paid, albeit briefly, to the question of whether human rights law—which was developed to be applied in and by states,<sup>44</sup>—needs some recalibration in the context of international criminal justice.

As far as the limitation of human rights is concerned, the point of departure is that exceptions must be “narrowly interpreted”<sup>45</sup> and that any restriction “must be convincingly established.”<sup>46</sup> Specifically in relation to the right to a fair trial, the European Court of Human Rights (ECtHR) has rejected a restrictive interpretation by emphasizing that “[i]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision . . . .”<sup>47</sup>

A right can only be limited when the foundation of the interference is in law (clear and foreseeable rules), the restriction is necessary for a democratic society (proportionality and subsidiarity), and there is a legitimate aim to restrict the rights.<sup>48</sup> In the context of international criminal tribunals, these limitation clauses may not be applied without some degree of transformation or recalibration.<sup>49</sup> For example,

<sup>43</sup> See *id.* ¶28 (“Thus, the question before the Appeals Chamber is how the second sentence of article 93 (7) (6) of the [Rome] Statute should be interpreted and applied so that it does not frustrate the Detained Witnesses’ right to an effective remedy from the Netherlands with respect to their asylum claims.”).

<sup>44</sup> See, e.g., ICCPR, *supra* note 8, art. 1(3) (articulating the ICCPR’s obligations as applying to “States Parties to the present Covenant”); ECHR, *supra* note 8, at 222 (describing parties to the Convention as “Governments of European countries”).

<sup>45</sup> E.g., *Klass v. Germany*, 28 Eur. Ct. H. R. (ser. A) at 17 (1978).

<sup>46</sup> E.g., *Funke v. France*, 256 Eur. Ct. H. R. 21, 24 (1993).

<sup>47</sup> *Delcourt v. Belgium*, 11 Eur. Ct. H. R. 1, 15 (1970).

<sup>48</sup> See, e.g., ECHR, *supra* note 8, art. 8(2):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in 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.

<sup>49</sup> See KRIT ZEEGERS, INTERNATIONAL CRIMINAL TRIBUNALS AND HUMAN RIGHTS LAW: ADHERENCE AND CONTEXTUALIZATION 99 (2016) (“It may be possible to establish that a given human rights norm is customary or provides an ‘internationally recognized human right,’ or

whether or not a restriction of a right is necessary in a democratic society is not something that can be easily assessed in the context of the international legal order.<sup>50</sup> It may thus be wise not to apply this element of the restriction test. Conversely, the requirement that the interference with a right must take place in accordance with the law, which is sufficiently clear and foreseeable, is a requirement that could by and large also apply to international criminal tribunals. This will be analyzed in far more detail below.

With respect to certain rights, the question also arises whether their content requires recalibration in light of the unique character of international criminal justice. In this regard, one can think of the right to an independent tribunal, which in a national justice system is assessed along the lines of separation of powers that cannot be easily transposed to the international level.<sup>51</sup> Krit Zeegers has done groundbreaking work in coming up with a framework that should govern these issues of readjusting—or recalibrating—human rights law in international criminal proceedings.<sup>52</sup> The bottom

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even to identify specific obligations that stem from it. But even in such cases, these obligations will be addressed to a state, not to an ICT.”).

<sup>50</sup> See *id.* at 99–100:

Similar considerations apply to concepts such as limitations and derogations, which equally presume the existence of a state. For example, states may limit the enjoyment of certain human rights, provided that such limitations are ‘prescribed by law,’ ‘pursue a legitimate aim,’ and are ‘necessary in a democratic society.’ States are also permitted to derogate from certain human rights obligations in times of ‘public emergency threatening the life of the nation.’ How should such requirements apply to an ICT? Can they also limit human rights and, if so, what meaning should the terms such as ‘prescribed by law,’ ‘democratic society,’ and ‘the nation’ be given in the context of an ICT? They cannot simply be copy-pasted and applied to an ICT because its law is fundamentally different from that of a state; it is not a ‘democratic society’ nor does it have a ‘nation’ whose life can be threatened. Given the ICTs’ limited mandates and the fundamentally different way in which they exercise public power, it is not obvious how such requirements could operate in their context. If these norms are to be applied to non-state entities, they must be translated and be given a meaning that fits the ICTs’ context.

(footnotes omitted).

<sup>51</sup> See *id.* at 99:

For example, the right to be tried by an independent and impartial tribunal, being part of the right to a fair trial, should surely apply to an ICT under a functional approach to its human rights obligations. However, the requirement of independence and impartiality in IHRL is closely connected to Montesquieuan conceptions of the separation of powers. Since no such structures apply at the international level, the question arises how this requirement should be shaped when applied to an ICT.

(footnotes omitted).

<sup>52</sup> See *id.* at 355–95 (“This chapter develops a methodological framework for the properly contextualized interpretation and application of human rights norms by the ICTs in their procedural practice.”).

line is that it should be a thorough process in which care should be taken that the end result is not one of reduced protection:

In order to truly adhere to IHRL, the ICTs must sometimes contextualize their interpretation and application of human rights norms. The circumstances in which an ICT operates can fundamentally differ from the circumstances in which international human rights norms normally apply. To ensure the effective protection of these norms in the context of an ICT, this specific context must be taken into account in the interpretation and application of human rights norms. As has been noted, ‘genuine fairness and justice are contextually defined’.

However, the ICTs do not employ a coherent methodology for the interpretation and application of human rights norms in their procedural practice. In addition, when they contextualize human rights norms, this too often results in underprotection. This is of particular concern because the ICTs’ practice of contextualization is often improperly justified, either because their legal reasoning is inadequate, or because they fail to offer any legal reasoning to substantiate their deviation. It has been noted that ‘the ICTs have not sufficiently focused on providing a proper analysis in which both the concrete human rights norm and the unique position of ICTs are adequately deconstructed.’<sup>53</sup>

There are, unfortunately, some examples in the case law of international criminal tribunals, notably the ICTY and ICTR, in which the special character of international criminal proceedings has played a role in reducing the protection of human rights as they otherwise would have been available at the national level.

In the very early years of the ICTY, the Trial Chamber issued a decision in 1995 in the Tadić case, which—for puzzling reasons—went a long way in dismissing the interpretation of human rights law by international and regional human rights courts.<sup>54</sup> The Trial Chamber held that “the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is *only of limited relevance* in applying the provisions of the Statute and Rules of the International Tribunal.”<sup>55</sup> As such:

[I]n interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between

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<sup>53</sup> *Id.* at 392 (footnotes omitted).

<sup>54</sup> See Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 27–30 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995), <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm> [<https://perma.cc/AL3C-V5MF>].

<sup>55</sup> *Id.* ¶ 27 (emphasis added).

the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own *unique legal framework*.<sup>56</sup>

This unique context is stressed by the affirmative obligation stated in the Statute to protect victims and witnesses, which neither ICCPR nor ECHR lists,<sup>57</sup> the gravity of offenses prosecuted by the tribunal and the fact that the tribunal is "operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses."<sup>58</sup>

Quite some years have passed since this decision was issued. In the interpretation of the Statute and Rules, the judges of all international criminal tribunals have heavily relied on domestic case law and the case law of international human right supervisory bodies, such as the Human Rights Committee and ECHR.<sup>59</sup> It may thus

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<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> *Id.* ("[N]either Article 14 of the ICCPR nor Article 6 of the European Convention of Human Rights . . . list the protection of victims and witnesses as one of its primary considerations.")

<sup>58</sup> *Id.* ¶¶ 27–28.

<sup>59</sup> *See, e.g.,* *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgement (Int'l Crim. Trib. for Rwanda, App. Chamber May 20, 2005), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-20/appeals-chamber-judgements/en/050520.pdf> [<https://perma.cc/3V62-ZEUY>]; *Prosecutor v. Tadić*, Case No. IT-94-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vugin (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber Feb. 27, 2001), <http://www.icty.org/x/cases/tadic/acjug/en/vuj-aj010227e.pdf> [<https://perma.cc/94WH-2XTX>]; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Judgement (Int'l Crim. Trib. for Rwanda Sept. 20, 2006), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44c/trial-judgements/en/060920.pdf> [<https://perma.cc/59ET-LSLN>]; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (Int'l Crim. Trib. for Rwanda May 23, 2005), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/appeals-chamber-judgments/en/050523.pdf> [<https://perma.cc/6GXG-BS34>]; *Prosecutor v. Nikolic*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (Int'l Crim. Trib. for the Former Yugoslavia Oct. 9, 2002), [http://www.icty.org/x/cases/dragan\\_nikolic/tdec/en/10131553.htm](http://www.icty.org/x/cases/dragan_nikolic/tdec/en/10131553.htm) [<https://perma.cc/7X8Z-MJAY>]; *Prosecutor v. Krajišnik*, Case No. IT-00-39 & 40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001), <https://www.legal-tools.org/doc/f7195c/pdf/>; *Prosecutor v. Brdanin*, Case No. IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release (Int'l Crim. Trib. for the Former Yugoslavia Mar. 28, 2001), <http://www.icty.org/x/cases/brdanin/tdec/en/10328PR215226.htm> [<https://perma.cc/R9AU-2HG7>]; *Prosecutor v. Brdanin*, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2000), <http://www.icty.org/x/cases/brdanin/tdec/en/00725PR213239.htm> [<https://perma.cc/NR6K-59A4>]; *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Motion for Provisional Release of Miroslav Kvočka (Int'l Crim. Trib. for the Former Yugoslavia Feb. 2, 2000), <http://www.icty.org/x/cases/kvočka/tdec/en/00202PR512949.htm> [<https://perma.cc/8MGQ-A2ZR>]; *Prosecutor v. Dokmanovic*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic (Int'l Crim. Trib. for the Former Yugoslavia Oct. 22, 1997); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Int'l Crim. Trib. for the Former Yugoslavia

appear that the protection of human rights law seems, on the surface, to be well up to standards. However, as will be further explored in the following sections, this may not be the case.

## II. THE ORGANIZATION OF INTERNATIONAL CRIMINAL PROCEEDINGS AND THE PROTECTION OF RIGHTS

The procedures of the ICTY and ICTR on the one hand and the ICC on the other were shaped under unique circumstances.<sup>60</sup> As previously discussed, there is no background or tradition of criminal procedure for the contemporary international criminal tribunals to fall back on.<sup>61</sup> Moreover, the procedural law had to be created as a matter of urgency, either because an international criminal tribunal needed to be operational within very short notice—with the goal of restoring international peace and security (i.e., the ICTY and ICTR), or because the momentum of negotiations had to be seized (i.e., the ICC).<sup>62</sup>

In light of these facts and circumstances, it is understandable that the procedural laws of the ICTY, ICTR, and ICC are short and concise as compared to national justice systems.<sup>63</sup> The procedural laws of these institutions concentrate on the main elements of procedure and leaves many aspects of investigations, especially, but also of prosecution and trials, unregulated.<sup>64</sup> In addition, as compared to national justice systems, the laws of the ICTY, ICTR, and ICC deal with aspects of their functioning which are generally not part of the procedural codes in domestic justice systems, such as the composition and organization of the court, and other institutional matters, including the election and ethical obligations for organs of the court.<sup>65</sup>

The following comes to mind when assessing the procedural components of the laws of the ICTY, ICTR, and ICC: The ICTY Statute contains thirty-four articles.<sup>66</sup> Nine of them are directly relevant to its procedure, dealing with the power to collect evidence, rights of the accused, cooperation with states, and protection of victims.<sup>67</sup>

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Sept. 2, 1997), <http://www.icty.org/x/cases/mucic/tdec/en/70902732.htm> [<https://perma.cc/7Z8X-A2E5>].

<sup>60</sup> On the creation of international criminal procedure, see INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (Göran Sluiter et al. eds., 2013) and CHRISTOPH SAFFERLING, INTERNATIONAL CRIMINAL PROCEDURE (2012).

<sup>61</sup> See SAFFERLING, *supra* note 60, at 4.

<sup>62</sup> See *id.* at 11–13.

<sup>63</sup> Cf. *id.* at 14.

<sup>64</sup> See *id.* at 2, 5.

<sup>65</sup> See, e.g., Rome Statute, *supra* note 6, art. 34 (“Organs of the Court”); ICTY Statute, *supra* note 4, art. 12 (“Composition of the Chambers”).

<sup>66</sup> ICTY Statute, *supra* note 4.

<sup>67</sup> These include: Art. 18: Investigation and preparation of indictment; Art. 19: Review of the indictment; Art. 20: Commencement and conduct of trial proceedings; Art. 21: Rights of the accused; Art. 22: Protection of victims and witnesses; Art. 23: Judgement; Art. 24: Penalties; Art. 25: Appellate proceedings; and Art. 26: Review proceedings. ICTY Statute, *supra* note 4.

The Rules of Procedure of the ICTY, in contrast, are far more elaborate, consisting of 155 provisions.<sup>68</sup> Around one hundred of them deal with procedure.<sup>69</sup> Those dealing with the totality of procedure, including appeals and review proceedings, appear fairly restricted.<sup>70</sup>

As far as the ICC is concerned, the applicable procedural law is more comprehensive than that of the ICTY and ICTR. In addition to a Statute and Rules of Procedure and Evidence, there are also Regulations of the Court as a subsidiary source of law.<sup>71</sup> All together, this makes for 479 provisions relating to procedure.<sup>72</sup> A significant portion of them are directly relevant to procedure, but do not go to such level of detail in that they regulate all available investigative measures.<sup>73</sup>

It follows from a reading of the applicable laws of the ICTY, ICTR, and ICC that important aspects of the tribunals' proceedings remain unregulated. For example, all three are silent on various investigative measures which infringe on individual rights, such as interception of telecommunications, search and seizure operations, and modern investigative techniques including (covert) surveillance and infiltration operations.<sup>74</sup> Karel De Meester has studied, in depth, the scarcity of procedural rules regulating investigations at international criminal tribunals.<sup>75</sup> He already considered this a significant problem from a human rights perspective:

It was concluded that the applicability of a procedural principle of legality to the law of international criminal procedure cannot easily be established, and how the incorporation thereof in the ICC Statute was explicitly rejected during the negotiations. However, even in the absence of this principle, in cases where investigative acts infringe upon the rights and liberties of the individuals concerned, it follows from the lawfulness requirement (“in accordance with the law”) under human rights law that sufficient procedural safeguards should be in place. . . . It is doubtful

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<sup>68</sup> ICTY RPE, *supra* note 8.

<sup>69</sup> *See id.*, r.48–r.155.

<sup>70</sup> *See* ICTY RPE, *supra* note 8.

<sup>71</sup> *See* Regulations of the Court, ICC-BD/01-01-04 (May 28, 2004) [hereinafter ICC Regulations]. In addition, there are also the Regulations of the Registry, but they are very much of a practical, administrative nature and not as relevant for regulating the procedure.

<sup>72</sup> *See* Rome Statute, *supra* note 6; Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13-Eng (2013); ICC Regulations, *supra* note 71.

<sup>73</sup> *See, e.g.*, ICC Regulations, *supra* note 71, at Reg. 13 (describing how presiding judges are selected).

<sup>74</sup> *See* ICTY Statute, *supra* note 4, art. 21 (“Rights of the accused”); Rome Statute, *supra* note 6, art. 55 (“Rights of persons during an investigation”); ICTR Statute, *supra* note 5, art. 20 (“Rights of the accused”).

<sup>75</sup> *See* KAREL DE MEESTER, THE INVESTIGATION PHASE IN INTERNATIONAL CRIMINAL PROCEDURE: IN SEARCH OF COMMON RULES (2015).

whether the current state of international criminal procedure is in full conformity with this requirement.<sup>76</sup>

Drawing from interviews with staff working at international criminal tribunals, De Meester found that the absence of detailed regulations governing procedures, especially investigations, was not considered a significant problem.<sup>77</sup> For example, the majority of the ICTR Prosecution staff whom De Meester interviewed did not find judicial authorization or review necessary for such coercive investigative measures as search and seizure operations and wiretaps.<sup>78</sup> Likewise, the majority of judges and senior legal officers at the ICTR interviewed generally felt that judicial authorization from an ICTR judge was unnecessary.<sup>79</sup>

In order to better understand these views, it may be surmised that the regulation of international criminal proceedings, especially in the pretrial phase, is sufficiently assured elsewhere. The procedure of international criminal tribunals extends over various criminal justice systems. International criminal tribunals have no territories or police forces of their own, but instead rely fully on the cooperation of others in various investigative actions and in the arrests and surrender of suspects.<sup>80</sup> The question arises as to how national law is regarded by international criminal tribunals when it comes to supplementing their own legal frameworks for investigations.

The laws of the ICTY and ICTR make reference to national law, but not so much as a means capable of filling deficiencies in the applicable law.<sup>81</sup> Rather, national law is seen as a potential obstacle that could, for example, hinder the arrests of suspects and their surrender to the ICTY and ICTR.<sup>82</sup> In this respect, states are admonished that they may not use national extradition law as an obstacle to arrest and surrender.<sup>83</sup> While references to national law governing investigative acts or arrests at the behest of the ICTY and ICTR are missing from their applicable laws, it is clear

<sup>76</sup> *Id.* at 878.

<sup>77</sup> *See id.* at 478–79.

<sup>78</sup> *See id.* The Office of the Prosecutor has its own discretion in discerning what evidence is needed, so long as it complies with governing state laws. *Id.* at 478.

<sup>79</sup> *Id.* at 480.

<sup>80</sup> *See* GÖRAN SLUITER, INTERNATIONAL CRIMINAL ADJUDICATION AND THE COLLECTION OF EVIDENCE: OBLIGATIONS OF STATES 7 (2002) (providing background on the importance of cooperation in the collection of evidence by international criminal tribunals).

<sup>81</sup> *ICTY Statute, supra* note 4, art. 29 (“Co-operation and judicial assistance”); *ICTR Statute, supra* note 5, art. 8, 28 (“Concurrent jurisdiction” and “Cooperation and judicial assistance”).

<sup>82</sup> *ICTY Statute, supra* note 4, art. 29 (“Co-operation and judicial assistance”); *ICTR Statute, supra* note 5, art. 28 (“Cooperation and judicial assistance”).

<sup>83</sup> *See* Rule 60 of the ICTY and ICTR Rules of Procedure and Evidence:

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a detained witness to the [Tribunal] in accordance with Rule 58 that may exist under the national law or treaties of the State concerned.

ICTY RPE, *supra* note 8, r.60.



that many acts of assistance in that area have been executed by states in accordance with their domestic laws and procedures.<sup>84</sup> Many states have enacted special legislation enabling them to cooperate with the ICTY and ICTR in investigations and arrests, and which often refer to domestic criminal procedural law to be applied by analogy in many instances.<sup>85</sup> This means that the investigations and arrests performed in national justice systems at the request of the ICTY and ICTR may, in practice, be governed by a more detailed legal framework than can be found in the applicable law of these two tribunals.<sup>86</sup> That said, in situations where the prosecutor of the ICTY or ICTR directly undertakes on-site investigations, where arrests and surrender are being done by international (peacekeeping) forces instead of national authorities, or where investigations and arrests are performed in a failed state, there is no actual legal framework governing the conduct of investigations and execution of arrest warrants.<sup>87</sup>

Compared to the ICTY and ICTR, the ICC contains more references to national law in the execution of arrest warrants and requests for assistance in the collection of evidence.<sup>88</sup> It appears as if this may help ensure the regulation of these matters through the applicable law. In Part 9 of the Rome Statute, dealing with cooperation between states and the ICC, it is stipulated that requests for arrest and surrender are to be executed in accordance with national law,<sup>89</sup> and the same applies for other requests for assistance.<sup>90</sup> The applicability of national law in the execution of requests for assistance is furthermore emphasized in Article 99(1) of the Statute: “Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request . . . .”<sup>91</sup>

The execution of arrest warrants is even the object of a separate provision in the Statute, obliging states to organize their national proceedings in compliance with the

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<sup>84</sup> See UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *Member States Cooperation*, <http://www.icty.org/en/documents/member-states-cooperation> [<https://perma.cc/5ZZK-KWXG>] (providing for an overview of national legislation regulating cooperation with the ICTY—and also the ICTR).

<sup>85</sup> See *id.*

<sup>86</sup> See generally *id.*

<sup>87</sup> De Meester is skeptical about this gap-filling potential of domestic law and practices:

Domestic requirements may not be provided for in the specific case or [may be] circumvented. In addition, practice has proven that investigative acts are sometimes executed through an agency (e.g. the execution of a search and seizure operation by SFOR on behalf of the ICTY Prosecutor in Bosnia and Herzegovina). Furthermore, the Prosecutor may sometimes execute coercive measures directly on the territory of the state concerned.

In all of the above situations, gaps in the protection of suspects, accused persons or persons otherwise affected by the investigations may arise.

DE MEESTER, *supra* note 75, at 878.

<sup>88</sup> See Rome Statute, *supra* note 6, art. 58, 69.

<sup>89</sup> See *id.* art. 89(1).

<sup>90</sup> See *id.* art. 93(1).

<sup>91</sup> *Id.* art. 99(1).

rights of the arrested person.<sup>92</sup> However, like at the ICTY and ICTR, the uncertainty of applicable law subsists in situations of on-site investigations, investigations conducted by or with the assistance of non-state actors, such as peacekeeping forces, or investigations in a failed state.<sup>93</sup> Taking the above into account, it cannot be said that, across the board, the execution of investigations, and arrests on national territories at the behest of the ICTY, ICTR and ICC are taking place in a legal vacuum. But the nature and degree of detail, and the quality of the applicable national law may differ greatly depending on the situation.

As an overarching issue concerning the ICTY, ICTR, and ICC, the question arises as to whether, even with a national legal framework governing the acts of investigation, the applicable law is of sufficient detail and quality. This matter is at the heart of this Article and will be further explored below in Part V.<sup>94</sup>

Individual rights find protection in the applicable law of ICTY, ICTR, and ICC, primarily through their respective Statutes and Rules of Procedure and Evidence. When concentrating on the pretrial phase, investigations and arrests, one notices that individual rights find protection in two ways. First, a number of provisions directly contain individual rights, either as rights of the arrested person, rights of suspects, rights of questioned persons, or fair trial rights. In this regard, the following provisions can be mentioned: Article 20 of the ICTR Statute, Article 21 of the ICTY Statute, Rule 40 of the ICTY and ICTR Rules of Procedure and Evidence, and Articles 55 and 67 of the Statute.<sup>95</sup> Second, attention must be given to those provisions which may not directly reference individual rights, but which—by their operation—include the protection of individual rights as an important objective. In the realm of the right to individual liberty, an excellent example are those provisions in the laws of the ICTY, ICTR, and ICC dealing with the procedures for provisional release applications available for detained persons.<sup>96</sup> These provisions ensure that detained individuals have an effective right to challenge their ongoing detentions, and that procedures are in place to have the detentions reviewed by a judge.<sup>97</sup> In a similar vein, the laws of the ICTY, ICTR, and ICC include provisions under which the defendant can submit an application to a Judge or Chamber for a request of legal assistance to be sent to a state, by which the defendant wishes to collect evidence for the preparation

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<sup>92</sup> See *id.* art. 59.

<sup>93</sup> On-site investigations in the context of the ICC have been regulated in Article 99(4) and have been subjected to more conditions than at the ICTY and ICTR. See Rome Statute, *supra* note 6, art. 99(4). Direct investigations by the Prosecutor in a territory of a failed State can be authorized by the Pre-Trial Chamber, without having secured the cooperation of that State, pursuant to Article 57(3)(d) of the ICC Statute. See *id.* art. 57(3)(d).

<sup>94</sup> See *infra* Part V.

<sup>95</sup> See ICTY RPE, *supra* note 8, r.40; ICTY Statute, *supra* note 4, art. 21; Rome Statute, *supra* note 6, art. 55, 67; ICTR Statute, *supra* note 5, art. 20.

<sup>96</sup> See ICTY RPE, *supra* note 8, r.65; Rome Statute, *supra* note 6, art. 60.

<sup>97</sup> See ICCPR, *supra* note 8, art. 9; ECHR, *supra* note 8, art. 5.

of his or her defense.<sup>98</sup> Clearly, these provisions aim at securing the defendant’s right to have adequate time and facilities for the preparation of his or her defense. These are just a few examples.

It can thus be concluded that the famous statement of the Secretary-General at the time of the creation of the ICTY—that it is “axiomatic” that human rights be fully protected—has not been a hollow phrase.<sup>99</sup> Indeed, the protection of individual rights is part of the procedural regulations that have made their way into the applicable law of the ICTY, ICTR, and ICC. However, this Article focuses on whether the lack of detailed procedural regulation of investigations is in and of itself problematic from a human rights perspective, even if this is by no means the intention. The highest judicial organ of the KSC appears to think so, as the following sections will show.

### III. THE CREATION OF THE KOSOVO SPECIALIST CHAMBERS

The Kosovo Specialist Chambers (KSC) is in several respects a unique new member of the ever-expanding family of international and internationalized criminal tribunals.<sup>100</sup> The direct reasons for its creation appear to be that reported in the memoirs of former ICTY Prosecutor Carla Del Ponte.<sup>101</sup> In her book, Del Ponte alleges that in the Summer of 1999, serious crimes were committed in Kosovo, in which approximately 300 Kosovo Albanians were transported to Albania for the purpose of organ-harvesting for criminal gain.<sup>102</sup> It was also claimed that the operation occurred with involvement of the Kosovo Liberation Army (KLA).<sup>103</sup> This assertion triggered an inquiry by Dick Marty for the Parliamentary Assembly of the Council of Europe, leading to a report published in 2010 (the “Marty Report”).<sup>104</sup> The report offers a more complex picture than Del Ponte’s book. According to the report, there is evidence that a KLA faction had taken on a central role in organized crime and was

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<sup>98</sup> See the ICTR Statute, *supra* note 5, art. 18 and the *ICTY Statute*, *supra* note 4, art. 19, in conjunction with ICTR RPE, *supra* note 8, art. 55 and ICTY RPE, *supra* note 8, art. 55. For the ICC, see the Rome Statute, *supra* note 6, art. 57(3)(d).

<sup>99</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, *supra* note 15, ¶ 106.

<sup>100</sup> On the distinction between “international” and “internationalised” criminal tribunals, in the context of the KSC, see Emanuele Cimiotta, *The Specialist Chambers and the Specialist Prosecutor’s Office in Kosovo: The ‘Regionalization’ of International Criminal Justice in Context*, 14 J. INT’L CRIM. JUST. 53, 59–60 (2016); Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization?*, 14 J. INT’L CRIM. JUST. 25, 26–27 (2016).

<sup>101</sup> CARLA DEL PONTE & CHUCK SUDETIĆ, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY* (2009).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 76–77.

<sup>104</sup> Parliamentary Assembly of the Council of Europe, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. 12462 (Jan. 7, 2011).

responsible for numerous crimes against Serbs remaining in Kosovo, and crimes against other persons perceived as political opponents to the group's activities.<sup>105</sup> The report also notes that these crimes remained unpunished until its 2010 publication date, and that some top KLA leaders were involved in some of the crimes.<sup>106</sup>

The next step was the European Union's (EU) addition of a new element to its Rule of Law Mission in Kosovo (EULEX), which consisted of a mandate to conduct investigations into war crimes and organized crime as alleged in the Martyr Report.<sup>107</sup> This mandate was to be executed by the Special Investigative Task Force (SITF).<sup>108</sup> It was soon realized that this mandate outgrew both the ability and also possibly the duration of EULEX.<sup>109</sup> As a next step, an exchange of letters between Kosovo and the EU confirmed that Kosovo would commit itself to creating an environment conducive to the proper administration of justice in any trial and appellate proceedings arising from the SITF investigations.<sup>110</sup>

On July 29, 2014, the SITF Prosecutor indicated that there was enough evidence for an indictment against senior KLA officials responsible for a campaign of persecution against ethnic Serb, Roma, and other minority populations of Kosovo.<sup>111</sup> In Kosovo, the necessary amendments were made to the Kosovo Constitution with a view towards creating the new Specialist Chambers and Specialist Prosecutor's Office.<sup>112</sup> On August 3, 2015, Kosovo implemented the amendments to its constitution and enacted the law necessary to fulfill its obligations under its agreement with the EU to create the Specialist Chambers in the Courts of Kosovo.<sup>113</sup>

Since its creation, a number of changes have been made to turn the KSC into a functioning court. Judges, a prosecutor, and a registrar have been appointed,<sup>114</sup> and the KSC's applicable law has developed.<sup>115</sup> The creation of Rules of Procedure and Evidence was a particularly important first task reserved to the judges.<sup>116</sup> As further explored in the following section, these rules had to be reviewed by some of the

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<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> Matthew E. Cross, *Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes: Remarks on Independence and Cooperation*, 14 J. INT'L. CRIM. JUST. 73, 78 (2016).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 78–79.

<sup>111</sup> Spec. Investigative Task Force, Statement of the Chief Prosecutor of the Special Investigative Task Force: 29 July 2014 1–2 (2014), [http://www.hlc-rdc.org/wp-content/uploads/2014/07/statement\\_of\\_the\\_chief\\_Prosecutor\\_of\\_the\\_SITF\\_EN.pdf](http://www.hlc-rdc.org/wp-content/uploads/2014/07/statement_of_the_chief_Prosecutor_of_the_SITF_EN.pdf) [<https://perma.cc/V57E-K4ZQ>].

<sup>112</sup> Cross, *supra* note 107, at 80.

<sup>113</sup> *Id.* at 80–81.

<sup>114</sup> *See* Kosovo Specialist Chambers & Specialist Prosecutor's Office, First Report 8–9 (2018) [hereinafter First Report], [https://www.scp-ks.org/sites/default/files/public/content/ksc\\_spo\\_first\\_report\\_en.pdf](https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf).

<sup>115</sup> *Id.* at 22.

<sup>116</sup> *Id.*

judges who sit in the Constitutional Chamber, with the goal of ensuring their consistency with Kosovo's Constitution, especially with human rights law.<sup>117</sup>

It exceeds the scope—and is not the objective—of this Article to examine various features of the KSC, or to address the essential question of to what degree the creation of the KSC was indeed necessary, or whether these crimes could also have been investigated and prosecuted by other fora. Instead, this Article concentrates on several aspects of the KSC that are relevant for understanding its procedural design.

The KSC is a unique internationalized court, established for the first time, on the basis of an agreement between the EU and a state, Kosovo.<sup>118</sup> Within this category of internationalized—or hybrid or mixed—courts dealing with international crimes, there are variations in how much domestic law governs procedure versus newly created rules of an international character.<sup>119</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC), for example, relies heavily on domestic criminal procedure, as demonstrated by the adoption of a full investigating judge, as is the law and practice within Cambodia.<sup>120</sup>

The KSC is formally part of the Kosovo court structure,<sup>121</sup> but its operation does not appear to be based on the law and practice of the ordinary courts of Kosovo.<sup>122</sup> Yet KSC law requires judges to be guided by the Kosovo Code on Criminal Procedure in the determination of the Rules of Procedure and Evidence (“the Rules”).<sup>123</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> See Cross, *supra* note 107, at 74–75.

<sup>119</sup> See *id.* at 75, 86.

<sup>120</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules, at R. 14, SS-64 (rev.9 2015).

<sup>121</sup> Compare On the Specialist Chambers and Specialist Prosecutor's Office, L. No. 05/L-053 [hereinafter On the Specialist Chambers and Special Prosecutor's Office], art. 1(2) (Kos.) (“Specialist Chambers *within the Kosovo justice system* and the Specialist Prosecutor's Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 (‘The Council of Europe Assembly Report’) and which have been the subject of criminal investigation by the Special Investigative Task Force (‘SITF’) of the Special Prosecution Office of the Republic of Kosovo (‘SPRK’).”) (emphasis added), *with id.* art. 3(1) (“Specialist Chambers shall be attached to each level of the court system in Kosovo . . .”).

<sup>122</sup> See *id.* art. 3(4) (“Any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into this Law shall not apply to the organisation, administration, functions or jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office. This Law shall prevail over any and all contrary provisions of any other law or regulation.”).

<sup>123</sup> See *id.* art. 19(2) (“The Rules of Procedure and Evidence shall reflect the highest standards of international human rights law including the ECHR and ICCPR with a view to ensuring a fair and expeditious trial taking into account the nature, location and specificities

It remains to be seen, however, to what degree the Kosovo Code of Criminal Procedure has indeed been taken into consideration in developing the Rules. It seems that the judges, in light of their backgrounds and expertise, have been borrowing from the procedural law and practice of various international and internationalized criminal tribunals as they existed in 2015, and which the judges deemed most suitable to ensure both an effective and fair functioning of the KSC.<sup>124</sup> It appears that a similar process took place at the ECCC, where, in spite of a statement in the agreement setting up the ECCC that the procedure would be in accordance with Cambodian law,<sup>125</sup> the judges were keen on developing their own procedural law which borrowed largely from the law of international criminal tribunals.<sup>126</sup>

In the context of the KSC, the exhortation is only to be “guided” by Kosovo criminal procedure, which arguably leaves more room for making different choices.<sup>127</sup> All elements of KSC procedure, from the very first investigations up to the appeal phase and beyond, are exclusively governed by the law of the KSC, especially its Rules of Procedure and Evidence.<sup>128</sup>

On March 17, 2017, the Plenary of the KSC’s judges adopted the Rules of Procedure and Evidence in accordance with Article 19(1) of the Law on the KSC.<sup>129</sup> The Specialist Chamber of the Constitutional Court had been assigned the task of reviewing the legality of the Rules adopted by the Plenary, as provided for in Article 19(5) of the Law on the KSC.<sup>130</sup> Obviously, the judges in the Specialist Chamber of the

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of the proceedings to be heard by the Specialist Chambers. In determining its Rules of Procedure and Evidence the Specialist Chambers *shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123.*) (emphasis added).

<sup>124</sup> See *id.*; see also Cross, *supra* note 107, at 84–85.

<sup>125</sup> See U.N.-Cambodia, art. 12(1), Apr. 29, 2005, 2329 U.N.T.S. 41723 (detailing part of the agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea).

<sup>126</sup> *But see* Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT’L CRIM. JUST. 314, 320 (2006).

<sup>127</sup> On the Specialist Chambers and Special Prosecutor’s Office, *supra* note 121, art. 19(2) (“The Rules of Procedure and Evidence shall reflect the highest standards of international human rights law including the ECHR and ICCPR with a view to ensuring a fair and expeditious trial taking into account the nature, location and specificities of the proceedings to be heard by the Specialist Chambers. In determining its Rules of Procedure and Evidence the Specialist Chambers *shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123.*”) (emphasis added).

<sup>128</sup> Cross, *supra* note 107, at 84.

<sup>129</sup> April 2017 KSC Judgment, *supra* note 1, at 1. See generally On the Specialist Chambers and Special Prosecutor’s Office, *supra* note 121, art. 19(1) (“The Rules of Procedure and Evidence for the conduct of proceedings before the Specialist Chambers shall be adopted by the Specialist Chambers Judges sitting in Plenary as soon as possible following their appointment and placement on the Roster of International Judges. The Judges of the Specialist Chamber of the Constitutional Court shall not participate in the adoption.”).

<sup>130</sup> *Id.* art. 19(5) (“Following adoption or amendment, the adopted Rules or amendment

Constitutional Court were not part of the plenary that adopted the Rules.<sup>131</sup> The Judgment on the referral of the Rules and their legality was issued on April 26, 2017.<sup>132</sup>

#### IV. THE JUDGMENT OF APRIL 26, 2017

The fact that the KSC inserted a mechanism of judicial review in its lawmaking process pertaining to its draft rules of procedure and evidence was largely unheard of in international criminal justice.<sup>133</sup> The idea was that the Rules, as a result of this review, would be of a better quality and would fully comply with human rights law.<sup>134</sup> It is a good and creative solution to improving the quality of what is in essence a legislative process, namely developing the procedural law of an international or internationalized criminal tribunal that can be emulated by other courts.<sup>135</sup>

The KSC procedure is also thorough in the case of Rules that are thought to be inconsistent with the Constitution; in such instances, the amended Rules need to be referred for review by the Constitutional Chamber.<sup>136</sup> This occurred within a couple of months and at this time the Constitutional Chamber held that the adopted Rules were not inconsistent with the Constitution.<sup>137</sup> Thus, every amendment in the Rules needs to pass by the Constitutional Chamber scrutiny.<sup>138</sup>

In its first review judgment, the Chamber explained how it saw its scope of review.<sup>139</sup> In this respect, it is especially important to understand the framework in

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to the Rules shall be referred to the Specialist Chamber of the Constitutional Court, which shall have thirty (30) days to review the Rules or amendments to ensure compliance with Chapter II, including Article 55, of the Constitution. In the event that the Specialist Chamber of the Constitutional Court determines an inconsistency with the Constitution, that determination shall be sent to the Judges in Plenary for action on the affected provision or provisions. The Judges of the Specialist Chamber of the Constitutional Court shall not participate in that action.”).

<sup>131</sup> *Id.* art. 19(1).

<sup>132</sup> April 2017 KSC Judgment, *supra* note 1, at 57.

<sup>133</sup> See On the Specialist Chambers and Special Prosecutor’s Office, *supra* note 121, art. 49(6).

<sup>134</sup> See First Report, *supra* note 114, at 22.

<sup>135</sup> See *id.* But see Göran Sluiter, *Procedural Lawmaking at the International Criminal Tribunals*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS (Shane Darcy & Joseph Powderly eds., 2011) (“With reason, one must be extremely suspicious about the accumulation of such significant [lawmaking] powers within one body, namely, the judiciary. This is especially the case when the rule-making process is non-transparent and when there is no external supervision of the role judges perform within the ICTY.”).

<sup>136</sup> See First Report, *supra* note 114, at 22–24.

<sup>137</sup> Judgment on the Referral of Revised Rules of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Case No. KSC-CC-PR-2017-03, Kos. Specialist Chambers 2 (June 28, 2017), <https://www.scp-ks.org/en/documents/judgment-referral-revised-rules-rules-procedure-and-evidence-adopted-plenary-29-may-2017>.

<sup>138</sup> *Id.* at 3.

<sup>139</sup> See April 2017 KSC Judgment, *supra* note 1, ¶¶ 10–11.

which the review takes place, namely that which is laid out in Chapter II of the Kosovo Constitution.<sup>140</sup>

Chapter II of the Kosovo Constitution is entitled “Fundamental Rights and Freedoms.”<sup>141</sup> Three features of this section need to be mentioned. First, Articles 23–52 provide a rather elaborate set of rights, a number of which are directly relevant for criminal proceedings.<sup>142</sup> Second, Article 22 provides for the direct effect of major human rights instruments, such as the ECHR, in the legal order of Kosovo and their priority over other sources of law.<sup>143</sup> It is worth noting that, because Kosovo was a very young state, it was not necessary to be a party for the effect of these human rights instruments.<sup>144</sup> One should also read Article 53 of the Constitution, which obliges authorities to interpret the rights set out in the Constitution in a manner consistent with the case law of the European Court of Human Rights (ECtHR).<sup>145</sup> Third, having special significance in the analysis of the Constitutional Chamber, Article 55 sets out strict conditions regarding the limitation of human rights, with the bottom line being, as stipulated in Article 55(5), that the “limitation of fundamental rights . . . shall in no way deny the essence of the guaranteed right.”<sup>146</sup>

Since the adopted Rules have not yet been tested in any concrete case, the Constitutional Chamber had to evaluate the Rules *in abstracto*, on the basis of their language, i.e., their ordinary meaning.<sup>147</sup> This means that, according to the Chamber, “where the plain meaning of a provision . . . is manifestly contrary to the tenor of the Constitution, the Court will find that such a provision is not in compliance with the Constitution.”<sup>148</sup> The Chamber also mentions that it will not easily conclude that a provision of the Rules is inconsistent with the Constitution, i.e., human rights law.<sup>149</sup>

Reading the entire Judgment, it becomes clear that the scope of review for the Rules tends to appear more full than marginal. This is not only evidenced by the detailed analysis of a number of “problematic” Rules, but also by the Chamber’s holdings. Ultimately, no fewer than thirteen provisions were declared to be in violation of human rights law;<sup>150</sup> in respect to one provision, the Chamber considered itself unable to declare it consistent with human rights law.<sup>151</sup>

<sup>140</sup> Const. Of the Republic of Kosovo, Ch. 11 (Kos.) (<http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>).

<sup>141</sup> *Id.* art. 21–22.

<sup>142</sup> *Id.* art. 23–52.

<sup>143</sup> *Id.* art. 22.

<sup>144</sup> *See id.*

<sup>145</sup> *Id.* art. 53.

<sup>146</sup> *Id.* art. 55(5).

<sup>147</sup> *See* April 2017 KSC Judgment, *supra* note 1, ¶¶ 13–14.

<sup>148</sup> *Id.* ¶ 13.

<sup>149</sup> *Id.* ¶ 17.

<sup>150</sup> *Id.* ¶¶ 10–11.

<sup>151</sup> *Id.* ¶ 216 (“In addition, the Court is unable to find that Rule 134(3) is consistent with Chapter II of the Constitution.”).



Although the Judgment deals with a considerable number of Rules that engage human rights, this Article concentrates on parts of the Judgment dealing with the Rules pertaining to investigations and detention on remand.

Paragraphs 58–107, a considerable portion of the Judgment, deal with the rights of persons during investigation.<sup>152</sup> In this section, the Chamber examines whether a number of investigative measures are in compliance with the Constitution, i.e., human rights law.<sup>153</sup>

This examination starts with Rules 31–33, which provide for the authorization of special investigative measures and regulation of their execution,<sup>154</sup> these special investigative measures include, according to Rule 2(1), covert video surveillance, covert monitoring of conversations and the interception of telecommunications and communications by a computer network, and require authorization by a panel of judges (Rule 32), or in exceptional circumstances may be ordered directly by the Specialist Prosecutor (Rule 33).<sup>155</sup> The Chamber’s—correct—starting point is that such measures constitute an interference with an individual’s right to respect for privacy as guaranteed under Article 36 of the Constitution and by Article 8 of the ECHR.<sup>156</sup> The analysis then centers around the question of whether the limitation on the right to privacy, as will take place in case of application of Rules 31–33, has been done in accordance with the law—as required by the Constitution and human rights law.<sup>157</sup> The law limiting this right “must meet certain quality requirements: it must be accessible to the person concerned and foreseeable as to its effects,” and “the law must provide adequate and effective safeguards and guarantees against abuse.”<sup>158</sup> After the enunciation of these general principles, and having regard for the case law of the ECtHR,<sup>159</sup> the Chamber sets out the minimum safeguards that should be available in the law authorizing and regulating these specific investigative measures. These minimum safeguards include specification of the nature of offences which may give rise to an inception order, a definition of the categories of people able to have their phones tapped, a limit on the duration of tapping, the procedure to be followed for examining, using and storing obtained data, identification of the precautions to be taken when communicating said data to other parties, and specification of the circumstances in which recordings may or must be erased or destroyed.<sup>160</sup> Especially in the case of a more serious interference with the right to privacy, for example in the case of a wiretap, the Chamber concludes that these minimum safeguards are not adequately

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<sup>152</sup> *Id.* ¶¶ 58–107.

<sup>153</sup> *See, e.g., id.* ¶¶ 61–68.

<sup>154</sup> *Id.* ¶ 59.

<sup>155</sup> *Id.* ¶¶ 59–60.

<sup>156</sup> *Id.* ¶ 60.

<sup>157</sup> *Id.* ¶ 42.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* The analysis of ECtHR case law can be found in paragraphs 64–66 of the judgment.

*Id.* ¶¶ 64–66.

<sup>160</sup> *Id.* ¶ 66.

protected in the Rules.<sup>161</sup> To summarize, the following aspects of the Rules are considered problematic and have led the Chamber to hold these Rules in violation of the Constitution, and human rights law:

1. The offences giving rise to the investigative measures have not been specified and it is doubtful whether all offences including those punishable by a fine would warrant this degree of interference with the right to privacy;<sup>162</sup>
2. “Rules 31–33 do not define the categories of persons in respect of whom the special investigative measures may be applied”;<sup>163</sup>
3. The Rules allow for infringements on the right to privacy without needing a reasonable suspicion as to the identity of a suspect and without having in place a special regime for intercepting communications between an individual suspect and his or her counsel;<sup>164</sup>
4. “The Rules . . . lack sufficient precision in terms of the duration of an intercepted communication”;<sup>165</sup> and
5. Finally, the Rules are not sufficiently clear and lack clarity concerning using and storing the data obtained.<sup>166</sup>

Rules 34, 35, and 36 deal with the investigative measures of searches and seizures.<sup>167</sup> The examination of these rules follows the same pattern as the examination of special investigative measures, focusing on whether the limitations of the right to privacy are in accordance with the law.<sup>168</sup> Again, the conclusion drawn by the Chamber is that this is not the case.<sup>169</sup> In short, the Rules on searches and seizures are drafted in too broad terms,<sup>170</sup> and fail to impose an obligation on the authorizing Panel to consider the search and seizure operation’s investigative necessity.<sup>171</sup> Moreover, the powers conferred upon the Specialist Prosecutor to carry out searches and seizures—without prior judicial authorization—are too broad,<sup>172</sup> this is not counter-balanced by the availability of an *ex post facto* judicial review in Rule 35 (3).<sup>173</sup>

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<sup>161</sup> *Id.* ¶ 69.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ¶ 70.

<sup>164</sup> *Id.* ¶ 71.

<sup>165</sup> *Id.* ¶ 72.

<sup>166</sup> *Id.* ¶ 73.

<sup>167</sup> *Id.* ¶ 76.

<sup>168</sup> *See id.* ¶ 80.

<sup>169</sup> *Id.* ¶ 88.

<sup>170</sup> *Id.* ¶ 81.

<sup>171</sup> *Id.* ¶ 82.

<sup>172</sup> *Id.* ¶¶ 85–86.

<sup>173</sup> *See id.* ¶ 87.

Finally, Rule 36 (governing the execution of searches and seizures) has not been formulated with the requisite degree of precision.<sup>174</sup>

The last Rule examined by the Chamber in the framework of investigative measures is Rule 38. Rule 38 deals with expert examinations, which concerns collection of blood samples, body tissue, DNA and other similar material that cannot be examined without bodily intrusion.<sup>175</sup> This Rule implicates the right to personal integrity and the right to respect for privacy under Articles 26 and 36 of the Constitution, and Article 8 of the ECHR.<sup>176</sup> Again, interference with this right is only permissible if it takes place in accordance with the law. The Chamber finds it, in this light, problematic that no judicial authorization is required under this Rule. Likewise, there are no procedural safeguards ensuring proportionality of the interference, and there is no *ex post facto* judicial review.<sup>177</sup> Furthermore, the Chamber finds the retention of bodily material to be for too long a duration and without sufficient safeguards.<sup>178</sup>

In addition to examining these investigative measures, the Chamber has also considered whether the Rules on arrest and detention, as set out in Chapter 4 of the Rules, are in compliance with international human rights law.<sup>179</sup> The right to liberty finds protection in, amongst other sources, Article 5 ECHR and Article 9 of the ICCPR.<sup>180</sup> The general principles of ECtHR case law on pretrial detention are aptly enunciated in paragraphs 113–15 of the judgment.<sup>181</sup> In very simple terms, the conditions for detention on remand under human rights law require that there always be a persistent reasonable suspicion to justify detention, and after a certain lapse of time, other grounds should exist to justify the continuation of detention, such as a risk of flight.<sup>182</sup> In addition, Judges should consider alternative measures for detention, should properly reason why prolonged detention is necessary, and should ensure that the presumption remains in favor of liberty.<sup>183</sup>

In its evaluation of the law on detention, the Chamber focused in particular on Rule 54(4), which stipulates that a “detained person shall not be released without the consent of [the] State” from which the detained person seeks to be released.<sup>184</sup> The Chamber found that while some delay in carrying out a decision of release may be understandable, making this execution fully dependent upon the consent of a State is clearly problematic.<sup>185</sup> The Chamber considered that “any detention in those

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<sup>174</sup> *Id.* ¶¶ 91–95.

<sup>175</sup> *Id.* ¶ 96.

<sup>176</sup> *Id.* ¶ 97.

<sup>177</sup> *Id.* ¶ 103.

<sup>178</sup> *Id.* ¶¶ 105–06.

<sup>179</sup> *Id.* ¶ 110.

<sup>180</sup> ICCPR, *supra* note 8, art. 9; April 2017 KSC Judgment, *supra* note 1, ¶ 111.

<sup>181</sup> April 2017 KSC Judgment, *supra* note 1, ¶¶ 113–15.

<sup>182</sup> *Id.* ¶ 114.

<sup>183</sup> *Id.* ¶ 115.

<sup>184</sup> *Id.* ¶ 118.

<sup>185</sup> *Id.* ¶¶ 119–20.

circumstances would lack the necessary legal basis and would not be a lawful detention.”<sup>186</sup> As a result, this part of Rule 54 was held to be inconsistent with Article 29 of the Constitution and human rights law.<sup>187</sup>

## V. EVALUATION AND IMPLICATIONS

The scrutiny of the KSC Rules in light of human rights law as performed by the Constitutional Chamber raises two important questions, which are the subject of the present Section. First, one may wonder whether the analysis and findings by the Constitutional Chamber are fully correct, bearing in mind the special context of the KSC. Second, if there is some merit in the findings of the Constitutional Chamber what are the implications thereof for international criminal tribunals, such as the ICC? Does it mean that the law and practices of the ICC in investigations and detention should be radically transformed?

### A. Evaluation

Let us start with an evaluation of the Chamber’s findings on the Rules, and especially their conclusion that the ordinary meaning of important Rules for investigations and detention are in violation of international human rights law.

It appears that throughout the Judgment, the use of ECtHR case law is thorough and generally correct. However, if one studies some of the ECtHR cases more in depth, their applicability to a given rule may not always be clear. For example, in the analysis of Rule 54(4), making provisional release dependent on acceptance by a state, the ECtHR is more complex than that set out in the Judgment.<sup>188</sup> A distinction is made in ECtHR case law between court orders for release which are ineffective, or the system in place lacking the possibility to order release, and interference in the execution of orders for release.<sup>189</sup> The Constitutional Chamber essentially based its review of Rule 38 on a case dealing with non-release as a result of external interference.<sup>190</sup> In *Assanidze*, the Court did not focus on provisional release, but rather on continued detention after a final acquittal.<sup>191</sup> It would be more fitting for the Chamber to have based its analysis on ECtHR cases focusing on the ineffectiveness

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<sup>186</sup> *Id.* ¶ 120.

<sup>187</sup> *Id.* ¶ 122.

<sup>188</sup> *Id.* ¶¶ 118–23.

<sup>189</sup> See the opposing situations in *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221 and *Schiesser v. Switzerland*, 34 Eur. Ct. H.R. (ser. A) (1979). The situation in *Schiesser* was one in which the applicant came before an official who was supposed to rule on the lawfulness of detention, but could not effectively order release in case he was to conclude that the detention was unlawful. *Schiesser*, 34 Eur. Ct. H.R. In *Assanidze*, the applicant’s release was ordered by the court after a final acquittal, but as a result of outside interference, that release was blocked. *Assanidze*, 2004-II Eur. Ct. H.R. 221.

<sup>190</sup> See *Assanidze*, 2004-II Eur. Ct. H.R. 221; April 2017 KSC Judgment, *supra* note 1, ¶ 101.

<sup>191</sup> April 2017 KSC Judgment, *supra* note 1, ¶ 113.

of the power to order release, following long-established ECtHR case law illustrating that a judge or other officer authorized by law to exercise judicial power is supposed to be able to release the person whose detention she is reviewing.<sup>192</sup>

More significant than this issue of applying the most suitable ECtHR judgment, is the question whether ECtHR case law is fully applicable to the KSC. It is clear that none of the ECtHR judgments deal with the unique context of an international, or internationalized criminal tribunal.<sup>193</sup> As already mentioned in Part I, this raises the question of whether ECtHR findings can be applied lock-stock-and-barrel to this international context. In his thorough study on this precise matter, Krit Zeegers provides a framework in which recalibration of the rights in a non-national context can be possible:

The second approach to IHRL that can be discerned from the ICT's law and practice is contextualization. . . . Four contextual factors in particular have been subject of this study: the unavoidable reliance on state cooperation, the gravity of the crimes with which accused persons are charged, the complexity of cases before the ICTs, and, finally, the fundamental importance of the ICTs' mission to 'end impunity'.<sup>194</sup>

The KSC Constitutional Chamber has not addressed whether one of these four factors, be it under strict conditions, can justify a contextualization of ECtHR case law in the context of the KSC.<sup>195</sup>

In the defense of the Constitutional Chamber, it must be mentioned that the Chamber appeared to have little choice other than reviewing the Rules in light of ECtHR case law, as this clearly follows from the Constitution.<sup>196</sup> But in its analysis of the ECtHR case law it would have been worthwhile to address, albeit very briefly, the question of whether this case law lends itself to a full, unmodified application to the KSC, or whether there are particular reasons, including those mentioned by Zeegers above, that can justify adjustments to that case law.<sup>197</sup>

<sup>192</sup> See, e.g., *Schiesser*, 34 Eur. Ct. H.R. ¶ 31; see also *Ryabikin v. Russia*, App. No. 8320/04, 48 Eur. H.R. Rep. 55, ¶ 137 (2008); *Mckay v. United Kingdom*, 2006-X Eur. Ct. H.R. 325, ¶ 35; *Öcalan v Turkey*, 2005-IV Eur. Ct. H.R. 131, ¶¶ 71–75; *Stafford v. United Kingdom*, 2002-IV Eur. Ct. H.R. 115, ¶ 88; *Curley v. United Kingdom*, App. No. 32340/96, 31 Eur. Ct. H.R. 14, ¶ 32 (2000); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 199 (1976).

<sup>193</sup> *But see* April 2017 KSC Judgment, *supra* note 1, ¶¶ 37–38.

<sup>194</sup> ZEEGERS, *supra* note 49, at 403.

<sup>195</sup> See April 2017 KSC Judgment, *supra* note 1, ¶ 11 (noting that ECtHR case law is in the court's scope but not stating factors).

<sup>196</sup> Constitution of the Republic of Kosovo, Apr. 7, 2008, art. 53 (“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”).

<sup>197</sup> See April 2017 KSC Judgment, *supra* note 1, ¶ 16 (explaining that the court will interpret human rights in a manner that is consistent with ECtHR case law without providing any reasons why).

In a similar vein, it would have been helpful if the Judgment paid some attention to the full picture of the applicable law in the case of investigations. Since the Constitutional Chamber found that the investigative measures in the Rules are in violation of human rights law, because—simply—said measures have not been sufficiently regulated, this begs the question of whether other sources of law could have compensated for that, providing a legal framework that could have holistically enjoyed the benefit of the doubt. The law of the KSC appears to be rather self-contained, leaving little room for external sources, such as ordinary Kosovo criminal procedure.<sup>198</sup> Article 3(4) of the Law on the KSC clearly stipulates that any other piece of Kosovo law shall not apply to the functioning of the KSC.<sup>199</sup> Yet, Rule 4(1) indicates that the Rules shall be interpreted, where appropriate, in a manner consonant with the Kosovo Code of Criminal Procedure.<sup>200</sup> This may open the door to some degree, albeit a very limited degree, to the applicability of domestic criminal procedure in the operation of, for example, search and seizures and wiretaps, which could fill some of the regulatory gaps identified by the Constitutional Chamber.<sup>201</sup>

In addition, the Constitutional Chamber does not differentiate between investigations on Kosovo territory and elsewhere.<sup>202</sup> This appears relevant as the question may arise as to what extent, from a human rights perspective, the regulation of investigative measures in the Rules has to be of the same degree of specificity for both situations. In the case of investigative measures in Kosovo, the orders of Judges have a direct effect and are exclusively governed by the KSC Law, especially the Rules.<sup>203</sup> However, in the case of investigative measures in other States, as provided for by Article 55 of the Law on the KSC,<sup>204</sup> their execution will also be governed by relevant domestic laws which may be sufficient to fill certain gaps in the Rules.<sup>205</sup> It remains uncertain from reading the Judgment whether the Constitutional Chamber has considered these different scenarios and how this would impact the human rights analysis of the Rules under review.<sup>206</sup>

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<sup>198</sup> On the Specialist Chambers and Special Prosecutor's Office, *supra* note 121, art. 3, ¶ 4.

<sup>199</sup> *Id.*

<sup>200</sup> Kos. Specialist Chambers and Specialist Prosecutor's Off., *Rules of Procedure and Evidence before the Kosovo Specialist Chambers*, r.24(1).

<sup>201</sup> *Id.*; April 2017 KSC Judgment, *supra* note 1, ¶¶ 79–95.

<sup>202</sup> See April 2017 KSC Judgment, *supra* note 1, ¶¶ 79–95 (failing to differentiate between investigations in Kosovo and elsewhere).

<sup>203</sup> On the Specialist Chambers and Special Prosecutor's Office, *supra* note 121, art. 19, ¶ 2.

<sup>204</sup> *Id.* art. 55, ¶ 1 (“The Specialist Chambers, the Registry and the Specialist Prosecutor may request the assistance and co-operation from other states, international organisations and other entities as is necessary for the investigation and prosecution of persons accused of committing crimes within the subject matter jurisdiction of the Specialist Chambers, and the fulfilment of the Specialist Chambers’ other responsibilities. In accordance with Article 4, the Specialist Chambers, the Registry and the Specialist Prosecutor may enter into such arrangements as are necessary for this purpose.”).

<sup>205</sup> *Id.* art. 3, ¶¶ 2–3.

<sup>206</sup> See April 2017 KSC Judgment, *supra* note 1.

It is certainly possible to criticize some aspects of the KSC Constitutional Chamber's human rights assessment of its Rules. But such criticism does not alter the fact that the KSC Constitutional Chamber has put a number of pertinent human rights issues on the international criminal justice agenda.<sup>207</sup>

### *B. Implications*

It is therefore essential to address the broader question of what the implications of the KSC Judgment are for international criminal tribunals, especially the ICC.

I will start with the least complex matter, namely that according to the Constitutional Chamber, it is a violation of the right to liberty when the provisional release of a suspect is made dependent upon the cooperation of a state.<sup>208</sup> This finding directly contradicts the position adopted by the ICC Appeals Chamber in the *Bemba* case, in which the Chamber also made release conditional upon the State's willingness to accept the person to be released.<sup>209</sup> In a previous publication, I have criticized this position adopted by the Appeals Chamber:

It seems to follow from reference to dependence upon state cooperation that the Appeals Chamber regards this as a non-mandatory form of cooperation. As a result, the compliance with fundamental human rights norms in the functioning of the ICC is made completely dependent upon whether or not a state agrees to accept a person who is eligible for release. The respect of fundamental human rights norms cannot be made conditional upon such highly uncertain factors. The Appeals Chamber does not embark upon an analysis of the inevitable consequences of this position; should we infer from this finding that even in the most serious violations of the right to liberty a person will not be released if not accepted by a state?<sup>210</sup>

The KSC Constitutional Chamber now confirms that it is not tenable, from a human rights perspective, to have deprivation of liberty continue simply because the detained

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<sup>207</sup> *Id.* at 56 (holding that multiple rules of procedure and evidence before the Kosovo Specialist Chambers violated Chapter II of the Constitution).

<sup>208</sup> *Id.* at 29–30.

<sup>209</sup> Prosecutor v. Bemba, ICC-01/05-01/08, Judgment on the Appeal of the Prosecutor Against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa," ¶ 106 (Dec. 2, 2009).

<sup>210</sup> Göran Sluiter, *Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law*, 8 NW. U. J. INT'L HUM. RTS. 248, 265 (2010) [hereinafter Sluiter, *Atrocity Crimes Litigation*] (footnotes omitted).

individual is not welcome in any state.<sup>211</sup> In such a scenario, there is always an option, and that option is to simply release the detained person in the State where he or she is effectively detained, i.e., the host state.<sup>212</sup>

One can safely say that there are no substantive justifications in favor of continuing detention in this scenario. Nothing in the context of international criminal justice can justify continuing detention under these circumstances. As far as it would still be the prevailing view of the ICC—Appeals Chamber—it would have to be reversed.

Turning now to the matter of under-regulated investigations, I submit that the findings of the Constitutional Chamber can have far-reaching implications for the ICC. As analyzed in Part II, the law of international criminal procedure has taken a very loose approach to the principle of procedural legality until now.<sup>213</sup> Investigative powers in the ICC, for example, are phrased in very broad terms; certain investigative activities, including invasive investigative activities, are not regulated at all and certainly do not contain safeguards.<sup>214</sup> One will not find any rules in the law of the ICC on wiretaps, search and seizure operations, or collection of DNA material, though such powers appear to be subsumed under the very broad power of the ICC Prosecutor to collect evidence under Article 54 (3) (a) of the ICC Statute.<sup>215</sup>

Compared to the minimalistic provisions of the ICC, the KSC Rules, as adopted by the Judges prior to review by the Constitutional Chamber, already constitute a very serious effort to comply with basic rules of procedural legality and requirements from human rights law, by regulating at least some important aspects of invasive investigative measures.<sup>216</sup> The ICC does not come close to these efforts.<sup>217</sup>

One must acknowledge that in drafting the Rules, the KSC Judges were under a relatively strict mandate to comprehensively legislate its procedure,<sup>218</sup> and to be guided by Kosovo law of criminal procedure.<sup>219</sup> Conversely, as analyzed in Part II, in the context of the ICC, there is no prior national guidance on procedure, and investigative measures are to some degree also governed by national law on criminal

<sup>211</sup> See *supra* note 208 and accompanying text.

<sup>212</sup> See Sluiter, *Atrocity Crimes Litigation*, *supra* note 210, at 267. The role of the host State in this matter:

But it needs to be borne in mind that Article 5 of the ECHR and Article 9 of the ICCPR impose obligations on the Netherlands, which, at a very minimum, require it to engage constructively with the ICC in ensuring the protection of the right to liberty of individuals present on Dutch territory.

<sup>213</sup> See *supra* notes 63–76 and accompanying text.

<sup>214</sup> See Rome Statute, *supra* note 6, art. 53–61.

<sup>215</sup> *Id.* art. 54(3)(a).

<sup>216</sup> See On the Specialist Chambers and Special Prosecutor's Office, *supra* note 121, art. 21, 35 (outlining the rights of the accused and investigative powers of the special prosecutor).

<sup>217</sup> See *supra* note 214 and accompanying text.

<sup>218</sup> See On the Specialist Chambers and Special Prosecutor's Office, *supra* note 121, art. 3, ¶ 4.

<sup>219</sup> See *id.* art. 19, ¶ 2.



procedure.<sup>220</sup> Furthermore, it was felt that the procedural law of the ICC should not unduly delay its creation, which could be the case if detailed and specific rules governing investigations were put in place.

Another argument against too hastily assuming strong implications of the KSC Judgment for the ICC is the very strong reliance by the KSC on the ECHR and the ECtHR case law.<sup>221</sup> The ECHR is relevant for the ICC and has been used on many occasions, but its impact on the ICC, an international—as opposed to a regional—institution, need not be as strong as is the case with the KSC.

While this all may justify a looser approach to the principle of procedural legality within the context of the ICC, the manner in which investigations are regulated—or rather not regulated—at the ICC appears to no longer be in keeping with international human rights law, even if the impact of the KSC Judgment is taken at its lowest.

Regulation of investigative activities is—with reason—required under human rights law. Such regulation embodies the essence of the rule of law and due process, as investigative measures interfere with individual rights, such as the right to privacy; accordingly, such regulation has a clear, accessible and high-quality basis in written law. The case law of the ECtHR offers valuable guidance of what should, at least from a human rights perspective, be part of the law authorizing investigative measures which interfere with individual rights. These are minimum standards, inherent in the dignity of every individual; standards which, in principle, need to be respected.

In the special context of the ICC, some debate may be expected as to the exact scope and content of the safeguards governing investigative measures. However, when invasive investigative measures such as wiretaps and search and seizure operations are not regulated at all, and can be easily requested by a Prosecutor making use of the broad power to collect evidence, the law of criminal procedure drops below the minimum standards of human rights law, and there is no convincing justification for that.

The law and practice governing investigative measures in national justice systems involved in the execution of ICC-investigations can never adequately compensate for this defect in ICC law, for two simple reasons. First, in light of the fact that ICC-investigations may involve a great number of justice systems, including those who do not sufficiently—or not at all—respect the rule of law and due process norms, there is no way of ensuring that *all* relevant national law and practices are in conformity with the requisite human rights standards. Second, as mentioned earlier, the national justice system that may be executing—or is involved in—the investigative measures in practice, is unlikely to effectively provide the required safeguards. Only the trial forum, i.e., only the ICC, can, for example, properly assess whether a specific investigative measure is necessary and proportionate to the interference of rights and the needs of the investigation, and what should be a reasonable duration in light of the

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<sup>220</sup> See *supra* notes 60–65, 88–93 and accompanying text.

<sup>221</sup> See April 2017 KSC Judgment, *supra* note 1 (citing ECHR and ECtHR case law to support the Court's decision).

investigation as a whole.<sup>222</sup> Another example of safeguards within the exclusive responsibility of the ICC is the results of national level investigations, which are to be transferred to the ICC;<sup>223</sup> rules related to the reception and storage of especially sensitive material, such as DNA, must thus be available within the context of the ICC.<sup>224</sup>

It is interesting that the law of the ICC contains no such safeguards. Even if certain safeguards regarding invasive investigative measures are available in lower-level sources of law, or quasi-law such as directives, protocols or policy documents, or could be inferred from such sources, this would not be sufficient. Such rules must be clear, precise, and publicly available. Providing for explicit and precise safeguards at the level of the Statute, or Rules of Procedure and Evidence, thus appears imperative.

Until now, ICC case law regarding investigations has tended to focus on possible violations of safeguards in the execution of investigative requests required at the national level.<sup>225</sup> For example, in the case of *Bemba*, the admissibility of evidence collected in Austria was challenged on account of violations of national law, as confirmed by an Austrian judgment.<sup>226</sup> The defense complained that the collection of evidence did not live up to safeguards available under Austrian law and that, as a result, the evidence obtained (documents from Western Union), was in violation of the right to privacy and thus should be excluded from the proceedings.<sup>227</sup>

The Trial Chamber acknowledged that there were problems in the application of Austrian law, and that this had violated the accused's right to privacy.<sup>228</sup> The Chamber then held that the violation was not serious enough to trigger exclusion of the evidence as a remedy.<sup>229</sup> Interestingly, the Chamber paid some attention to the interaction between the Prosecutor and the Austrian authorities, explaining how the violation of the right to privacy could have occurred:

<sup>222</sup> See Rome Statute, *supra* note 6, art. 56–57 (outlining the role and powers of the pre-trial chamber).

<sup>223</sup> See *id.*

<sup>224</sup> See *id.* art. 53–61 (leaving broad discretion to the prosecutor and failing to adequately detail safeguards against this power).

<sup>225</sup> See Prosecutor v. Bemba, ICC-01/05-01/13, Decision on Request in Response to Two Austrian Decisions, ¶¶ 40, 43 (July 14, 2016) (acknowledging a violation of the defendant's privacy rights, but not excluding the evidence obtained).

<sup>226</sup> *Id.* ¶¶ 9–16.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* ¶ 28 (“[T]he Chamber considers that any further assessment whether there was manifestly unlawful conduct is not necessary and concludes that the internationally recognised right to privacy has been violated. The Chamber is not persuaded by the Prosecution’s interpretation that the ‘in accordance with the law’ requirement when assessing privacy infringements means only that the correct procedural safeguards were applied, irrespective of the correctness of their application. Following this view would lead to a merely formalistic interpretation of this safeguard to interfere with a person’s right to privacy, and which does not provide an effective protection of this right.”) (footnotes omitted).

<sup>229</sup> *Id.* ¶¶ 40, 43.

The Chamber agrees that the Prosecution was involved in the process that led to the illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders. However, even though the *Oberlandesgericht* deemed that the information provided by the Prosecution was insufficient, the Prosecution was in no position to know this. In fact, the Prosecution had complied with all the formal requirements by engaging with the national authorities in order to legally obtain the requested material. As previously stated, the Prosecution tried at all times to apprise the Austrian authorities of its actions in respect of obtaining the Western Union Documents. The Prosecution had also reason to believe that it had complied with all the substantive requirements, since the Austrian public prosecutor's office did not request further information and proceeded to request authorisation of the collection of the Western Union Documents via judicial order.<sup>230</sup>

Further, and most importantly, the first-instance Austrian court provided the judicial orders as requested, so that the Prosecution had to assume that it had fulfilled all necessary requirements to legally obtain the material. It is clear that the transmission of the Western Union Documents was not per se forbidden and that the Austrian law provides for a procedure to legally obtain them. The Repealed Austrian Rulings also prevented the Prosecution from potentially providing further information to the Austrian authorities that would have more substantiated the requests in order to meet the requirements of the Austrian law.<sup>231</sup>

These considerations by the Trial Chamber confirm how right and necessary the KSC Judgment is for present day international criminal proceedings. The primary issue should be whether the law of the ICC offers sufficient safeguards in its investigations. It would not have come to this situation if the Prosecutor were required to apply for judicial authorization while respecting other rules and safeguards at the ICC level. That said, with sufficient ICC safeguards, all parties involved, including the Austrian authorities, would be assured that invasive investigative acts or requests coming from the ICC are in full conformity with human rights law.

In sum, the implications of the KSC Judgment for the investigative law and practice of the ICC are potentially big and should lead, in my view, to significant law and policy changes at the ICC—or at other international criminal tribunals.

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<sup>230</sup> *Id.* ¶ 36 (footnotes omitted).

<sup>231</sup> *Id.* ¶ 37.

## CONCLUDING OBSERVATIONS

The research question in this Article was whether, in light of the KSC Judgment of April 26, 2017, the loose approach to procedural law in international criminal justice—for example, there being no regulation or minimal regulation of invasive investigative powers—is in violation of international human rights law. I conclude that this question must be answered in the affirmative.

As examined in Part I, contemporary international criminal tribunals have incorporated human rights law in their applicable law in a variety of ways. Their commitment to human rights law looks quite good on paper. However, international criminal tribunals tend to be created with urgency or only after a few years of negotiation. Moreover, there is no national tradition of criminal procedure or due process to fall back on.

The organization of criminal procedure at international criminal tribunals echoes the desire to keep it short and simple. On the one hand, this is understandable, as the elaboration of detailed procedural and investigative rules, at times the result of lengthy negotiations between states (the ICC), may risk seriously delaying the effective functioning of the system. On the other hand, the absence of safeguards in the regulation of invasive investigative powers, such as search and seizure operations and wiretaps, raises serious human rights issues, which have, until now, been glossed over in international criminal proceedings.

This may change with the Judgment of the KSC Constitutional Chamber, as the KSC Rules of Procedure and Evidence were submitted to a thorough human rights assessment. Unlike the ICC and other international criminal tribunals, the KSC Rules contain a number of provisions attempting to regulate invasive investigatory powers. Even so, the Constitutional Chamber's judgment was loud and clear: the regulation of investigative powers in the KSC Rules still lacked sufficient safeguards and were therefore in violation of international human rights law. The KSC Constitutional Chamber's legal analysis may not have been flawless in every detail, but it is, by and large, solid and convincing.

Applying the findings of the KSC to international criminal tribunals such as the ICC, the question was then addressed as to whether the law of the ICC on investigations is in need of serious reform. I believe this to be the case. The lack of safeguards in the ICC's law on investigative powers cannot be sufficiently compensated by other—i.e., national—rules that might also govern ICC investigative activities in practice. These national rules may not be adequate enough or may not be available at all. What is more, certain safeguards, like judging whether an invasive investigative measure is really needed, or whether its scope and duration are proportionate, can only be effective when available at the level of the ICC. Without these safeguards, as is the case at present, the ICC law and practice on investigations is in violation of human rights law and is in need of serious reform. The KSC Judgment offers the highly needed incentive and guidance to make such reforms.