

The Investigation Phase  
in International Criminal Procedure  
In Search of Common Rules  
Karel De Meester



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Email: mail@intersentia.co.uk

Karel De Meester  
The Investigation Phase in International Criminal Procedure: In Search of  
Common Rules

ISBN 978-1-78068-305-8  
D/2015/7849/87  
NUR 828

Cover illustration: © Rudolf Hess being interrogated by members of the  
American prosecution team at Nuremberg, by William S. Hechter. Courtesy  
of Yad Vashem Photo Archives, <http://www.yadvashem.org>.

© 2015 Intersentia  
Cambridge – Antwerp – Portland  
[www.intersentia.com](http://www.intersentia.com) | [www.intersentia.co.uk](http://www.intersentia.co.uk)



British Library Cataloguing in Publication Data. A catalogue record for this book is  
available from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or  
any other means, without written permission from the publisher.

## ACKNOWLEDGEMENTS

This study was made possible by the support of the Netherlands Organisation for Scientific Research (NWO) (VIDI research programme ‘International Criminal Procedure: In Search of General Rules and Principles’), for which I am grateful. Furthermore, I am much indebted to my promotor, Göran Sluiter for providing me the opportunity to write this dissertation and for his support in writing and completing this research. The many opportunities I received from him I will not forget. Likewise, I am grateful for the support I received from my co-promotor, the late Bert Swart. Although his illness prevented him from participating until the completion of this dissertation, I feel privileged for the valuable ideas he offered me. He often provided me with new perspectives on my thesis. Furthermore, I am grateful to the members of the doctorate committee, dr. Serge Brammertz, dr. Megan Fairlie, Prof. dr. van Kempen, Prof. dr. Donders, Prof. dr. Mettraux and dr. Abels. I should also sincerely thank the many judges, staff members and defence counsel of the different tribunals I visited and who agreed to be interviewed for the purpose of this study. On many points, their insights into the law of international criminal procedure were indispensable for the completion of this study. Additionally, I greatly benefited from the expertise from the participants of the IEF research project. Further, I express my gratitude to my wonderful colleagues of the University of Amsterdam and the Amsterdam Center for International Law for creating a welcoming and stimulating working environment. Harmen, Tom, Sergey, Denis, Annemieke, Cassandra, Toni, Maike, Koen, Gaetano, Sander, Sara, Arjen, Menno and Frederiek, many thanks to all of you. Koen and Krit, a special thank you for agreeing to be my *paranimfen* and for your kind assistance with the preparations for the ‘big day’. I also wish to thank my present colleagues from the Leuven Institute for Human Rights and Critical Studies (‘LIHRICS’) for their cheers. I pay tribute to my parents and family for their encouragements. Finally, Ibele, thank you for your lasting love and support. To you and to Pauline, I dedicate this book.

## CONTENTS

<i>Acknowledgements</i> .....	v
<i>List of Abbreviations</i> .....	xv

### VOLUME I

#### SECTION 1. FRAMING THE RESEARCH

<b>Chapter 1. General Introduction</b> .....	5
I. The investigative deficit .....	5
II. Purpose of this study .....	8
III. Scope of the study .....	11
IV. Methodology .....	13
V. Organisation of the chapters .....	17
<b>Chapter 2. International Criminal Procedure: Nature, Characteristics and Evaluative Parameters</b> .....	21
I. Introduction .....	21
II. The uncertain sources of international criminal procedure (and its methods of interpretation) .....	25
III. Human rights and international criminal procedure: minimum standards? .....	39
III.1. Applicability of human rights norms to international criminal courts and tribunals .....	39
III.2. Human rights as a source of interpretation .....	53
III.3. The nature of human rights: 'minimum standards' .....	64
III.4. Applicability of the right to a fair trial to criminal investigations ..	65
III.5. Contextualisation of human rights norms .....	69
IV. The dichotomy between adversarial and inquisitorial procedures: bridging the gap? .....	81
V. A myriad of professed goals .....	93
VI. Vagueness, broad powers and the procedural principle of legality .....	105
VII. Characteristics and nature of investigations before international(ised) criminal tribunals .....	112
VII.1. Reliance on state cooperation .....	113
VII.2. Fragmentation of the investigation .....	128
VII.3. Scope and complexity of the investigations .....	133
VIII. The identification of normative parameters .....	134

<b>Chapter 3. Structure and Scope of the Investigation</b> .....	137
Introduction .....	137
I. The investigation phase: definition and delineation. ....	138
I.1. Minimum threshold for the commencement of the investigation. .	138
I.2. The pre-investigation phase. ....	143
I.3. The investigation proper. ....	159
I.3.1. The <i>ad hoc</i> tribunals and the SCSL. ....	159
I.3.2. The International Criminal Court .....	164
I.3.3. The Extraordinary Chambers in the Courts of Cambodia .....	180
I.3.4. The Special Tribunal for Lebanon .....	185
I.3.5. The Special Panels for Serious Crimes .....	189
I.4. Reactive versus proactive investigations. ....	194
II. Prosecutorial discretion .....	214
II.1. Introduction .....	214
II.2. The <i>ad hoc</i> tribunals: broad discretion .....	219
II.3. The Special Court for Sierra Leone (SCSL): ‘guided’ discretion .	230
II.4. The ICC: tempered legality .....	237
II.4.1. General .....	237
II.4.2. Variables to be considered. ....	238
II.4.3. Review of and control over prosecutorial discretion .....	262
II.4.4. Organisational safeguards and constraints of prosecutorial discretion .....	269
II.4.5. Prosecutorial practice. ....	270
II.5. The Extraordinary Chambers in the Courts of Cambodia (ECCC): moderate legality .....	272
II.6. The Special Panels for Serious Crimes (SPSC) .....	280
II.7. The Special Tribunal for Lebanon (STL) .....	282
II.8. Conclusions. ....	283
III. Principle of (prosecutorial) objectivity .....	295
III.1. Introduction .....	295
III.2. The <i>ad hoc</i> tribunals .....	299
III.3. The Special Court for Sierra Leone .....	303
III.4. The International Criminal Court .....	304
III.5. The Internationalised criminal tribunals. ....	310
IV. Due process obligations .....	315
Preliminary findings .....	321

## SECTION 2. THE COLLECTION OF EVIDENCE

<b>Chapter 4. Interrogation of Suspects and Accused Persons</b> .....	327
I. Introduction. ....	327
II. Applicable procedural regime .....	328
II.1. Status of the interviewee .....	328

II.1.1.	Introduction . . . . .	328
II.1.2.	Suspects versus witnesses . . . . .	329
II.1.3.	Suspects versus accused persons . . . . .	335
II.1.4.	The autonomous interpretation of ‘charged’ under international human rights law . . . . .	336
II.2.	Status of the interviewer . . . . .	338
II.2.1.	Introduction . . . . .	338
II.2.2.	Uniformity of procedure? . . . . .	338
II.2.3.	Minimum guarantees versus modalities for the conduct of questioning . . . . .	342
III.	Prosecutorial power to interrogate suspects and accused persons . . . . .	344
III.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	344
III.2.	The International Criminal Court . . . . .	344
III.3.	Internationalised criminal courts and tribunals . . . . .	345
IV.	Procedural safeguards and modalities . . . . .	345
IV.1.	Right to the assistance by counsel during interrogation. . . . .	345
IV.1.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	345
IV.1.2.	The International Criminal Court . . . . .	353
IV.1.3.	Internationalised criminal courts and tribunals . . . . .	355
IV.2.	Right to remain silent . . . . .	357
IV.2.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	357
IV.2.2.	The International Criminal Court . . . . .	368
IV.2.3.	Internationalised criminal courts and tribunals . . . . .	369
IV.3.	Right to be informed of the charges or allegations . . . . .	371
IV.3.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	371
IV.3.2.	The International Criminal Court . . . . .	376
IV.3.3.	Internationalised criminal courts and tribunals . . . . .	377
IV.4.	Right to the free assistance of an interpreter . . . . .	377
IV.4.1.	The <i>ad hoc</i> tribunals and SCSL . . . . .	377
IV.4.2.	The International Criminal Court . . . . .	378
IV.4.3.	Internationalised criminal courts and tribunals . . . . .	380
IV.5.	The right not to be subjected to torture or inhuman or degrading treatment . . . . .	380
IV.5.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	380
IV.5.2.	The International Criminal Court . . . . .	382
IV.5.3.	Internationalised criminal courts and tribunals . . . . .	382
IV.6.	Recording procedure. . . . .	383
IV.6.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	383
IV.6.2.	The International Criminal Court . . . . .	384
IV.6.3.	Internationalised criminal courts and tribunals . . . . .	386
V.	Comparative analysis: some tentative conclusions . . . . .	390
<b>Chapter 5. Questioning of Witnesses . . . . .</b>		<b>393</b>
I.	Introduction. . . . .	393
II.	Defining witnesses and witness statements . . . . .	397

III.	Witness statements as a source of evidence: admissibility of out-of-court witness-statements . . . . .	400
IV.	Applicable procedural regime . . . . .	406
V.	Power and applicable procedural norms . . . . .	409
V.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	409
V.1.1.	The power of the parties to interview witnesses . . . . .	409
V.1.2.	The power to compel witnesses to be interviewed . . . . .	410
V.1.3.	Procedural safeguards . . . . .	415
V.1.4.	Statement taking modalities . . . . .	417
V.2.	The International Criminal Court . . . . .	423
V.2.1.	The power of the parties to interview witnesses . . . . .	423
V.2.2.	The power to compel witnesses to be interviewed . . . . .	424
V.2.3.	Procedural safeguards . . . . .	426
V.2.3.1.	Privilege against self-incrimination . . . . .	427
V.2.3.2.	Other procedural safeguards . . . . .	429
V.2.4.	Statement taking modalities . . . . .	430
V.3.	Internationalised criminal courts and tribunals . . . . .	433
V.3.1.	The power of the parties to interview witnesses . . . . .	433
V.3.2.	The power to compel witnesses to be interviewed . . . . .	437
V.3.3.	Procedural safeguards . . . . .	438
V.3.4.	Conduct of the interview . . . . .	439
VI.	International human rights norms . . . . .	441
VI.1.	The privilege against self-incrimination for witnesses . . . . .	442
VI.2.	Right to examine witnesses . . . . .	443
VII.	Challenges of international criminal investigations . . . . .	449
VIII.	Comparative analysis: some tentative conclusions and recommendations . . . . .	457
	<b>Chapter 6. Non-custodial Coercive Measures . . . . .</b>	<b>461</b>
	Introduction . . . . .	461
I.	General . . . . .	462
I.1.	Definition . . . . .	462
I.2.	Direct enforcement versus request for judicial assistance . . . . .	464
I.3.	Necessity of a judicial warrant . . . . .	466
I.3.1.	The requirement of a judicial authorisation derives from international human rights law . . . . .	469
I.3.2.	The requirement of a judicial warrant as a general principle of law . . . . .	472
I.3.3.	The requirement can be derived from the statutory texts . . . . .	475
I.3.4.	The requirement follows from a theoretical perspective on the judicial role . . . . .	476
I.3.5.	Judicial authorisation by an international Judge . . . . .	478
I.4.	General threshold for the use of non-custodial coercive measures . . . . .	486
I.5.	Principle of proportionality . . . . .	488
I.6.	(Subsidiarity) – necessity – specificity . . . . .	491

I.7.	Admissibility of evidence obtained through illegal coercive measures . . . . .	493
I.7.1.	The question of a proper remedy . . . . .	493
I.7.2.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	494
I.7.3.	The International Criminal Court . . . . .	500
II.	Specific investigative measures. . . . .	506
II.1.	General . . . . .	506
II.2.	Search and seizure operations. . . . .	507
II.2.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	508
II.2.2.	The International Criminal Court (ICC). . . . .	513
II.2.3.	Other tribunals with international elements. . . . .	515
II.3.	Tracing, freezing, and seizure of property, proceeds or instrumentalities of the crime . . . . .	517
II.3.1.	Introduction . . . . .	517
II.3.2.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	519
II.3.3.	The International Criminal Court . . . . .	523
II.3.4.	Other tribunals with international elements. . . . .	527
II.4.	Interception of communications . . . . .	527
II.4.1.	Generally . . . . .	527
II.4.2.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	529
II.4.3.	The International Criminal Court . . . . .	531
II.4.4.	Other tribunals with international elements. . . . .	532
II.5.	Examinations of body and mind. . . . .	532
II.5.1.	The <i>ad hoc</i> tribunals and the SCSL . . . . .	532
II.5.2.	The International Criminal Court . . . . .	537
II.5.3.	Other tribunals with international elements. . . . .	538
III.	Conclusion. . . . .	538
III.1.	Formal and material requirements . . . . .	538
III.2.	Individual non-custodial coercive measures . . . . .	540

## VOLUME II

### SECTION 3. DEPRIVATION AND RESTRICTION OF LIBERTY

<b>Chapter 7. Arrest and Surrender . . . . .</b>	<b>547</b>
Introduction . . . . .	547
I. Definition. . . . .	549
II. Arrest upon judicial authorisation . . . . .	553
II.1. Preconditions for the issuance of the arrest warrant. . . . .	553
II.2. Applicable standard of proof . . . . .	559
II.3. State cooperation in the enforcement of the arrest warrant. . . . .	561
II.3.1. The <i>ad hoc</i> tribunals. . . . .	562
II.3.2. The International Criminal Court . . . . .	569
II.4. Execution of the arrest warrant. . . . .	578
II.4.1. The <i>ad hoc</i> tribunals and the SCSL . . . . .	578



II.4.2.	The International Criminal Court .....	580
II.5.	Indictments/Arrest warrants under seal. ....	589
II.6.	Procedure in case of failure to execute the arrest warrant. ....	591
III.	Arrest in the absence of an arrest warrant. ....	594
III.1.	The <i>ad hoc</i> tribunals and the SCSL .....	594
III.1.1.	Standard of proof for warrantless provisional detention ..	595
III.1.2.	Execution of the provisional arrest .....	596
III.1.3.	Transfer and provisional detention of suspects (Rule 40 <i>bis</i> ) .....	597
III.2.	The International Criminal Court .....	602
III.3.	Internationalised criminal tribunals. ....	604
IV.	An alternative route: summons to appear .....	606
V.	Rights of the arrested and detained person .....	611
V.1.	Right to personal liberty .....	611
V.2.	The right to be promptly informed of the reasons for the arrest. .	615
V.2.1.	The <i>ad hoc</i> tribunals and the Special Court. ....	615
V.2.2.	The International Criminal Court .....	624
V.2.3.	The internationalised criminal tribunals .....	625
V.3.	Right to be promptly brought before a judge or ‘judicial officer’ .	626
V.3.1.	The <i>ad hoc</i> tribunals and the Special Court. ....	628
V.3.2.	The International Criminal Court .....	635
V.3.3.	The internationalised criminal tribunals .....	636
V.4.	The right to challenge the lawfulness of detention ( <i>habeas corpus</i> ) .....	639
V.4.1.	The <i>ad hoc</i> tribunals and the Special Court. ....	639
V.4.2.	The International Criminal Court .....	648
V.4.3.	The internationalised criminal tribunals .....	652
VI.	Irregularities in the execution of the arrest. ....	653
VII.	Forms of substantive redress .....	673
VII.1.	The <i>ad hoc</i> tribunals and the Special Court. ....	675
VII.2.	The International Criminal Court .....	691
VII.3.	The internationalised criminal tribunals. ....	705
VIII.	Allocating responsibility for unlawful arrest and detention .....	711
VIII.1.	The <i>ad hoc</i> tribunals and the SCSL .....	711
VIII.2.	The International Criminal Court .....	720
VIII.3.	The internationalised criminal tribunals. ....	722
	Preliminary findings .....	722
 <b>Chapter 8. Pre-trial Detention and Release</b> .....		 729
	Introduction .....	729
I.	Provisional release, a proper right? .....	730
II.	Provisional detention as the rule or as an exception .....	736
II.1.	The early practice: provisional release as the exception, detention as the rule .....	736

II.2.	The <i>ad hoc</i> tribunals and the SCSL: release as neither the rule nor the exception . . . . .	742
II.2.1.	Unfettered discretion to refuse release . . . . .	751
II.2.2.	The burden of proof rests with the accused . . . . .	753
II.2.3.	Standard of proof. . . . .	759
II.2.4.	General principle of proportionality . . . . .	761
II.2.5.	Interlocutory appeals against provisional release decisions . . . . .	763
II.2.6.	Material conditions for release . . . . .	765
II.2.6.1.	Whether the accused, if released, will appear for trial. . . . .	766
II.2.6.2.	Interference with victims, witnesses or other persons. . . . .	779
II.2.6.3.	Hearing of the host state and the state to which the accused seeks to be released. . . . .	782
II.2.7.	Provisional release on humanitarian/compassionate grounds or on medical grounds . . . . .	782
II.2.8.	Conditions imposed pursuant to Rule 65 (C). . . . .	784
II.2.9.	Requests for modification of the conditions of detention. . . . .	788
II.2.10.	Length of the pre-trial detention . . . . .	789
II.2.11.	Agreements on the acceptance of provisionally released persons . . . . .	795
II.3.	The ICC: Provisional release as the rule, detention as the exception. . . . .	797
II.3.1.	Absence of discretion to refuse provisional release . . . . .	803
II.3.2.	Burden of proof rests with the Prosecutor . . . . .	804
II.3.3.	Periodic review of ruling on release or detention . . . . .	806
II.3.4.	Interlocutory appeal against decisions on detention or release . . . . .	812
II.3.5.	Grounds justifying pre-trial detention . . . . .	813
II.3.5.1.	General . . . . .	813
II.3.5.2.	To ensure the presence of the suspect or accused at trial . . . . .	816
II.3.5.3.	Obstruction or endangerment of the investigation or of the court proceedings . . . . .	820
II.3.5.4.	Continuous contribution to the commission of the alleged (or related) crime(s). . . . .	822
II.3.6.	Length of pre-trial detention. . . . .	822
II.3.7.	Conditional release . . . . .	824
II.3.8.	Impact of medical reasons on provisional detention. . . . .	829
II.4.	Internationalised criminal tribunals: confirming pre-trial detention as the exception . . . . .	830
II.4.1.	The Extraordinary Chambers in the Courts of Cambodia . . . . .	830
II.4.1.1.	General . . . . .	830
II.4.1.2.	Grounds justifying pre-trial detention. . . . .	841

II.4.1.3. Length of pre-trial detention . . . . .	852
II.4.1.4. Bail orders and conditional release. . . . .	854
II.4.1.5. Alternative forms of detention . . . . .	854
II.4.1.6. Provisional release on humanitarian grounds . . .	854
II.4.2. The Special Panels for Serious Crimes . . . . .	855
II.4.2.1. General . . . . .	855
II.4.2.2. Grounds justifying pre-trial detention. . . . .	861
II.4.2.3. Length of the pre-trial detention. . . . .	863
II.4.2.4. Conditional release . . . . .	864
II.4.3. Special Tribunal for Lebanon . . . . .	865
Preliminary findings . . . . .	869
 SECTION 4. CONCLUSIONS	
<b>Chapter 9. General Conclusions and Recommendations . . . . .</b>	<b>875</b>
I. Introduction . . . . .	875
II. Main findings . . . . .	875
II.1. The obstacles in identifying commonly shared rules . . . . .	875
II.2. The importance of the status of person(s) affected by the investigation . . . . .	877
II.3. The ‘under regulation’ of the investigation stage of proceedings. .	878
II.4. Gaps in the legal protection of suspects and accused persons . . . .	879
III. Commonly shared rules identified . . . . .	881
III.1. Procedural safeguards (shield dimension of international criminal procedure). . . . .	881
III.2. Other commonly shared rules. . . . .	884
IV. Recommendations . . . . .	887
<b>Summary . . . . .</b>	<b>897</b>
<b>Samenvatting . . . . .</b>	<b>913</b>
<i>Bibliography . . . . .</i>	<i>933</i>
<i>Table of Cases . . . . .</i>	<i>967</i>
<i>Table of Instruments . . . . .</i>	<i>1019</i>
<i>Index. . . . .</i>	<i>1027</i>

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHR	African Commission on Human and Peoples' Rights
ACtHR	African Court on Human and Peoples' Rights
AIDP	Association Internationale de Droit Pénal
ASP	Assembly of States Parties
CoE	Council of Europe
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention
HRC	Human Rights Committee
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SCU	Special Crimes Unit
SPSC	Special Panels for Serious Crimes
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties
VWU	Victims and Witnesses Unit