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BEFORE DOMESTIC COURTS**

**Jean d'Aspremont and Catherine Brölmann**

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## CHALLENGING INTERNATIONAL CRIMINAL TRIBUNALS BEFORE DOMESTIC COURTS

*Jean d'Aspremont and Catherine Brölmann\**

### Introduction

Whether grounded in a binding Security Council Resolution or an international treaty, the obligation to cooperate with international criminal tribunals is crucial to the efficacy of these tribunals, as these must be able to rely on domestic enforcement mechanisms. International courts, despite the wide-ranging means that have been put at their disposal<sup>1</sup>, need the cooperation of various domestic actors.<sup>2</sup> The cooperation of States with international criminal tribunals has not always been without difficulty, as these tribunals have been the object of various challenges before domestic judges. The aim of this paper is, from a general international law perspective, to examine these instances of case-law as well as to try and shed some light on the answers that have been provided by domestic judges confronted with such challenges of international criminal tribunals.

In the context of this paper the concept of 'challenge' refers to any kind of *testing* of the tribunals' authority, competences, procedures – in short: the tribunals' *acts* or *actions* – against certain standards, accompanied by the claim that the tribunals do not meet the test. A domestic litigant will present such a challenge before a domestic court, in the case against a State that is cooperating with the pertinent tribunal. Whether a domestic

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<sup>1</sup> See for instance the resort to international forces to enforce its arrest warrants. On this respect see the Rule 59bis of the Rules and Procedure and Evidence of the ICTY. For an account of the practice under this provision and the cooperation with the UN Transitional Authority in Eastern Slavonia, Branja, Western Sirmium in Croatia (UNTAES) and by the IFOR in Bosnia, see S. D. Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" 93 *American Journal of International Law* (1999) 57, at 75-76. See also Han-Ru Zhou, 'The Enforcement of Arrest Warrants by International Forces. From the ICTY to the ICC', *Journal of International Criminal Justice* (2006), 202.

<sup>2</sup> See A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* 2 (1998), at 13.

court honours the request and actually proceeds to a *review* of the tribunals' authority, competences and procedures is a separate question.

The challenges of international criminal tribunals before domestic courts that have been reported so far all pertain to the ICTY and ICTR. This is not entirely surprising, since these tribunals have been in function for almost two decades. Because the International Criminal Court and other international tribunals like the Special Tribunal for Lebanon (hereinafter STL) still are in their infancy and the cases brought before them are at an early stage, there is little or no practice of challenges before domestic courts. The following paragraphs accordingly zero in on the practice pertaining to the ICTY and ICTR.

The first part of this chapter gives a brief sketch of recent cases in which an international criminal tribunal was challenged before a domestic court, whether or not this actually led to a judicial *review* of the tribunal's action or existence (I). In the second section (II), the chapter briefly seeks to outline the various contexts in which international criminal tribunals are put to the test before domestic courts (II.1), as well as the object (II.2) and the standards (II.3) used in such a challenge and, eventually, the form which an actual review may take (II.4). In a third part, this chapter attempts to formulate some thoughts on how domestic judges have justified their (refusal to engage in a) review of international criminal courts.. We argue that discussions about the entitlement *vel non* of domestic courts to review international criminal tribunals bespeak two discourses, each of them leading to a different understanding of the role and place of these tribunals as well as their autonomy (III). The one discourse proceeds from the idea of *supremacy* of the international legal order and henceforth of international (criminal) proceedings. The other rests on the idea of the closeness of the domestic legal order, and consequently the prevalence of domestic law at the national level. This is what we call the discourse of *constitutional autonomy*. As will be shown, recourse to one discourse never implies a complete exclusion of the other : domestic judges confronted with the challenge of an international criminal tribunal often seem to borrow from both discourses.

An additional remark may be formulated as regards the place of this chapter in the general study undertaken in this book. While treaty-based tribunals usually are considered international organizations with independent international legal personality, *ad hoc* tribunals constitute organs of the United Nations created by an 'act' of the latter<sup>3</sup>. As a result,

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<sup>3</sup> G. Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations' 20 *Leiden Journal of International Law* (2007), 613-636.

assessing an order, decision, judgement or even the statute of an ad hoc tribunal formally amounts to reviewing an act of the United Nations. However, despite the different legal bases of *ad hoc* tribunals and treaty-based tribunals, from a different and equally valid perspective these tribunals may be seen as international courts capable of adopting certain acts with autonomous judicial effect at the international level. This is why some of the lessons learnt from this practice may provide useful insights for possible future cases of review of the action of the ICC by domestic courts.

### **I. Practice: a brief sketch**

The following presents, in chronological order, the few instances of domestic case-law in which issues of challenge and review of an international criminal tribunal – *in casu* the ICTY and the ICTR – arose.

In the case *Dragan Opacic v the Netherlands (Netherlands 1997)*<sup>4</sup>, Opacic was brought to The Hague by the ICTY for testimony. When he turned out to be a false witness, the ICTY was bound by the applicable agreement to return him to Bosnia Herzegovina. Opacic claimed that he would face human rights abuses if returned, and took his case for summary proceedings to the district court in The Hague. This court, however, pointing to the binding character of ICTY orders, found that ICTY decisions could not be reviewed by Dutch national courts.

In *Ntakirutimana (US 1999)*<sup>5</sup> Elizaphan Ntakirutimana appealed the district court's denial of his habeas corpus petition, alleging that the district court erred because (1) the Constitution of the United States requires a full treaty, involving Congress, for surrender to the ICTR, (2) the request for surrender did not establish 'probable cause', (3) the Security Council is not authorized to establish the ICTR, and (4) the ICTR is not capable of protecting fundamental rights guaranteed by the United States Constitution and international law. The Court held that it was not unconstitutional to surrender Ntakirutimana to the ICTR pursuant to the Executive-Congressional Agreement, and dismissed the last two allegations as well, as falling outside the scope of a *habeas* review. The alleged lack of 'probable cause' – a procedural safeguard in US extradition law – interestingly was not dismissed by the court as belonging to a legal context different from surrender, but was rebutted on

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<sup>4</sup> *Dragan Opacic v. the Netherlands*, District Court of The Hague, Kort Geding KG 97/742 30 mei 1997.

<sup>5</sup> *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999).

the basis of findings of investigations and reasonable interpretation of the facts. The US Court thus embedded its compliance with the request of the ICTR in the classic framework of ‘extradition.’

In the appeal proceedings in *Croatia v Naletilić-Tuta (Croatia 1999)*<sup>6</sup>, Naletilić claimed the existence of concurrent jurisdiction of the ICTY and the Croatian domestic court, which had been the first to initiate proceedings. Furthermore Naletilić pleaded implicitly a breach of article 6 ECHR, as he pointed out that the ICTY was not expected to justly and speedily conduct the proceedings. Thus, he requested not to be surrendered to the ICTY, but to be tried in Croatia. The Court held that the ICTY had primacy over domestic courts according to the ICTY Statute and the 1997 ICTY Rules of Procedure and Evidence. It dismissed the considerations about the efficiency and duration of proceedings before the ICTY as non-legal arguments.

In *Naletilić v Croatia (ECtHR 2000)*<sup>7</sup> Naletilić subsequently complained in Strasbourg under Article 6 § 1 of the European Convention that in case of his extradition to the ICTY, criminal proceedings against him in Croatia would necessarily be suspended which would amount to a violation of his right to be tried within a reasonable time; and that the ICTY was not an independent and impartial tribunal established by law. In addition he claimed breach of his rights under article 7 – disregarding the proviso for criminalization on the basis of international law in article 7(2) –, in that the maximum prison term in Croatia would be shorter than that envisaged by the ICTY. The European Court of Human Rights declared his complaints inadmissible, as it could not take into consideration the length of “some hypothetical future proceedings”. Importantly the Court recalled that the surrender to an international court did not amount to an act in the nature of an extradition. It moreover held that the ICTY, “in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence”<sup>8</sup>.

*Milošević v The Netherlands (Netherlands 2001)*<sup>9</sup> revolved around a request by the accused, put to the ICTY host State where he was held in

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<sup>6</sup> *Croatia v. Naletilić-Tuta*, Supreme Court of Croatia, 13 October 1999, Appeal Judgement, 690/1999-4, ILDC 384 (HR 1999); annotated by Ivo Josipović, Marin Bonačić.

<sup>7</sup> *Mladen Naletilić v. Croatia*, European Court of Human Rights, Application No. 51891/99 (May 4, 2000).

<sup>8</sup> *Ibidem*, para. 1(b).

<sup>9</sup> *Milošević v The Netherlands*, The Hague District Court (Civil law division), 31 August 2001; See also *Milošević v. the Netherlands*, ECtHR, Decision on Admissibility, Application No. 77631/01.

custody, that he be released or returned to Yugoslavia or, in the alternative, that the Netherlands plead before the tribunal and relevant UN bodies for such release or return. Milošević argued *inter alia* that the ICTY constituted a violation of the principle of the sovereign equality of all UN member States for which reason the tribunal could not be regarded as “an independent and impartial tribunal within the meaning of Article 6 of the European Convention”. The Hague Court held the creation of the ICTY to be legal, with a reference to the 1995 *Tadić* pronouncement of the ICTY.<sup>10</sup> In addition it held, with a reference to the ECtHR’s 2000 *Naletilić* judgment,<sup>11</sup> that the ICTY met all the standards of protection of the accused, including those of impartiality and independence. Finally, it stated that pursuant to the Headquarters Agreement and the ensuing implementation act, all competence in relation to persons indicted before the tribunal had been transferred by the Netherlands to the ICTY.

Soon after, Mr. Milošević brought complaints before the European Court of Human Rights directed against his arrest and detention and the proceedings conducted in the ICTY. He relied on the ECHR Articles 5 (right to liberty and security), 6 (right to a fair trial), 10 (freedom of expression), 13 (right to an effective remedy) and 14 (prohibition of discrimination). Only the complaint based on article 6(1) had been made at the domestic level, but here he had not pursued appeal. The Strasbourg Court therefore declared the application inadmissible in its entirety for non-exhaustion of domestic remedies. (*Milošević v The Netherlands (ECtHR 2001)*)<sup>12</sup>.

In *Rukundo v Switzerland (Switzerland, 2001)*<sup>13</sup> a Rwandan citizen Emmanuel Rukundo, at the time residing at Geneva, appealed against the Swiss favourable response to the ICTR’s request for Rukundo’s transfer and the transfer of certain of his documents. His main argument was that the ICTR could not guarantee the right to a fair trial as enshrined in the ECHR and the ICCPR, notably because the ICTR was subject to severe dysfunctions relating to the management and the functioning of the tribunal. The Court recalled that Switzerland did not extradite or transfer persons to States or institutions that failed to guarantee the respect of minimal procedural rights. It added, however, that with regard to the

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<sup>10</sup> *Tadić*, ICTY Appeals Chamber, 2 October 1995, IT-94-1-AR72.

<sup>11</sup> *Naletilić v. Croatia*, European Court of Human Rights, Application No. 51891/99 (4 May 2000).

<sup>12</sup> *Milošević v. The Netherlands*, European Court of Human Rights, Application No. 77631/01 (March 19, 2002).

<sup>13</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001); annotated by A. Ziegler.

ICTR there was a presumption that such procedural rights were guaranteed. In particular, the Court – thus implicitly engaging in a review of the ICTR – referred to recent improvements in the functioning of the tribunal, and the expectation that the ICTR would be able to operate “in conformity with the guarantees of due process contained in the ICCPR.”<sup>14</sup>

In the opinion on the *Bobetko report (Croatia 2002)*<sup>15</sup> the Croatian government submitted a request to the Constitutional Court for clarification *inter alia* of the question as to what the legal meaning was of statements in the ICTY indictment to the effect that crimes against humanity alleged to have been committed during the action ‘Medak pocket’ had been part of a wide-spread and systematic assault on the civil population by the military forces of Croatia. The court underscored Croatia’s obligation to arrest and surrender accused individuals to the ICTY without probing the well-foundedness of the accusations, or the existence of crimes, or the guilt of an alleged perpetrator. On these points only the court before which the charges had been brought, could decide. That court would be the ICTY. Thus the Constitutional Court affirmed the primacy of the ICTY over national courts.

The case *Re International Arrest Warrant (‘Lukić’)*<sup>16</sup> stemmed from two requests for transfer of Mr. Lukić, one day apart: from ICTY and Serbia-Montenegro, respectively. Lukić stated he would agree to surrender to the ICTY on condition that his case would not be referred to the courts of Bosnia and Herzegovina or of any other State. The court applied the ICTY Statute and ICTY Rules, to give priority to the ICTY’s request. It then applied Law 24767 relating to extradition procedures (known as the rule of speciality and re-extradition), and ordered that the ICTY not send Mr. Lukić without the prior authorization of Argentina to another court in connection with acts other than those that formed the basis for the ICTY’s request for surrender.

Most recently, in its decision as to the admissibility of the application of *S. Galic* against the Netherlands, the European Court of Human Rights held in an obiter dictum that the basic legal provisions governing the ICTY’s organization and procedure are “purposely designed to provide those

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<sup>14</sup> *Ibidem*, para 3b.

<sup>15</sup> *Bobetko Report*, 12 November 2002, Constitutional Court of Croatia, Review of constitutionality and legality, U-X-2271/2002; ILDC 383 (HR 2002) (request for advisory opinion submitted by the government), annotated by Ivo Josipović, Marin Bonačić.

<sup>16</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006), annotated by Fabian Raimondo; para. 68.



indicted before it with all appropriate guarantees”.<sup>17</sup> The applicant had i.a. alleged a contradiction between the ICTY criminal proceedings and decisions and his right to a fair trial enshrined in article 6 of the ECHR. The European Court found that acts of the ICTY cannot be attributed to the host state and on that ground (unlike its finding of inadmissibility in the *Naletilić* and *Milošević* cases) deemed the case inadmissible. Hence there was no case against the Netherlands. While by consequence there was no need for the European Court to address (even by rejecting it) the ‘challenge’ of the ICTY, the Court nonetheless obiter expressed an opinion on the compatibility between fundamental human rights and ICTY proceedings.

## **II. Challenge and review of international criminal tribunals before domestic courts: a brief taxonomy**

Challenges of international criminal tribunals before domestic courts originate in the obligation of States to cooperate at the international and national levels with these institutions. The statutes of the ICTY<sup>18</sup> and the ICTR<sup>19</sup> comprise an obligation to cooperate. This obligation binds all States member to the United Nations – and is seen as “absolute” in the sense that it is not subject to any exception,<sup>20</sup> while in addition it creates obligations *erga omnes partes*. In the context of this paper, it may be emphasized that the cooperation with these tribunals does not unfold in total isolation of domestic law, for ‘cooperation’ is too broad an obligation to generate a self-executing norm. Indeed, cooperation often requires domestic measures of implementation. This is confirmed by the fact that the provisions in the ICTY and ICTR statutes which provide for cooperation, are generally taken as non-self-executing<sup>21</sup>, reinforcing the need for implementation measures.

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<sup>17</sup> ECHR, *Galic* against the Netherlands, Decision on the admissibility, Application No. 22617/07, 9 June 2009.

<sup>18</sup> Article 29; see also article 58 of the Rules of Procedure and Evidence; Article 29 has been construed by the ICTY as generating an obligation *erga omnes partes*. See *Prosecutor v. Tihomir Blaškić*, ICTY, Judgement of 29 October 1997 of the Appeals Chamber on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, Case No. IT-95-14-AR108bis, para. 26-36.

<sup>19</sup> Article 28; see also the Rules of Procedure and Evidence

<sup>20</sup> ICTY, *Prosecutor v. Tihomir Blaškić*, Decision of the Trial Chamber II of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of a Subpoena Duces Tecum, Case No. IT-95-14-PT and Judgement of 29 October 1997 of the Appeals Chamber on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, Case No. IT-95-14-AR108bis.

<sup>21</sup> On the self-executing character of the UN Charter and SC Resolution are non-self executing in the United States see gen. J. A. R. Nafziger and E. M. Wise, ‘The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations’, 46 *American Journal of Comparative Law* 424 (1998); T. A. Schweitzer, ‘The United

With respect to the ICTY and the ICTR, the necessity to adopt additional domestic legislation has been confirmed by the Security Council<sup>22</sup> and the ICTY<sup>23</sup>. States must thus adapt their domestic law to ensure compliance with the obligation to cooperate enshrined in the Security Council's Resolutions<sup>24</sup>. It is worth mentioning that in the United States a 'surrender treaty' with the tribunals is required<sup>25</sup>, which itself in turn requires implementation measures.<sup>26</sup> This is, incidentally, separate from the

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Nations as a Source of Domestic Law: Can Security Council Resolutions be Enforced in American Courts', 4 *Yale Studies of World Public Order* 162 (1977-1978); M. Glennon, 'The Constitution and Chapter VII of the United Nations Charter', 85 *American Journal of International Law* 74 (1991); J. B. Bianchi, 'Security Council Resolutions in United States Courts', 50 *Indiana Law Review* 83 (1974); R. A. Brand, 'Security Council Resolutions: When do They Give Rise to Enforceable Legal Rights? The United Nations Charter, the Byrd Amendment and a Self-Executing Treaty Analysis', 9 *Cornell International Law Journal* 298 (1975-1976). The case-law does not provide any decisive indication. On the one hand, see *Diggs v. Schultz*, 555 F.2d 461 (D.C. Cir. 1972) (which ruled that the Security Council resolutions concerned were not self-executing); it however did not take any position on Security Council Resolutions in general; *Pauling v. McElroy* (stating the UN Charter in general and the Trusteeships Agreements for the Pacific Islands are not self-executing), 164 F. Supp. 390, 393 (D.D.C. 1958); *Sei Fujii v. State*, 217 P.2d 718, 242 P.2d 617 (1952) (declaring that human rights provisions of the Charter are non-self executing). This was confirmed on appeal, 38 Cal.2d 718, 724, 242 P.2d 617, 621-22 (1952); *United States v. Vargas* (declaring that article 73(a) of the Charter is non-self-executing, 370 F. Supp. 908 (D.P.R. 1974). See also the recent decision of the Supreme Court in *Medellin v. Texas*, Appeal Judgment, No. 06-984; ILDC 947 (US 2008), 25 March 2008 according to which article 94 of the UN Charter is not endowed with a self-executing effect. On the other hand see *Keeney v. United States*, 218 F.2d 843 (D.C. Cir. 1954) (declaring that article 100 and 105 of the UN Charter are self-executing); *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831 (N.D. Cal. 1950) (holding that article 104 of the Charter is self-executing); *Curran v. City of New York*, 191 Misc 299, 77 N.Y.S.2d 206 (Sup. Ct. 1947) (stating that article 104 is self-executory); *Saipan v. Department of Interior*, 502 F.2d 90 (9th Cir. 1974) (holding that a Trusteeship Agreement is self-executing); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (holding that article 2(4) of the Charter is self-executing).

<sup>22</sup> See UNSC Res 1207 (1998) calling upon FRY and other States to take any measure necessary under their domestic law to implement the provision of the Statute of the ICTY.

<sup>23</sup> ICTY, Decision of the President on the Defence Motion Filed Pursuant to Rule 64, 3 April 1996, *Blaškić*, IT-95-14-T, at para. 8.

<sup>24</sup> See the account of the legislations adopted by States in A. Ciampi, 'The Obligation to Cooperate' in Cassese, et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 1607, at p. 1615.

<sup>25</sup> See section 3181 of the Title 18 of the United States Code (USC); see the 1994 United States-Yugoslavia Tribunal Agreement on Surrender of Persons and the 1995 United States-Rwanda Tribunal Agreement on Surrender of Persons.

<sup>26</sup> National Defense Authorization Act, Pub. L. No. 104-106, 110 Sta. 486 (1996), para. 1342. For a commentary of this legislation, see R. Kushen and K. J. Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', *American Journal of International Law* 510 (1996); For a first application of this legislation, see the case of the surrender of Elizaphan Ntakirutimana, Misc. No. L-96-5, US District Court of the Southern District of Texas, Laredo division, 1997 US Dist. LEXIS 20714, 17

question whether cooperation with a tribunal and especially the transfer of the accused has been *domestically* construed as a form of ‘extradition’ or a form of ‘surrender’.<sup>27</sup> Whether or not a special treaty is required, in all cases where implementation measures are necessary to ensure cooperation with the tribunals, and such measures are susceptible to review by the domestic judge, the fact of cooperation inevitably brings also the action of international tribunals as such under the scrutiny of domestic courts.

The following paragraphs survey different instances in which the ICTY and the ICTR may be subject to challenge and occasionally review before domestic courts. We look at the context and objectives of challenges of the tribunals (1); the legal grounds for, or object of, such a challenge (2); the standards to which domestic courts resort when confronted with a challenge of the tribunals (3). In conclusion a few words are said about form, as the review of a tribunal is not necessarily express (4).

## **1. Context and objective of challenges of international criminal tribunals**

### **A. Transfer of persons: extradition and surrender**

This section addresses the ‘handing over’ of a person by a state to a tribunal (or sometimes the other way around, as in ‘*Lukić*’)<sup>28</sup>. This is what we term ‘transfer’. In the legal sense, a distinction must be made between a transfer understood between legal equals (such as by one state to another) on the one hand, and the transfer by a state on the basis of a non-reciprocal obligation on the other. In line with general parlance<sup>29</sup> this chapter calls the first type of transfer ‘extradition’ and the latter ‘surrender’. Clearly the idea is to distinguish between the *concepts*, and not the terms, as in international practice these terms are not used consistently: the ICC Statute uses the term ‘surrender’ but the ad hoc tribunals refer to ‘transfer’. ‘Surrender’ is also occasionally referred to in the context of interstate judicial relations, e.g. within the framework of

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December 1997. See the comments of G. Sluiter, ‘To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal’, 11 *Leiden Journal of International Law* 383-395 (1998).

<sup>27</sup> see *infra* 1A

<sup>28</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006), annotated by Fabian Raimondo; para. 68.

<sup>29</sup> Cf the ECtHR in the Naletilic case: “However, it is not an act in the nature of an extradition which is at stake here, as the applicant seems to think. Involved here is the surrender to an international court...” (*Mladen Naletilic v. Croatia*, European Court of Human Rights, Application No. 51891/99 (May 4, 2000).

article VII of the NATO Status of Force Agreement.<sup>30</sup> Finally, eg in the *Rukundo* case, the Swiss court did set apart ‘surrender’, but it nonetheless reserved the right to withhold request for transfer.

Leaving aside the terminological complexities, and turning to conceptual distinctions, the UN’s cooperation-procedure for the ICTY and the ICTR follows the model of uni-directional obligation between an organization and its member states, rather than the practice of inter-state transfer of persons.<sup>31</sup> That does not mean there is uniformity as to how States have in their domestic systems construed and implemented the cooperation with the UN tribunals regarding the handing over of suspects. Indeed, two different conceptions emerge from the practice of States. On the one hand, some States see the transfer of an individual from the vantage point of the horizontal setting of cooperation between States. States then have a choice whether to cooperate or not, and on what conditions. Transfer in this classic inter-State dynamic is generally termed ‘extradition’. Agreed rules on extradition may be recorded in a synallagmatic instrument such as a treaty. On the other hand transfer can be understood by States in a vertical dynamic. Such transfer does not follow from the free choice of States, but is based on imposed legal obligation (even if traceable to the States’ consent somewhere in the past), *in casu* stemming from the United Nations. Transfer of this kind is frequently termed ‘surrender’.<sup>32</sup> Rules on surrender may be recorded in a ‘legislative’ instrument such as a binding resolution. The ICTY itself has on numerous occasions stated that the transfer of the accused does not fall within classical extradition procedure and should be seen as a *sui generis* surrender procedure.<sup>33</sup> While some States – like Switzerland and the Netherlands – have adopted a special procedure for surrender, the absence of *ad hoc* legislation regarding the ICTY and ICTR in some other States could – at least initially - be interpreted as an indication that transfer of the accused to an international criminal tribunal is construed as a case of ‘extradition’, which accordingly leaves room for, among others, the classical grounds of refusal.<sup>34</sup> It is not

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<sup>30</sup> SOFA of 19 June 1951, as supplemented by the Supplementary Agreement of 1959 (subsequently amended in 1971, 1981 and 1993), available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm)

<sup>31</sup> See UN Doc. S/PV.3217, at 15, 24-25, 37 (1993).

<sup>32</sup> Cf the ECtHR in *Naletilić*: “However, it is not an act in the nature of an extradition which is at stake here, as the applicant seems to think. Involved here is the surrender to an international court...” (*Naletilić v. Croatia*, ECtHR, Application No. 51891/99, para 1(b)).

<sup>33</sup> See the Fourth Annual Report of the International Tribunal for Yugoslavia, UN Doc. A/52/375 (1997) and UN Doc. S/1997/729, para. 183.

<sup>34</sup> See the account of domestic legislations by G. J. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Transnational Publishers, 2002), 70 ff. See the account of the Danish, Norwegian, Swedish and Bosnian implementing legislation as referred to by G. Sluiter, ‘To Cooperate or not to Cooperate?’, 11 *Leiden*

the aim of this paper to discuss in more detail how in legal practice surrender of suspects to international criminal tribunals is different from classical extradition.<sup>35</sup> The manner in which the obligation to transfer ought to be implemented seems to be ultimately a matter of domestic law. As long as the way in which States implement their duty to cooperate does not constitute an obstacle to compliance, it behoves each country to determine which form it gives to its implementation measures and, notably, whether or not to use the mold of extradition law – which has the practical advantage that unlike *ad hoc* domestic ‘surrender law’ it is usually already in place.<sup>36</sup>

In the context of this paper it is worth mentioning that almost all recent cases in which the ICTY and ICTR have been challenged before a domestic court, revolved around the transfer of a suspect to the tribunal. This is borne out by the decisions of domestic and regional courts in the cases of *Lukić*<sup>37</sup>, *Naletilić*<sup>38</sup>, *Ntakirutimana*<sup>39</sup>, *Rukundo*<sup>40</sup> or the *Bobetko report* of the Croatian Constitutional Court<sup>41</sup>, which ensued requests for surrender by the *ad hoc* tribunals. Although an (implicit) review was only carried out in the *Rukundo* case, these examples suffice to corroborate that requests for transfer are the most common context for a challenge against international criminal tribunals. While a challenge of the ICC in response

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*Journal of International Law* 383-395 (1998), esp. 387. It is interesting to note that despite subjecting the cooperation with the tribunal to classical extradition law, the United States ruled out the application of the classical grounds for refusal of extradition. For a closer look at the US legislation pertaining to the cooperation with the Tribunals, see R. Kushen and K. J. Harris, ‘Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda’, *American Journal of International Law* 510 (1996).

<sup>35</sup> For a discussion of this question, see G. J. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Transnational Publishers, 2002), pp. 26 ff. See also M. Cherif Bassiouni and P. Manikas, *The Law of the ICTY* (1996), 787.

<sup>36</sup> Cf on this matter G. Sluiter, ‘The Surrender of Ntakirutimana Revisited’, 13 *Leiden Journal of International Law* 45-466 (2000). *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999).

<sup>37</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006).

<sup>38</sup> *Croatia v. Naletilić-Tuta*, Supreme Court of Croatia, 13 October 1999, Appeal Judgement, 690/1999-4, ILDC 384 (HR 1999), annotated by Ivo Josipović, Marin Bonačić; see also EctHR, *Naletilić v. Croatia*, Application No. 51891/99.

<sup>39</sup> *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999).

<sup>40</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001).

<sup>41</sup> *Bobetko Report*, 12 November 2002, Constitutional Court of Croatia, Review of constitutionality and legality, U-X-2271/2002; ILDC 383 (HR 2002) (request for advisory opinion submitted by the government), annotated by Ivo Josipović, Marin Bonačić.

to the arrest or the surrender of a suspect is well conceivable, to the knowledge of these authors there is not yet any example in practice.<sup>42</sup>

#### B. Collection of evidence

Because cooperation encompasses a duty to produce evidence upon the request of the international tribunal, challenge may also occur on the occasion of a request for the transfer of evidence as is illustrated by the abovementioned *Rukundo* decision.<sup>43</sup> This may include a request to review bank accounts connected to a suspect<sup>44</sup>.

#### C. Release from detention (*habeas corpus*)

It has occurred that an individual, once detained by an international criminal tribunal, has challenged his detention before the domestic courts of the host State. This is what happened in the *Milošević* case<sup>45</sup>. The negative response by the court is unsurprising, but should however not be generalized as in that case the position of the Dutch State vis-à-vis the ICTY was determined by the Headquarters agreement between the host State and the UN.

#### D. Other requests

Cooperation with an international criminal tribunal may involve other acts which are justiciable before domestic courts. One may think in particular of the request to take testimony,<sup>46</sup> or the request to return any property acquired by criminal conduct<sup>47</sup>. So far, available practice does not show any challenge directed at these elements of the procedure, so for now it remains hypothetical.

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<sup>42</sup> See generally article 59 of the ICC Statute. On the arrest and surrender regime under the Rome Statute, see gen. B. Swart, 'Arrest and Surrender', in A. Cassese et al, *The Rome Statute of the International Criminal Court: a Commentary* (Oxford, OUP, 2002), pp. 1639-1704; see also G. Sluiter, 'The Surrender of War Criminals to the International Criminal Court', *Loyola of Los Angeles International and Comparative Law Review*, 2003, 605, see esp. 621-643 or M. M. El Zeidy, 'Critical Thoughts on Article 59 (2) of the ICC Statute', 4 *Journal of International Criminal Justice*, 2006, 448-465.

<sup>43</sup> Request for the transfer of evidence to the tribunal: *Rukundo v. Federal Office of Justice*, 3 September 2001, Federal Supreme Court of Switzerland, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001).

<sup>44</sup> See the request to review bank accounts connected to Milošević in Greece, *International Enforcement Law Reporter*, Volume 17, Issue 11, November 2001, p. 487.

<sup>45</sup> The Hague District Court (Civil law division), 31 August 2001; See also *Milošević v. the Netherlands*, ECtHR, Decision on Admissibility, Application No. 77631/01.

<sup>46</sup> See for instance article 93 of the ICC Statute. See article 29 of the ICTY Statute.

<sup>47</sup> *Ibid.* See also article 24 of the ICTY Statute.

## 2. Object of the challenge

The object and standards of reference on which the challenge of an international criminal tribunal may be based, are manifold. They may be directed at different aspects of the procedure of an international criminal tribunal. They may also rest on the application of – diverging – standards, for domestic tribunals are confronted with challenges of an international criminal tribunal from different angles, ranging from domestic human rights to international requirements of due process.

The challenge may focus on various aspects of the (action of) international criminal tribunals. For example, despite international criminal tribunals having themselves ruled on their “validity”<sup>48</sup>, the challenge may be directed at the legality of the very creation of these tribunals, as is illustrated by the *Milošević* case<sup>49</sup> before the Hague District Court. Apart from the tribunals’ legal existence their *procedure* may be at issue. This can take the form of a reactive challenge - directed at completed proceedings, while the claimant is eg serving a prison sentence as in the *Galic* case.<sup>50</sup> Often, however, it is a proactive challenge, raising the question of possible *future* breaches of human rights-related obligations such as impartiality and independence that could occur if cooperation with these tribunals is pursued. Examples are provided by (parts of) the decisions in the *Naletilić*<sup>51</sup>, *Milošević*<sup>52</sup> and *Rukundo*<sup>53</sup> cases.

The evidentiary basis of the request for cooperation can also be the object of review by domestic courts, as is exemplified by the *Ntakirutimana*

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<sup>48</sup> For the ICTR, see *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR 95-15-T, 18 June 1997, Decision on the Defence Motion on Jurisdiction, para. 13-14. For the ICTY, see *Tadić*, Appeals Chamber, 2 October 1995, IT-94-1-AR72, paras 41-48. Surprisingly, the Special Court for Sierra Leone, despite being a treaty-based institution, felt also obliged to assert the compatibility of its creation with the powers of the Security Council. See, SCSL, *Prosecutor Against Moinina Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction *Materiae: Illegal Delegation of Powers by the United Nations (Delegation Decision)*, Case No. SCSL-2004-14-AR72(E), 25 May 2004. On this point see the remarks of C. Chernor Jalloh, ‘The Contribution of the Special Court for Sierra Leone to the Development of International Law’, 15 *African Journal of International and Comparative Law* 165-207 (2007), esp. 194-199.

<sup>49</sup> The Hague District Court (Civil law division), 31 August 2001.

<sup>50</sup> ECHR, *Galic* against the Netherlands, Decision on the admissibility, Application No. 22617/07, 9 June 2009.

<sup>51</sup> *Naletilić v. Croatia*, ECtHR, Application No. 51891/99.

<sup>52</sup> The Hague District Court (Civil law division), 31 August 2001.

<sup>53</sup> *Rukundo v. Federal Office of Justice*, 3 September 2001, Federal Supreme Court of Switzerland, Appeal Judgement, Cases No. 1A.129/2001 and 1A.130/2001; ILDC 348 (CH 2001).

case<sup>54</sup>. The challenge of the evidentiary basis of a request for cooperation is more likely to occur in Common Law countries where cooperation implementation legislations usually require that evidence be reviewed by domestic courts.<sup>55</sup> By contrast, most Civil Law countries restrict their review to the assessment of jurisdiction or the identity of the indictee.<sup>56</sup>

It is worth noting that in the practice reported above, requests for review by domestic courts have not been directed at the merits of the decisions of these tribunals.

### 3. Standards of reference

Challenging an international criminal tribunal before a domestic court by definition amounts to an appraisal of its conformity with certain standards. These standards vary. They may be procedural or substantive. They may originate in domestic law or in international law. The choice of the standards of reference does not entirely depend on the domestic judge that is reviewing the domestic aspects of the cooperation with the international criminal tribunal concerned. Often, it is contingent on the domestic measures of implementation connected to the international cooperation duties of the State.<sup>57</sup> The ICTY in the *Blaškić* case<sup>58</sup> pointed out that to subject the cooperation with an international criminal tribunal to certain standards determined by domestic law is not entirely consistent with the presumably absolute character of the cooperation duty. However, this is a question of compliance and responsibility which we do not consider here. In the context of this paper, suffice it briefly to take stock of the various standards that plaintiffs and domestic judges have resorted to – or would be likely to resort to – in relation to a challenge of international criminal tribunals. For the sake of clarity, we distinguish between domestic (A) and international standards (B) of reference. Even though, in some cases – e.g. with domestically ‘incorporated’ international norms – the formal pedigree or ‘source’ of a standard is arguably a matter of debate.

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<sup>54</sup> see the separate opinion of Judge Parker in *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999). See the comments of G. Sluiter, ‘The Surrender of Ntakirutimana Revisited’, 13 *Leiden Journal of International Law* 45-466 (2000).

<sup>55</sup> G. J. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Transnational Publishers, 2002), 70 ff.

<sup>56</sup> See the account of the legislation of civil law countries by G. J. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Transnational Publishers, 2002) 74 f.

<sup>57</sup> See for instance section 10(1) (b) of South African Act pertaining to the cooperation with the ICC subject the surrender of a suspect to the Court to the respect for “procedures laid down in domestic law”. For an account of the various legislations, see *supra* note.

<sup>58</sup> See *supra* note 20.



#### A. Domestic standards of reference

Most of the time, domestic courts will gauge the conformity of the establishment or the procedure of international criminal tribunals by reference to domestic standards so defined by the implementation measures adopted to ensure cooperation with the tribunal. It therefore may happen that an international criminal tribunal is challenged on the basis of domestic norms pertaining to transfer of persons – especially in countries that have construed ‘surrender’ as ‘extradition’ – or evidence. *Ntakirutimana* is the clearest example<sup>59</sup>. It also happens that these tribunals be challenged domestically on the basis of *human rights* standards, especially with respect to human rights, albeit that these standards may be of regional or international descent (see below under B).

#### B. International standards of reference

Domestic courts may also face a challenge of an international criminal tribunal based of standards of reference which originate in the international legal order. This is the case when domestic courts are requested to review the procedural legality of the creation of a tribunal, especially the *ad hoc* tribunals created by virtue of a Security Council resolution. In such a situation, the domestic tribunal is asked to take the procedural rules defining the powers of the Security Council enshrined in the UN Charter as its yardstick. No cases are known to the present authors in which such a request has been honoured.

More frequently a domestic tribunal would review the legality of a tribunal or its actions by reference to substantive international standards. Such substantive standards in this context appear to be always human rights standards.<sup>60</sup> While human rights have been safeguarded to some extent in the ICC Statute<sup>61</sup> and have been deemed applicable in ICC proceedings<sup>62</sup>, the Statutes of the *ad hoc* Tribunals do not contain any

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<sup>59</sup> *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999).

<sup>60</sup> On the application of International Human Rights to International Criminal Proceedings, see gen. M. Fedorova and G. Sluiter, *Human Rights as Minimum Standards in International Criminal Proceedings*, 3 *Human Rights and International Legal Discourse* 9 (2009).

<sup>61</sup> See below footnote 113.

<sup>62</sup> See the judgement of the ICC Appeals Chamber, 14 December 2006, *Prosecutor v. Lubanga Dyilo*, Judgement of the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, App. Ch., available at [www.icc-cpi.int](http://www.icc-cpi.int), para. 37.

reference to human rights standards.<sup>63</sup> Yet, the UN Secretary-General's statement in his report on the establishment of the ICTY is usually seen as a general directive regarding the respect for human rights by the tribunals.<sup>64</sup>

It is this respect for *international* human rights norms that some domestic courts are asked to appraise (i.e. on the basis of international standards of reference). For instance, it may be noted that in Belgium, the implementation act has made surrender to the *ad hoc* tribunals conditional on due respect for that person's rights under international human rights conventions.<sup>65</sup> Likewise Switzerland – where extradition or transfer of persons to States or institutions is prohibited in case minimal procedural rights standards as defined in the ICCPR or the European Convention on Human Rights would be infringed – has applied, with respect to international criminal tribunals, a presumption that such human rights guarantees are respected.<sup>66</sup> The Netherlands' Hague District Court found in the *Opacic* case that it was bound by the ICTY's orders and refused to review an ICTY decision in light of the ECHR.<sup>67</sup> In the later *Milošević* case, the Hague District Court refrained from any appraisal of the ICTY's procedure because one year earlier the European Court of Human Rights had asserted that the tribunal was consistent with the elementary requirements of a fair trial.<sup>68</sup> The Netherlands implementation act of the cooperation duties vis-à-vis the ICTY does not contain the explicit conditionality we find in the Belgian and Swiss legislation.<sup>69</sup> However, the explanatory memorandum to the Dutch 'ICC Cooperation Act'

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<sup>63</sup> The sole human rights reference relates to 'the rights of the accused' (in articles 20 and 21 of the ICTY Statute; and articles 19 and 20 of the ICTR Statute). These rights moreover have a context-specific interpretation.

<sup>64</sup> UNSC, Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (UN Doc. S/25704) (1993), para. 106. See also the argument of M. Fedorova and G. Sluiter, *Human Rights as Minimum Standards in International Criminal Proceedings*, 3 *Human Rights and International Legal Discourse* 9 (2009) at 18 et seq. (who argue that the UN-origin of human rights norms as well as the objectives of the UN make them applicable within the UN system to organs of the UN, including the ICTY and the ICTR).

<sup>65</sup> See the *Moniteur Belge*, 1996, at 10260.

<sup>66</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001);

<sup>67</sup> *Dragan Opacic v. the Netherlands*, District Court of The Hague, Kort Geding KG 97/742 30 May 1997.

<sup>68</sup> *Milošević v The Netherlands*, The Hague District Court (Civil law division), 31 August 2001, para. 3.4.

<sup>69</sup> Provisions Relating to the Establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Amended Bill of 9 March 1994). ([Http://www.icty.org/x/file/Legal%20Library/](http://www.icty.org/x/file/Legal%20Library/))

indicates that the Netherlands reserves the right to review ICC decisions which require the active cooperation of the host-State in light of obligations incumbent on the Netherlands under the ECHR.<sup>70</sup> The domestic legislation of Belgium or Switzerland is not at all unique. Essentially all countries party to the European Convention of Human Rights that construe surrender of a suspect to an international criminal tribunal as a question of ‘extradition’, must apply similar conditions, as they are bound by the interpretive practice of the European Court and accordingly would have to subject their cooperation with international tribunals to the *Soering* jurisprudence.<sup>71</sup>

In the modest body of case law examined here, the wide array of procedural safeguards falling under the “right to a fair trial” has proven central. In the abovementioned case-law, the human rights norms invoked as standards of reference for challenges of international criminal proceedings are the classic civil and political rights of *Habeas Corpus* (art 5 ECHR – at issue eg in the *Milošević* case before the Dutch court<sup>72</sup>), fair trial (art 6 ECHR, art 14 ICCPR – at issue eg in the *Rukundo* case<sup>73</sup>), freedom of expression (art 10 ECHR– at issue eg in the *Milošević* case before the European Court<sup>74</sup>), right to an effective remedy (Article 13 ECHR – likewise at issue in the European Court’s *Milošević* case).

#### 4. Forms of review

To the knowledge of the present authors, in no case the establishment of an international criminal court or its acts have been *expressly* reviewed by a domestic court. The review, be that of its procedure or its actions, has been *implicit*. This is illustrated by the *Rukundo* case in Switzerland

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<sup>70</sup> G. Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’, *New England Law Review* (2003), 935-948, at 947; see *Tweede Kamer, vergaderjaar 2001-2002*, 28 098 (R1704), nr. 3, p. 46; cf also the letter of the Netherlands Minister of Justice on the relation between the ICC and the EConventionHR (*Tweede Kamer, vergaderjaar 2001-2002*, 28 099, No. 11).

<sup>71</sup> *Soering v. the United Kingdom* 11 Eur. Ct. H.R. (ser. A) (1989). See also *Cruz Varas v Sweden* (1991) 14 EHRR 1. While the *Soering* case is only concerned with the respect by the receiving State of the standard set in article 3 of the ECHR (prohibition of torture), the subsequent case-law of the Court has extended the *Soering* principle to the requirement of a fair trial (article 6). See in particular, *Mamatkulou and Askarou v. Turkey*, ECtHR, Application No. 46827/99 (4 February 2005).

<sup>72</sup> The Hague District Court (Civil law division), 31 August 2001; See also *Milošević v. the Netherlands*, ECtHR, Decision on Admissibility, Application No. 77631/01.

<sup>73</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1A.130/2001; ILDC 348 (CH 2001); annotated by A. Ziegler.

<sup>74</sup> *Milošević v. The Netherlands*, European Court of Human Rights, Application No. 77631/01 (March 19, 2002).

where the judge ventured into an appraisal of the conformity of the procedure of the ICTY with international standards of human rights but applied a presumption of conformity.<sup>75</sup> The mere fact that such a presumption is applied, confirms the fact that the tribunal – although implicitly – embarked on a review of the procedure of the international tribunal.<sup>76</sup> The same sort of presumption seems present in the case-law of the European Court of Human Rights.<sup>77</sup> A form of – implicit – review is also at issue also when a domestic court accepts international standards of reference by directly referring to the decision reached by an international court. This mechanism of ‘review by renvoi’ is found in the *Milošević* case<sup>78</sup> where the Dutch Court relied on the European Court’s conclusion in *Naletilić* that the ICTY procedure could be presumed to meet basic human rights standards.

### **III. International Criminal Justice in the Domestic Legal Order: Two Discourses**

The practice referred to above has shown that, even when the opportunity arose, there only are a few cases in which domestic courts have actually reviewed the acts of an international criminal tribunal. And when it happened, domestic judges did it with the tip of the toe. Such heedfulness is not surprising. Firstly there is reluctance to possibly engage the responsibility of the State, which after all remains bound by a general international duty to cooperate with the international tribunal concerned. Non-compliance with the international obligation to cooperate usually prompt the use of compliance mechanisms, a prospect to which judges generally show reservation.<sup>79</sup>

Leaving aside the issues of possible non-compliance, the caution of domestic judges can be explained by the manner in which these judges have construed the relationship between the international legal order and their domestic legal order. This section seeks to formulate a few thoughts on the underlying reasons and assumptions that play a role when judges

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<sup>75</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001);

<sup>76</sup> Cf the comment by A. Ziegler to the *Rukundo* decision, ILDC 348 (CH 2001).

<sup>77</sup> ECtHR, *Mladen Naletilić v. Croatia*, Application No. 51891/99 (May 4, 2000); ECtHR, *Milošević v. the Netherlands*, Decision on Admissibility, Application No. 77631/01; ECtHR, *Galić against the Netherlands*, Decision on the admissibility, Application No. 22617/07, 9 June 2009.

<sup>78</sup> The Hague District Court (Civil law division), 31 August 2001.

<sup>79</sup> On cases of non-compliance with requests by ICTY and requests for Security Council intervention, see B Swart, ‘Arrest and Surrender’, in A Cassese et al, *The Rome Statute of the International Criminal Court: a Commentary* (Oxford, OUP, 2002), at 1658.

engage in the review of an international criminal tribunal or, conversely, have avoided doing so.

It is submitted that when responding to a request for cooperation with an international criminal tribunal, domestic courts may draw on one (or both) of two discourses. One proceeds from the idea of *supremacy* of the international legal order and of international (criminal) proceedings (1). The other is based on the idea of the closeness of the domestic legal order and the ensuing prevalence of domestic law at the national level. This is the discourse of *constitutional autonomy* (2). As will be argued, the domestic judges' reactions to the challenge of an international criminal tribunal often seem to draw on both discourses (3).

The *supremacy* and the *constitutional autonomy* discourses are in some ways reminiscent of, respectively, the 'monist' and 'dualist' theories of the relationship between international law and national law. However, it is worth recalling that this similarity holds only up to a certain degree. The two 'discourses' have some underlying assumptions which are also basic elements of the two 'theories' - eg that all law is part of one single legal universe or, conversely, that domestic rules and international rules belong to separate legal spheres - but they go well beyond the monist or dualist conceptions of the relationship between international law and domestic law. More fundamentally, this chapter does not seek to argue that there are two 'theories', 'approaches' or models which may (or may not) adequately and coherently describe the functioning of the law. The only point it attempts to make is that judges when confronted with the challenge of an international criminal tribunal, seem to move within one (or both) of two 'discourses' in the social theory sense.<sup>80</sup>

## 1. The discourse of supremacy

The practice reported above shows that, while some domestic courts have engaged in a veiled review of an international criminal tribunal, most domestic courts have demurred to do so for reasons pertaining to the declared 'supremacy'<sup>81</sup> of the international tribunal or its legal

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<sup>80</sup> The meaning given, notably by Foucault, to the term 'discourse' has been summarized as a "system[s] of thoughts composed of ideas, attitudes, courses of action, beliefs and practices that systematically construct the subjects and the worlds of which they speak" (Iara Lessa, *Discursive Struggles Within Social Welfare*, 2006 *British Journal of Social Work* 36: 283-298, at 285).

<sup>81</sup> The word 'supremacy' is construed here in a broad sense and not strictly as a principle of precedence of international law over national law in the international legal order. For a stricter understanding of Supremacy, see G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *Collected*

foundations. The argument of supremacy in this context is grounded in an idea of hierarchy between legal norms at the formal level of ‘rules’; therefrom follows a hierarchy in the standards of justice attached to the rules. According to this approach, standards of international criminal justice always prevail over applied in domestic criminal proceedings. In this perspective, it would not be possible at the domestic level to review an international criminal tribunal, as these institutions originate in treaty regimes that are deemed superior to domestic legal orders.

It is important to note that the “supremacy discourse” as it appears in the various cases is multifaceted. In these decisions, the idea that international criminal proceedings cannot be subjected to domestic review rests on different legal arguments and contentions, whose relevance and weight may vary. The following paragraph aims to unravel and appraise some of these arguments.

#### A. Supremacy and conflict of norms

The idea of supremacy of international criminal proceedings can take the form of a conflict of norms-solving principle. In *Lukić* for instance, the Argentinean court, without mentioning the provision (as indeed would have been difficult since the request by Serbia-Montenegro was not based on an extradition treaty between the two States), used the vocabulary and the logic of article 103 when it contended that Argentina’s obligation to execute the ICTY’s request would prevail over any request coming from a foreign country.<sup>82</sup> This reasoning bears some resemblance to the stance adopted by the CFI in the much commented *Yusuf and Kadi* case<sup>83</sup>. In this case the CFI considered that by virtue of article 103 of the UN Charter, the legality of UN sanctions cannot be reviewed. In a different context this may be taken as a manifestation of the ‘functionalist’ approach to international organizations, in which organizations (*in casu* the EU) are

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*Courses* (1957-II), 68-94. For some challenging view on the classical understanding of supremacy, see A. Nollkaemper, ‘Rethinking the Supremacy of International Law’, *Amsterdam Center of International Law Working Papers* 2009, available at <http://ssrn.com/abstract=1336946>.

<sup>82</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006), para. 68.

<sup>83</sup> Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, 21 September 2005, [2005] ECR II-3533; Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, [2005] ECR II-3649, esp. paras 281 ff., 299 and 316. See the special symposium of the *International Organizations Law Review*, vol. 5, 2009 devoted to the case.

viewed as open structures at the service of the member States, without a separate ‘internal legal order’.<sup>84</sup>

## B. Supremacy and the obligatory character of the acts of international organizations

The supremacy discourse can also take an institutional perspective. That is, the idea that international criminal proceedings are “supreme” and thus immune from any review under domestic law because of the effect of the obligatory character of Security Council resolutions. In *Naletilić*, for instance, the Croatian Court did not resort to article 103 of the UN Charter but simply referred to the obligation created by the Statute of the ICTY contained in a Security Council’s resolution endowed with the effect of article 41 of the Chapter VII of the UN Charter in order to justify the rejection of the challenge instituted against the ICTY’s request<sup>85</sup>. From the vantage point of positive law – in which some form of transformation or incorporation is generally deemed necessary for application by the domestic court - this argument is not self-evident.<sup>86</sup>

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<sup>84</sup> See C. Brölmann, ‘International Organizations and Treaties: Contractual Freedom and Institutional Constraint’, in J. Klabbers (ed.) *Research Handbook on International Organizations*, E. Elgar Publishing, 2010 (Forthcoming).

<sup>85</sup> Para. H2 of the reported decision.

<sup>86</sup> If one argues that the duty to cooperate must either be incorporated or transformed (even automatically) into domestic law in order to be applicable by domestic judges, the prevalence of the duty to cooperate over any conflicting rule of domestic law is not self-evident. Incorporation or transformation does not entail any supremacy within domestic law. The obligation to cooperate will prevail over any conflicting obligations *within domestic law* if the legal order in question has itself bestowed supremacy upon international law within that legal order. Supremacy of international law over domestic law in the domestic legal order is not automatic and must be established by domestic law. The prevalence of the obligation to cooperate with the tribunal will only occur in those States that have duly incorporated that obligation and have bestowed supremacy upon international law. See for instance Belgium (*ING België v B I*, Appeal Judgment, Nr C.05.0154.N; ILDC 1025 (BE2007), 2 March 2007), Indonesia (Constitutional review of Law No 22 of 1997 on Narcotics, No 2-3/PUU-V/2007; ILDC 1401 (ID 2007), 23 October 2007), Latvia (Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, ILDC 189 (LV 2004)). The same can be said of the Netherlands. On the status of international law in the Netherlands, see A. Nollkaemper, ‘The Application of Treaties in the Netherlands’, in: *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (D Sloss, ed. Cambridge University Press, forthcoming 2009). The European Union can be considered as a legal order very amenable to international law. See gen. Case 181/73, *Haegeman v Belgium*, [1974] ECR 449; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case C-268/90, *Poulsen and Diva Corp.* [1992] ECR I-6019; Case T-115/94, *Opel Austria v Council* [1997] ECR II-39; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655. For examples of country that does not grant supremacy to international law in domestic law, see US Supreme Court, *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*, 126 S. Ct. 2669; Judgment 1942 of the Venezuelan Constitutional Chamber from of Supreme Court of Justice dated July 17, 2003, cited the

### C. Supremacy and primacy of international courts

In the abovementioned *Naletilić case*, the Court also employed an argument of “primacy” to fend off the challenge to the ICTY’s request. This calls for a brief terminological remark. ‘Primacy’ is traditionally used in the situation of tribunals having competing *jurisdiction* whilst ‘supremacy’ is generally used in the situation of a conflict of *norms*. This distinction is relevant, for resorting to the argument of primacy implies that the debate is couched in terms of jurisdiction and not in terms of conflict of norms. It means that in *Naletilić* the Court construed the precedence given to ICTY request also as a matter of jurisdiction, and not simply as a matter of conflicting obligations. In view of the notable fact that fragmentation in *judicial application* of the law (which is the direct result of a proliferation of courts) appears to be more generally accepted than fragmentation of the *law itself*, it is perhaps surprising that arguments of *primacy* are not used more often by domestic courts. Be that as it may, to decline review of the ICTY with the argument of primacy of the tribunal’s jurisdiction could seem odd in this context, especially since it follows the statement by the Croatian court – as discussed above – that the obligation to cooperate exists in the Croatian legal order and must be applied by the Court. Moreover, the very existence of the obligation to cooperate hinges on the ICTY having jurisdiction. If the Croatian Court bases its decision not to engage in a review of the tribunal’s actions on the obligation to cooperate with the ICTY, it apparently presupposes that the ICTY has jurisdiction. The Court would then have no need subsequently to turn to the argument of primacy. Some time later, in the opinion on the *Bobetko report (Croatia 2002)*<sup>87</sup> the Croatian Court’s reasoning in a similar way emphasized the primacy of international jurisdiction rather than supremacy of international rules.

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2005 Annual Report of the Inter-American Commission on Human Rights, par.275, available at <http://www.cidh.org/annualrep/2005eng/chap.4d.htm>; See the decision of the Supreme Court of Sri Lanka, *Singarasa v Attorney General*, Application for judicial review, SC Spl (LA) No 182/99; ILDC 518 (LK 2006); see the decision of the Supreme Court of Sierra Leone, *Sesay and ors v President of the Special Court for Sierra Leone and ors*, Original application, SC no 1/2003; ILDC 199 (SL 2005). On these questions, see generally J. d’Aspremont and F. Dopagne, ‘Two Constitutionalisms in Europe’, *Heidelberg Journal of International Law (ZaöRV)*, pp. 970-971. G. Arangio-Ruiz, ‘International Law and Interindividual Law’, in Nijman and Nollkaemper (ed.), *New Perspectives on the Divide between International and National Law* (OUP, 2007); see also G. Gaja, ‘Dualism – A Review’, J. Nijman & A. Nollkaemper, *ibid.*, at 61.

<sup>87</sup> *Bobetko Report*, 12 November 2002, Constitutional Court of Croatia, Review of constitutionality and legality, U-X-2271/2002; ILDC 383 (HR 2002) (request for advisory opinion submitted by the government), annotated by Ivo Josipović, Marin Bonačić.



#### D. Supremacy and ‘surrender’

The idea that international criminal proceedings take precedence and enjoy some form of supremacy which bars any challenge before domestic courts can thus manifest itself in different ways. The supremacy discourse may use arguments based on the trumping effect of international (*in casu UN Charter*) obligations by virtue of article 103; or on the obligatory character of certain acts of international organizations (*in casu UN law*); on primacy of jurisdiction; or on simple self-restraint vis-à-vis the assessment of foreign legal orders. While being multifaceted, the idea of supremacy of international criminal proceedings is not limited to the few domestic judicial decisions mentioned above. The supremacy discourse is also reflected in those instances of domestic *legislation* which implement the international obligation to cooperate with an international criminal tribunal as an obligation to “surrender” (which does not leave room for choice as in the traditional inter-State setting – see above para. II.1.A) rather than “extradition”, which is an international-legal context for which states usually have a domestic legal framework already in place. As was pointed out above, transfer of suspects to the *ad hoc* tribunals is envisaged by the ICTY<sup>88</sup> on a ‘vertical’ model different from the sovereign inter-State “extradition” blueprint.<sup>89</sup> However, States have remained free to shape their implementation measures in the format they choose. States which follow the UN’s approach and construe the transfer of suspects to the ICTY in terms of *surrender*, such as has been done by Switzerland and The Netherlands in that respect can be said to show some amenability for the supremacy discourse, although such qualifications are usually not absolute. Indeed, the ICTY implementation measures are put in the specific context of the relation between an institution and its host State, and Dutch obligations are specifically formulated by the Headquarters Agreement.<sup>90</sup> It is notable that, in the *Rukundo* case, the Swiss court did acknowledge that in relation to the Rwanda Tribunal ‘surrender’ rather than ‘extradition’ be at issue, but the Court nonetheless reserved – in principle - the right to decline a request for transfer.

#### 2. The discourse of constitutional autonomy

When, and to the extent that, domestic courts refuse deference to an international criminal tribunal, we witness a discourse that may be loosely termed the discourse of ‘constitutional autonomy’. This discourse

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<sup>88</sup> See the Fourth Annual Report of the International Tribunal for Yugoslavia, UN Doc. A/52/375 (1997) and UN Doc. S/1997/729, para. 183.

<sup>89</sup> See UN Doc. S/PV.3217, at 15, 24-25, 37 (1993).

<sup>90</sup>

addresses the legal sphere (*in casu* the domestic legal order) as an (in principle) procedurally and substantively self-contained system, with the necessary rules of conflict or ‘hierarchy’, and a self-defined foundation of ‘fundamental values’. This discourse is particularly well-suited to the description of a domestic system of law, but it can be applied to any legal sphere, such as the institutional regime of an international organization,<sup>91</sup> or even to a treaty regime that has both systemic and substantive constitutional features such as that of the European Convention of Human Rights.<sup>92</sup> The following paragraphs touch upon some manifestations of this discourse in the context of domestic collaboration with international criminal tribunals.

#### A. Constitutional autonomy and ‘extradition’

Cooperation with a ‘non-domestic’ judicial institution (or any normative framework generally) by the national judge tends to be regarded as a *matter of choice* as it would logically be in the classic system of inter-State relations. In the constitutional autonomy discourse, a request for cooperation with an *international* criminal tribunal is put on the same footing as a request emanating from another State. The trend to approach a request for transfer (all cases discussed revolve around transfer apart from the Milošević case which concerns a state’s cooperation in the form of *hosting* the tribunal) as a matter of ‘extradition’ - that is a matter international cooperation between legal equals (see above para. II.1.A) – with concomitant domestic law complications, is seen for example in *Lukić*<sup>93</sup> and *Ntakirutimana (US 1999)*<sup>94</sup>, although in these cases the grounds for refusal provided by the domestic legal framework were not actually used.

As with the supremacy discourse, signs of the constitutional autonomy discourse can also be found in domestic *legislation* implementing the duty

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<sup>91</sup> Cf CM Brölmann, ‘International Organizations and Treaties : Contractual Freedom and Institutional Constraint’ in: J Klabbers (ed), *Research Handbook on International Organizations* (Edward Elgar Publishing, 2010 *forthcoming*).

<sup>92</sup> Cf. the argument in CM Brölmann, ‘Limits to the Treaty Paradigm,’ in M Craven & M Fitzmaurice (eds.), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Wolf Legal Publishers, 2005), at 38-39.

<sup>93</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006);

<sup>94</sup> *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999); cf comments by G. Sluiter, ‘To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal’, 11 *Leiden Journal of International Law* 383-395 (1998).

to cooperate with international tribunals. Legislation that construes cooperation with international tribunals in terms of “extradition” clearly underpins the idea of the autonomous character of the sphere of international criminal proceedings, for they imply the idea that the individual needs to be transfer from one independent legal order to another. This is reflected in *Rukundo*<sup>95</sup> which, although the term ‘surrender’ is used to signify the transfer to an international institution rather than a foreign State, *argues* along the lines of extradition doctrine by making the transfer conditional upon certain standards. This is regardless of the outcome, which in fact was compatible with the international obligation to cooperate resting on Switzerland.

#### B. Constitutional autonomy and other domestic procedural requirements

Domestic courts sometimes subject cooperation with international tribunals to the procedural requirements of domestic law. *Ntakirutimana (US 1999)*<sup>96</sup> is the sole case in our set of examples in which a formal-procedural requirement from *domestic* law – the type of treaty (involving Congress or only the President) required by US law to formalize cooperation with the tribunal – was at stake. Such a manifestation of the constitutional autonomy discourse is often the direct consequence of the dualist character of the legal order concerned.

#### C. Constitutional autonomy and domestic ‘fundamental values’

Where the domestic system is conceptualized as an independent constitutional order, it logically follows that domestic judges find room to review the compatibility of external obligations *with standards of domestic law*. These standards generally lie in the sphere of ‘fundamental values’. Here it is not a formal matter of the origin of the rule in which the standard is comprised. These are *substantive* norms valid in the domestic legal order (regardless of their formal origin which might be a treaty or a domestic act) which are used as a yardstick for review. The constitutional autonomy discourse famously lies at the basis of the ‘*Solange*’ decision of the German Constitutional Court<sup>97</sup> and the decision of the ECJ (2008) in

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<sup>95</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001).

<sup>96</sup> *Elizaphan Ntakirutimana v. Janet Reno Attorney General of the United States*, 184 F3d 419 (5<sup>th</sup> Cir. 1999).

<sup>97</sup> See the ‘*Solange*’ decision of the Bundesverfassungsgericht (BVerfG), [1974] 2 CLMR 540, esp. 549-50 and ‘*Solange II*’ decision, BVerfG, *Re Wunsche Handelsgesellschaft*, [1987] 3 CLMR 225, 265. See also the decision of the Italian Constitutional Court, *Frontini c. Ministero delle Finanze* [1974] 2 CMLR 372.

the *Kadi* case<sup>98</sup>. It is found also in the less well-known examples, regarding international criminal tribunals, mentioned in this paper, such as the *Rukundo* case. By testing the implementing measures relating to the Security Council ICTR Resolution against the obligations resulting from e.g. the ICCPR, the Swiss Court, in an implicit manner, reviewed the actions of the Security Council. Indeed, it “affirmed—at least in principle—the normative superiority of both human rights instruments vis-à-vis binding Security Council resolutions”.<sup>99</sup> Reliance on fundamental values can also be found – yet more indirectly – in the Dutch Court’s *Milošević* decision and in the European Court’s decisions in *Naletilić v Croatia* (EctHR 2000)<sup>100</sup> and *Milošević vs The Netherlands* (EctHR 2001).<sup>101</sup>

#### D. Constitutional autonomy and self-restraint

The constitutional autonomy discourse can also be expressed in a much simpler way, as exemplified by the *Milošević* decision of the Dutch Hague District Court. In that ruling, the judge abided by the ICTY’s decision as regards the legality of its own creation<sup>102</sup>. In doing so, the Dutch Court did not bring in any legal argument to justify its abiding by the ICTY’s decision. Indeed, there was no need to do so. The Hague District court refused to review the validity of the establishment of these tribunals as if it assumed that it is not up to the tribunal of one legal order (in this case of the Netherlands) to assess whether an institution created in another legal order (in this case of the UN) has been validly established according to the principles of that other legal order.<sup>103</sup> Also when not the legality of a Tribunal as such, but that of its actions or decisions is at issue, this manifestation of the constitutional autonomy discourse explain why

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<sup>98</sup> See C. Brölmann, ‘International Organizations and Treaties: Contractual Freedom and Institutional Constraint’, in: J. Klabbers (ed), *Research Handbook on International Organizations* (Edward Elgar Publishing, 2009); see also J. D’Aspremont, ‘Kadi: the ECJ’s reminder of the elementary divide between legal orders’, 5 *International Organizations Law Review* (2008) 371-379.

<sup>99</sup> *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeal Judgement, Cases No. 1A.129/2001 and 1.A.130/2001; ILDC 348 (CH 2001); annotated by A. Ziegler.

<sup>100</sup> *Miaden Naletilić v. Croatia*, European Court of Human Rights, Application No. 51891/99 (May 4, 2000).

<sup>101</sup> *Milošević v. The Netherlands*, European Court of Human Rights, Application No. 77631/01 (March 19, 2002).

<sup>102</sup> See *Tadić*, Appeals Chamber, 2 October 1995, IT-94-1-AR72, paras 41-48.

<sup>103</sup> This is an argument also made elsewhere. See J. d’Aspremont and F. Dopagne, ‘Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders’, *Heidelberg Journal of International Law* (ZaöRV) 939-978. See also J. d’Aspremont, ‘Kadi: The ECJ’s Reminder of the Elementary Divide between Legal Orders’, 5 *International Organizations Law Review* (2008), 371-379

perhaps ‘acts’ of international criminal courts may be challenged, but never actual *decisions* and *judgments* on the merits of a case. Indeed, couched in jurisdictional terms this would amount to an appeal situation straddling legal orders.

### 3. Moving between supremacy and constitutional autonomy

As is clear from the above, domestic court decisions embrace different aspects of each discourse and often seesaw between the two – as is illustrated for example by the domestic *Naletilić*<sup>104</sup> decision. In *Lukić*<sup>105</sup> the Court affirmed the supremacy of the ICTY’s request for transfer over any such request by a foreign State, but at the same time moved strictly within the framework of its domestic extradition law, subjecting the transfer of Mr Lukić to conditions set by Argentinian law and not by UN Law or international law.

These two discourses may represent equally valid convictions in the mind of a domestic judge, who may be torn between respect for international law and protection of the substantive and procedural standards of the legal order from which she derives her power. Indeed, judges have been entrusted of their judicial powers within a given legal order by virtue of the law of that legal order. As a result, judges are due to strictly abide by the fundamental substantive and procedural requirements set by the law of that legal order. At the same time, domestic judges, more than any other public authorities, are less constrained by the State self-interest and often prove more amenable to international law.<sup>106</sup>

### IV. Concluding remarks

This chapter has looked into the practice of domestic courts confronted with the challenge of an international criminal tribunal – in our examples: the ICTY and the ICTR. In these cases, domestic courts have been asked to exercise some degree of judicial review over the requests of cooperation by the ad hoc tribunals. [hypothesis 1]. As is suggested by the practice examined in this chapter, *challenges* mostly occur in the context of a person’s requested *transfer* by a State to the tribunal.

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<sup>104</sup> *Croatia v. Naletilić-Tuta*, Supreme Court of Croatia, 13 October 1999, Appeal Judgement, Ikž 690/1999-4, ILDC 384 (HR 1999), annotated by Ivo Josipović, Marin Bonačić.

<sup>105</sup> *Lukic Milan s/ Captura*, Argentina, National Court on Federal Criminal and Correctional Matters No. 8, 10 January 2006, International Arrest Warrant, Decision on arrest, surrender and extradition, Case Mo. 11807/05, ILDC 1083 (AR 2006).

<sup>106</sup> J. D’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts: Elevating Domestic Judges to Architects of the Consistency of the International Legal Order’, *Proceedings of the Second ILDC conference*, Oslo May 2009 (forthcoming).

The responses of domestic courts range from refusal to engage in any form of review, to a ‘review by *renvoi*’ (i.e. to a decision of another court), to an – implicit – test on the basis of certain procedural or substantive standards.<sup>107</sup> The various responses by domestic judges examined in this chapter confirm that *challenges* (and even *review*) of (the establishment or acts of) international criminal tribunals take place regardless of the degree of openness of the domestic order towards the international legal order, *i.e.* irrespective of whether the State’s constitutional system qualifies as a ‘monist’ or a ‘dualist’ system [hypothesis 2]. This can be interpreted in at least two ways. One interpretation is that the legal duty of cooperation with the tribunal is addressed to the State and not to the individuals therein. So, although the judge is the internal State organ involved in the State formally executing this duty, this international obligation does not become part of the domestic legal order in a way that makes it relevant whether the domestic system is predominantly ‘monist’ or ‘dualist’. Another view is that because the legal duty of cooperation as enshrined in the law of the international criminal tribunals generally needs implementation measures, which take the form of domestic legislation, the duty of cooperation in an implemented and specified form is thus incorporated in the domestic legal order, and monist or dualist features of the domestic constitutional system for the reception of international law at that point are not relevant. Indeed, this domestic legal obligation is generally what the plaintiffs focus on when challenging a criminal tribunal and what courts rely on in their response.

This chapter has also argued that the responses of domestic courts seized by a request for review of the action or the existence of an international criminal tribunal appear to partake in different discourses.<sup>108</sup> One has been presented as the ‘discourse of supremacy’, the other has been labelled the ‘discourse of constitutional autonomy’. The first proceeds from a view of international law as supreme and prevailing over domestic law. This may be construed either as a clash of norms resolved by the conflict clause in article 103 UN Charter or as a confirmation of the binding nature of Security Council Chapter VII resolutions, or even as a matter of competing jurisdictions. This discourse mainly revolves around *formal* rules establishing prevalence of international legal obligations. The constitutional autonomy discourse, on the other hand, proceeds from the vision of a particular legal order (in this case, the domestic legal order) as autonomous and self-contained *vis-à-vis* rules originating in another legal order, be it domestic, international, or institutional. This discourse

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<sup>107</sup> Cf supra II.

<sup>108</sup> Cf supra III.

may involve prevalence of domestic procedural rules, but it mainly operates on substantive norms which are part of the catalogue of human rights and individual procedural rights. It tends to emphasize the status of these rights as values that are ‘fundamental’ to the (in this case domestic) legal order.

Whether by incorporation, interpretive principles or any other means, the standards of review used by domestic courts often have an international or regional origin. This finding confirms that challenges of international criminal tribunals before domestic courts are not exclusively a matter of domestic law, and in fact often are based on substantive norms – notably human rights – of international origin. In all probability this is seen to strengthen the legitimacy and thereby the effectiveness of these challenges. Although diverging interpretations of human rights standards are frequent, recourse to common international human rights standards can potentially bring about more consistency in the substance of these challenges. This seems to confirm that a human rights review based on internationally accepted principles is less problematic than a review exclusively based on domestic standards. [hypothesis 3].

It would be an oversimplification to squarely divide the various reactions of domestic courts to challenges of international criminal tribunals along the strict lines of the two abovementioned discourses. As becomes clear from the case-law examined in this chapter, domestic courts often seem to use elements of both discourses, or in their reasoning oscillate between the two. Perhaps that is reinforced by a dilemma which domestic judges have been said to face, between the need to secure independent and functioning international criminal tribunals on the one hand and the safeguard of fundamental human rights guarantees offered by the domestic legal order on the other [hypothesis 4].

The tension between these two objectives will probably be no different in possible future cases of challenge of the ICC. When we take a different perspective, for example of substantive international criminal law, and we look at the UN tribunals not as ‘organs created by an act of the organization’ but, more simply, as ‘courts’, there are clearly relevant parallels between the ICTY and the ICTR on the one hand and the ICC on the other. Because the ICC still is in its infancy, cooperation with the ICC has not yet given rise – at least to the knowledge of these authors – to challenges of the ICC before domestic courts. The possibility, however, cannot be excluded. Indeed, like that of the ICTY, ICTR, the Statute of

the ICC<sup>109</sup>, despite having a different legal foundation, contains an obligation to cooperate<sup>110</sup> – adoption of implementation measures is then necessary for domestic law in order to allow a State to abide by its obligation under article 86 of the Statute, as is confirmed by article 88 of the Statute. It is likely that if and when challenges of the ICC occur, these would also arise – as in the case of the ICTY and ICTR – in the context of the execution at the domestic level of the duty to cooperate with the Court, and especially when a domestic court is confronted with the transfer of the accused or that of evidence.<sup>111</sup> It also is conceivable that the legality of the *creation* of a treaty-based tribunal be challenged,<sup>112</sup> although that would require an improbable review of the treaty-making procedure itself, including the grounds of nullity. In any event, domestic judges will likely be confronted to the conflicting aspirations to ensure the independent functioning of the ICC and the protection of fundamental rights of individuals. As a result, a similar discursive dynamic as the one that we have outlined, cannot be excluded. This being said, it is to be expected that domestic judges will probably feel more confident in giving way to the independent and efficacious function of the Court given the express guarantees, such as Article 21(3), enshrined in the ICC statute itself.<sup>113</sup>

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<sup>109</sup> Article 86 - 93 of the Statute. See generally A. Ciampi, 'The Obligation to Cooperate', *supra* note 24, pp. 1607-1638. For early cases of application, see O. Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience', 6 *Human Rights Law Review* 499 (2006)

<sup>110</sup> The same is true with respect to the STL. Because the STL was originally designed to be a treaty-based institution, the duty to cooperate remains limited to Lebanon. See article 4 of the Statute of the STL pertaining to concurrent jurisdiction.

<sup>111</sup> Cf. with *supra* I.

<sup>112</sup> This already occurred before the SCSL itself. See SCSL, *Prosecutor Against Moinina Fofana, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations* (Delegation Decision), Case No. SCSL-2004-14-AR72(E), 25 May 2004.

<sup>113</sup> See generally D. Radosavljevic, 'Male Captus Bene Detentus and the Right to Challenge the Legality of Arrests Under the ICC Statute', 29 *Liverpool Law Review* (2008), 269-285; G. Sluiter, 'The Surrender of War Criminals to the International Criminal Court', 25 *Loyola of Los Angeles International and Comparative Law Review* 605 (2003), esp. 624-626; See also L. Caflisch, 'The Law: Substantive and Procedural Questions', 7 *The Law and Practice of International Courts and Tribunals* (2008), 289-299.