The investigation phase in international criminal procedure: in search of common rules

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SECTION III: DEPRIVATION AND RESTRICTION OF LIBERTY

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INTRODUCTION

This chapter and the subsequent chapter both deal with custodial coercive measures. Different forms of deprivation or restrictions on the right to liberty of the person are examined in the ensuing analysis. Most prominently featured among these different forms is the arrest of the suspect or accused person. The importance of the arrest of the suspect or accused person should be understood in the light of the general prohibition of in absentia trials in international criminal law.\(^1\) Claims to the effect that the arrest “constitutes an obvious key

\(^1\) Article 63 (1) ICC Statute; Article 21 (4) (d) ICTY Statute; Article 20 (4) (d) ICTR Statute and Article 17 (4) (d) SCSL Statute (right of the accused to be tried in his or her presence); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 101 (“A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence”); ICTR, Decision on Interlocutory Appeal, Zigrayirayiro v. Prosecutor, Case No. ICTR-2001-73-AR73, A. Ch., 30 October 2006, par. 11-12 (the Appeals Chamber holds that ‘presence’ pursuant to Article 20 (4) (d) requires the physical presence of the accused at trial). The only exception is Article 22 of the STL Statute, which makes allowance for trial proceedings in the absence of the accused. Consider, in general, W. A. SCHABAS, In Absentia Proceedings before International Criminal Courts, in G. SLUITER and S. VASILIEV (eds.), International Criminal Procedure: Towards a Coherent Body of Law, London, Cameron May, 2009, pp. 335 – 380. Consider also SLUITER, who argues that difficulties in the cooperation by states and other organisations in the effectuation of arrests may in the future lead to the reconsideration of this prohibition. See G. SLUITER, in S. MÜLLER, S. ZOURIDIS, M. FRISHMAN and L. KISTEMAKER (eds.), The Law of the Future and the Future of the Law, Torkel Opsahl Academic EPublisher, Oslo, 2011, p. 630 (to be found at: http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_web.pdf, last visited 22 December 2013). It should also be noted that accused persons or suspects may appear voluntary before the tribunal. For example, according to one commentator, “somewhere around two dozen defendants surrendered voluntarily” to the ICTY. See P.M WALD, Apprehending War Criminals, Does International Cooperation Work?, in «American University International Law Review», Vol. 27, 2012, p. 236. It may be argued that the importance of the arrest “goes beyond the prohibition of trials in absentia.” In case such trials are allowed, they carry less authority. See K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation,
step in conducting prosecutions” should be assessed in light of this basic principle and starting point. It will emerge that, unlike what was said regarding non-custodial coercive measures, international(ised) criminal tribunals in principle require prior judicial intervention in case the liberty of the person is at stake.

The present chapter focuses on the arrest and the surrender (or transfer) of persons to the jurisdiction of the international criminal tribunals. In turn, the ensuing pre-trial detention and the possible provisional (or interim) release will be the subject of attention of the next chapter. It should be noted that a chronological approach is not always strictly followed. For example, while pre-transfer provisional detention (or the possibility of interim release in the custodial state) should logically be discussed in the next chapter on provisional detention and provisional release, this detention by definition precedes the transfer to the international jurisdiction which is dealt with in the present chapter.

The arrest and detention of a person, by nature, infringe upon the basic right to the liberty and the security of the person, as well as on the presumption of innocence. Notably, irregularities in the course of the apprehension of suspects and accused persons, together with the problem of prolonged pre-trial detention are said to leave important stains on the legacy left behind by the ad hoc tribunals. Such criticisms mostly stem from deviations of the tribunals’ procedure from international human rights norms. In turn, as will be illustrated, the ad hoc tribunals seek to justify these deviations by referring to their unique characteristics and features.


1 Y. GAMARRA and A. VICENTE, United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic, in «International Criminal Law Reviews», Vol. 8, 2008, pp. 632 – 633 (later, in their conclusion, the authors explain that “because without arrest, there can be no trials” (p. 653)); Consider also, e.g. G. F. RUXTON, Present and Future Record of Arresting War Criminals; the View of the Public Prosecutor of ICTY, in W.A.M. VAN DIJK and J.I. HOVENS (eds.), Arresting War Criminals, Wolf Legal Productions, Nijmegen, 2001, p. 19; L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 397 (recalling that at the time, the absence of any arrests had become “a life-threatening issue for the ICTY as it had been conceived”); B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1640 (reminding that the adjudication of international crimes in the aftermath of WWI largely failed because the surrender of persons could not be secured).

2 Article 9 (1) ICCPR, Article 5 (1) ECHR; Article 7 (1) ACHR, Article 6 ACHPR. Consider also Article 9 UDHR and Principle 2 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. For a detailed discussion of the relation between the presumption of innocence and pre-trial detention, see infra, Chapter 8, f.
In general, the apprehension of suspects and accused persons has been a persistent problem facing international criminal courts and tribunals. Since these institutions lack their own enforcement arm, and therefore rely upon states and international peacekeeping forces for the arrest and detention of suspects and accused persons, difficult questions arise as to the responsibility international criminal tribunals hold for violations that occur in the context of the apprehension (the attribution of pre-transfer violations). Moreover, procedural violations that occur raise questions as to the proper remedies. For example, whether and under what circumstances violations of the rights of the suspect or the accused, during their apprehension, can lead to the declination of the tribunal to exercise jurisdiction ought to be assessed. While international human rights norms require that the person be released if the arrest and detention are unlawful, it will be shown that under international criminal procedural law, this remedy is reserved to exceptional situations and has, as a matter of fact, never been awarded.

Some key concepts describing the apprehension and transfer of suspects and accused to the jurisdiction of the international(ized) criminal jurisdictions need to be defined at the outset of this chapter. Secondly, successively, the arrest pursuant to an arrest warrant, the arrest in emergency situations as well as the alternatives to arrest under international criminal procedural law will be discussed in detail. Attention will be paid to the interplay between the international and the domestic level in the effectuation of arrests. Thirdly, some of the suspect’s and the accused person’s key rights in relation to the deprivation of liberty will be the subject of our attention. These rights include basic human rights norms such as the right to be informed of the reasons of one’s arrest or the right to be promptly brought before a judge or a judicial officer. Fourthly, some irregularities in the execution of the arrest and/or the transfer of persons, based on the practice of the tribunals, will also be discussed. Finally, the issue of remedies for violations of the suspect’s or accused’s rights in the context of the deprivation of liberty as well as the attribution of responsibility to the international criminal tribunals for pre-transfer violations will be considered.

I. DEFINITION

§ Arrest

The different international criminal tribunals do not provide identical definitions for what is considered to be an arrest. The ICTY RPE define ‘arrest’ as “[t]he act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40.” 5 In turn, Rule 2 of the ICTR RPE provides for a slightly different definition which includes both the act of apprehension and of taking the person into custody. 6 The definition provided for under the SCSL RPE is somewhat shorter and speaks of “[t]he act of apprehending and taking a suspect or an accused into custody”, thereby deleting the normative element of the definition. 7

The Trial Chamber in the Mrkšić et al. case (Dokmanović) considered that in international law, “a restraint upon a person’s free movement is seen as a necessary component of an arrest.” 8 The Trial Chamber argued, relying on human rights law that ‘arrest’ and ‘detention’ could be defined as the ‘act of depriving a person of his liberty’ and the ‘state of being deprived of liberty’ respectively. 9 An arrest entails ‘an extreme form of restriction upon freedom of movement.’ 10 Consequently, when a law enforcement officer, “by physical restraint, conduct, or words indicates to an individual that he or she is not free to leave”, an arrest has occurred. 11 On the basis of this analysis, the Trial Chamber held that Dokmanović...

5 Originally, Rule 2 ICTY, ICTR and SCSL defined ‘arrest’ as ‘the act of taking a suspect or an accused into custody by a national authority’. The provision was amended on 25 July 1997 during the thirteenth plenary session (IT/32/Rev.11).
6 Rule 2 ICTR RPE defines ‘arrest’ as the “act of apprehending and taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40.”
7 Rule 2 SCSL RPE.
8 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkšić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 28-29. The Trial Chamber came to this conclusion after considering the definitions of ‘arrest’ and ‘detention’ under international human rights law (Article 5 (1) ECHR and Article 9 (1) ICCPR) and under national law (the Chamber only considers common law criminal justice systems). According to the Trial Chamber, national law at the minimum requires “some sort of restriction of liberty by government personnel, or their agents, of an individual.”
9 Ibid., par. 28. For example, NOWAK defines arrest within the meaning of Article 9 ICCPR as “the act of depriving personal liberty and [which] generally covers the period up to the point where the person is brought before the competent authority. See M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 221.
10 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkšić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 28.
had only been arrested on Croatian territory because he entered the UNTAES vehicle that transported him from the Federal Republic of Yugoslavia to Croatia of his own free will. Therefore, until his arrival at the UNTAES base, his freedom of movement had not been restricted and his liberty had not been deprived.  

As far as the internationalised criminal tribunals are concerned, the definition of arrest provided by the procedural framework of the STL differs considerably insofar that it does refer not only to suspects or accused persons, but applies equally to witnesses. In addition, the definition mistakenly leaves out forms of arrest in the absence of an arrest warrant, which are provided for under the tribunal’s procedural framework. No definition of ‘arrest’ is provided for under the Internal Rules of the ECCC. In turn, the TRCP defined arrest as ‘the act of taking a suspect or accused into custody with or without a warrant of arrest from an Investigating Judge or under Section 19A.4’ (arrest by the police in the absence of a warrant of arrest). Surprisingly, the SPSC did not discover any problem with ‘arresting’ a person for crimes within the jurisdiction of the SPSC, when that person had already been arrested and detained (for illicitly crossing of the border). This interpretation, by the Special Panels, should be rejected on the basis of its own definition of ‘arrest’. It refers to an act of ‘taking a suspect or accused into custody’. In turn, custody refers to the “state of being held by the police”. Consequently, when a person is already detained, the person cannot be taken into custody, in the sense in which it was meant by the TRCP.

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12 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mržić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 30–31.
13 Article 2 STL RPE: “[t]he act of taking a suspect, accused or witness into custody pursuant to a warrant of arrest.” Consider in this regard Rule 79 STL RPE which refers to the ‘person’, which may apparently include suspects, accused persons or witnesses.
14 Which is provided for under Rules 62, 63 STL RPE. See infra, Chapter 7, III.3.
15 In turn, the ECCC IR define and distinguish between an ‘arrest warrant’ (mandat d’amener) and an ‘arrest and detention order’ (mandat d’arrêt). Whereas the former refers to an order directed to the judicial police to arrest a person and bring that person before the Co-Investigating Judges or the Chambers, the latter refers to the order to the judicial police ‘to search for, arrest and bring any person to the ECCC detention facility; and to the head of the ECCC detention facility to receive and detain that person pending an appearance before the Co-Investigating Judges or a Chamber’. See the Glossary annexed to the IR.
16 Section 1 (c) TRCP.
17 SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, Prosecutor v. Aprecio Mali Dao, Case No. 18/2003, SPSC, 29 April 2004, par. 43 (“the court does not find any problem of arresting for a murder someone already arrested for crossing the border once it comes out during the investigation that the person arrested is also accused of other crimes. Once the information is confirmed the police investigator can arrest him for the new crime”).
For the purposes of this chapter, the arrest refers to the act of the deprivation of liberty, whether this occurs with or without an arrest warrant. The period of arrest ends (and the period of pre-trial detention begins) when the person is brought before the competent judicial authority.18

With regard to the terms ‘transfer’ and ‘surrender’, it should be noted that both terms are referred to interchangeably in the Statutes of the ad hoc tribunals.19 No definition is provided for either of these terms. It is not clear what the distinction between these two terms entails.20 However, according to SCHARF, ‘surrender’ refers to the situation when a person is already detained pursuant to action undertaken by national authorities under national law.21 In contrast, ‘transfer’ refers to the situation in which the person is taken into custody pursuant to an order of a tribunal and is therefore in the constructive custody of the tribunal at the time of arrest.22 No specific legal consequences are connected to these terms. Since the term ‘transfer’ is mostly used by the statutory framework of the ad hoc tribunals, that is the term that will be used here.

The ICC Statute uses the term ‘surrender’ to denote ‘the delivering up of a person by a State to the Court pursuant to the Statute’. The Statute distinguishes ‘surrender’ from ‘extradition’, which refers to the ‘delivering up of a person by one State to another as provided by treaty, convention or national legislation’.23 It has been underlined that ‘surrender’ is concerned with

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18 See infra, Chapter 8.
19 See Articles 19 (2) and 29 (2) (e) ICTY Statute and 18 (2) and 28 (2) (e) ICTR Statute. The use of these terms instead of ‘extradition’, “reflects important conceptual and operative differences between transfer or surrender under the Statute and traditional extradition.” See K.S. GALLANT, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, in «Criminal Law Forum», Vol. 5, 1994, p. 560.
20 Confirming, consider B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1666 (noting that “the Rules of Procedure and Evidence show a marked preference for the term ‘transfer’” and that “no particular consequences seem to attach to the distinction” (surrender is only referred to in Rules 58 and 60 ICTY RPE)).
22 On the meaning of ‘constructive custody’, see infra, Chapter 7, VIII.
23 Article 102 ICC Statute, which was adopted as a ‘use of terms’ provision, following intense debates at the negotiations on the ICC Statute. B. SWART notes that “[i]t is one of the merits of the Statute that it has largely succeeded in creating a special regime with regard to the delivery of persons accused or convicted of crimes under general international law without which the Court would not be able to fulfill the expectations of the community. It is only proper that the Statute has underlined this fundamental choice by designating the process of delivering by the word ‘surrender’ instead of ‘extradition’.” See B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1678. In a similar vein, consider KRESS and PROST, who note that
the delivering of a person, aiming at the prosecution of that person or the enforcement of a sentence.\(^{24}\) The term surrender has been chosen because it refers to the process of the handing over of persons to treaty-based bodies, rather than the handing over of persons to other states.\(^{25}\)

In the following sections, a distinction will be drawn between two scenarios. Normally, the arrest and surrender of the suspect or accused person follows the issuance of an arrest warrant by a Judge or a (Pre-)Trial Chamber and, thus, requires judicial intervention. Exceptionally, however, a suspect can be arrested on a provisional basis. These two scenarios will be discussed separately.

II. ARREST UPON JUDICIAL AUTHORISATION

II.1. Preconditions for the issuance of the arrest warrant

At the ad hoc tribunals and the SCSL, an arrest warrant can be ordered by the Judge who has confirmed the indictment, at the request of the Prosecutor.\(^{26}\) Furthermore, the power of the

\(^{24}\) Indeed, a distinct procedural regime applies to the transfer of detained witnesses (Article 93 (7) ICC Statute), See G. SLUITER, Surrender of War Criminals to the ICC, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 607, fn. 5.

\(^{25}\) M. OOSTERVELD, M. PERRY and J. MCMANUS, The Cooperation of States with the International Criminal Court, in «Fordham International Law Journal», Vol. 25, 2001 – 2002, p. 771. As recalled by MAOGOTO, the intent was “to free ‘surrender’ from a host of conditions, restrictions, and requirements which, developed in other epochs and designed for different purposes, are inappropriate in the context of the ICC.” “[T]o strengthen ‘surrender’ and render it more efficient, the number and scope of grounds for refusal by the requested state had to be significantly restricted.” See J. NYAMUYA MAOGOTO, A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime, in «The University of Queensland Law Journals», Vol. 23, 2004, p. 120.

\(^{26}\) Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute. No reference to arrest is made by the SCSL Statute, leaving the issue to be regulated by the RPE; Consider also Rule 47 (H) (i) ICTY, ICTR and SCSL RPE. Consider S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 170 – 171 (arguing that the Article 19 (2) ICTY Statute “appears to be an extremely open-textured authorization for a judge to issue any such orders requested by
Judge or a Trial Chamber to issue an order for the arrest and transfer of accused persons follows from the general provision of Rule 54 ICTY, ICTR, and SCSL RPE. Both judicial supervision as well as the existence of a \textit{prima facie} case (threshold) against the accused are required for the issuance of the arrest warrant. Remarkably, the existence of a legitimate purpose is not a precondition for the issuance of an arrest warrant (nor is it a precondition for pre-trial detention). 27 The ICTY’s RPE also require that the arrest warrant be signed by a permanent Judge and be accompanied by an order for the \textit{prompt} transfer of the accused to the tribunal upon arrest. 28

While the absence of a legitimate ground upon which the arrest is based is not problematic \textit{in itself}, the case law of the ECtHR requires the existence of a “genuine requirement of public interest” for further pre-trial detention which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty. 29 This requirement of necessity will be considered further in Chapter 8.

The procedural regime of the ICC differs in some respects. The arrest warrant is issued by the Pre-Trial Chamber and does normally precede the confirmation of the charges. 30 In line with the \textit{ad hoc} tribunals and the SCSL, judicial intervention is likewise required. 31 A threshold is equally provided for and the Pre-Trial Judge should be satisfied that there exist ‘reasonable

\footnotesize{the Prosecutor which a judge deems necessary [..] [t]he language of Article 19 does not suggest any limits upon the Tribunal’s ability to issue arrest warrants”).}

27 SAFFERLING sought to explain the absence of the requirement of a legitimate purpose at the \textit{ad hoc} tribunals by arguing that detention is always imperative in international criminal proceedings. See C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 144.

28 Rule 55 (A) ICTY RPE as amended at the Fourteenth plenary session on 20 October and 12 November 1997, IT/32/Rev. 12.

29 Consider e.g. ECtHR, Smirnova v. Russia, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 60; ECtHR, W. v. Switzerland, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, Tomasi v. France, Application No. 12830/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84. See the discussion \textit{infra}, Chapter 8, I. While Article 5 (1) (c) ECHR refers to deprivation of liberty on reasonable suspicion of (i) having committed an offence, (ii) where it is considered necessary to prevent his committing an offence or (iii) fleeing after having so, this provision should not be understood as requiring a ‘double justification’ of ‘reasonable suspicion’ as well as a legitimate ground upon which the deprivation of liberty is based. Consider S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 425.

30 However, while it would normally be the case, a warrant of arrest is not necessarily issued \textit{before} the confirmation of charges, as is sometimes suggested. Compare e.g. J.D. MICHELS, Compensating Acquitted Defendants before International Criminal Courts, in «Journal of International Criminal Justices», Vol. 8, 2010, p. 410 (“At the ICC, the arrest warrant is issued first […] After the suspect has been surrendered to the ICC, the Pre-Trial Chamber holds a confirmation hearing”).

31 Article 58 (1) ICC Statute. Where the requirements for the issuance of an arrest warrant are fulfilled, an arrest warrant ‘shall’ be issued (\textit{chapeau} of Article 58 (1) ICC Statute). Consequently, no discretion is left with the Pre-Trial Chamber.
grounds to believe’ that the person has committed a crime within the Court’s jurisdiction.32
Lastly, detention should be necessary on the basis of one of the alternative grounds justifying detention. The ICC Statute provides for three distinct purposes on which basis an arrest warrant can be ordered, to know that the arrest appears necessary (1) to ensure the person’s appearance at trial, (2) to ensure that the person does not obstruct or endanger the investigation or court proceedings or (3) or to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out the same circumstances.33 It follows from the wording of Article 58 (1) (b) ICC Statute that detention must ‘appear’ to be necessary to one of the reasons under Article 58 (1) (b) ICC Statute. The question revolves around the possibility, not the inevitability, of a future occurrence.34 Consequently, the necessity of the arrest (as well as of the continued detention) for one of the reasons provided in Article 58 (1) (b) (i)-(iii) should not be based on one factor in isolation but may be established on the basis of all relevant factors taken together.35 The legitimate grounds are in the alternative.36

32 Article 58 (1) (e) ICC Statute.
33 Article 58 (1) (b) (i) – (iii) ICC Statute. Some decisions on applications for an arrest warrant are limited to a determination that there are ‘reasonable grounds to believe’ and that detention is necessary, in the absence of any further discussion of the legitimate grounds. Consider e.g. ICC, Decision on Prosecutor’s Application for Warrants of Arrest under Article 58, Situation in Uganda, Situation No. ICC-02/04, PTC II, 8 July 2005, p. 3. Note that the material conditions for detention will be discussed in Chapter 8.
35 See e.g. ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 55.
36 ICC, Judgment on the Appeal of Mr. Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 139; ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, Prosecutor v. Katanga and Chui, Situation in the DRC, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008, par. 20.
The question arises whether the admissibility of the case is a prerequisite for the issuance of a warrant of arrest. Hence, should an admissibility check be performed when the Pre-Trial Chamber considers an application for a warrant of arrest? Whereas earlier case law considered an ‘initial determination’ necessary to whether a case is admissible to be a precondition for the issuance of an arrest warrant, the Appeals Chamber clarified that the application of Article 17 (1) ICC Statute is not a prerequisite to the issuance of a warrant of arrest. First, the Appeals Chamber held that Article 58 ICC Statute exhaustively lists all the preconditions for the issuance of an arrest warrant. Moreover, the Article does not require that the Prosecutor provide any information or evidence on admissibility. Nevertheless, it follows from Article 19 (1) ICC Statute that the Court may determine admissibility at its own motion. In deciding whether to exercise this discretion, the Court should give sufficient consideration to the suspect’s interests and should consider whether exercising this discretion is appropriate in the circumstances of the case. Since proceedings are ex parte, such insufficiently protects the rights of the suspect, even where the Pre-Trial Chamber held that this determination would be without prejudice to any later determination, because “a degree of predetermination is inevitable” if the suspect later appears before the same Chamber. The rights of other participants should also be borne in mind by the Pre-Trial Chamber in exercising this discretion. Later jurisprudence confirms a cautionary approach towards the determination of the admissibility of a case during Article 58 proceedings.

37 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 18.
38 Ibid., par. 42. The Appeals Chamber noted that where the two prerequisites of Article 58 ICC Statute are fulfilled, the opening sentence of the said article provides that the Pre-Trial shall issue an arrest warrant.
39 Cf. Article 58 (2) ICC Statute.
40 Ibid., par. 50. The Appeals Chamber added that where decisions on the admissibility are appealable, the situation could even be worse in case the suspect would be confronted with a determination by the Appeals Chamber that the case is admissible.
41 Ibid., par. 52.
42 Consider e.g. ICC, Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, Situation in the Libyan Arab Jamahiriya, Situation No. ICC-01-11-27 June 2011, par. 12 (“In light of the information provided by the Prosecutor in his Application, the Chamber decides, at this stage, not to exercise its discretion to determine, on its own motion, the admissibility of the case against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi as (i) the proceedings triggered by the Prosecutor's application for warrants of arrest
As far as the internationalised criminal tribunals are concerned, the TRCP provided that a suspect could be arrested upon the issuance of an arrest warrant by the Investigating Judge upon request by the Public Prosecutor.\footnote{According to Section 24.3 of TRCP, these powers of the Investigating Judge terminated at that moment. Whereas it followed from Section 29.5 (juncto Section 20.6) of the TRCP that at the preliminary hearing, a panel of Judges or an individual Judge could decide on the detention of the accused, it was not made explicit in the Rules what judicial organ was responsible for ordering detention following the indictment but \textit{prior} to the preliminary hearing. The SPSC held in the \textit{Sisto Barros et al.} case that “when the powers of the Investigating Judge with respect to the detention or continued detention of a suspect terminate pursuant to TRCP Sec 24.3 by reason of the suspect’s indictment, those powers vest in the individual judge or the panel of judges to whom the indictment has been forwarded pursuant to TRCP Sec. 26.2 [Section 26.1 was meant]. This is so whether the defendant remains at liberty or in detention at the time of the indictment.” The Court further reasoned that there are numerous instances where the TRCP refer to the authority of the individual Judge or a panel of Judges in matters relating to the detention status of the defendant. Furthermore, and looking at the drafters intentions, it is argued that it is hardly likely that an individual Judge or a panel of Judges were given the authority to decide on the detention of the defendant at all stages, except where the defendant is not already in custody at the moment of the indictment. See SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, \textit{Prosecutor v. Sisto Barros et al.}, Case No. 03/2004, SPSC, 17 March 2004, par. 36 – 42. Consider also: SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, \textit{Prosecutor v. Wiranto et al.}, Case No. 05/2003, SPSC, 18 February 2004, p. 5; SPSC, The request for the release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, \textit{Prosecutor v. Sarmento et al.}, Case No. 18/2001, SPSC, 22 March 2002, par. 27.} An arrest warrant was issued if there were ‘reasonable grounds to believe’ that the person had committed a crime.\footnote{According to Section 9.3 (a) and Section 19A.1 TRCP. Subsequently, the warrant or order for arrest of a suspect may be executed by a law enforcement official anywhere in East Timor (Section 9.8 (a)). No adversarial hearing should be organised on a request for the issuance of an arrest warrant. Consider in that regard the argumentation by the Deputy General Prosecutor (DGP), who argued that such hearing would allow “the media and the audience throughout the world” to evaluate the charges and to contribute to the establishment of a historical record, and referred to its ‘rule of law’ function: “[b]y following the rule of law, they have demonstrated that even the most serious criminal cases can be adjudicated in a manner that is fair and just.” Where the Prosecution asserted that what is not prohibited is allowed, the Investigating Judge responded that “[t]his proposition runs contrary to the very nature of the Rules themselves.” “The Rules constitute a form of positive legislation supplying a concrete legal foundation for the manner in which criminal cases shall be processed. Their purpose is to ensure that procedures are clearly stated in order to ensure both the integrity of the court’s proceedings as well as the rights of those subject to the Court’s authority.” Consider SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, \textit{Prosecutor v. Wiranto et al.}, Case No. 05/2003, SPSC, 18 February 2004, pp. 6 – 9, 16. A detailed analysis of the arguments offered by the DGP and the reasoning of the Investigating Judge can be found in A. DE HOOG, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: Timor Leste – The Special Panels for Serious Crimes 2001 – 2003, Vol. XIII, 2008, pp. 86 – 87.} No legitimate purpose was required. Once the indictment had been presented to the Court, the authority to order the arrest and the (continued) detention of the accused shifted to the Court.\footnote{According to Section 29.5 (juncto Section 20.6) of the TRCP that at the preliminary hearing, a panel of Judges or an individual Judge could decide on the detention of the accused, it was not made explicit in the Rules what judicial organ was responsible for ordering detention following the indictment but \textit{prior} to the preliminary hearing. The SPSC held in the \textit{Sisto Barros et al.} case that “when the powers of the Investigating Judge with respect to the detention or continued detention of a suspect terminate pursuant to TRCP Sec 24.3 by reason of the suspect’s indictment, those powers vest in the individual judge or the panel of judges to whom the indictment has been forwarded pursuant to TRCP Sec. 26.2 [Section 26.1 was meant]. This is so whether the defendant remains at liberty or is in detention at the time of the indictment.” The Court further reasoned that there are numerous instances where the TRCP refer to the authority of the individual Judge or a panel of Judges in matters relating to the detention status of the defendant. Furthermore, and looking at the drafters intentions, it is argued that it is hardly likely that an individual Judge or a panel of Judges were given the authority to decide on the detention of the defendant at all stages, except where the defendant is not already in custody at the moment of the indictment. See SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, \textit{Prosecutor v. Sisto Barros et al.}, Case No. 03/2004, SPSC, 17 March 2004, par. 36 – 42. Consider also: SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, \textit{Prosecutor v. Wiranto et al.}, Case No. 05/2003, SPSC, 18 February 2004, p. 5; SPSC, The request for the release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, \textit{Prosecutor v. Sarmento et al.}, Case No. 18/2001, SPSC, 22 March 2002, par. 27.} In the \textit{Júlio...
Fernandes et al. case, arrest warrants were issued against persons that were already in custody. The Court of Appeals considered this to be improper insofar that Section 19 TRCP (issuance of arrest warrants) "relates to the initial arrest of a suspect and his detention or release during the course of investigations". 48 Not only were the arrest warrants issued by the SPSC rather than by the Investigating Judge in the course of the investigation, but the Court of Appeals held that "it would not make sense to issue warrants of arrest against accused that were already in pre-trial detention which had been ordered based in their files [sic]." 49 They can only apply in relation to a person that is already in custody for another offence which is being investigated. 50

Article 18 (2) STL Statute and Rule 88 (A) STL RPE encompass the general power of the Pre-Trial Judge to issue orders for the arrest or transfer of persons at the Prosecutor’s request. 51 It follows from Article 68 (J) and Rule 79 STL RPE that the confirmation of the indictment is a prerequisite for the issuance of a warrant of arrest. Consequently, the issuance of an arrest warrant by the Pre-Trial Chamber requires the existence of a prima facie case against the suspect. 52 Further, the RPE provide for three distinct, alternative grounds justifying arrest. Pursuant to Rule 79 (A) STL RPE, the Pre-Trial Judge may issue an arrest warrant (1) to ensure the appearance of a person ‘as appropriate’ 53; (2) to prevent the

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49 Ibid., p. 11.
50 Ibid., p. 7.
51 While peculiar to the STL, it should be noted that, pursuant to Article 4 of the STL Statute, the STL has primacy over Lebanese prosecutions within its jurisdiction, and the competent judicial authorities should, upon request, defer competence over the investigation of the attack against Hariri and others, this implies that persons detained in connection with this investigation will also be transferred to the custody of the Tribunal (Article 4 (2) and 4 (3) (b) STL Statute.). Pursuant to Rule 17 (A) (iii) STL RPE, the Lebanese judicial authorities seized with the Hariri investigation should submit to the Pre-Trial Judge, upon his or her request (which follows the request by the Prosecutor), among others, a list of persons detained in relation with this investigation. After this list has been communicated, the Prosecutor will make a reasoned submission regarding each of the people on the list whether they should be released or detained. In the former case, the Prosecutor should indicate whether conditions should be imposed (Rule 17 (B) STL RPE). In case the Prosecutor does not oppose release, the Pre-Trial Judge will decide whether to request the Lebanese authorities to release the person (with immediate effect) within a reasonable time. For every person whose release the Prosecutor opposes, a public hearing should be organised, which may include videoconferencing for the person and his counsel, if appropriate, and the Pre-Trial Judge will decide on the transfer into custody of the person (Rule 17 (B) (ii)) STL RPE). These decisions may be appealed under Rule 17 (H) STL RPE. Besides, pursuant to Rule 17 (G) STL RPE the Pre-Trial Judge may, at the request of the Prosecutor, decide that persons detained by the national courts of Lebanon in relation to other investigations or criminal proceedings of which the Prosecutor requested the deferral, shall be transferred to the custody of the Tribunal.
52 Rule 68 (F) STL RPE.
53 As amended on 10 November 2010, it previously read ‘at trial’. The amendment was adopted “to allow the flexibility, subject to approval by the Pre-Trial Judge, to issue warrants of arrest to ensure the appearance of persons before the Tribunal in any stage of the proceedings.” See STL, Summary of the Accepted Rule
obstruction or endangerment of the investigation or prosecution by the person, including through interference with witnesses or victims or (3) to prevent criminal conduct of a kind of which he stands accused.\textsuperscript{54}

In the course of their judicial investigation, the Co-Investigating Judges may issue an arrest warrant against a suspect, a charged person or an accused person.\textsuperscript{55} In turn, an arrest and detention order may be ordered by the Co-Investigating Judges or the Trial Chamber against a charged person or an accused person who flees or resides in an unknown place, after hearing the Co-Prosecutors.\textsuperscript{56} No other requirements are provided for the issuance of an arrest warrant. The only threshold follows from the status of the person concerned. The person should at least qualify as being a suspect. Consequently, the Co-Investigating Judges should "consider [such person] may have committed a crime within the jurisdiction of the ECCC."\textsuperscript{57} However, given the subjective nature of this definition, it does not establish a useful threshold. Nevertheless, in understanding this lower threshold, it should be reiterated that 'arrest warrant', as it is used in the Internal Rules, refers to 'an order directed to the judicial police to arrest a person and bring that person before the Co-Investigating Judges'. It may better be translated as an 'order to bring' (mandat d'amener in the French version of the Internal Rules). In turn, for an arrest and detention order (which might be better translated as 'arrest warrant', in conformity with the French term (mandat d'arrêt)), the person should at least have the status of a charged person. Therefore, this person should be named in an introductory or supplementary submission or have been charged by the Co-Investigating Judges when they considered there to be 'clear and consistent evidence indicating that this person may be criminally responsible for the commission of a crime referred to in an introductory submission or a supplementary submission'.\textsuperscript{58} Furthermore, due regard should be paid to the peculiarities of the procedural framework of the Extraordinary Chambers which, rather than providing for automatic detention upon arrest, stipulates that provisional detention can only be ordered following an adversarial hearing when (i) there is well-founded reason to believe that the person may have committed the crime or crimes specified in the introductory

\textsuperscript{54} Rule 79 (A) STL RPE.
\textsuperscript{55} Rule 42 and 55 (5) (d) ECCC IR. For the difference between an arrest warrant and an arrest and detention order, see supra, fn. 15.
\textsuperscript{56} Rule 44 ECCC IR. For the difference between an arrest warrant and an arrest and detention order, see supra, fn. 15.
\textsuperscript{57} See the glossary annexed to the Internal Rules.
\textsuperscript{58} Rule 55 (4) ECCC IR.
or supplementary submission and (ii) when provisional detention is required for one of the legitimate grounds provided for under Rule 63 (3) (b) ECCC IR. A person who has been arrested should be brought before the Co-Investigating Judges or as soon as possible after their provisional detention.

II.2. Applicable standard of proof

The ad hoc tribunals, the Special Court, and the ICC all provide for a different threshold for the issuance of an arrest warrant. To what extent the standard provided for by the ad hoc tribunals is similar to the standard provided by the ICC remains unclear. The ad hoc tribunals and the SCSL (as well as the STL) require that the charges be confirmed as a prerequisite for the issuance of the arrest warrant. Consequently, an arrest warrant can only be issued against an accused person. At the ad hoc tribunals and the STL, the standard of proof for the confirmation of charges is the existence of a prima facie case. This standard entails that there is ‘a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused of that charge’. The procedural framework of the Special Court

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59 Rule 63 (3) ECCC IR. See in detail, infra, Chapter 8, II.4.1.
60 Rule 45 (5) ECCC IR.
61 Consider O. FOURMY, Powers of the Pre-Trial Chambers, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, pp. 1219 - 1220 (arguing that “[i]t is unclear whether the criterion of ‘reasonable grounds’ in the ICC Statute should be understood as requiring a lesser degree of conviction than the criterion of ‘prima facie case’.” He notes the similarity in formulation between Article 58 (1) (a) ICC Statute and Rule 47 (B) ICTY RPE. However, the latter provision refers to the act of the forwarding of the indictment by the Prosecutor to the Registrar for confirmation by the Judge, the step immediately preceding the confirmation of the indictment. At least one author has noted that the two thresholds do not substantially differ. Consider G. SLUITER, Arrest and Surrender, in A. CASSESE, The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, pp. 250 – 251.
62 Article 19 (1) ICTY Statute juncto Rule 47 (E) ICTY RPE; Article 18 (1) ICTR Statute juncto Rule 47 (E) ICTR RPE.
63 Consider e.g. ICTY, Decision on the Review of the Indictment, Prosecutor v. Kordić et al., Case No. IT-95-14-I, T. Ch., 10 November 1995, p. 3; ICTY, Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Mladić, Case No. IT-99-37-I, Confirming Judge, 24 May 1999, par. 4; ICTY, Decision on Review of Indictment and Order for Non-Disclosure, Prosecutor v. Činčić and Mladić, Case No. IT-03-73-I, Judge, 24 February 2004, p. 2; ICTY, Decision on Review of Indictment, Prosecutor v. Tabočan, Case No. IT-98-32-I-R77-1, Confirming Judge, 17 November 2009, p. 2; ICTY, Decision on the Review of the Indictment, Prosecutor v. Kašemuzi et al., Case No. ICTR-95-1-T, Confirming Judge, 28 November 1995. However, it should be noted, that no uniform definition was adopted as to what constitutes a ‘prima facie case’. For example, Judge Hunt noted in the Mladić case that there had been considerable investigation in the definition of a ‘prima facie case’ and defined it as “whether there is evidence (if accepted) upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.” However, as rightly underlined by Judge May, such is the test applied at the Rule 98bis stage: see ICTY, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, Prosecutor v. Mladić, Case No. IT-99-37-I, Confirming Judge, 29 June 2001, par. 3 and ICTY, Decision on Review of Indictment, Prosecutor v. Mladić, Case No. IT-01-51-I, Confirming Judge, 22
does not require the judicial finding of a \textit{prima facie} case for the confirmation of charges. All that is required is (1) that the Judge be satisfied that the crime(s) laid down in the indictment are within the Court’s jurisdiction and (2) that the allegations in the case summary, if proven, amount to the crimes particularised in the indictment.\footnote{Rule 47 (E) SCSL RPE.} This threshold is considerably weaker than a \textit{prima facie} standard. It falls short of the ‘reasonable suspicion’ threshold as provided for in Article 5 (3) ECHR.\footnote{See the discussion of this ‘reasonable suspicion’ standard in the following paragraph.} It should, therefore, be rejected.

The threshold required for the issuance of a warrant of arrest by the ICC’s Pre-Trial Chamber (‘reasonable grounds to believe’) (cf. SPSC) must be distinguished from the threshold required for the confirmation of charges (‘substantial grounds to believe’) and the threshold for conviction (‘beyond reasonable doubt’).\footnote{Article 61 (7) ICC Statute and Article 66 (3) ICC Statute respectively.} The Statute prescribes progressively higher thresholds which must be met at different stages during the ensuing proceedings.\footnote{ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, \textit{Prosecutor v. Al Bashir, Situation in Darfur, Sudan}, Case No. ICC-02/05-01/09-3, PTC I, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Ušacka, par. 10.} In the Court’s jurisprudence, the threshold of ‘reasonable grounds to believe’ has been equated with the ‘reasonable suspicion’ standard, which can be traced back to Article 5 (1) (c) ECHR.\footnote{ICC, Decision on the Prosecution’s Application for a Warrant of Arrest, Article 58, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06-7, PTC I, 10 February 2006, par. 12 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).} This threshold has been interpreted by the ECtHR as requiring the “existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.”\footnote{ECtHR, \textit{Fox, Campbell and Hartley v. United Kingdom}, Application Nos. 12244/86, 12245/86, 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 32 (emphasis added). Consider also, among others ECtHR, \textit{Cebotari v. Moldova}, Case No. Application No. 35615/06, Judgment of 13 November 2007, par. 48; ECtHR, \textit{Labita v. Italy}, Application No. 26772/95, Reports 2000-IV, Judgment of 6 April 2000, par. 155.} What may be regarded as ‘reasonable’ will depend upon all circumstances.\footnote{ECtHR, \textit{Fox, Campbell and Hartley v. United Kingdom}, Application Nos. 12244/86, 12245/86, 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 32; ECtHR, \textit{Murray v. the United Kingdom}, Application No. 14310/98, Series A, No. 300-A, Judgment (Grand Chamber) of 28 October 1994, par. 57.} According to the ECtHR, facts which raise a suspicion do not require...
sufficient evidence to bring charges,\textsuperscript{71} nor does the evidence need to be of the same level as what is necessary to justify a conviction.\textsuperscript{72} Something more than suspicion is required insofar that the provision requires reasonable grounds to believe. Belief imports a higher standard of acceptability of something compared to suspicion. It denotes the “acceptance of a fact.”\textsuperscript{73} Article 58 (1) (a) ICC Statute requires that such belief be founded upon grounds which warrant its reasonableness.

When the Pre-Trial Chamber in the \textit{Al Bashir} case introduced a test requiring that the evidence “show[s] that the only reasonable conclusion to be drawn […] is the existence of reasonable grounds to believe in the existence”, the Appeals Chamber determined that it set the threshold too high because it required proof that was “beyond reasonable doubt”.\textsuperscript{74}

Occasionally, the threshold required may in practice be even higher because the ICC Statute requires that the request for arrest and surrender be accompanied by ‘documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested state’.\textsuperscript{75} Indeed, with a view to the expeditious execution of the arrest warrant, the Prosecutor may well want to anticipate such higher threshold.\textsuperscript{76} This higher threshold, required to fulfill domestic requirements, will be discussed in a next subsection.\textsuperscript{77}

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\textsuperscript{72} ECtHR, \textit{Murray v. the United Kingdom}, Application No. 14310/88, Series A, No. 300-A, Judgment (Grand Chamber) of 28 October 1994, par. 55.


\textsuperscript{74} ICC, Judgment on the Appeal of the Prosecutor against the ”Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, \textit{Prosecutor v. Al Bashir, Situation in Darfur, Sudan}, Case No. ICC 02/05-01/09-73, PTC I, 3 February 2010, par. 32; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, \textit{Prosecutor v. Al Bashir, Situation in Darfur, Sudan}, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, par. 158.

\textsuperscript{75} Article 91 (2) (c) ICC Statute.

\textsuperscript{76} See infra, Chapter 7, II.3.1.

II.3. State cooperation in the enforcement of the arrest warrant

The effectuation of arrest warrants differs depending on the nature of the tribunal concerned. For example, the Extraordinary Chambers have not faced the kind of problems associated with the execution of arrest warrants issued by international criminal tribunals as of yet. Given the court’s integration in the domestic court system, the ECCC can rely directly on judicial police officers who can execute arrest warrants and orders from the Co-Investigating Judges or Co-Prosecutors. Therefore, the ensuing discussion will concentrate on the problems encountered by international criminal tribunals, since they cannot directly execute arrest warrants but should, instead, rely on other states and other international actors. The above is not to say that the internationalised criminal tribunals have not faced problems regarding the effectuation of arrests. It is to be recalled that, unlike cooperation obligations of the states “most concerned”, the obligations of third states to cooperate with these jurisdictions are very much limited. For example, the absence of a solid framework for cooperation with Indonesia seriously impacted upon the success of the SPSC. The large majority of those indicted by the SPSC remain at large outside the jurisdiction of East-Timor. Most of the persons indicted resided in Indonesia, which country refused to cooperate with the SPSC or to try them.
II.3.1. The *ad hoc* tribunals

§ Addressees

Lacking their own enforcement powers, the *ad hoc* tribunals need to rely on state cooperation to arrest and surrender accused persons. While the usual *addressees* of the arrest warrant will be states, the ICTY and ICTR Statute do not preclude that warrants be directed to other actors. In Mrkšić, the Trial Chamber held that where Article 19 (2) ICTY Statute is couched in broad terms, arrest warrants should not be directed to states exclusively.\(^{83}\) It follows from Rule 59bis ICTY RPE that arrests warrants may be transmitted to ‘an appropriate authority or international body’ or to the Prosecutor.\(^{84}\) In this regard, Rule 59bis offers an *alternative route* for the execution of the arrest and transfer by states.\(^{85}\) The reality is that a substantial number of ICTY arrest warrants have been effectuated by multinational forces.\(^{86}\) The notions of

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\(^{83}\) ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 37. Consider also Rule 54 ICTY RPE.

\(^{84}\) In Mrkšić, the ICTY Trial Chamber stated that such procedure is valid and supported by the terms of the Statute. In particular, Rule 59 bis “can be regarded as giving effect to [Article 19 (2) ICTY Statute] when a decision has been made by the Confirming Judge that it is ‘required’ that entities other than States receive and execute warrants for the arrest, detention and transfer of accused persons.” Besides, the Trial Chamber argued that Article 20 (2) on the procedure to be followed upon confirmation of the indictment lends support to this conclusion. Indeed, this article does not make any mention of states, nor does it place any limitation on the authority of an international body or the Prosecutor to participate in the arrest proceedings. The Defence had contended that, since the accused resided on the territory of the Former Republic of Yugoslavia (FRY), the FRY bore the sole responsibility for the arrest of Dokmanović, on the basis of Article 29 ICTY Statute \textit{juncto} Rule 55 ICTY RPE. See \textit{ibid.}, par. 37. The reference to arrest warrants issued directly to the Prosecutor seems to refer to arrests carried out at the behest of the Prosecutor, rather than arrests directly executed by the Prosecutor him or herself. See S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in *The British Yearbook of International Law*, Vol. 70, 2000, p. 219. Consider also Rule 55 (G) ICTY RPE, which refers to the execution of an arrest warrant by an ‘appropriate authority or international body’.

\(^{85}\) ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 40 (“[i]t became clear with the commencement and the continuation of the functioning of the Tribunal that several States were not fulfilling their obligations with regard to the arrest and transfer of indicted persons. […] The Judges therefore, adopted Rule 59 bis within the parameters of Article 19 and 20 of the Statute to provide for a mechanism additional to that of Rule 55, which, however, remains the primary method for the arrest and transfer of persons to the Tribunal”). Consider also ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 50.

\(^{86}\) As noted, for example, by H-R. ZHOU, The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC, in *Journal of International Criminal Justice*, Vol. 4, 2006, p. 203; C. STAHN, Arrest and Surrender Under the ICC Statute: a Contextual Reading, in C. STAHN and L. VAN DEN HERIK (eds.), Future Perspectives on International Criminal Justice, The Hague, T.M.C. Asser Press, 2010, p. 665. On the problems surrounding the effectuation of arrest warrants by international forces and the capacity of the ICTY to direct arrest warrants to international forces, consider: S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in *The British Yearbook of International Law*, Vol. 70, 2000, pp. 181 – 213. The question as to the responsibilities of multinational forces in the effectuation of arrests has been the subject of extensive scholarly debate. Some authors argue that while multinational forces have the *authority* to effect arrests, there is no *duty* incumbent on the multinational forces to arrest accused persons. Consider e.g. P. GAETA, Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for
‘appropriate authority’ or ‘international body’ were left undefined, raising questions as to what addressees are included under Rule 59bis. While Rule 59bis speaks of the transmission of a ‘copy’ of the arrest warrant, international forces have, in practice, been the direct addressees of arrest warrants. This provision seems to have been relied upon in order to evade the cumbersome Rule 61 (D) procedure and to have been turned into the preferred vehicle to transmit an arrest warrant to the authorities of all member states of the United Nations. While the ICTR RPE do not provide for a similar provision, the power to address arrest warrants to an appropriate authority or international body can indirectly be construed.

the Former Yugoslavia?, in «European Journal of International Law», Vol. 9, 1998, pp. 179 – 180 (the author argues, among others, that it is a fundamental principle of international law that an international obligation is binding on a state within the state’s own territory, including the territory over which the state may de facto exercise exclusive jurisdiction. This also applies to the obligations a state participating in a multinational state holds under Security Resolution 827 of 1993. However, where the multinational forces exercise extensive power, they do not de facto exercise exclusive jurisdiction); M.B. HARMON and F. GAYNOR, Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 412; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 194 (“[t]he better view appears to be that while multinational forces operating in Bosnia And Herzegovina […] are arguably empowered to effect arrests, this has yet to crystallize into an explicit obligation to do so under customary international law”). Other authors have contended that an obligation is incumbent on multinational forces to execute arrests. Consider e.g. N. FIGÀ-TALAMANCA, The Role of NATO in the Peace Agreement for Bosnia and Herzegovina, in «European Journal of International Law», Vol. 7, 1996, p. 173 (“it could be contended that, in so far as a contributing State is legitimately in control of the territory where an accused is known to reside, and is in practice able to arrest him or her […] the state is under the obligation to arrest the accused and transfer him to the tribunal”); J.R.W.D. JONES, The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of International Law», Vol. 7, 1996, p. 239 (arguing that IFOR may not only have the right but also the duty to execute the Tribunal’s arrest warrants). This latter view has been adopted in the jurisprudence of the ad hoc tribunals. First, the jurisprudence has adopted the view that the duty to cooperate under Article 29 ICTY Statute and Article 28 ICTR Statute also extends to international organisations or its competent organ (see infra, fn. 94 and the authorities cited therein). Furthermore, among other arguments, the Trial Chamber argued in Nikolić that Article 59bis (A) refers to an ‘order’, which may indicate the binding character thereof. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 55. Where the notion of ‘international body’ refers in the first place to the execution of arrest warrants by SFOR and other multinational forces, what is meant by an ‘appropriate authority’ is less clear. See, e.g., the argumentation by LAMB that such category could arguably include the local police administration or individual police chiefs: S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 213-218. Notably, the rule also foresees the scenario where the Prosecutor takes the accused into custody. Consider e.g. ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Milčić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 3 (Judge Riad apparently directly addressed the arrest warrant to UNTAES); in other instances, a copy of the original warrant seems to have been transmitted. Consider e.g. ICTY, Order Under Rule 59bis for the Transmission of Arrest Warrant, Prosecutor v. Tošović, Case No. IT-97-25-I, Duty Judge, 23 August 2002. Consider e.g. ICTY, Warrant of Arrest, Order for Surrender, Prosecutor v. Stanišić, Case No. IT-014-79-I, Single Judge, 25 February 2005 (where reviewing Judge Amm El Mahdi authorised the delivery of the Warrant of Arrest and Order for Surrender to all member states of the United Nations and does so on the basis of Rule 55 and Rule 59bis). See Article 18 (2) ICTR Statute, Rule 53 (D) ICTR RPE (disclosure of (parts of) an indictment to an appropriate authority or international body) and Rule 39 (iii) ICTR RPE (The Prosecutor may seek the assistance of any relevant international body including INTERPOL in the conduct of the investigation).
Rule 55(D) ICTY RPE deals with the transmission of copies of the arrest warrant to the person or authorities to which they are addressed (which may include the national authorities of a state in whose territory, or under whose jurisdiction the accused resides, was last known to be, or is believed by the Registrar to be found). This provision has been interpreted by the Confirming Judge (Judge Hunt) in the Milošević case as providing the authority, when read together with Rule 54 (as there can be no trial if the accused is not arrested), for the Judge to transmit copies of the arrest warrant to every member state of the UN. Judge Hunt argued “that the power to transmit certified copies of the arrest warrant pursuant to Rule 55 (D) is a wide one.” In turn, the ICTR RPE foresee the possibility of transmitting the arrest warrant to every state to facilitate the arrest of persons that move between states or whose whereabouts remain unknown. Rule 59 ICTR and Rule 60 ICTY RPE also allow for the public advertisement of the indictment at the Prosecutor’s request.

§ Duty for states and other actors to comply with requests for arrest and transfer

In cases where an arrest warrant is addressed to a state, this will normally be the territory of the state in whose territory or under whose jurisdiction or control the person resides or was last known to be found. States should comply with any request for the arrest or detention of persons and the surrender or transfer of the accused to the tribunal (pursuant to Article 29 ICTY Statute (Article 28 ICTR Statute)) without delay. Gaps or impediments under the

91 ICTY, Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Milošević et al., Case No. IT-99-37-I, T. Ch., 24 May 1999. As noted above, a similar broad interpretation was given to Rule 59 bis ICTY RPE. Critical of the approach by the Trial Chamber is G. SLUITER, who argues that for an international arrest warrant to be issued, the proper procedure (Rule 61 (D) ICTY RPE) should have been followed. These international arrest warrants can only be issued by a Trial Chamber and when the arrest warrant that has been issued pursuant to Rule 55 has not been executed within a reasonable time. The commentator argues that where Rule 61 is specialis to the generalis Rules 54 and 55, the former is the correct procedure to be applied. Nevertheless, Judge Hunt expressly distinguished between the procedure of Rule 55(D) of transmitting certified copies of the original arrest warrant and Rule 61 (D) regulating the issuance of international arrest warrants (par. 22). See G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 48.


93 See Rule 61 (A) (i) ICTY and ICTR RPE and Rule 55 (B) ICTR RPE.

94 Article 29 (2) (d) and (e) ICTY Statute, Article 28 (2) (d) and (e) ICTR Statute, Rule 56 ICTY and ICTR RPE. These obligations incumbent on States ultimately derive their binding force from Security Council Resolution
municipal law of the requested state do not relieve that state from its obligations.\textsuperscript{95} The obligations under Article 29 ICTY Statute prevail over any legal impediment to the surrender or transfer of the accused or a witness to the tribunal (which may exist under the national law or extradition treaties of the state concerned).\textsuperscript{96} As one author notes, requests for arrest and surrender impose an obligation of result on the requested state.\textsuperscript{97} While many states adopted measures to domestically implement their obligation to arrest and surrender, there is, strictly speaking, no obligation to do so.\textsuperscript{98} According to Rule 56 ICTY and ICTR, states have a \textit{duty of due diligence} ‘to ensure proper and effective execution’. The unqualified nature of the obligations of states or other actors to surrender a person to the tribunal also entails that when a state effectuated an arrest and the tribunal as well as another state or actor requests the extradition, the request of surrender should prevail. However, the practice may sometimes be different.\textsuperscript{99}

\textsuperscript{95} ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14, President, 3 April 1996, par. 7.

\textsuperscript{96} Rule 58 ICTY, ICTR and SCSL RPE. Note that this provision reflects the priority rule of Article 103 UN Charter according to which, in case a conflict arises between the obligations of member states of the United Nations under the UN Charter and their obligation under any other international agreement, their obligations under the UN Charter prevail. Presumably, the only exception would be the situation when the arrest and surrender would be impeded by norms of \textit{jus cogens} or peremptory norms. Consider e.g. B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), \textit{The Rome Statute of the International Criminal Court}, Oxford, Oxford University Press, 2002, p. 1665; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «


\textsuperscript{98} Consider Y. GAMARRA and A. VICENTE, United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukić, Gotovina and Zelenovic, in «International Criminal Law Review», Vol. 8, 2008, pp. 639 – 653 (the authors illustrate, by discussing several examples of transfer of accused persons to the ICTY, that “the arrest and transfer of war criminals is more likely to take place when States have a true intention to cooperate, which is explicit when they adopt specific domestic legislation to make the process of arresting and transferring smooth and transparent”).

\textsuperscript{99} C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), \textit{International Prosecutors}, Oxford, Oxford University Press, 2012, p. 686 (recalling the case of Karamira, in which Karamira was taken by Rwandese agents from Indian territory. When he escaped in Ethiopia, during his transfer, the ICTR Prosecutor learned about his presence in Ethiopia and requested his surrender. However, the Rwandese authorities threatened to stop cooperation with the ICTR and to block access to witnesses and the Prosecution gave in. Karamira was transferred to Kigali where he was sentenced to death and eventually

\textsuperscript{827} adopted on 25 May 1993 and Security Council Resolution 955 of 8 November 1994, adopted under Chapter VII of the UN Charter and Article 25 of the UN Charter. Where the \textit{ad hoc tribunals} are subsidiary organs of the UN Security Council, their order for cooperation may indirectly be regarded as decisions from the Security Council under Chapter VII. Consider in this regard the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 125-126 (“[a]n order by a Trial Chamber for the surrender of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the United Nations”). For the SCSL, consider Article 17 (2) (c) and (2) SCSL Agreement (in the case of the SCSL, such obligation is only incumbent on the government of Sierra Leone, but consider Rule 56 SCSL RPE on addressing arrest warrants to third states and any relevant international body).

\textsuperscript{88} adopted on 25 May 1993 and Security Council Resolution 955 of 8 November 1994, adopted under Chapter VII of the UN Charter and Article 25 of the UN Charter. Where the \textit{ad hoc tribunals} are subsidiary organs of the UN Security Council, their order for cooperation may indirectly be regarded as decisions from the Security Council under Chapter VII. Consider in this regard the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 125-126 (“[a]n order by a Trial Chamber for the surrender of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the United Nations”). For the SCSL, consider Article 17 (2) (c) and (2) SCSL Agreement (in the case of the SCSL, such obligation is only incumbent on the government of Sierra Leone, but consider Rule 56 SCSL RPE on addressing arrest warrants to third states and any relevant international body).
Given that arrests are in practice often effectuated by international organisations, it should be reiterated that Article 29 ICTY Statute (Article 28 ICTR Statute) also applies when states operate collectively. Consequently, Article 29 ICTY Statute should be understood as conferring power upon the tribunal to require these international organisations, including their competent organ, to cooperate with the tribunal.

Interestingly, the Statutes of the ad hoc tribunals encompass a duty to comply with requests for the arrest and detention of persons while the obligation to surrender and transfer is limited only to the accused. Consequently, the surrender and transfer of suspects seems to be excluded. However, an obligation on states to surrender and transfer suspects follows from the general cooperation obligation of states under the ICTY and ICTR Statute, as has been suggested by SWART.


100 See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. Simić, Case No. IT-95-9, T. Ch., 18 October 2000, par. 46 – 47 (holding that Article 29 ICTY applies to all states “whether acting individually or collectively.” “In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case.” A purposive construction of Article 29 suggests that it is as applicable to such collective enterprises as it is to States. The purpose of Article 29 of the Statute of the International Tribunal is to secure cooperation with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law in the former Yugoslavia. The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force. Although this cooperation would, more naturally, be expected from States, it is also achievable through the assistance of international organizations through their competent organs which, by virtue of their activities, might have information relating to, or come into contact with, persons indicted by the International Tribunal.” […] “The mere fact that the text of Article 29 is confined to States and omits reference to other collective enterprises of States does not mean that it was intended that the International Tribunal should not also benefit from the assistance of States acting through such enterprises”). Judge Robinson, in his separate opinion to the decision, agrees with the majority but adds that the customary right to habeas corpus further warrants that Article 29 ICTY Statute is so construed. Such contextual interpretation is in line with the rules of treaty interpretation (Article 31 (3) (1) (c) VCLT). See ibid., Separate Opinion of Judge Robinson, par. 8. Consider also ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 49. This finding was confirmed by the Appeals Chamber in ICTY, Decision on Request of the North Atlantic Treaty Organisation for Review, Prosecutor v. Milutinović et al., Case No. IT-05-87-AR108bis.1, A. Ch., 15 May 2006, par. 8.

101 ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. Simić, Case No. IT-95-9, T. Ch., 18 October 2000, par. 48.

102 Article 29 (2) (d) and (e) ICTY Statute and Article 28 (2) (d) and (e) ICTR Statute respectively.

One country, the U.S., has signed separate surrender agreements with both ad hoc tribunals.\textsuperscript{104} The intention behind these agreements was not only to demonstrate the willingness of the U.S. to cooperate with the ad hoc tribunals but also, equally, to reconcile the “assistance to the ad hoc tribunals with requirements deriving from US extradition law, in particular (1) that suspects will only be surrendered on a treaty-base and (2) the requirement of a ‘probable cause’.”\textsuperscript{105} On 17 December 1997, a U.S. magistrate Judge dismissed a request by the ICTR for the surrender of Ntakirutimana, following his provisional arrest, and ordered that he be released. The Judge decided that the obligation to cooperate with the tribunal was unconstitutional and that there was no ‘probable cause’.\textsuperscript{106} A new request for the surrender of


\textsuperscript{105} J.A.F. Godinho, The Surrender Agreements between the US and the ICTY and ICTR: A Critical View, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 503. According to Kushen, one of the drafters and negotiators of the agreements, the agreements aimed at “put[ting] the Tribunals on notice and obtain Tribunal acquiescence to the need for a judicial process to take place in the US before surrender could be accomplished.” Besides, the agreements “served to frame the nature of the legislation that followed.” Where it only contains one substantive ground of refusal (finding of probable cause), it does away other traditional grounds for refusal in extradition law. See R. Kushen, The Surrender Agreements between the US and the ICTY and ICTR: The American View, in «Journal of International Criminal Justice», Vol. 1, 2003, pp. 517 – 518. According to the agreement, the request is to be supported by ‘copies of the warrant of arrest and of the indictment and by information sufficient to establish there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested. This information is required to satisfy the constitutional ‘probable cause’ standard applied in US extradition proceedings (Article 2 (3) of the Agreement). Besides, supplemental information may be requested from the tribunal, in which case the proceedings continue and the person is detained during a period necessary to afford the tribunal a reasonable opportunity to provide the additional information (Article 2 (5) of the Agreement).

\textsuperscript{106} In the Matter of Surrender of Elisaphan Ntakirutimana, 988 F. Supp. 1038, 17 December 1997, at 1040 - 1042, 1044. On the former point, the Judge held that the surrender agreement concluded with the ICTR was a congressional-executive agreement and no formal extradition treaty, as required. A formal extradition treaty is required by Section 3181 of Title 18 of the United States Code (USC). As argued by several authors, it is puzzling why the government did not refer to the UN Charter, which is the ultimate basis of the surrender request. Consider e.g. J.J. Paust, The Freeing of Ntakirutimana in the United States and ‘Extradition’ to the ICTR in «Yearbook of International Humanitarian Law», Vol. 1, 1998, p. 206 (“Given the UN Charter treaty-base, the executive agreement was not a sole executive agreement, but at least a treaty-executive agreement with all the constitutional authority in the United States as a treaty.”); G. Sluiter, To Cooperate or not to Cooperate?; The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal, in «Leiden Journal of International Law», Vol. 11, 2008, p. 390 (“the question arises why the government did not suggest the UN Charter, in which case the surrender request ultimately finds its basis”); J.A.F. Godinho, The Surrender Agreements between the US and the ICTY and ICTR: A Critical View, in «Journal of International Criminal
Ntakirutimana was subsequently presented and approved by a magistrate and then confirmed by the U.S. Court of Appeals for the Fifth Circuit. The review of the ‘probable cause’ and the possibility to refuse surrender when no evidence sufficient to establish ‘probable cause’ is found, is especially problematic in light of the absolute and unconditional cooperation requirements of the states vis-à-vis the ad hoc tribunals. It may unduly delay the surrender, which may lead to a violation of the obligation incumbent on the U.S. to provide timely cooperation.

§ Enforcing the obligation to arrest and surrender

In cases of non-compliance with a request for assistance, the ad hoc tribunals cannot directly take enforcement measures against the state concerned. In the absence of such a power, the ICTY Appeals Chamber confirmed in Blaškić that the tribunal possesses the ‘inherent power’ to make a judicial ‘finding’ concerning a state’s failure to observe the provisions of the Statute or the RPE. The Prosecutor does not hold such a power. Hence, the finding of non-compliance constitutes a judicial prerogative. In addition, the tribunal has the power to

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Justice", Vol. 1, 2003, p. 511 (the author argues that “[t]he legal basis of the obligation for UN Member States lies first and foremost in the UN Security Council resolutions where such obligation was laid down”). On the latter point, the magistrate discovered several deficiencies in the affidavits that had been submitted. These deficiencies included the lack of identification of the witnesses, other than by letter in the affidavit filed by a Belgian police officer assigned to the ICTR; the fact that no statement was included regarding the witnesses’ reliability; the lack of an indication whether the witnesses were under oath; the circumstances of the interview; the accuracy of the translations etc.

107 Elizaphan Ntakirutimana v. Janet Reno, 184 F.3d 419, 5 August 1999. The Court held that a formal treaty was not required (legislative approval by statute suffices) and that the evidence was sufficient to support the decision by the District Court that there was ‘probable cause’. For a discussion of the decision of the United States Court of Appeals for the Fifth Circuit, consider: G. SLUITER, The Surrender of Ntakirutimana Revisited, in «Leiden Journal of International Law», Vol. 13, 2000, pp. 459 – 466.


111 Compare G. SLUITER, Obtaining Cooperation from Sudan – Where is the Law?, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 874 (holding that “The Prosecutor simply lacks the required impartiality to make the determination of non-compliance, a determination that has serious consequences for the state concerned”).

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II.3.2. The International Criminal Court

The ICC’s arrest and surrender cooperation regime is far more detailed than that of the ad hoc tribunals. In general, as discussed in Chapter 2, the cooperation regime of the ICC consists of a mixture of the ‘horizontal’ and ‘vertical’ approach. Some specific traits of the regime regarding the enforcement of warrants of arrest will be discussed below. Several commentators have discussed the procedural regime regarding requests for the arrest and surrender of persons by comparing it with and distinguishing it from classic inter-state extradition law. The obligations of states in relation to arrest and surrender differ, depending on the legal basis underlying their obligations to provide assistance to the ICC. Clearly, States Parties to the ICC Statute are bound by their obligations under the ICC Statute. However, leaving voluntary cooperation aside, there are situations when states not party may also be under an obligation to cooperate with the ICC. First, the obligations of cooperation under the ICC Statute may become obligations for UN member states that are not a party to the ICC Statute when a situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter. Furthermore, cooperation obligations may

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112 Ibid., par. 33.
114 Rule 61 ICTY and ICTR RPE.
115 See infra, Chapter 7, II.6.
116 See supra, Chapter 2, VII.1.
118 The correct view is that an Article 13 (b) referral by the UN Security Council may impose cooperation on a UN member state that is no party to the ICC Statute. However, this will depend on the formulation on the decision referring a situation to the Court. See e.g. C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 353; Contra, see B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International...
follow either from the *ad hoc* acceptance of the Court’s jurisdiction pursuant to Article 12 (3) ICC Statute or from *ad hoc* agreements concluded by the Court with states not party, pursuant to Article 87 (5) (a) ICC Statute.

It follows from Article 58 (5) ICC Statute that the Court may request the arrest and surrender of the person pursuant to Part 9 of the ICC Statute only in cases where a warrant of arrest has been issued. In addition to the general cooperation obligations under Article 86 ICC Statute a duty to cooperate with the ICC in matters of arrest and surrender is provided for under Article 89 (1) ICC Statute. A request may be transmitted to any state on whose territory the person may be found.\[^{119}\] As a rule, these requests should be executed immediately.\[^{120}\]

§ Adressee

In line with what was previously discussed with regard to the *ad hoc* tribunals, the question arises whether the addressees of warrants of arrests could be states solely or could also include other entities. The statute solely refers to states. However, it follows from Article 87 (6) ICC Statute that the Court may request any intergovernmental organisation ‘for other [than providing information and documents] forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate’. However, it is unclear how the arrest of persons might work in practice.\[^{121}\] For example, Article 59 (2) ICC Statute on arrest proceedings in the custodial state refers only to

\[^{119}\] Article 89 (1) ICC Statute.

\[^{120}\] See e.g. Article 59 (1) ICC Statute: “[a] State Party which has received a request for provisional arrest or for arrest and surrender *shall immediately take steps* to arrest the person in question” (emphasis added). See also the general cooperation obligation of Article 86 ICC Statute which encompasses a duty to cooperate ‘fully’, which implies an obligation to comply promptly and without delay (see e.g. C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, pp. 1514 – 1515).

\[^{121}\] Consider S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in *The British Yearbook of International Laws*, Vol. 70, 2000, p. 244 (the author notes that it is to be regretted that the ICC Statute “did not directly contemplate the arrest of suspects by international forces”).
the competent judicial authority. It is not clear what this entails if the arrest has been effectuated by a multinational force.122

§ Duty for states and other actors to comply with requests for arrest and transfer

While no formal grounds of refusal are included in Article 89 ICC Statute, several provisions qualify the obligation States Parties have to immediately arrest and surrender the person in relation to parallel national proceedings. Among others123, the person whose surrender is sought may bring a challenge on the basis of the ne bis in idem principle before the national court. In this case, the requested state should determine whether the admissibility has been ruled on by the Court, in which case the requested state will proceed with the execution of the request.124 In cases where an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on the admissibility.125 Secondly, where the person whose surrender is sought is being prosecuted by the requested State Party or is serving a sentence for a crime different than the one for which surrender is sought, the state should grant the Court’s request but should also consult with the Court.126

122 See C.K. HALL, Article 59, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1151, fn. 20 (the author argues that “[a] degree of flexibility in the implementation of Article 59 that is consistent with the purpose of the Statute may be possible, such as bringing the person promptly before a court of the custodial State sitting in the State with jurisdiction where the person was arrested or prompt surrender to the Court, provided that the safeguards for the rights of the suspect, as envisaged in Article 59, were fully respected and kidnapping in violation of international law was prohibited”); G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 468 (noting that it is unclear what legal regime applies to arrests performed by non-state entities. He notes that problems may arise where Article 59 seems to be exhaustive and where violation of Article 59 opens the door for an enforceable right to compensation pursuant to Article 85 ICC Statute).


124 Article 89 (2) ICC Statute. Note that pursuant to Article 19 (2) (a) ICC Statute, a person against whom a warrant of arrest or a summons to appear has been issued may also contest the admissibility before the Court.

125 Article 89 (2) ICC Statute. Consequently, the arrest itself may not be postponed. Consider in that regard also the more general Article 95 ICC Statute, which allows for the execution of every request to be postponed pending the determination by the Court of an admissibility challenge pursuant to Articles 18 and 19 ICC Statute.

126 Article 89 (4) ICC Statute. While the provision is open to several interpretations, it has been advanced that it should be read as leaving no room for the refusal of the request for surrender. See C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1548 (explaining that the unfortunate formulation is attributable to the fact that the issue of the inclusion of grounds for refusal was not resolved until
In addition, Article 95 ICC Statute more generally provides for the postponement of the obligation to execute the request pending the determination of the admissibility pursuant to Articles 18 or 19 ICC Statute. However, under Article 19 (8) (c) ICC statute, the Prosecutor may seek a ruling from the Court, pending a determination by the Court, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest pursuant to Article 58 ICC statute. Furthermore, Article 94 ICC Statute allows for the postponement of the execution of a request if immediate execution would interfere with the ongoing investigation or prosecution of a case different from the one to which the request relates.

Characteristic of the ICC’s procedural regime is the duty to consult with the court in case of difficulties in the execution of requests.\(^{127}\) In turn, this feature is necessitated by the fact that, unlike that which is the case with regard to the ad hoc tribunals, the obligations to cooperate with the ICC do not prevail over obligations under other international agreements. According to Article 90 ICC Statute, whenever a state party is faced with competing requests for the extradition and surrender of the same person regarding *the same conduct*, notification of the Court and of the requesting state is required.\(^{128}\) Where the competing extradition request originates from another State Party, priority should be given to the ICC request, if the Court made\(^{129}\) or subsequently makes a determination that the case is admissible, taking into consideration the investigation and/or prosecution by that state.\(^{130}\) Where the extradition request originates from a state not party, priority must be given to the Court’s request when a

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127 See the general duty to consult under Article 97 ICC Statute, in case the state party discovers problems that may prevent or impede the execution of a request. According to Article 97 (b) ICC Statute, such problems may include, in the case of a request for surrender, ‘the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant’.

128 Article 90 (1) ICC Statute.

129 This will often not be the case. Consider in that regard the finding of the ICC Appeals Chamber that “an initial determination by the Pre-Trial Chamber that the case is admissible is not a prerequisite for the issuance of a warrant of arrest pursuant to article 58 (1) of the Statute.” See ICC, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled: “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Situation in the DRC, Case No. ICC-01/04-169, A. Ch., 13 July 2006, par. 38 – 53. See supra, Chapter 7, II.1.

130 Article 90 (2) (a) and (b) of the ICC Statute. Where a decision is pending, the requested state may proceed with the extradition request but may not extradite until a determination has been made by the Court that the case is inadmissible (Article 90 (3) ICC Statute). Where the ability and willingness of the requesting state party would lead to the inadmissibility of the case before the Court, the Court will have to determine whether the requesting state party is unwilling and unable genuinely to investigate or prosecute the case.

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determination on the case’s admissibility has been made and when the state is not under an international obligation to extradite the person to the state concerned.\textsuperscript{131} In instances the state requested is under an international obligation to extradite, the state should decide whether to extradite or whether to surrender, taking a number of relevant factors into consideration which are outlined in Article 90 (6) ICC Statute.\textsuperscript{132} Nevertheless, how far this provision is binding on the requesting state may be questioned, since it is not a party to the ICC Statute and extraditions treaties normally contain provisions on competing requests on which basis a determination can be made.\textsuperscript{133} If the extradition request and the request for surrender encompass different conduct, the Court’s request has priority if no international obligation for the extradition exists. In cases where an international obligation does exist, the requested state shall decide, based on the criteria outlined in Article 90 (7) (b) ICC Statute.

More controversial is the provision that the ICC may not proceed with a request for surrender or assistance if it requires the requested state to act inconsistently with its obligations under international law concerning state or diplomatic immunity, unless a waiver of that immunity has first been obtained.\textsuperscript{134} This provision limits the power of the Court to issue a request for surrender and imposes an obligation upon the Court “not to put a State in the position of

\textsuperscript{131} Article 90 (4) ICC Statute. This latter scenario also encompasses situations where the agreement between the requested state and the state party from which the request originates does not create an obligation to extradite under the specific circumstances of the case at hand. Where no determination as to the admissibility has been made, the state may proceed with the extradition at its own discretion. See Article 90 (5) ICC Statute.

\textsuperscript{132} These considerations include (a) the respective dates of the requests; (b) the interests of the requesting state including, where relevant, whether the crime was committed in its territory and the nationality of the victim and of the person sought and (c) the possibility of a subsequent surrender between the Court and the requesting states. A fourth consideration may be included, to know whether the requesting state is willing and able to genuinely pursue the criminal proceedings upon extradition. See e.g. W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 1006; C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1556.


\textsuperscript{134} Article 98 (1) ICC Statute. Where it may be argued that no functional immunity exists under international law for the crimes within the jurisdiction of the ICC (and that therefore, Article 27 (2) ICC Statute is declaratory of customary international law), it is open to debate whether personal immunity attaches to some of the highest state officials while in function. It is not the place here to dwell upon the extent to which such personal immunities remain valid before international criminal tribunals and the ICC in particular. However, consider the Arrest Warrant Case (Yerodia case) (ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), Judgment, 14 February 2000, ICJ Reports 2000, par. 61) and the dictum that an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (the Court refers to the ICTY, the ICTR and the ICC (the Court explicitly refers to Article 27 (2) ICC Statute)). Consider also, SCSL, Decision on Immunity from Jurisdiction, Prosecutor v. Taylor, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, par. 51 (the Appeals Chamber explains the distinction drawn by the ICJ between national courts and international courts by referring to the non-applicability of the principle of sovereign equality).
having to violate its international obligations with respect of immunities.”

Rather than including a ground for refusal to execute the request for surrender, it prohibits the Court from formulating such a request in the instances given and, as such, requires a state to contest a request when a situation under Article 98 ICC Statute arises. The determination thereof is left with the ICC and it is up to the Court to apply to third states for a waiver before it pursues the request. There is some controversy relating to the exact scope of this provision, more

135 C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1606; Similarly, consider D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, p. 421; S. WILLIAMS and L. SHERIF, The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, in «Journal of Conflict & Security Law», Vol. 14, 2009, p. 86; G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, p. 107. Where Article 98 (1) ICC Statute refers to the ‘State or diplomatic immunity of a person or property of a third State’, it has been argued that ‘third state’ should be understood to refer to a state not party. Consider, P. GAETA, Does President Al Bashir Enjoy Immunity from Arrest?, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 328. This interpretation seems logical: where the third state would be a State Party, Article 27 (2) ICC Statute applies, implying that immunities do not bar the exercise of the jurisdiction of the Court and the issuance of an arrest warrant against an individual enjoying personal immunities. Suggesting that Article 98 (1) ICC statute would include States Parties would remove the effet utile of Article 27 (2) ICC Statute. Moreover, such interpretation is in line with Article 2 (1) (h) of the Vienna Convention on the Law of Treaties, which defines ‘third state’ as a ‘a State not party to the Statute’. For a confirming view, consider also D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, pp. 423 – 424 (arguing that “an interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished.” Besides, he argues that such interpretation would nullify the removal of immunity from the Court’s jurisdiction embodied in Article 27 ICC Statute); W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 1041 (“if a ‘vertical’ approach to state cooperation is adopted, there may be no good reason why a State Party other than the requested State should be in a position to invoke any immunity to which it may be entitled vis-à-vis the requested State”); S. PAPILLON, Has the United Nations Security Council Implicitly Removed Al Bashir’s Immunity?, in «International Criminal Law Review», Vol. 10, 2010, pp. 283 – 284; S. WILLIAMS and L. SHERIF, The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, in «Journal of Conflict & Security Law», Vol. 14, 2009, p. 86. Other authors have argued that ‘third state’ refers to states other than the requested state. Consider e.g. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1606 (the authors argue that “it was widely felt during the negotiations [that] this inviolability could place an obstacle on the execution of a request for surrender, both vis-à-vis a State Party or a non-State Party”). In the end, these authors conclude that “[b]y accepting the Statute, and more in particular, article 27, States Parties have waived any possible immunity under international law for the purpose of proceedings before the Court, the different interpretation of the term ‘third state’ has no consequences on a practical level (ibid., p. 1607).

136 According to Rule 195 (1) ICC RPE, where the requested state notifies the Court that a request for surrender or assistance raises problems of execution in respect of Article 98, the requested state should provide the Court with any information that may assist the Court in the application of Article 98 ICC Statute. Similarly, any concerned third state or sending state may provide additional information to assist the Court. Consider in that regard D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, p. 431 (where the author notes the absence of any procedure the Court should follow in making a determination under Article 98. The author notes that “on a matter of such importance, it can only be assumed that the state concerned is entitled to a decision by the pretrial chamber.” “Although this issue is not specifically covered in the list of functions of the pretrial chamber in Article 57 of the Statute, Rule 195 arguably grants procedural rights to concerned third states or sending states in any hearings
precisely regarding the applicability of Article 98 (1) ICC Statute to officials of States Parties. Unfortunately, Pre-Trial Chamber I in the Al Bashir case did not elaborate on the applicability of Article 98 (1) ICC Statute when it issued a request for the arrest and surrender of Al Bashir to States Parties and Security Council members.

A similar limitation to the issuance of requests for surrender is provided by Article 98 (2) ICC Statute, which states that the Court should respect international agreements requiring the consent of the sending states (including, but not limited to, Status of Forces Agreements (‘SOFA’s’)) and should not proceed with a request for surrender or assistance unless the sending state consents thereto. Similar to Article 98 (1) ICC Statute, the rationale underlying this provision is to avoid situations of conflicting obligations. Again, divergent

before the pretrial chamber.” Leaving the decision to the Court implies that any error made in the determination by the Court leads to the criminal responsibility of the requested state. Whereas the person arrested may challenge the legality of the request for surrender in the custodial state (pursuant to Article 59 (2) ICC Statute), the author argues that disagreements as to the existence of an obligation to surrender a person to the court fall within the ambit of Article 119 ICC Statute, according to which disputes regarding the judicial functions of the Court should be settled by the decision of the Court).

The standard view is that it follows from Article 27 ICC Statute and the waiver included therein, that Article 98 (1) ICC Statute is not applicable to state officials of States Parties. Through Article 27 ICC Statute, States Parties have already waived their obligations under international law concerning immunities as far as proceedings before the Court are concerned and with regard to other States Parties. The mainstream view is that Article 27 (2) ICC Statute does not only remove immunities vis-à-vis the ICC but also removes the applicability of immunities vis-à-vis national authorities of States Parties undertaking action in response to a request by the Court. Consider e.g. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1607 (the authors argue that in theory a distinction can be drawn between Article 27 (2) ICC Statute and Article 98 (1) ICC Statute as the latter provision deals with requests issued to states for surrender, which implies an exercise of that state’s criminal jurisdiction while the former provision refers to the exercise of the Court’s jurisdiction. However, such distinction denies the verticality in the relationship between the Court and national states and “fails to capture the substantial difference between the State arrest in a purely national or a traditional inter-State setting and in the context of direct enforcement of international criminal law stricto sensu” (ibid., p. 1607)). For a similar view, see D. AKANDE, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 337 – 339 (“the better view is that Article 27 removes immunities, even with respect to actions taken by national authorities, where those authorities are acting in response to a request by the Court.” “[R]eading Article 27 as applying only to actions by the court render parts of that provision practically meaningless.”); D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, pp. 420 – 426.

Consider in that regard D. AKANDE, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 337 (calling such “a regrettable and amazing oversight by the Chamber” and that “[a] reader of the decision would think that the PTC was unaware that Article 98 appears to apply in precisely this sort of case”).

Article 98 (2) ICC Statute; Rule 195 (2) ICC RPE.

views exist regarding the question of whether the provision only applies to the nationals of states not party.\textsuperscript{142}

§ Rule of specialty

Surprisingly, a rule of specialty has been included in the ICC Statute implying that a person who is surrendered to the Court may only be prosecuted, punished or detained for conduct prior to the surrender which forms the basis of the crimes for which he or she was surrendered.\textsuperscript{143} Rather than being a ground for refusing the surrender of a person, this rule limits the consequences thereof.\textsuperscript{144} A waiver of this rule may be requested from the state that surrendered the person.\textsuperscript{145} In turn, States Parties have the authority (read: are not obliged) to provide this waiver. This requirement stems from traditional extradition law.\textsuperscript{146} This requirement is absent from the procedural scheme of the \textit{ad hoc} tribunals.\textsuperscript{147} The placement of

\textsuperscript{142} Consider \textit{e.g.} AKANDE, who notes (\textit{ibid.}, p. 428) that while Article 98 (2) ICC Statute does not expressly exclude States Parties, they should be excluded from the provision. He argues, \textit{inter alia}, that given the substantial overlap between Article 98 (1) and (2) these provisions should be given a similar interpretation. Consequently, 98 (2) ICC Statute could be used to circumvent Article 98 (1). For a confirming view, see W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 1045. For another view, see C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1915 (arguing that “[w]hile such a view would certainly yield results conducive to effective cooperation it must be recognized that the wording of paragraph 2 is not so confined”). However, at the same time, they reason that where the sending state is a State Party and is not exercising jurisdiction itself, it is bound to give its consent to a request for surrender. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1619.

\textsuperscript{143} Article 101 (1) ICC Statute.


\textsuperscript{145} Article 101 (2) ICC Statute.


\textsuperscript{147} Consider in this regard: ICTY, Decision Stating Reasons for the Appeals Chamber’s Order of 29 May 1998, \textit{Prosecutor v. Kovačević}, Case No. IT-97-24-AR73, A. Ch., 2 July 1998, par. 37 (“In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal”). This does not come as a surprise given that the states cannot refuse to arrest and surrender a person. See \textit{supra}, Chapter 7, II.4.1.
this rule in the ICC Statute, characterised by a quasi-absolute obligation for states to surrender persons may surprise given that it is linked to the principle of state sovereignty. Scholarly writings favour the deletion of this provision because it does not serve any purpose. The provision may have been drafted with ad hoc cooperation agreements or ad hoc acceptance of jurisdiction in mind. But then, this rule of speciality should, preferably, have been incorporated into the agreement. The person who has been surrendered to the Court should be provided the possibility to present their views on this issue.

§ Requests for arrest and surrender

Article 91 of the ICC Statute outlines the procedural requirements regarding the content of requests for arrest and surrender. The request should normally be made in writing. It should be accompanied by a translation of the arrest warrant and by a translation of the relevant provisions of the Statute, in a language that the person ‘fully understands and speaks’. The request should contain sufficient information allowing the identification of the person sought as well as information on the person’s probable location. Moreover, a copy of the warrant of arrest as well as ‘documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested state’ should be included. This latter requirement deserves our special consideration. The ICC Statute demands that requirements

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149 Ibid., p. 1637 (arguing that where the jurisdiction of the Court is strictly limited, there is no real possibility for the surrendered person to be ‘cheated’ by a sudden extension of the charges); B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1700 (the author concludes that the requirement does not serve any useful purpose. First, the rule of speciality does not prohibit conviction for a lesser crime where such is based on the same set of facts. Besides, where the States Parties have an unconditional obligation to surrender a person to the Court, the rule of speciality cannot be applied where the state would have been obliged to surrender the person for an additional crime). One exception in this regard is KNOOPS, who argues that where “the rule of speciality constitutes one of the main principles of international extradition law, and has attained customary international law status, this rule may be regarded as normative for surrender proceedings initiated by international courts.” However, the author does not clarify what role such principle which stems from traditional extradition law plays in surrender proceedings. See G.-J.A. KNOOPS, Surrendering to the International Criminal Court: Contemporary Practice and Procedures, Ardsley, Transnational Publishers, 2005, p. 175.
152 Rule 196 ICC RPE
153 Article 91 (1) ICC Statute.
154 Rule 187 ICC RPE juxta Rule 117 (1) ICC RPE (consider also Article 67 (1) (a) ICC Statute).
155 Article 91 (2) (a) ICC Statute.
156 Article 91 (2) (b) and (c) of the ICC Statute.
are not more burdensome than the requirements applicable to extradition requests pursuant to treaties and arrangements between the state concerned and other states. 157 Preferably, they should be less burdensome by taking the distinct nature of the ICC into consideration. This provision, in particular, seems to be incorporated to meet requirements characteristics for common law criminal justice systems. As explained above, common law criminal justice systems under domestic law often require supporting evidence to satisfy requests for extradition. 158 This requirement may imply that on some occasions, evidence additional to what is required pursuant to Article 58 ICC Statute is required for before addressing a request to the state concerned. In case no sufficient information is adduced, the person should be released. 159

§ Enforcing the obligation to arrest and surrender

In cases of failure of a State Party to honour a request for the arrest and surrender of a person, the Court may make a finding to that extent and refer the matter to the Assembly of States Parties, or where the Security Council referred the situation to the Court, to the Security Council. 160 The same regime applies if a state not party fails to honour a request for arrest and surrender.

157 Article 91 (2) (c) ICC Statute.
158 See SWART, noting that this provision is a compromise between different legal traditions regarding extradition proceedings. See B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1690 (the author notes that “the basic compromise of Article 91 ICC Statute consists of respecting these differences in approach and allowing every State to stick to its own preferences.” While the author understands the advantage of such requirement where “a safeguard consisting of the production of evidence should not be disregarded”, he is equally sensitive to the argument that “it offers an opportunity for States unwilling to cooperate with an international court to delay compliance with that court’s requests or to sabotage them.”) See the discussion above on the U.S. surrender agreements with the ad hoc tribunals, supra, Chapter 7, II.3.1.
159 This is so even if Article 59 (4) ICC Statute prevents the competent judicial authority from assessing the legality of the original arrest warrant. This provision does not prevent the requested state from raising the lack of sufficient information as an obstacle to the execution of the request for surrender. See G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 470. Whereas SLUITER suggests inserting an additional provision in Article 59, giving additional time to the executive branch to request additional information from the ICC, it is not clear whether this would require the issuance of a new arrest warrant by the Court (including newly adduced evidence), as seems to be suggested by the author. At stake is the information, statements and documents that accompany the request for arrest and surrender, not the legality of the original warrant of arrest.
160 Article 87 (7) ICC Statute juceto Regulation 109 of the Regulations of the Court; Article 112 (2) (f) ICC Statute. Consider also G. SLUITER, Obtaining Cooperation from Sudan – Where is the Law?, in Journal of International Criminal Justice, Vol. 6, 2008, p. 875 (who points out that the ‘competent Chamber’ may be the same Chamber which issued the request for cooperation, in which case this provision would violate the nemo iudex in sua causa principle. Hence the author suggests “to build in a mechanism of review by a Chamber that is not directly involved and can review any finding with the required critical distance”). Consider e.g. ICC, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with
and surrender of a person, in case of an Article 12 (3) declaration.\footnote{161} Where a state not party which entered into an \textit{ad hoc} arrangement or agreement with the Court fails to honour a request for the arrest and surrender of a person, the Court may inform the Assembly of States Parties or the Security Council (in case the Security Council referred the situation) of this failure to comply.\footnote{162} The same regime applies in case of a state not party whose cooperation obligations follow from a Security Council resolution under Chapter VII of the UN Charter.\footnote{163}

\section*{II.4. Execution of the arrest warrant}

\subsection*{II.4.1. The \textit{ad hoc} tribunals and the SCSL}

The signed warrant of arrest, accompanied by the indictment and a statement of the rights of the accused, will be transmitted to the state concerned.\footnote{164} The latter document should be translated in a language which is understood by the accused.\footnote{165} When these documents are served to the accused, the documents should be read in a language which is understood by him or her. Furthermore, he or she should be cautioned in that language of his or her right to

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\footnote{161}{See Article 12 (3) ICC Statute: ‘The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9’.


163}{C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1524 (the authors note that the reference in Article 87 (5) (b) ICC Statute to ‘an \textit{ad hoc} arrangement or agreement with the Court’ can only be exemplary and that binding obligations may also follow from a Security Council Resolution).

164}{Rule 55 (B) ICTR RPE; Rule 55 (C) ICTY RPE; or to the relevant authorities of the State of Sierra Leone in the case of the SCSL (Rule 55 (B) SCSL RPE). Note that no other information, including supporting evidentiary material will be transmitted to the state concerned. As noted by SWART, the absence of evidentiary material accompanying the request is more unusual to common law criminal justice systems where traditional extradition laws would require sufficient evidence for a person’s arrest and his committal for trial. See B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1667.

165}{Rule 55 (B) (iii) ICTR RPE; Rule 55 (C) ICTY RPE. Note that the ICTY Rule only requires that such translation is provided where the accused does not understand either of the official languages of the court and as far as the language understood by the accused is known to the registrar. The accused is not entitled to a copy of the warrant for his arrest in his or her own language. See ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, \textit{Prosecutor v. Mrkšić et al.}, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 56.}
remain silent and that any statement he or she provides will be recorded and may be used in
evidence.\textsuperscript{166} A member of the OTP can be present at the moment of the execution of the arrest
warrant.\textsuperscript{167} If this member is present, he or she has the authority to inform the accused of his
rights and the nature of the charges.\textsuperscript{168} However, this participatory right during the
apprehension of the accused should be distinguished from the Prosecutor’s power to execute
the arrest him or herself directly.\textsuperscript{169} While Rule 59\textsuperscript{bis} (A) ICTY RPE allows for the
transmission of a copy of the arrest warrant to the Prosecutor, this provision cannot be
interpreted as allowing the Prosecutor to execute the arrest warrant on the territory of a state
directly.\textsuperscript{170}

Rule 55 (E) ICTY and 55 (C) ICTR and SCSL RPE oblige the Registrar to ‘instruct’ the
national authorities to serve the aforementioned documents on the accused. More interesting
is the question of what the consequences are for the proceedings when these documents have
not been properly served. The stated provisions do not provide for remedies in case of
breaches of these obligations. In the \textit{Ntagerura} case, the Defence alleged that the indictment,
the warrant of arrest, and the statement of the rights of the accused were not properly served

\textsuperscript{166} Rule 55 (E) ICTY RPE; compare Rule 55 (C) (iii) ICTR and SCSL RPE. According to Rule 55 (F) ICTY
RPE, the documents should not be read to the accused where he or she has been served with the indictment and
the statement of the rights of the accused in a language the accused understands or is able to read. On the right of
the accused to remain silent, see \textit{supra}, Chapter 4, IV.2.1.

\textsuperscript{167} Rule 55 (D) ICTR and SCSL RPE and Rule 55 (G) ICTY RPE.

\textsuperscript{168} ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, \textit{Prosecutor v. Mrkići et al.},
Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 51; ICTR, Decision on Musabyimana’s Motion on the
Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, \textit{Prosecutor v. Musabyimana},

\textsuperscript{169} ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of
the tribunal must turn to states in order to effectuate the arrests and to have them surrendered); ICTY, Decision
on the Prosecutor’s Request for Leave to Amend the Indictment and Issue of Warrant of Arrest and Order for
Surrender, \textit{Prosecutor v. Krstić}, Case No. IT-95-4-A, Confirming Judge, 19 July 2001, p. 3 (“the search for
and arrest transfer of an accused to the Tribunal do not form part of the functions assigned to the Prosecutor
under Article 16 of the Statute of the Statute of the Tribunal, and […] Rule 55 (G) of the Rules provides that
‘when an arrest warrant issued by the Tribunal is executed by the authorities of a State or an appropriate
authority or international body, a member of the Office of the Prosecutor may be present as from the time of the
arrest’”). Consider also M. P. Scharf, \textit{The Prosecutor v. Slavko Đokmanović: Irregular Rendition and the
Chamber’s judgment in Blažkić implies that the OTP may not act unilaterally, but that “it does not prevent them
from participating in operations as an adjunct to the United Nations or NATO”) and H-R. Zhou, \textit{The
Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC}, in \textit{Journal of International
Criminal Justice}, Vol. 4, 2006, p. 203 (noting that the OTP “should retain a strong participatory role in the
apprehension of individuals indicted by the ICTY”).

\textsuperscript{170} See the argumentation provided \textit{supra}, Chapter 7, II.3.1., fn. 84.
on Ntagerura. The Trial Chamber determined that in the absence of any information, it was unable to verify whether or not the relevant instruments were served on the accused. Nevertheless, the Trial Chamber reasoned that this possible lack of service was remedied as soon as was possible upon his transfer to the detention faculties in Arusha. Hence, the rights of the accused were respected as far as possible. This reasoning fails to acknowledge that serving these documents on the accused is not but a procedural error. This requirement aims at safeguarding the rights of the accused, including the right to be informed of the reasons for his or her arrest and the right to be afforded sufficient time and facilities to prepare a defence. Regarding the former right, it should be noted that the warrant of arrest was confirmed on 10 August 1996 and that a request to serve these documents was sent to the authorities in Cameroon 12 August 1996. It would not be until 23 January 1997, or more than five months later that Ntagerura would be transferred to Arusha and that the documents would be served on him.

Upon his or her arrest, the accused should be detained by the authorities concerned who will promptly notify the Registrar. Three different parties are involved in the transfer of the accused, namely the Registrar, the state authorities concerned, and the host state. It is important to note that the RPE do not impose any time limitations on the length of the transfer proceedings. However, Rule 55 (A) ICTY RPE includes the additional requirement that the warrant of arrest includes an order for the prompt transfer of the accused to the tribunal upon the accused’s arrest.

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171 ICTR, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, Prosecutor v. Ntagerura, Case No. ICTR-96-10-I, T. Ch. II, 28 November 1997, par. 33.
172 Arguably, in the absence of any information, the Trial Chamber could have concluded that the non-compliance with Rule 55 (B) was not unequivocally shown. See G.-J.A. KNOOPS, Surrendering to the International Criminal Court: Contemporary Practice and Procedures, Ardsley, Transnational Publishers, 2005, pp. 178 – 179.
173 ICTR, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, Prosecutor v. Ntagerura, Case No. ICTR-96-10-I, T. Ch. II, 28 November 1997, par. 35.
174 Ibid., p. 2.
175 Rule 57 ICTY, ICTR and SCSL RPE. No discretion is left to the national authorities to rule on provisional release.
176 Rule 55 (A) ICTY RPE as amended at the fourteenth plenary session on 20 October and 12 November 1997 (IT/32/Rev. 12).
II.4.2. The International Criminal Court

The execution of requests for the arrest and surrender by the custodial state is governed by Article 89 (1) and 59 ICC Statute. First, where Article 89 (1) ICC Statute refers to a duty to cooperate ‘in accordance with the provisions of this Part [9] and the procedure under national law’, it implies that the state can choose how to implement a request for the arrest and surrender, as long as the surrender is obtained. Secondly, and linked to that, is that the reference to Part 9 entails that Article 88 applies which requires that States Parties ensure that the procedures necessary for the arrest and surrender are foreseen under its domestic laws. Furthermore, Article 86 ICC Statute equally applies, which requires that the national law enables the state to ‘cooperate fully’ with the Court. Consequently, the procedure under national law, referred to in Articles 89 and 59, should already have been amended to enable full cooperation. Thirdly, the discretion which is at the requested state’s disposal is substantially limited by Article 59 ICC Statute, which encompasses several obligations regarding the implementation of the request for arrest and surrender.

In contrast with the ad hoc tribunals, Article 59 sets out some rights the individual is entitled to in the course of arrest proceedings in the custodial state. A (habeas corpus) right for the person arrested to be promptly brought before the competent judicial authority is provided for. This authority should determine, in accordance with municipal law (i) that the arrest warrant applies to that person, (ii) that the person has been arrested in accordance with the proper process, and (iii) that the person’s rights have been respected. The provision does not apply to the period of time before the receipt of the request for arrest and surrender by the custodial state. Different aspects of this provision are unclear. Differing views exist as to the
scope of the ‘person’s rights’. To date, the Court’s jurisprudence has not elucidated its content further. Evidently, the rights the person is entitled to under national law as well as rights that follow from human rights treaties to which the requested state has acceded should be included.\(^{182}\) It has been noted by SLUITER that leaving the scope of ‘the person’s rights’ entirely to be determined by national law is dangerous: “if the attribution and interpretation of rights are a matter of national law only, the provision would lose much of its protective force, for the very simple reason that the degree of protection, and rights offered may vary considerably among States.”\(^{183}\) At the very least, the rights under Article 55 should be included.\(^{184}\) Such interpretation is not precluded by the wording of Article 55 (‘In respect of an investigation under this Statute’), nor by the holding of Pre-Trial Chamber I that Article 55 (1) does not apply to an investigation conducted by an entity other than the Prosecutor and which is not related to proceedings before the Court.\(^{185}\) At issue here is the execution of the arrest proceedings at the request of the Court. Moreover, ‘the person’s rights’ should be interpreted as also encompassing the arrested person’s internationally protected rights.\(^{186}\)

Furthermore, it is unclear what ‘proper process’ in the sense of 59 (2) (b) ICC Statute entails exactly. In the absence of any definition, it is left to the States Parties or to the competent judicial authority to define these terms. From a study of the acts of States Parties implementing the ICC Statute, it follows that some states entertain the view that the term refers to the national procedural law applicable to the arrest of a person, while other states hold the view that the term refers to the lawfulness of the domestic arrest warrant executing

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\(^{182}\) Such follows from the reference to ‘in accordance with the law of that State’ in the chapeau of Article 59 (2) of the Statute. Indeed, this reference has been interpreted by Pre-Trial Chamber I as referring to ‘national law’. See ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6.


\(^{184}\) However, as far as the determination of the ‘right not to be subjected to arbitrary arrest or detention and not to be deprived of his liberty except on such grounds, and in accordance with such procedures as are established in the Statute’ (Article 55 (1) (d) ICC Statute) is concerned, it should be noted that it is, for the biggest part, within the competence of the Pre-Trial Chamber and not within the competence of the competent national judicial authority. See B. SWART, Arrest Proceedings in the Custodial State, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, pp. 1253 – 1254.


\(^{186}\) G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 474 (the author argues that whereas the chapeau of Article 59 (2) contains the words ‘in accordance with national law’, this should only refer to the national procedural steps). Consider also C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 709.
the arrest warrant issued by the ICC. Still other states leave the interpretation to the national judge. At the very least, it implies that the arrest is executed in compliance with national law, including the human rights obligations which follow from treaties to which that state is a party. However, it is regretful that the practice of the ICC refers only to ‘national law’, without any mention of human rights obligations. Missing to the same extent again is any reference to Article 55 ICC Statute, including the right not to be subjected to arbitrary arrest or detention (Article 55 (1) (d) ICC Statute).

Importantly, according to Article 59 (4) ICC Statute, it is not open to the competent authority to challenge the legality of the warrant of arrest. The person may challenge the legality of the arrest before the Pre-Trial Chamber and request the appointment of counsel to assist with proceedings before the Court. The Court should further ensure that as soon as the person is arrested by the requested state, he or she will receive a copy of the arrest warrant and of the

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188 Compare e.g. B. SWART, Arrest Proceedings in the Custodial State, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1252 (arguing that the expression primarily refers to the national law of the requested state, including its obligations under human rights conventions) with C.K. HALL, Article 59, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1152 (arguing that the term means “that the warrant be duly served on the person arrested and the process be consistent with international law and standards”).
189 Consider e.g. ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 41 (referring to “the process envisaged by Congolese law”). Nevertheless, it may be argued that the reference to national law may be interpreted as encompassing the obligations that follow from international human rights treaties, which that state is bound to apply. Critical is SLUITER, arguing that the Court should at least state whether the Congolese law was consistent with at least the rights set out in treaties to which Congo is a party. See G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHL and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 473.
190 It seems to follow from the wording of Article 59 (4) ICC Statute that this provision does not apply to the proceedings under Article 59 (2) ICC Statute. First, the provision starts with the sentence "[i]n reaching a decision on any such application", which refers to applications on interim release (Article 59 (3) ICC Statute). Secondly, whereas Article 59 (2) speaks of the competent judicial authority, Article 59 (4) refers to the competent authority. However, these arguments can be rebutted. First, the category of ‘competent authority’ may be interpreted as including the competent judicial authority referred to in Article 59 (2) ICC Statute. Secondly, it follows from the wording of Rule 117 (3) ICC RPE that the general competence to hear challenges to the legality of the arrest warrant lies with the Pre-Trial Chamber.
191 Rule 117 (2) and (3) ICC RPE. Apparently, these provisions do not include the assistance of counsel before the competent national authority. This is unfortunate where the assistance of counsel may not always be provided for. For a similar view, see W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 720.
relevant parts of the statute. This should be done in a language the person fully understands and speaks.¹⁹²

Furthermore, a right for the person to apply to the competent authority for provisional release pending surrender is provided for. This right will be discussed in detail in the subsequent chapter.¹⁹³ More important is what is not included in Article 59 ICC Statute. Absent are remedies in cases of violations of the rights of the person in the course of the arrest or during the detention in the custodial state. These violations should be distinguished from the non-compliance of States Parties with their cooperation obligations under Part 9, to which the remedies imbedded in Article 87 (5) (b) and (7) and 112 (2) (f) ICC Statute apply.¹⁹⁴ The absence of remedies in the context of proceedings at the national level coupled with the availability of remedies at the international level (Article 85) has been interpreted as reflecting the intention that the Court act as the final arbiter.¹⁹⁵ It seems impossible for the competent legal authority to impose a remedy if that prevents the execution of the request, without prior consultation with the Court.¹⁹⁶ Furthermore, when the national court determines that the proper process has not been respected, the person may have an enforceable right to compensation as a ‘victim of unlawful arrest or detention’.¹⁹⁷ In extreme cases, the state may refuse the surrender of the person, if the rights of the person have been breached.¹⁹⁸ Arguably, some risks are inherent to a cooperation regime which leaves flexibility to the requested state

¹⁹² Rule 117 (1) ICC RPE.
¹⁹³ See infra Chapter 8, II.3.
¹⁹⁴ Consider also Rule 109 of the Court Regulations.
¹⁹⁷ Article 85 (1) ICC Statute.
¹⁹⁸ See e.g. W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 719 (arguing that in case of violation of the person’s rights, the state should weigh its requirements pursuant to Article 59 and 89 ICC Statute alongside other obligations it has pursuant to international human rights norms. In the absence of any hierarchy between these obligations, there is no reason why the state’s obligations under the Statute should prevail. In this regard, SLUITER notes that, pursuant to Article 59, the competent national authority cannot order final release with prejudice to the Prosecutor, if such would be warranted; nonetheless, egregious violations could be a reason for the executive branch to refuse cooperation. See G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 469. Contra: C.K. HALL, Article 59, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1152 (holding that “neither the determination by the judicial authority that the suspect’s rights were violated nor the remedies it adopted could prevent surrender to the Court”); M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 458 (“the national judge should not be competent to decline jurisdiction or stay proceedings at this point”).

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to determine the remedy in case violations occur.\textsuperscript{199} Overall, it seems that requested states could only refuse surrender exceptionally, since the Court “is seemingly best positioned to consider all the different elements playing a role in the process of an arrest and surrender.”\textsuperscript{200}

\section*{§ The supervisory role of the Court over Article 59 (2) ICC Statute}

The follow-up question then is to examine the role the Court can play in relation to the proceedings in the custodial state. It has been previously shown that the role of the Pre-Trial Chamber under Article 59 ICC Statute and Rule 117 ICC RPE prior to the transfer of the person is limited to challenges regarding the legality of the arrest and the appointment of counsel for proceedings before the Court. The importance of these responsibilities lies in the fact that it evidences that the role of the Pre-Trial Chamber in safeguarding the rights of suspects and accused persons also extends to pre-transfer proceedings.\textsuperscript{201} More controversial is the role that the Pre-trial Chamber should play following the transfer of the suspect (or accused) to the Court in relation to the detention in the custodial state.

Even where the statutory provisions are silent on the question of whether any supervisory role is incumbent on the Pre-Trial Chamber, the litigation practice of the Court offers clarification. Notably, in Lubanga, the Defence argued on appeal that the Pre-Trial Chamber had ignored or paid inadequate attention to the supervisory role of the Pre-Trial Chamber under Article 59 (2) of the Statute. More precisely, the Defence argued that “the Pre-Trial Chamber is charged under this article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest.”\textsuperscript{202}

\textsuperscript{199} One may think of referrals of situations by the UN Security Council to the ICC pursuant to Article 12 (3) through what mechanism states not party may be forced to cooperate with the court (other scenarios are possible). Consider G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 468 (warning that Article 59 ICC Statute may turn out to be a Trojan horse).

\textsuperscript{200} C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 727.

\textsuperscript{201} In that regard, the Appeals Chamber in the case of Katanga and Ngudjolo Chui held that “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.” See ICC, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for German Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, \textit{Situation in the DRC, Prosecutor v. Katanga and Ngudjolo Chui}, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.

\textsuperscript{202} ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, \textit{Prosecutor v. Lubanga Dyilo, Situation in the DRC}, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 41; ICC, Decision on the “Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court
The Appeals Chamber clarified that the Court does not sit as a court of appeal on the decision of the national competent authority. Its power to review questions of substance and procedure before national courts is limited. Rather, its task is to see that the national law was followed and that the rights of the person arrested were respected. As argued by the Pre-Trial Chamber, “it is for the national jurisdictions to have primary jurisdiction for interpreting and applying national law.” However, Pre-Trial Chamber I held that “this does not prevent to retain a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which […] are referred directly back to that national law by the Statute.” Similarly, in Bemba, Pre-Trial Chamber III held that questions of substance and procedure before national authorities should primarily be raised and pursued before the national authorities as they are better placed than international jurisdictions to deal with such issues and may provide for a proper remedy. The Chamber relied upon the approach taken by the ECtHR that:

“it is, not normally the Court’s task to review the observance of domestic law by national authorities […] it is otherwise in relation to matters where […] the Convention refers directly back to that law; for in such matters, disregard of the domestic law entails breach of the
Convention, with the consequence that the Court can and should exercise a certain power of review.\textsuperscript{209}

Furthermore, as far as the interpretation of domestic laws goes, the ECtHR held that:

“\textit{It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law […] The Court’s role is confined to ascertain whether the effects of such an interpretation are compatible with the Convention.}\textsuperscript{210}

Consequently, a distinction should be drawn. On the one hand it is clear that the Pre-Trial Chamber, in the absence of an explicit provision, determined that it has the authority to review Article 59 (2) proceedings. This ‘procedural review’ is limited to the assessment of whether the procedural rights of the person pursuant to Article 59 (2) (a) – (c) were respected (\textit{e.g.} the person was not promptly brought before the competent judicial authority) and limited to the international procedure.\textsuperscript{211} Consequently, this review would not encompass a review of the efficiency of the domestic procedure.

The Court seems more careful in its consideration and interpretation of the procedure and substance of domestic law. This review is primarily left with the national authorities. Nevertheless, the Court recognised that, since the international and national proceedings are entangled and to the extent that the respect of the procedural rights under Article 59 (2) ICC Statute depends on the national proceedings, it cannot disregard national law entirely. Regrettably, what is unclear from the Court’s reasoning is whether the Court should assess the domestic proceedings in light of Article 21 (3) and Article 55 (1) ICC Statute.

\textsuperscript{209} ECtHR, \textit{Winterwerp v. Netherlands}, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 46.


\textsuperscript{211} EL ZEIDY argues that the review powers of the Court follow from the fact that notwithstanding the principle of complementarity, at the Article 59 stage, the state acts on behalf of the ICC. Consider M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in \textit{Journal of International Criminal Justice}, Vol. 4, 2006, p. 458. This argument seems to be based on the view that the issuance of an arrest warrant necessarily encompasses an assessment of the admissibility of the case. However, consider in this regard ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrests, Article 58”, \textit{Situation in the DRC}, Situation No. 01/04-169, A. Ch., 13 July 2006.
There is an inherent tension in the way the Court views its role with regard to proceedings in the custodial state. It is difficult to reconcile the Court’s self-proclaimed ‘primary’ role which it should play at the pre-trial stage in safeguarding the rights of suspects and of accused persons with the hesitant role it plays in reviewing proceedings in the custodial state. The reference made to the role played by the ECtHR vis-à-vis national authorities illustrates this point perfectly. Central to the ECtHR’s functioning is the organisational ‘principle of subsidiarity’. However, the role played by the ECtHR cannot easily be compared with the role played by the ICC which is the Court which finally adjudicates the matter and which encompasses proceedings which are characterised by their fragmentation over several jurisdictions. If the Pre-Trial Chamber is serious about its primary function in protecting the rights of the suspects and accused at the pre-trial stage, it should show a willingness to review all pre-trial violations and to remedy every violation.

Furthermore, the obligation incumbent on the competent national authorities to assess whether the proper process has been respected does not extend to the arrest and detention before the cooperation request by the Court which are not linked to the proceedings before the Court.212 In addition, the Appeals Chamber confirmed that violations occurring prior to the sending of the cooperation request will only be considered by the ICC once a ‘concerted action’ between the Court and the DRC has been established.213 The Court is not responsible for detention in the custodial state which was not at the behest of the tribunal. However, in addition, the Court may stay the proceedings when violations make a fair trial impossible.214 Similarly, in the Katanga and Ngudjolo Chui case, Pre-Trial Chamber I held that Article 59 (2) “is only applicable to those proceedings that take place after the transmission by the Registrar of the relevant cooperation request for arrest and surrender” and, accordingly that “any alleged prior violations of international human rights standards vis-à-vis a suspect […] that according to the Defence, may prevent this Court from exercising jurisdiction over him, 213 ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6 (holding that the detention prior to 14 March 2006 was solely related to national proceedings in the DRC). 214. Ibid., p. 9; ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42. See the detailed discussion, infra, Chapter 7, VII, 2.
must be raised as a challenge to jurisdiction pursuant to article 19 of the Statute.”215 In Gbagbo, Pre-Trial Chamber I, somewhat differently, held that Article 59 does not apply “to the period of time before the receipt of the custodial State of the request for arrest and surrender, even where the person may already have been in the custody of that State, and regardless of the grounds for any such prior detention.”216 This differs from the Appeals Chamber’s holding that the sending, rather than the receipt of the arrest and surrender request marks the start of the proceedings under Article 59. However, further on, the Pre-Trial Chamber notes that the transmission of the request for arrest and surrender triggers the obligations under Article 59 ICC Statute, further adding to the confusion.217

In the aforementioned Lubanga case, the Defence’s principal claim was that the Pre-Trial Chamber ignored human rights breaches before his appearance and “before the directions for the enforcement of the warrant of arrest.” The Appeals Chamber held that there was no evidence to lend credence to the allegations of the appellant where the information provided did not reveal that the process of bringing the person to justice was flawed in any way. “Mere knowledge on the part of the Prosecutor of the investigations conducted by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for this purpose”.218 Consequently, no ‘concerted action’ could be established.

The limited role the Pre-Trial Chamber assigned itself in addressing pre-transfer violations of the rights of the suspect has been criticised.219 Indeed, only the Court seems to be in the

215 See the reference to a confidential decision in ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 44 (as cited with approval by Trial Chamber II).


217 Ibid., par. 102 (“The Chamber notes that the Registrar transmitted to Côte d’Ivoire the request for arrest and surrender of Mr. Gbagbo on 25 November 2011, triggering the obligations of Côte d’Ivoire under Article 59 of the Statute”).

218 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42.

position to effectively address those violations. Moreover, the inherent risk of the aforementioned interpretation by the Court is that it may lead to a situation whereby the ICC Registrar postpones the sending of the request for arrest and surrender until such time that he or she knows that the person can immediately be surrendered. In this manner, the Court can avoid incurring responsibility for pre-transfer violations of the suspect.

Similar to the *ad hoc* tribunals and the SCSL, the surrender arrangements will involve three parties, to know the national authorities, the Registry, and the host state. While it follows from Article 59 ICC Statute that the arrest will be conducted by the national authorities, neither the Statute nor the RPE shed light on the question as to whether and in how far the staff of the OTP may assist and participate in the arrest.

One more difference with the *ad hoc* tribunals and the Special Court is to be noted here. Pre-Trial Chamber I held that the Pre-Trial Chamber, assisted by the Registry (pursuant to Rule 176 (2) ICC RPE and Rule 184 ICC RPE), is the only organ that is competent to make and transmit a cooperation request for arrest and surrender. Only when “specific and compelling circumstances” exist can the Chamber authorise the Prosecution to transmit a particular cooperation request for an arrest and surrender. At the ICTY, these requests could be transmitted by the Prosecutor. Indeed, it may be recalled that an arrest warrant may, pursuant to Rule 59bis ICTY RPE, be addressed to the Prosecutor directly. Moreover, Rule 55 (D) ICTY RPE leaves discretion regarding the organ that should be entrusted with the transmission of cooperation requests.

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220 In this regard, SLUITER refers to three compelling reasons for the Court to address *any* violation: (i) offering a remedy for the violation of a right (cf. Article 85 ICC Statute); (ii) to prevent future violations and; (iii) to preserve the integrity of the court proceedings.

221 Compare with the practice of the *ad hoc* tribunals, *supra*, Chapter 7, II.4.1.

222 Rule 184 ICC RPE; Regulations 76 and 77 of the ICC Regulations of the Registry.

223 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Situation in the DRC, Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 117 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006). Consider also ICC, Informal Expert Paper: Fact finding and Investigative Functions; par. 82 (arguing that the Prosecutor should be empowered to make such request as part of its power, pursuant to Article 54 (3) (e) ICC Statute to “*seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate*”).

224 *Ibid.*, par. 119 (referring to a decision of Pre-Trial Chamber II of 12 July 2005).

225 Rule 55 (D) ICTY RPE (“*Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed*” (emphasis added)). *Ibid.*, par. 118.
II.5. Indictments/Arrest warrants under seal

Arrest warrants are often not disclosed but issued under seal. The basis for this course of action is to be found in Rule 53 ICTY, ICTR, and SCSL RPE which provides that the Judge confirming the indictment may, in consultation with the Prosecutor, order that the indictment is not to be publicly disclosed until the indictment has been served on the accused or on all accused (compare Rule 74 STL RPE). ICTY Rule 53 (D) additionally provides that this does not prevent the Prosecutor from disclosing the indictment or parts thereof to the authorities of a state or an appropriate authority or international body when he or she considers this to be necessary not to lose an opportunity to secure the possible arrest of an accused. Whereas originally, this possibility was not relied upon in practice, the ICTY Prosecutor (Arbour) decided in 1997 to adopt a new strategy and to request sealed indictments to foster arrests. The importance of this tool lies in its potential to prevent the accused person from absconding or from interfering with victims, witnesses and evidence. One author has argued that the practice of sealed indictments may infringe upon the accused’s right to be informed promptly and in detail of the nature and the cause of the charges against him or her. However, from a human rights perspective, it is not so much the time between the moment that the charges were confirmed and the communication of the charges to the

227 Rule 53 (B) ICTY, ICTR and SCSL RPE.
228 Rule 53 (D) ICTY, ICTR RPE.
229 Fourth Annual Report 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, U.N. Doc. A/52/375/ - S/1997/729, 18 September 1997, par. 60 (“In response to the dilatoriness of some States to hand over indicted persons to the Tribunal, the Prosecutor decided to implement a new strategy that would lead to their detention and arrest. The Prosecutor requested the Trial Chambers that certain new indictments and certain amendments to existing indictments not be disclosed, that is, remain confidential, and that the names of suspects not be released until they are apprehended. Such indictments were then handed over to those entities which had the authority and opportunity to detain the indicted persons. In June and July 1997, this new strategy resulted in the detention and arrest of two indictees - Slavko Dokmanović and Milan Kovačević”); L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 397.
230 C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 667. Compare ICC, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, Prosecutor v. Ntaganda, Situation in the DRC, Case No. ICC-01/04-02/06-18, PTC I, 28 April 2008, p. 4 (“public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court”).
accused person which is important, but rather the fact that the accused is given sufficient time for the preparation of his or her defence.\textsuperscript{232}

Likewise, nothing in Article 58 ICC Statute prevents the use of sealed warrants of arrest.\textsuperscript{233} In practice, warrants are often issued under seal.\textsuperscript{234} The warrants of arrest are made public prior to the effectuation of the arrest. For example, in \textit{Ntaganda}, the Prosecution requested the unsealing based on the facts that (i) the suspect was no longer fighting as top commander of the MRC, (ii) there were reasons to believe that Ntaganda had become aware of the existence of an arrest warrant against him, (iii) protective measures to ensure the adequate protection of witnesses had been taken, (iv) informing international actors of the warrant of arrest could frustrate efforts by Ntaganda to go into hiding in neighbouring countries, and (v) the Congolese authorities were not able to execute the arrest and the unsealing of the warrant of arrest could facilitate this process.\textsuperscript{235}

\section*{II.6. Procedure in case of failure to execute the arrest warrant}

In cases where the state to which the warrant for arrest or transfer issued by the \textit{ad hoc} tribunals is directed, is ‘unable’ to execute the arrest or transfer, it should inform the Registrar of the reasons for this. Clearly, as stated previously, the obligation of states \textit{vis-à-vis} the \textit{ad

\textsuperscript{232} S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 207. The author refers to General Comment No. 13. In this General Comment, the Human Rights Committee held that “the right to be informed of the charge “promptly” requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee \textit{this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such} (emphasis added). Consequently, whereas at that moment, a procedural step (the confirmation of the indictment) has already been taken against the person, the person has not yet been publicly named. See HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice) 13 April 1984, par. 8.


hoc tribunals is one of result. In cases where no action is undertaken and no report has been made within a reasonable time, the RPE provide for a presumption of a ‘failure’ on the part of the state to execute the arrest warrant or transfer and the Trial Chamber may refer to the President for appropriate action. This action may include reporting the matter to the Security Council.236

Rule 61 ICTY and ICTR RPE is triggered when the indictment could not be served on the accused within a reasonable time. The Confirming Judge may invite the Prosecutor to report on the measures taken.237 The procedure may be initiated if the Judge is convinced that (1) all reasonable steps have been taken by the Prosecutor and the Registrar (including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be), and (2) the whereabouts of the person remain unknown and all reasonable steps have been taken to ascertain the whereabouts (including via public advertisement). In such case, the Judge will order the Prosecutor to submit the indictment to the Trial Chamber, together with all the evidence that was submitted to the Confirming Judge. The Prosecutor may call and examine witnesses whose statements were submitted to the Confirming Judge and may tender additional evidence.238 Additionally, the ICTY Trial Chamber may request that the Prosecutor call other witnesses whose statements had been submitted.239 The accused is not represented during the proceedings.240 The Trial Chamber will make a determination as to whether ‘reasonable grounds’ exist to believe that the person has committed any or all of the charges.

236 Rule 59 (B) ICTY, ICTR and SCSL (with regard to the Sierra Leonese authorities) RPE.
237 Rule 61 (A) ICTY RPE was amended on 18 January 1996. In its original form, Rule 61 did not leave it to the Judge to ‘invite’ the Prosecutor but left the initiative with the Prosecutor.
238 Rule 61 (B) ICTY and (C) ICTR RPE. Prior to its amendment on 30 January 1995 during the fifth plenary session (IT/32/Rev.3), Rule 61 (B) excluded the possibility of live evidence. The possibility of live evidence responded to the rights of victims to be heard in public. See fn. 244 and accompanying text.
239 Rule 61 (B) ICTY RPE. A similar proprio motu power is not provided for under Rule 61 ICTR RPE.
alleged in the indictment. Importantly, the Rule 61 procedure is not a trial in absentia insofar that there is no finding of guilt. Rather, the procedure’s purpose is to:

“give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting the indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated.”

In this latter sense, the proceedings may offer a ‘formal means of redress’ to the victims insofar that it allows them to testify and to have their testimony recorded. In general, these proceedings ensure that the tribunal, which lacks direct enforcement powers, “is not rendered ineffective by the non-appearance by the accused and may proceed nevertheless.”

The tribunal will order an international arrest warrant, and may issue an order to (a) state(s) to adopt provisional measures to freeze the assets of the accused (proprio motu or at the Prosecutor’s request). If the Trial Chamber determines that the failure to serve the arrest warrant is due in part, or entirely, to the lack of cooperation by one or more states, the President may, after consultation with the Judges, notify the Security Council.

241 Rule 61 (C) ICTY and ICTR RPE.
242 ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Rajić and Anđić, Case No. IT-95-12-R61, T. Ch., 13 September 1996, par. 3. The Trial Chamber noted that “[t]he only consequences are the public airing of evidence against the accused and the possible issuance of an international arrest warrant.”
243 Ibid., par. 2.
246 Rule 61 (D) ICTY and ICTR RPE. On the freezing of assets, see supra, Chapter 6, II.3. Probably, the issuance of an international arrest warrant may not prove very helpful where the person remains on the territory of the state to which the arrest warrant was first addressed. However, it has been noted that it may be a helpful tool in ‘publicly branding’ an ‘international fugitive’. See S. FURUYA, Rule 61 Proceedings in the International Criminal Tribunal for the Former Yugoslavia, A Lesson for the ICC, in «Leiden Journal of International Law», Vol. 12, 1999, p. 641 (quoting the ICTY Information Memorandum on Rule 61).
247 See e.g. the notification in the Nikolić case (IT-94-2-R61) on non-cooperation by the Bosnian Serb administration; in the Rajić case (IT-95-12-R61) on the non-cooperation by Bosnia and Herzegovina and Croatia; in the Karadžić case (IT-95-II-R61; IT-95-18-R61) on the non-cooperation by the FRY and the Republika Srpska and in the Mrkšić case (IT-95-13-R61) on the non-cooperation by the FRY.
Rule 61 proceedings fulfill a dual function. On the one hand, they serve as an *ex parte* re-confirmation of the indictment in open court, culminating in the determination of whether there are reasonable grounds for believing that the accused has committed the crime, even though this decision is provisional in nature. On the other hand, an assessment is made concerning who is responsible for the failure to execute the arrest warrant.

Rule 61 proceedings were never held at the ICTR or the SCSL. At present, this procedure may be referred to in terms of a ‘historical curiosity’. Indeed, whereas this procedure was relied upon in the early years of the ICTY, the procedure quickly became obsolete once defendants were surrendered to the custody of the ICTY. The ICC Statute does not provide for a procedure similar to Rule 61 in case of failure to execute an arrest warrant. No distinction is drawn between arrest warrants addressed at individual states and international arrest warrants.

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249 Ibid., p. 642.
250 W.A. SCHABAS, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge, Cambridge University Press, 2006, p. 383 (the author argues that “Rule 61 was adopted as a compromise intended to assuage critics from continental European justice systems who charged that the lack of an *in absentia* procedure would seriously hamper the work of the Tribunal”).
251 Some procedural actors have ventilated strong criticism on Rule 61 proceeding. Notable are the comments by Louise Arbour, who argued: “I believed that recourse to Rule 61 was detrimental to the work of the Prosecutor, and I was never persuaded that its benefits outweighed its deleterious effects. First and foremost, the Rule 61 hearings exposed publicly large parts of the evidence against the accused before he was apprehended. This exposure increased the danger of witness intimidation, tampering with evidence and fabrication of convenient evidentiary responses. It also monopolized important and scarce resources within [the] OTP, with investigators and prosecutors re-examining the case for hearing preparation rather than moving on to developing new cases. Because the hearings were, by definition, *ex part*, it also gave the trial attorneys, in my view, a false sense of security and confidence in the quality of their case. Evidence always looks better when it is unopposed and unchallenged. In short, I was not favourably exposed to Rule 61 hearings, but the matter was not under my control. I came to believe it would resolve itself if we were successful in our arrest strategy and that I should focus my energies there. Rule 61 is, however, an example of an institutional issue that impacts considerably on the work of the Prosecutor and the internal constraints under which he or she operates.” L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 398 – 399. For an overview of Rule 61 proceedings before the ICTY, see ICTY, Third Annual Report 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, U.N. Doc. A/51/292-S/1996/665, 16 August 1996, par. 50 – 61.
252 However, consider the discussion of Article 87 (5) (b) and 87 (7) ICC Statute, supra, Chapter 7, II.4.2.
253 Compare with Rule 84 STL RPE. Where no Rule 61 equivalent is provided for, the Prosecutor may request the Pre-Trial Judge or Trial Chamber to issue an international arrest warrant. Similarly, the ECCC IR do not put restrictions on the issuance of international arrest warrants. See Rule 42 ECCC IR.
III. ARREST IN THE ABSENCE OF AN ARREST WARRANT

III.1. The ad hoc tribunals and the SCSL

In cases of urgency, provision is made under the RPE of the ad hoc tribunals and the Special Court for the provisional arrest of suspects in the absence of a warrant.254 In this regard, ICTR Trial Chamber II referred to “the need to allow for short, provisional detentions of persons under investigation by the Tribunal in order to, for example, preserve physical evidence, avoid escape of a suspect, and/or prevent injury to or intimidation of a victim or witness.”255 Where the ad hoc tribunals and the Special Court lack a direct enforcement mechanism, the RPE establish a system which provides for the provisional detention of suspects by a requested state at the behest of the tribunal.256 No explicit power to provisionally arrest suspects is provided for under the Statutes of the different tribunals.257 However, the cooperation obligations incumbent on states do, as explained previously, extend to the arrest of suspects.258 Again, specific legitimate grounds upon which the provisional arrest of persons is allowed are absent.259 Nevertheless, it is remarkable that reference is sometimes made in

254 Rule 40 (i) ICTY RPE (allowing the Prosecutor to request any state to provisionally arrest a suspect or accused. The state should comply, pursuant to its obligations under Article 29 ICTY Statute); Rule 40 (A) (i) ICTR RPE; Rule 40 (A) (i) SCSL RPE. The ICTR Trial Chamber in Ngirumpatse noted that, whereas many national jurisdictions require a warrant, the Statute and Rules do not. See ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, Prosecutor v. Ngirumpatse, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 63.


257 Whereas some defendants have objected that Rule 40 is unlawful as it finds no basis in the Statute, such claims have been dismissed. Consider e.g. ICTR, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-I, T. Ch. II, 18 November 1998, p. 6 (noting that Rule 40 (bis) ICTR RPE does not contradict the Statute (Article 17 – 20 ICTR Statute in particular) but supplements it). The Special Court held that from the absence of any specific reference to the detention of suspects in the SCSL Statute, it cannot be concluded that the detention of suspects is ultra vires. See SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, Prosecutor v. Kondowa, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 24 - 28 (The Trial Chamber reasons, inter alia, that “through the process of incorporation of these Rules, the Statute of ‘The Special Court’, when adopted by legislative authority, did provide for the detention of suspects, as such provisions existed in the said Rules at the time of establishment of the ‘Special Court’”). Similarly, see SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, Prosecutor v. Fofana, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 24 – 28.

258 See Article 29 (2) (d) and (e) ICTY Statute and Article 28 (2) (d) and (e) ICTR Statute respectively. Consider the discussion of these provisions, supra, Chapter 7, II.3.1.

259 See ICTY, Decision on the Motions for the Exclusion of Evidence by the Accused, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC. II, 25 September 1997, par. 38 (finding that there is nothing in Rule 40 from which it can be inferred that the grounds on which a person can be provisionally arrested are limited. In the wording of the Trial Chamber, such reading “would be an unwarranted fetter on [the Prosecution’s] ability to perform her duties effectively to limit the exercise of her discretionary powers […]” The Defence had argued
the jurisprudence to such underlying grounds, necessitating the provisional arrest of a suspect.260

III.1.1. Standard of proof for warrantless provisional detention

In Kajelijeli, the ICTR Trial Chamber held that the only threshold for the arrest of a suspect pursuant to Rule 40 (A) (i) ICTR RPE, follows from the definition of ‘suspects’, according to which it concerns individuals about whom the Prosecutor possesses reliable information, which tends to show that a person may have committed a crime over which the tribunal has jurisdiction. No other standard of proof, such as the existence of ‘probable cause’, exists.261

There is no requirement for the Prosecutor to already have initiated proceedings against a suspect prior to requesting his or her provisional arrest pursuant to Rule 40 (A).262 The Trial Chamber held in Kajelijeli that whenever a suspect is arrested, there is no requirement for the Prosecutor to have an arrest warrant or to have evidence that the person has committed a crime within the jurisdiction of the Court.263 The Appeals Chamber disagreed with the Trial
Chamber’s conclusion and emphasised that whenever a Rule 40 request is made for the urgent arrest of a suspect, the ‘reliable information’ threshold should be met. 264

III.1.2. Execution of the provisional arrest

Requests for the provisional arrest of a suspect can be made to the state concerned by the Prosecutor either orally or in writing. 265 It is because Rule 40 keeps silent on the manner and method in which the arrest has to be executed, that this remains within the requested state’s domain. 266 Rule 40 ICTY, ICTR, and SCSL RPE do not provide for the right of the suspect to be informed without delay about the reasons for his or her arrest or the right to be promptly brought before a judge. 267 The requested state will, following a request to that effect by the Prosecutor, organise, control, and carry out the arrest in accordance with its domestic laws. 268 The requested state may or may not require an arrest warrant or impose other legal conditions but those depend on the national state concerned. 269

Remarkably, in contrast with Rule 40 ICTY, the ICTR RPE additionally require that the suspect be released if the Prosecutor fails to issue an indictment within 20 days from the moment of transfer. 270 While it seems clear from the wording that the time limitation should be calculated from the moment of transfer, the ICTR Appeals Chamber has held otherwise. 271 Nevertheless, this holding is at odds with the ordinary wording of the rule, and should


267 These safeguards deserve our close attention and will be discussed in depth in a subsequent section, see infra, Chapter 7, V.

268 Ibid., par. 56.

270 Rule 40 (D) ICTR RPE, as amended on 12 January 1996.

271 The ICTR Appeals Chamber in *Barayagwiza* calculated the period from the moment of the Rule 40 request, but gave no further explanation. See ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 43.
henceforth be rejected.\footnote{Contrary to the holding of the Appeals Chamber, ICTR Trial Chamber II stated that “the twenty day limit does not start to run from the date on which the order is issued but from the date on which the suspect is transferred” (emphasis added). See ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, Prosecutor v. Kanyahashi, Case No. ICTR-96-15-A, T. Ch. II, 23 May 2000, par. 37. As will be discussed infra, Chapter 7, III.1.3, the ICTR Appeals Chamber in Barayagwiza gave a similar interpretation to Rule 40bis (H) ICTR RPE. Nevertheless, it revised its interpretation in the Semanza case. Consequently, it is opined by this author that also the interpretation given by the Appeals Chamber in Barayagwiza to Rule 40 should be revised (see In. 287 - 294 and accompanying text).} In the absence of any determination as to the acceptable length of the detention prior to transfer, the ICTR Appeals Chamber determined that this period of detention may not be unreasonable.\footnote{ICTR, Decision, Prosecutor v. Kajelijeli, Case No. ICTR-98-19-AR72, A. Ch., 3 November 1999, par. 62; ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A-A, A. Ch., 23 May 2005, par. 229.}

According to Rule 40 (B) SCSL RPE, the Prosecutor should apply for the transfer of the suspect to the Court pursuant to Rule 40bis within 10 days from the arrest. If the Prosecutor fails to make such request, this failure will be sanctioned with release.\footnote{ICTR, First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other serious Violations Committed in the} This provision should be preferred because it puts a clear limitation on the period of time a person can be detained in the custodial state, prior to transfer.

III.1.3. Transfer and provisional detention of suspects (Rule 40bis)

Rule 40bis was later inserted in the ICTY and ICTR RPE, providing an explicit basis for the transfer and detention of suspects at the seat of the tribunals.\footnote{Rule 40 C (ii) SCSL RPE.} It is also included in the SCSL RPE. According to the ICTR Appeals Chamber, “as an exception, in light of the complexity of the charges faced by accused persons before this Tribunal, provisional detention of a suspect without being formally charged for a maximum of 90 days is warranted as long as the suspect’s rights under Rule 40 and 40bis are adhered to.”\footnote{Rule 40bis ICTY RPE, as adopted at the Tenth Plenary Session, 22-23 April 1996 (IT/32/Rev.8); Rule 40bis ICTR RPE, as adopted on 15 May 1996 (ICTR: 3/Rev 2).} The Rule was adopted to respond to practical difficulties experienced during the investigations by both ad hoc tribunals. The ICTR was confronted with a situation in which Cameroon had arrested twelve suspects and the question of their transfer to the tribunal arose before the indictments could be confirmed. This prompted the Prosecutor to seek the amendment of the RPE.\footnote{ICTR, First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other serious Violations Committed in the} Similar problems arose at
the ICTY, when Bosnia arrested the suspects Djukić and Kršmanović. While the provisions adopted by the ICTR and ICTY respectively differ, it has been noted that these differences relate more to form than to substance.

Pursuant to Rule 40bis (A) ICTY, ICTR, and SCSL RPE, the transfer and provisional detention of suspects requires an order from a Judge, at the Prosecutor’s request. The grounds on which the request is made should be indicated together with the provisional charge and the material on which the Prosecutor relies. The rule applies to situations when the suspect has been detained by the state at the Prosecutor’s request under Rule 40 or when he or she is otherwise detained in that state. Other material conditions include a threshold requiring the existence of a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the tribunal has jurisdiction and specific justifying grounds requiring that the transfer and detention is necessary to prevent escape, to prevent physical or mental injury to or intimidation of a victim or witness, the destruction of evidence, or is otherwise necessary for the conduct of the investigation. The provisional detention can
be ordered for a period of up to 30 days from the day of the transfer (Rule 40bis (C) ICTR and SCSL RPE speak of a period of 30 days which are to be counted from the day after transfer), but can be prolonged twice. The original provision provided for a detention of a maximum of 30 days from the signing of the provisional detention order. The rule was amended as the maximum period of provisional detention may be exceeded before the suspect is transferred to the seat of the tribunal. In any case, the total period cannot exceed ninety days. If no indictment has been confirmed and an arrest warrant signed at the end of this period, the suspect shall be released or delivered to the authorities of the state.

This time limitation has given rise to controversy in the case law of the ICTR. Whereas the Trial Chamber in Barayagwiza followed the Prosecutor’s position that Rule 40bis is not applicable until after the transfer of the suspect to the tribunal’s detention unit, the Appeals Chamber gave a different interpretation to the said provision. The Appeals Chamber argued that the purpose of Rule 40bis is to restrict the amount of time a suspect may be detained without being indicted. The Appeals Chamber argued that it cannot “accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40bis places time limits on such detention if the suspect is detained at the Tribunal’s detention unit.”

“The principle of effective interpretation mandates that these Rules be read together and that they be restrictively
interpretation.” Consequently, the time limitation of Rule 40bis also applies to the pre-transfer detention period.289

In a separate opinion, attached to the Appeals Chamber Judgement, Judge Shahabuddeen argued that Rule 40bis cannot be applied to the pre-transfer period of detention as such interpretation conflicts with the clear meaning of the Rule that the procedural guarantees which it provides begin to operate only from the day after the transfer to the detention unit of the tribunal.290 He rightly held that the Rule addresses the question of the mode of authorising the transfer of a suspect to the detention unit of the tribunal and the conditions applicable to the detention following the transfer to that unit. It does not address the pre-transfer detention.291 Consequently, the interpretation given to Rule 40bis by the Appeals Chamber amounts to legislation, rather than interpretation and changes the substance and purpose of the text.292

First and foremost, the interpretation given to Rule 40bis clearly contradicts its legislative history and the amendments that have been made thereto, as discussed previously.293 For this reason, in Semanza, the Appeals Chamber revised its interpretation of Rule 40bis (C) and rejected its applicability to pre-transfer detention.294 Whereas the amendment of Rule 40bis clearly did away with any time limitation regarding the period of time that the suspect can be

289 ibid., par. 50.
291 ibid., p. 8. Judge Shahabuddeen argued that while the Rule assumes that there will always be an interval between the arrest in the requested state and the transfer to Arusha, the time stipulated will nonetheless begin to run from the transfer of the suspect.
292 ibid., p. 9. Where the Appeals Chamber based its interpretation on the ut res magis valeat quam pereat or ‘effective interpretation’ maxim, Shahabuddeen underscored that the maxim should only be relied upon within reasonable limits, otherwise risking rewriting or reconstructing a treaty.
293 See supra Chapter 7, III.1.3, fn. 275 - 279 and accompanying text.
294 ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 91-97. The Appeals Chamber clarified that “in the interests of legal certainty and predictability the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Where the interpretation given by the Appeals Chamber in Barayagwiza to Rule 40bis was in keeping with the spirit and letter of Rule 40bis as it was originally adopted, “the Appeals Chamber must take into account the abrogative effect of any legislative amendment.” “The principal effect of the 4 July 1996 amendment was to break with the interpretation of Rule 40 bis in the form in which it emerged from the 15 May 1996 text” (ibid., par. 96).
detained in the requested state, this does not imply, as will be argued, that the time a person
may spend in the custodial state is not limited.295

Rule 40bis further provides that copies of the request and the order should be served on the
suspect. The latter should include the provisional charges, the grounds on which the Judge
issued the order, the initial time limitation as well as a statement of the rights of the accused
under Rules 42 and 43 of the RPE.296 These documents should be served on the suspect as
soon as possible.297 When the suspect is transferred to the seat of the tribunal, he or she
should be brought before the Judge who confirmed the provisional detention order without
delay.298 He or she can submit all (habeas corpus) applications relative to the propriety of the
detention or release.299 Lastly, the regime regarding the provisional detention of the accused is
applied mutatis mutandis to the provisional detention of suspects at the tribunal pursuant to
Rules 40bis (H) ICTY and 40bis (L) ICTR RPE.

§ Relationship between Rule 40 and Rule 40bis: gaps and overlaps

Some of the tribunals have amended Rule 40 further. The ICTR amended Rule 40, by adding
sub-provisions (B) – (D).300 This amendment, predating the introduction of Rule 40bis, allows
for a Judge to order, upon request by the Prosecutor, the transfer and detention of a suspect at
the seat of the tribunal or at another designated place if the requested state has made clear
that, because of a major impediment, it is unable to hold the person under provisional
detention or to prevent escape.301 If the Prosecutor fails to issue an indictment within 20 days
following the transfer, the suspect should be released.302 While a possible overlap may exist
with Rule 40bis, this procedure only applies to scenarios of urgency, whereas Rule 40bis
applies both to situations in which the Prosecutor has previously issued a request pursuant to

295 For example, as will be argued, the ICTR Appeals Chamber underscored that a transfer and provisional
detention request should be made within a reasonable period of time in order to ascertain that the suspect is
promptly brought before a Judge. See ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A; A.
Ch., 23 May 2005, par. 232. See infra, Chapter 8, II.2.10.
296 Rule 40bis (D) of the ICTR and SCSL RPE and Rule 40bis (C) ICTY RPE.
297 Rule 40bis (E) ICTR and SCSL RPE. While this requirement is absent in the ICTY provision, such obligation
may follow from the application mutatis mutandis of Rule 55 ICTY RPE.
298 Rule 40bis (J) ICTR and SCSL RPE; Rule 40bis (F) ICTY RPE. See the detailed discussion of this provision,
infra, Chapter 7, V. III.
299 Rule 40bis (K) and (L) ICTR and SCSL RPE; Rule 40bis (G) and (H) ICTY RPE.
300 Rule 40 ICTR as amended on 12 January 1996.
301 Rule 40 (B) ICTR RPE.
302 Rule 40 (D) ICTR RPE.
Rule 40 and to suspects who are otherwise detained. The threshold for issuing this order is lower than the threshold under Rule 40bis, with the only threshold following from the definition of a 'suspect'. Furthermore, no specific grounds to legitimise the transfer and detention are required. Lastly, the time limitation is stricter than the time limitation under Rule 40bis, requiring the Prosecutor to issue the indictment within 20 days after transfer, without possibility to extend the period of post-transfer detention.303

A lacuna exists in cases in which the Prosecutor has sent a Rule 40 request, because there is no time limitation for the Prosecutor to apply to the Judge for a Rule 40bis order for the transfer and provisional detention of the suspect at the seat of the tribunal. In practice, this gap has led to unacceptable situations in which suspects have spent up to 233 days, or more than seven months in provisional detention, before being transferred to the tribunal.304 As discussed previously, the Special Court filled this important gap in the regulatory framework of the ad hoc tribunals by requiring that the Prosecutor, within 10 days following the provisional arrest, applies for an order for the transfer of the suspect to the tribunal’s detention facility. The suspect has to be released in cases where the Prosecutor fails to apply for this order.305

However, this amendment proves not to be entirely satisfactory in light of the non-applicability of the Rule 40bis time limitation to the pre-transfer period of detention. Following the application of the SCSL Prosecutor for a Rule 40bis order, the suspect may continue to linger in pre-trial detention where Rule 40bis SCSL RPE does not limit the period the suspect may spend in detention prior to his or her transfer to the Special Court. This leads to the situation in which neither the Statute nor the RPE of the ad hoc tribunals or of the SCSL put a clear limitation on the period of time a person can be detained before being transferred. Consequently, the period a person is detained prior to his or her transfer to the tribunal is left to the diligence of the actors involved and the eventuality of a challenge of a transfer by the suspect.306 It has been noted by SWART that, on this point, the procedural frameworks of the ad hoc tribunals and the SCSL deviate from the approach taken by

303 Rule 40 (D) ICTR RPE.
305 Rule 40 (C) (ii) SCSL RPE.
extradition treaties. Nevertheless, national laws implementing the Statutes of both tribunals often provide that a suspect who has been provisionally arrested pursuant to a request by the tribunal needs to be released if this request is not followed by a request for transfer within a prescribed period of time. Furthermore, the ICTR Appeals Chamber held that absent any time indication in Rule 40bis regarding the time a person can be detained, this period of detention cannot be unreasonable. It will be argued below, that international human rights norms also require that a detention request be made within a reasonable period of time.

The Appeals Chamber underscored that it is not acceptable for the Prosecutor to get around the time limits of Rule 40bis and the tribunal’s responsibility of ensuring the rights of the suspect by using its powers under Rule 40 to keep the suspect in detention in a cooperating state.

III.2. The International Criminal Court

A provisional arrest can be requested pending the presentation of the request for surrender and the documents supporting the request. Nevertheless, the ICC statute does not make allowance for provisional arrests in the absence of a judicial authorisation. In a sense, the allowance, which is made for provisional arrest under the ICC Statute, is akin to the practice in extradition treaties, which usually provide for the provisional arrest of a person, in

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507 Ibid., p. 1250. See e.g. Article 3 of the Dutch legislation implementing the ICTY Statute, which refers to the time limitations in the Extradition Law; Article 3 (3) of the Agreement on Surrender of Persons Between the Government of the United States and the Tribunal; Article 53 (2) of the Belgian Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals (the suspect that has provisionally been detained will in any case be released if no indictment has been served on him or her within three months after the arrest warrant by the Investigating Judge has been served on him or her). Consider ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-A, T. Ch. II, 23 May 2000, par. 56 (the Belgian authorities informed the ICTR Registrar that they would be required to release Kanyabashi if no warrant of arrest was served on him).


509 See infra, Chapter 8, II.2.10.

510 ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 233. Through a reference to the Appeals Chamber decision in Barayagwiza, the Appeals Chamber seems to again rely on its previous interpretation of Rule 40, which it revised in Semanza, see fn. 290 - 294 and accompanying text.

511 Article 92 ICC Statute. The information required includes information describing the person, sufficient to identify the person as well as information on the person’s probable location; a concise statement of the crimes for which the provisional arrest is sought as well as the facts alleged to constitute those crimes; a statement of the existence of a warrant of arrest as well as a statement that a request for surrender will follow.

512 Article 58 (5) ICC Statute.
anticipation of the receipt of the extradition request.\footnote{Compare e.g. with Article 9 of the United Nations Model Treaty on Extradition, U.N. Doc. A/RES/45/116, 14 December 1990.} It has been argued that the Statute is still flexible enough, given that the issuance of an arrest warrant is disconnected from the confirmation of the indictment.\footnote{G. SLUITER, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 251.} Given the importance of the right at stake (the right to liberty), some authors hold that this procedural model should be preferred to a model whereby provisional arrest powers are given directly to the Prosecutor. Such powers ought only to be provided to the Court.\footnote{See, e.g. C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 670 (arguing that whereas the ad hoc tribunals provided for such provisional arrest powers, later tribunals have abandoned the far-reaching arrest powers of the OTP. However, it should be remarked that whereas prosecutorial provisional arrest powers are more circumscribed in the SCSL RPE, the Special Court did not abandon them).} Whereas judicial intervention is doubtless the best guarantee for the protection of the rights of the suspect, such preference may disregard the exigencies of the investigations, and remove some of the flexibility of the system during the early stages of the investigation. This holds especially true where stringent requirements (e.g. the existence of a \textit{prima facie} case) have to be met for an arrest warrant to be issued. It should be recalled that under human rights law, the lawfulness requirement does not necessarily presuppose the issuance of a warrant of arrest.\footnote{Consider e.g. ECommHR, \textit{X. v. Austria}, Application No. 775/77, Decision of 18 May 1977, 9 D.R. 210, p. 211 (“This provision [Article 5 (1) (c)] does not stipulate that an arrest can only be effected on the authority of a warrant of arrest issued by a judge. The Convention merely requires in Article 5, paragraph 3 that everyone arrested or detained in accordance with paragraph 1(c) of this Article shall be brought promptly before a judge”). However, a detention that extended over several months without being ordered by a judge or a judicial officer was found by the Court not be lawful. See ECtHR, \textit{Baranowski v. Poland}, Application No. 28358/95, Reports 2000-III, Judgment of 28 March 2000, par. 57.} The practice of the Court, however, has revealed that the Court is willing to act quickly, for example in the cases where there is a real likelihood that the suspect would flee.\footnote{ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, \textit{Prosecutor v. Bemba Gombo, Situation in the Central African Republic}, Case No. ICC-01/05-01/08, PTC III, 10 June 2008, par. 4 – 10, as referred to in K. DE MIESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 318. \textit{In casu}, the Pre-Trial Chamber issued a warrant of arrest on only some of the counts in the Prosecutor’s request and considered the issuance of a new warrant of arrest on additional counts at a later stage.} In cases of urgency, a request for the arrest may be made ‘by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel
provided for in Article 87, paragraph 1 (a). The request for the provisional arrest of a person should not be accompanied by supporting evidence.

A limitation in time of the provisional arrest is provided for. If the requested state has not received the request for arrest and surrender and the documents supporting the request within 60 days, the person may be released. In the inclusion of this time limitation unmistakably lays the greatest improvement from the practice of the ad hoc tribunals. However, the discretion should, ideally, be removed and the person released from detention. The possibility of consent is provided for if this is allowed for by the laws of the requested state. The release will not prejudice the subsequent arrest and surrender of that person if a request is later made to that extent.

III.3. Internationalised criminal tribunals

From the internationalised criminal tribunals included in this dissertation, the Special Panels also provided for the possibility, exceptionally, to arrest a suspect in the absence of an arrest warrant. In case of urgency, a person could be arrested without judicial authorisation. Three different scenarios were provided for, to know: (a) where the person was found in the act of committing the crime, (b) where there were reasonable grounds to believe that the suspect had committed a crime and there was an ‘immediate likelihood’ that, before the warrant would be issued, the suspect would flee, destroy, falsify or taint evidence or endanger public safety or the integrity of victims or witnesses, or (c) cases of hot pursuit. The Public Prosecutor had to be informed immediately and had to decide whether further detention was necessary, in which

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318 Article 96 (1) ICC Statute.
319 Rule 188 ICC RPE juncto Article 92 (3) ICC Statute. However, note that within that time period, the person may consent to the surrender where such is allowed by the requested state.
320 Article 92 (3) ICC Statute.
321 Article 92 (4) ICC Statute.
322 Section 19A.4 (a) – (c) TRCP. In the Mali Dao case, an accused person was arrested in the absence of an arrest warrant. The Court reasoned that there was an “immediate likelihood that before a warrant could be obtained the suspect will flee”, where the accused had been arrested on a few meters from the border with West Timor. Such conclusion is doubtful, where the suspect was already detained by the police for another offence (illegal crossing of the border). In such circumstances, what is missing is an element of urgency, which underlies the three distinct scenarios where an arrest can be executed in the absence of an arrest warrant. (Section 19A.4 (a) – (c) TRCP). See SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, Prosecutor v Aprecio Mali Dao, Case No. 18/2003, SPSC, 29 April 2004, par. 40 – 41.
case he had to apply for an arrest warrant. Underlying these distinct scenarios is an element of urgency.

Likewise, Rule 62 (A) (i) of the STL RPE provides for arrests of suspects or accused persons in the absence of an arrest warrant in cases of urgency. It is for the Prosecutor and not for the Pre-Trial Judge to seek provisional detention. The person will be put in custody ‘in accordance with the laws of that state.’ In addition, the Prosecutor may request that state to take necessary measures to prevent escape, intimidation of victims or witnesses or the destruction of evidence. Different from, and improving the ad hoc tribunals’ procedural framework, a strict time limitation in time is provided for insofar that it is required that these urgent measures are followed, within ten days, by an application for the transfer of the person arrested. Reasonable grounds to believe that the person has committed a crime should be present.

The Prosecutor may file a reasoned request to the Pre-Trial Judge for an order or request for the transfer of a suspect to the custody of the tribunal and his or her provisional detention. The application should contain a provisional charge and a summary of the material which shows that the person qualifies as a suspect and which justifies detention. The order by the Pre-Trial Judge should include a statement of the rights of the suspect and an indication of the initial time-limitation of the provisional detention. When the Pre-Trial Judge orders the transfer, he or she should be convinced that the person qualifies as a suspect. This implies that ‘reasonable grounds to believe that the person has committed a crime’ should be

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323 Sections 19A.5 and 19A.6 (a) TRCP.
324 STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 36 (“the Prosecutor alone is in a position to evaluate whether – and in what timeframe – he is in a position to consider a person a suspect and, if necessary, to indict that person”).
325 Rule 62 (A) (iii) STL RPE.
326 Rule 62 (B) STL RPE. An amendment was proposed to provide for an express 90-day time limit for the Pre-Trial Judge to order or request the transfer of the suspect. The amendment was rejected as “the Pre-Trial Judge is already under a general duty to act speedily.” Besides, it was argued that the imposition of such specific deadline may hamper negotiations or cooperation with third states or other entities. See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 19.
327 See the definition of ‘suspect’ in Rule 2 STL RPE.
328 Rule 63 (A) STL RPE.
329 Rule 63 (A) STL RPE. No provisional charge or summary is required where the suspect is only transferred to be questioned by the Prosecutor.
330 Rule 63 (C) STL RPE.
331 Rule 63 (B) (ii) STL RPE.
Furthermore, the Pre-Trial Judge should consider provisional detention necessary, either (1) to prevent escape, (2) to prevent the obstruction or endangerment of the investigation or prosecution by the suspect, including through interference with witnesses or victims or (3) to prevent criminal conduct of a kind of which he is suspected. A ‘legitimate ground’ is, thus, required which is in line with the procedural frameworks of the ad hoc tribunals and the Special Court. While originally the RPE allowed for the deprivation of liberty when such was required for the conduct of the investigation, this ground was removed at the occasion of the third revision of the RPE. Indeed, this ground is too broad and open to abuse. Moreover, it is no ground which is recognised as a ground legitimising the deprivation of liberty under international human rights norms.

Similar to the procedural regime of the ad hoc tribunals and the Special Court, the detention upon transfer prior to the confirmation of the indictment is strictly limited. Detention can be ordered for a period not exceeding 30 days. Bearing further similarity with the ad hoc tribunals and the Special Court, ‘if warranted by the investigation’, the Pre-Trial Judge may extend the provisional detention for another 30 days, following an inter partes hearing, upon application by the Prosecutor. A second extension of 30 days presupposes the presence of ‘special circumstances’. In any case, the detention may not exceed 90 days. If by that time, the indictment has not yet been confirmed and an arrest warrant issued, the person should be released or delivered to the requested state.

Lastly, as far as the Extraordinary Chambers are concerned, the deprivation of liberty in the absence of an arrest warrant is also allowed for. During their preliminary investigation, the Co-Prosecutors may hold a suspect in police custody (garde à vue) ‘for the needs of the inquiry’. This action does not presuppose judicial intervention, the only threshold being that the person should be ‘suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice’. Police custody is limited in time and may be ordered

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332 See the definition of ‘suspect’ in Rule 2 STL RPE.
333 Rule 63 (B) (iii) STL RPE.
334 Rule 63 (B) (iii) STL RPE as amended. Consider: STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 22.
335 See infra, Chapter 8, II.3.5.1.
336 Rule 63 (C) and (D) STL RPE.
337 Rule 63 (D) STL RPE. To be calculated from the day following the transfer of the suspect.
338 Rule 63 (D) STL RPE.
for a period of time not exceeding 48 hours, which may be extended once by another 24 hours. 339 The person who is taken into police custody must be brought before the Co-Prosecutors as soon as possible. 340 On this occasion, he or she may be assisted by counsel. 341 At the end of the police custody, the person should be either released or presented before the Co-Investigating Judges. 342 The person in police custody should be informed about the reasons for their custody and of his or her rights. 343 No requirement of urgency is explicitly provided for. 344 It has been argued that because the Cambodian criminal justice system is weak, judicial intervention for the ordering of police custody would have been preferable, especially outside of the context of urgency. 345

IV. AN ALTERNATIVE ROUTE: SUMMONS TO APPEAR

The issuance of a warrant of arrest is not the only manner in which the appearance of the suspect or accused person can be obtained. A summons to appear can be issued. It is appropriate to deal with this issue in the present chapter because a summons to appear impacts upon and interferes with the right to liberty of the person, and because the issuance of a summons to appear functions as an alternative route to the issuance of an arrest warrant.

The ICC Statute has been praised for including this alternative course of action to the issuance of an arrest warrant. 346 It puts into effect the principles of proportionality and subsidiarity. 347

339 Rule 51 (3) ECCC IR.
340 Rule 51 (4) ECCC IR.
341 Rule 51 (5) ECCC IR. Counsel may meet the person for a maximum of 30 minutes before the person is presented before the Co-Prosecutors.
342 Rule 51 (7) ECCC IR.
343 Rule 51 (1) ECCC IR and Rule 21 (1) (d) ECCC IR.
344 Rule 51 (2) ECCC IR only provides that the order for police custody may be given orally in case of urgency (and must be put in writing as soon as possible thereafter).
345 Y. KODAMA, For Judicial Justice and Reconciliation in Cambodia: Reflections upon the Establishment of the Khmer Rouge Trials and the Trials’ Procedural Rules, in «The Law and Practice of International Courts and Tribunals», Vol. 9, 2010, p. 91 (“The author submits that, in a country with a relatively weak judicial system, with the potential risk of police abuse in exercising executive power, control by the judiciary through a warrant or at least practical scrutiny is all the more essential. It is advisable that, if police custody is a compulsory action by the Judicial Police under the Internal Rules, the issuance of a warrant by either the investigating judges or the Pre-Trial Chamber should be required. Otherwise, police custody should be non-compulsory, or, in practice, permissible only in emergencies”).
346 Article 58 (7) ICC Statute. For a dissenting voice, see K.S. GALLANT, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, in «Criminal Law Forum», Vol. 5, 1994, p. 580 (“While summonses for court appearances are useful in preventing pretrial incarceration or humiliating arrests for misdemeanors, they are inappropriate for persons charged with serious violations of international humanitarian law”).
The practice of the ICC Court reveals that this less intrusive coercive measure may be a viable option in certain instances. Several summonses were issued in the Situation in Darfur, Sudan, and in the Situation in the Republic of Kenya, leading to the voluntary appearance of several suspects. However, it was underscored by the Court that the issuance of a summons to appear does not function as an alternative route available to the Pre-Trial Chamber, upon an application by the Prosecutor for a warrant of arrest. This route is only open to the Chamber when the Prosecutor seeks to secure the attendance of the person through this process. However, the principle of subsidiarity, which was previously discussed, implies that the Pre-Trial Chamber should deny the request for a warrant of arrest, when it considers that the issuance of a less intrusive summons to appear would be sufficient (and the issuance of an arrest warrant is not otherwise deemed to be necessary). Put otherwise, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and there are certain risks of intimidation of witnesses (cf. Article 58 (2) (b) (iii)), which may be excluded by means of the issuance of a summons coupled with certain conditions, the Pre-Trial Chamber should decline to issue an arrest warrant and the necessity requirement embedded in Article 58 (1) (b) ICC Statute will not be satisfied.

However, whereas the ICC’s procedural framework purports that pre-trial detention is the exception, the practice shows a different picture whereby the alternative of a summons to appear is treated as the actual exception. What is telling in this regard is the language employed by Pre-Trial Chamber I, which wrongly held that what is required is that “the...
Chamber shall be satisfied that a summons to appear would be equally effective as a warrant of arrest to ensure the person’s appearance before the Court.”

While the Prosecutor in the case at hand requested a summons to appear or, alternatively, an arrest warrant, it is unclear where this additional requirement of ‘equal effectiveness’ comes from. According to the Court, “[t]he application of article 58 (7) of the Statute is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender.”

Moreover, the Pre-Trial Chamber routinely examines, when it is requested to issue a summons to appear, whether “the issuance of a warrant of arrest does not appear necessary for the purposes of Article 58 (1) (b).” Consequently, it seems that, prior to the issuance of a summons to appear, the Pre-Trial Chamber checks whether the issuance of an arrest warrant would not be required. Again, while the concerns of the Pre-Trial Chamber may be legitimate, a precondition of ‘absence of necessity of an arrest warrant’ is alien to Article 58 (7) ICC Statute. It is up to the Prosecutor to decide what route to follow and to decide whether the circumstances of the case require a warrant of arrest or a summons to appear.

The Pre-Trial Chamber held that a summons to appear cannot be issued in cases where the person is already deprived of their liberty. This would be contrary to the object and purpose of Article 58 (7) of the ICC Statute. Indeed, both the Statute and the Rules make the surrender of a person dependent on the prior issuance of an arrest warrant.

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352 Ibid., par. 117.

353 Consider e.g. ICC, Summons to Appear for Saleh Mohammed Jerbo Jamus, Prosecutor v. Abdallah Banda Abukar Nourain and Saleh Mohammed Jerbo Janus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-2, PTC I, 27 August 2009, par. 20. This condition surprises. These documents are the ‘self-executing documents’ issued pursuant to the ‘Second Decision on the Prosecutor’s Application under Article 58’, which does not make a reference to such requirement. Similarly, see ICC, Summons to Appear for Bahr Idriss Abu Garda, Prosecutor v. Abu Garda, Situation in Darfur, Sudan, Case No. ICC-02/02-02/09-2, PTC I, 7 May 2009, par. 20.

354 For a divergent view, consider C.K. HALL, Article 58, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, pp. 1143 – 1144, who argues on Article 58 (7): “[t]he provision draws upon those cases where the circumstances do not support the issuance of a warrant of arrest pursuant to paragraph 1 of this article. The arrest may not appear necessary, e.g. if there are no grounds to believe that the suspect will disappear before the trial will take place” (emphasis added).

355 ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan, Case No. ICC-02/05-01/07-1, PTC I, 27 April 2007, par. 120.

356 In that regard, the Pre-Trial Chamber noted that the ICC RPE envisage the possibility of temporary transfer of a person (Rule 183), in case a person is being proceeded against or is serving a sentence in the requested state.
For the Pre-Trial Chamber to issue a summons to appear, it should be satisfied (1) that there are reasonable grounds to believe that the person committed the alleged crime and (2) that there are reasonable grounds to believe that a summons is sufficient to ensure the person’s appearance. A summons to appear can be issued with or without conditions that restrict liberty. What conditions can be imposed depends on domestic law. When the Pre-Trial Chamber considers imposing conditions, it should ascertain the national law of the state receiving the summons and impose one or more conditions, including (but not limited to) the ones listed in Article Rule 119 (1) ICC RPE. The Pre-Trial Chamber should impose these conditions in keeping with the national law. Conditions that have been imposed include the obligation to refrain from discussing issues related to the charges underlying the summons or the evidence and information presented by the Prosecutor and considered by the Chamber, not to interfere with witnesses or to tamper or interfere with the investigations of the Prosecution, to attend all hearings at the ICC, to refrain from committing crimes or not to leave the premises of the Court (including the location assigned) for the period of the stay in the Netherlands and to comply with the instructions of the Registrar. Since the summons to appear is an alternative to, and is subsidiary to the issuance of, an arrest warrant, conditions imposed should arguably be linked to the justifications for the deprivation and/or limitation of the liberty of the person. Therefore, a fourth condition which is routinely imposed surprises. The Pre-Trial Chamber requires the person that is summoned,

“refrain from making any political statements while within the premises of the Court, including the location assigned to them.”

The disrespect of this condition may lead the Pre-Trial Chamber to the issuance of an arrest warrant. Nevertheless, it is unclear how this condition should be linked up to one of the grounds for the justification of pre-trial detention under Article 58 (1) (b) ICC Statute.

In two other cases, the Pre-Trial Chamber imposed the condition that the suspects should not have direct or indirect contact with anyone who is believed to be a victim of or to have

However, as noted by the Court, this procedure equally requires the prior issuance of a warrant of arrest (ibid., par. 120 – 121).

357 Article 58 (7) ICC Statute.
358 Article 58 (7) ICC Statute.
359 Rule 119 (5) ICC RPE.
360 On the link between the conditions imposed and the justification for the restriction/deprivation of liberty, see in detail, infra, Chapter 8, II.2.8 and II.3.7.
witnessed the crimes for which the suspects were summoned. The Defence of Muthaura requested that this condition be altered where it “disproportionately interferes with the ability of the suspects to prepare for further court proceedings and their right to a fair trial as it ‘prevents them from contracting directly defence witnesses or people they believe to be defence witnesses’.” While the Single Judge reiterated that all witnesses are witnesses of the Court (and cannot be attributed to one party), she determined that a proper balancing of (i) the right of the Defence to properly prepare a defence, including the right to approach witnesses on the one hand and (ii) the obligation of the Court in protecting witnesses on the other hand was required. Therefore, the Single Judge decided that the Defence had to communicate the name and contact details of the witness it wanted to approach to the VWU, which would then advise on the potential risks and the security arrangements the Defence should obey.

What are lacking in the Statute and the RPE are rules on how the conditions will be executed and supervised. Domestic law applies in the absence of these rules. In this regard, the Pre-Trial reiterated its right to review its finding to issue a summons to appear proprio motu or at the request of the Prosecutor, in particular if the suspect does not turn up on the date specified or when he or she does not comply with the conditions imposed.
When the suspects arrive in the host state, pursuant to a summons to appear, the Registrar should ensure that they are informed of their rights under the ICC Statute as soon as practical after their arrival.367

Not only the procedural scheme of the ICC provides for the alternative vehicle of a summons to appear. The more recent STL also provides that a summons to appear may be requested by either party or may be issued by the Pre-Trial Judge proprio motu (in the interests of justice).368 Doubtless, the STL’s provision should be preferred to Article 58 (7) ICC Statute insofar that it explicitly provides that the Pre-Trial Judge may issue a summons to appear, ‘in the interests of justice’ if he considers this to be ‘more appropriate’.369 This approach is in keeping with the principle of subsidiarity.370 The Extraordinary Chambers also provide for the possibility to summon suspects, charged persons, accused, civil parties, and witnesses.371 While the procedural frameworks of the ad hoc tribunals and the SCSL do not necessarily prohibit the issuance of a summons to appear, they have not been issued in practice.372

V. RIGHTS OF THE ARRESTED AND DETAINED PERSON

In the subsequent section, the substantive and procedural rights of the arrested and detained suspects and accused persons which relate to the arrest and surrender or transfer, will be discussed. It is important to keep the different procedural regimes applicable to the provisional arrest and surrender of suspects and to the arrest and surrender of accused persons respectively in mind.

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Abu Garda, Situation in Darfur, Sudan, Case No. ICC-02/05-02/09, PTC I, 7 May 2009, par. 32. See Rule 119 (4) ICC RPE.


368 Rule 78 (A) and (B) STL RPE. The Prosecutor may request a summons to appear for a suspect, accused or witness, while the Defence, in turn, can request a summons to appear for a witness (the summons to appear may identify a place other than the seat of the Tribunal for the suspect, accused or witness to appear).

369 Rule 77 (C) STL RPE. According to Rule 77 (D) STL RPE, where a party requests a summons to appear, the Pre-Trial Judge may decide to issue a warrant of arrest.

370 See supra, Chapter 6, I.6.

371 Rule 41 ECCC IR.

V.1. Right to personal liberty

Rather than prohibiting the deprivation of liberty, international human rights law forbids any deprivation of liberty which is unlawful or arbitrary.\textsuperscript{373} In this sense, human rights law requires that the instances in which liberty can be deprived and the applicable procedure are strictly construed. Moreover, it requires that national laws “allow for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.”\textsuperscript{374} Some international instruments provide for a general exception to the right to personal liberty on condition that the arrest and detention are not arbitrary (the ICCPR, the ACHR and the ACHPR),\textsuperscript{375} whereas the ECHR provides an exhaustive list of exceptions to the right to liberty.\textsuperscript{376} The right not to be arbitrarily arrested and detained is also provided for under the constitution of most states.\textsuperscript{377}

\textsuperscript{373} See Article 9 (1) ICCPR (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”); Article 5 (1) ECHR (“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition”); Article 7 (1) – (3) ACHR (“(1) Every person has the right to personal liberty and security. (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. (3) No one shall be subject to arbitrary arrest or imprisonment”); Article 6 ACHPR (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”) Consider also Article 9 UDHR and Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Consider also M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2\textsuperscript{nd} edition), Kehl am Rhein, Engel, 2005, p. 211 (the author notes that “[i]t is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful”).

\textsuperscript{374} Ibid., pp. 211-212.

\textsuperscript{375} In this regard, TRECHSEL points to the risk of giving carte blanche enabling states to decide in which circumstances they want to detain persons, which is allowed as long as statutes are promulgated which are sufficiently precise to avoid arbitrariness. See S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 408.

\textsuperscript{376} Article 5 (1) (a) – (f) ECHR.

\textsuperscript{377} C. BASSOUNI, Human Rights in the Context of International Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, in Duke Journal of Comparative and International Laws, Vol. 3, 1993, pp. 261 – 262 (A comparative survey identified such right in at least 119 national constitutions. The author notes that this right is either expressed negatively, prohibiting all forms of arbitrary deprivation of liberty or is expressed as a specific exception to the general right of liberty, listed as a procedural protection).
All international instruments require that any interference with the right to liberty is in accordance with the law. This requirement of lawfulness comprises both a substantial and a procedural element.\(^{378}\) It refers primarily to the requirements under domestic law but equally includes the conditions that derive from the human rights treaties.\(^{379}\) Furthermore, the deprivation of liberty should not be arbitrary. Accordingly, the deprivation of liberty should not be “manifestly disproportionate, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.”\(^{380}\) While no explicit prohibition of arbitrariness is provided for under Article 5 (1) ECHR, the ECtHR confirmed that the arbitrary deprivation of liberty can never be lawful and as such included a requirement of the absence of arbitrariness into the requirement of ‘lawfulness’ under article 5 (1) ECHR.\(^{381}\)

Whereas the Court has never provided a definition of what types of conduct by the national authorities constitute ‘arbitrariness’, the jurisprudence of the ECtHR reveals that whether the

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\(^{378}\) Consider e.g. the wording of Article 9 (1) ICCPR (“on such grounds, and in accordance with such procedure”) or of Article 5 ECHR (“in the following cases and in accordance with a procedure prescribed by law”).

\(^{379}\) ECtHR, Winterwerp v. Netherlands, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 39, 45 (“the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein”); Similarly, the HRC confirmed, in a string of cases concerning Article 9 (4) ICCPR, that “lawfulness” is not restricted to domestic law. Consider e.g. HRC, Baban v. Australia, Application No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001, Decision of 6 August 2003, par. 7.2 (“Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1”).

\(^{380}\) M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 225 (the author notes that that the notion is originally based on an Australian proposal and that it, according to the majority of delegates, “contained elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American concept of due process of law.”) Consider also Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, UN Sales No. 65.XIV.2, 1964, p. 205 (“arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person”).

\(^{381}\) Consider e.g. ECtHR, Saad v. the United Kingdom, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 84 (the Grand Chamber notes that “[c]ompliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness”); ECtHR, Chahal v. The United Kingdom, Application No. 22414/93, Reports 1996-V, Judgment (Grand Chamber) of 15 November 1996, par. 118 (“Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention […] requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.”); ECtHR, Mooren v. Germany, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 78; ECtHR Öcalan v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 83; ECtHR, Stafford v. The United Kingdom, Application No. 46295/99, Reports 2002-IV, Judgment (Grand Chamber) of 28 May 2002, par. 63; ECtHR, Winterwerp v. Netherlands, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 39 (lawfulness under Article 5 (1) also encompasses conformity with the purpose of the restrictions permitted under Article 5 (1) ECHR).
deprivation of liberty is arbitrary depends on the form of deprivation of liberty. Given that this chapter is primarily concerned with pre-trial deprivation of liberty, including detention with a view to extradition, the following examples of arbitrary arrest and detention, which were discerned by the Court, are relevant. First (1), in cases where there is an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to apply the relevant legislation correctly, the deprivation of liberty will be considered arbitrary. Also (2) where the order to detain and the execution of the detention do not “genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of article 5 § 1”, and (3) in the absence of some relationship between the ground of deprivation of liberty permitted and relied upon and the place and condition of detention, the deprivation of liberty is considered arbitrary. Further, (4) where in case of detention on remand (Article 5 (1) (c) ECHR), no grounds are given by the judicial authorities in their decisions authorising detention for a prolonged period of time or where the reasons given are ‘extremely laconic’ and without reference to any legal provision which would have permitted the applicant’s detention and (5) where a detention order which had either expired or had been found to be expired had been replaced by the domestic courts too slowly (a period of less than one month has been accepted, while a period of more than one year has been found to render the detention arbitrary), the deprivation of liberty was found to be arbitrary. In case of detention with a view to extradition of deportation, (6) where the detention continues for an unreasonable length of time (the principle of proportionality is limited to that extent in cases of detention pursuant to Article 5 (1) (f) ECHR), the deprivation of liberty is considered to be arbitrary.

Surprisingly, the legal frameworks of the ad hoc tribunals and the SCSL do not provide a right for suspects and accused persons to be free from unlawful or arbitrary arrest and detention. It has been argued that this absence underlines the need for these tribunals to apply

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382 ECtHR, Mooren v. Germany, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 77; ECtHR, Saadi v. the United Kingdom, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 68, including the relevant jurisprudence cited in the following paragraphs.

383 ECtHR, Saadi v. the United Kingdom, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 69 – 73; ECtHR, Mooren v. Germany, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 78 – 81.
the relevant international human rights norms to their full extent, including the relevant jurisprudence.\textsuperscript{384}

Hence, the inclusion of Article 55 (1) (d) into the ICC Statute was praised as a “major advance over the ICTY and ICTR Statutes and Rules.”\textsuperscript{385} It provides that ‘in respect of an investigation under this Statute, a person [s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute’. Importantly, the broad formulation of the right, as applying to ‘an investigation under this Statute’, implies that it applies both to the Court and to national authorities.

A similar entitlement of every person to be free from arbitrary or unlawful deprivation of liberty was provided for under the TRCP.\textsuperscript{386} In turn, no explicit provision is made under the statutory framework of the STL or the ECCC for a right for persons to be free from unlawful or arbitrary arrest and detention.

It follows from human rights law that the remedy when a person has been the victim of an unlawful or arbitrary arrest or detention is to release him or her. However, the international criminal tribunals avoid granting this remedy.\textsuperscript{387} When some rights of the suspect or the accused have been violated, the tribunals do not make a finding that the detention was ‘unlawful’ to avoid granting the remedy of release.\textsuperscript{388} In fact, such remedy may reveal itself to


\textsuperscript{386} Section 2.3 TRCP (‘No person shall be subjected to arbitrary arrest or detention. No person shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as prescribed in the present regulation and other applicable UNTAET Regulations’).

\textsuperscript{387} Consider in that regard A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 109 (“[t]he severity of the charges might, however, influence a careful balancing of what remedies can be used in order to repair violations”).

\textsuperscript{388} C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 660 (in referring to the example of a situation where the tribunal concluded that the right of the suspect to be informed promptly of the nature of the charges against him was violated, the author argues that rather than declaring the situation one of unlawful detention, they avoided doing so. “Because of that, neither do they have to explain what kinds of problems come with a strict application of this remedy of release and how they would resolve them”). Consider also B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999, Vol. II, Antwerp, Intersentia, 2001, p. 204.
be a pro forma remedy, since the UN member states would be under an obligation to, or the ICC could request states to immediately re-arrest the person. For this reason, PAULUSSEN argues that rather than automatically releasing the person, the tribunal “should instead simply accord the most appropriate remedy, taking every single aspect of the case into account, not only, among other things, the seriousness of the irregularity, but also the seriousness of the alleged crimes and hence the importance of the continuation of the trial.” Such assessment also allows for bringing the Prosecutor’s involvement into the equation.

V.2. The right to be promptly informed of the reasons for the arrest

V.2.1. The ad hoc tribunals and the Special Court

A right for the accused to be immediately informed upon arrest of the reasons thereof is provided for in the statutory framework of the ad hoc tribunals and the Special Court. Only Rule 55 (E) ICTY RPE requires that the Registrar instruct the national authorities that the indictment and the statement of rights of accused be read at the time of arrest. Whereas the SCSL and ICTR RPE require that the arrest warrant, the order for surrender, the indictment and the statement of rights should be served on the accused (and read to him or her in a language he or she understands), there is no qualifier that this should be done at the time of arrest. The ICTR Trial Chamber stated that sufficient information about the legal basis for the arrest of the accused can be given at the time of the arrest, or as soon as is practicable immediately following the arrest. Furthermore, Rule 53bis ICTY, ICTR, and SCSL RPE provides that the indictment should be personally effected on the accused at the time the person is being taken into the custody of the tribunal or as soon as possible thereafter.

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390 Ibid., pp. 838 - 859 (the author argues that such would add some ‘flexibility’ to the system). He additionally notes that with internationalised international criminal tribunals, the situation may even more problematic, where third states do not have the same cooperation obligations with the tribunal.
391 Article 20 (2) ICTY Statute; Article 19 (2) ICTR Statute (right of the accused to be immediately informed of the charges against him or her upon being taken into custody). A corresponding provision is absent in the SCSL Statute. Besides, Article 21 (4) (a) ICTY Statute, Article 20 (4) (a) ICTR Statute and 17 (4) (a) SCSL Statute provide for the right “[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.” This latter provision echoes Article 14 (3) (a) ICCPR.
392 Rule 55 (C) (ii) and (iii) ICTR and SCSL RPE.
No right for suspects to be informed without delay about the reasons for their arrest can be found in the Statute of the ad hoc tribunals and the SCSL. Nevertheless, a requirement to inform the suspect of the provisional charges under which he or she is arrested and detained, and the grounds necessitating provisional arrest and detention, follows from the provisions on the transfer and provisional detention of the suspect at the seat of the tribunal (Rule 40bis). In contrast, the same right is conspicuously absent in Rule 40 ICTY, ICTR and SCSL RPE. The absence of this right under the procedure of Rule 40 may lead to a gap in the protection of the individual rights of the suspect. Indeed, since a Rule 40bis order is often preceded by a prior prosecutorial request under Rule 40, the question arises as to the applicability of the right to be informed of the reasons for the arrest prior to the Rule 40bis order, even more so given the absence of any time limitations on the Prosecutor to request a Rule 40bis order following a Rule 40 request.

Nevertheless, the applicability of the said right to suspects has firmly been established in the case law of the ad hoc tribunals. The Appeals Chamber underscored that the right to be informed of the reasons of the arrest comes into effect from the moment of arrest and

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394 Consider Rule 40 ICTY, ICTR and SCSL RPE. In that regard, the right to be promptly informed of the reasons for the arrest needs to be distinguished from the right of the accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (Article 21 (4) (a) ICTY Statute; Article 20 (4) (a) ICTR Statute and Article 17 (4) (a) SCSL Statute) by means of an indictment. The confirmation and service of the indictment may follow sometime after the arrest: see ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 78, fn. 104; ICTR, Judgement and Sentence, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 105.

395 Rule 40bis (E) ICTR and SCSL RPE require the Registrar to ensure that copies of (i) the request and (2) the Rule 40bis order (which sets out (1) the grounds for the request by the Prosecutor, (2) including the provisional charges and (3) the grounds justifying provisional detention at the seat of the tribunal under Rule 40bis (B) (iii) ICTR and SCSL RPE) are served on the suspect and his counsel ‘as soon as possible’ (consider also Rule 40bis (I) ICTR and SCSL RPE, according to which Rule 55 (C) ICTR and SCSL RPE apply mutatis mutandis). While a comparable provision is lacking in Rule 40bis of the ICTY RPE, the same requirement arguably follows from Rule 40bis (E) ICTY RPE juncto Rule 55 (E) ICTY RPE. Consider also ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-ART72, A. Ch., 3 November 1999, par. 79, fn. 204: “the focus of the inquiry here is the determination of when the Appellant was actually notified of the general nature of the charges at any time after the initial Rule 40 request on 17 April 1996, but before the filing of the Rule 40bis order” (emphasis in original). Nevertheless, compare: W. SCHOMBURG, The Role of International Criminal Tribunals in Promoting Respect for Fair Trials, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, p. 11 (where the author notes that Rule 40bis merely obliges the Prosecution to communicate a provisional charge to the Registrar when requesting the transfer and a provisional detention of a suspect. “No reference is made to the rights of a suspect that are triggered upon his arrest.” This argumentation seems to be based solely on Rule 40bis (A) ICTY, ICTR and SCSL RPE. While it is certainly correct that no right for the suspect to be informed of the reasons of the arrest and detention is provided for, a duty incumbent on the Registrar to serve the Rule 40bis order and request on the suspect (informing the suspect of the reasons of his or her arrest) is explicitly provided for in the ICTR and SCSL RPE (and indirectly as far as ICTY Rule 40bis is concerned, through the application mutatis mutandis of Rule 55 (E) ICTY RPE)).

396 See supra, Chapter 7, III.1.3.
detention. When a request for an arrest pursuant to Rule 40 is made, the suspect should be informed as soon as possible after the request about reliable information why he or she is considered to be a suspect and about provisional charges against him or her. The principle of prosecutorial due diligence requires the Prosecutor to request the authorities of the requested state to do so on its behalf.

The tribunals have derived the right from international human rights norms. The Appeals Chamber determined in Barayagwiza that the right of the suspect to be promptly informed of the charges against him or her serves two distinct purposes. On the one hand, such right counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. As such, this information duty ensures the effective realisation of the suspect’s right to challenge his or her detention, and affords the suspect the opportunity to deny the offence and obtain his or her release prior to the initiation of the trial proceedings. Secondly, it provides the suspect with the information necessary to prepare his or her defence.

From a conceptual point of view, it is important to clearly distinguish between two rights. At stake in Barayagwiza was the right for the suspect to be informed of the reasons for his or her arrest and of any charges in order to enable the suspect to challenge the detention, which should be distinguished from the right to be informed promptly and in detail about the charges. Logically, at the moment of the arrest of the suspect, at an earlier stage in the criminal investigations, information may be of a more summary nature, less precise.

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397 ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 78; ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 81-82; ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 226. Notably, where a suspect was already detained, the Appeals Chamber found that the right attaches from the moment the suspect was detained pursuant to a request under Rule 40: ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 81.


399 In particular, the ICTR Appeals Chamber derived such right from Article 9 (2) ICCPR; Article 5 (2) ECHR and Article 7 (4) ACHR.


401 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 80 (the Appeals Chamber stresses the importance of this underlying purpose, where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect).

402 As underscored by the Appeals Chamber in Barayagwiza, the second ‘function’, to enable the suspect to prepare his or her defence, will require more detailed and specific charges to be provided.

403 HRC, Mc Lawrence v. Jamaica, Communication No. 702/96, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997, par. 5 (noting that the information which should be provided to the accused under article 14 (3) (a) ICCPR is more precise than that for arrested persons under Article 9 (2) ICCPR. So long as Article 9 (3) (including the right to be brought before a judge promptly) is complied with, the details of the nature and cause
'two functions' scheme outlined above, as postulated by the Appeals Chamber, risks conflating these different and distinct concepts.404

Where the procedural framework and jurisprudence analysed above acknowledge the existence of a right of suspects and accused persons to be promptly informed of the reasons for their arrest, further guidance as to the substance of this right may be sought in international human rights norms and jurisprudence.405

First, the ECtHR addressed the right to be promptly informed of the reasons for the arrest in Fox, Campbell, and Hartley v. The United Kingdom. In the wording of the Court, Article 5 (2) ECHR “contains the elementary safeguard that any person should know why he is being deprived of his liberty.”406 This implies that any person arrested should be informed, in simple, non-technical language that he can understand, about the essential legal and factual grounds for his arrest, in order to be able to exercise his or her right to challenge its lawfulness: “[w]hilst this information must be conveyed ‘promptly’[…], it need not be related in its entirety by the arresting officer at the very moment of the arrest.”407 Where Article 9 (2) of the charge need not necessarily be provided to an accused person immediately upon arrest). See also HRC, Kelly v. Jamaica, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987, 8 April 1991, par. 5.8. Similarly, in relation to the ECHR, TRECHSEL noted that the information which should be provided to the accused pursuant to Rule 6 (3) (a) ECHR should be more precise than that for arrested persons under Article 5 (2) ECHR. The different purpose the rights serve influences the nature of the information that should be provided. Where the former right according to which everyone charged with a criminal offence should be informed in detail of the nature and cause of the accusations against him serves the purpose of allowing the accused to mount a defence at trial, the former serves the purpose to allow the accused to effectively challenge his or her detention pursuant to Article 5 (4) ECHR. In that regard, Article 6 (3) (a) refers to information ‘in detail’. See S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, pp. 457-458.

405 As far as international human rights norms are concerned, consider in particular Article 9 (2) ICCPR: “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”; Article 5 (2) ECHR: “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”; Article 7 (4) ACHR: “[a]nyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.” Note that the formulation of this right under the ACHR differs from the other instruments where it seems to apply to detention rather than arrest and where it may be read as presupposing the existence of (a) charge(s). Reference should also be made to HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 4 (in case of preventive detention, information of the reasons should be given. Consider also Principle 10 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Resolution 43/173, U.N. Doc. A/RES/43/173, 9 December 1988 (“[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him”).
406 ECtHR, Fox, Campbell and Hartley v. United Kingdom, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 40.
407 Ibid., par. 40.
ICCPR requires that initial information be provided at the time of the arrest, this information can be limited to a general description of the reasons for the arrest.408

The degree of specificity necessitated under Article 5 (2) ECHR cannot be described in general terms and requires a factual determination. The issue of whether or not the content and promptness of the information conveyed were sufficient needs to be assessed in each case according to its specific features.409 In any case, the information provided should be sufficiently precise to allow the accused to challenge the arrest (habeas corpus).410 Similarly, the HRC held that under Article 9 (2) ICCPR, anyone arrested should be informed sufficiently of the reasons for his arrest “to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded.”411 In this regard, it should be reiterated that legitimate grounds are not required for the (provisional) arrest of a suspect or accused, save for the provisional detention of a suspect at the seat of the tribunal (Rule 40bis ICTY, ICTR, and SCSL RPE). Obviously, the information that is conveyed to the suspect or to the accused person differs. The suspect who is transferred to the seat of the tribunal will be informed of the grounds for the transfer requested by the Prosecutor, the provisional charges as well as of the grounds justifying the transfer and detention whereas the accused person will be informed of the charges.412

Importantly, since the right ultimately serves the purpose of allowing the person to have the lawfulness of his or her detention decided upon speedily, the ECtHR held that Article 5 (2) does not only apply to persons ‘arrested’ but also to persons ‘deprived of [their liberty] by detention’. Consequently, the right equally applies when persons have already been arrested

410 ECtHR, Fox, Campbell and Hartley v. United Kingdom, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 40; ECtHR, Van der Leer v. The Netherlands, Application No. 11569/85, Series A, No. 170-A, Judgment of 21 February 1990, par. 28. The right to challenge the arrest will be discussed, infra, Chapter 7, V.3.
411 HRC, Drescher Caldas v. Uruguay, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2, 21 July 1983, par. 13.2. Consequently, the HRC held that it was not sufficient to inform Caldas that he was arrested under the prompt security measures without any indication of the substance of the complaint against him.
412 Consider in particular Rule 40bis (E) SCSL and ICTR RPE.
and detained, and when the basis for this arrest and detention subsequently changes.\textsuperscript{413} Hence, when the requested state has already detained a suspect or accused person whose arrest and transfer is sought by an international criminal tribunal (for instance at the behest of a third state), a right for the suspect or accused attaches from the moment the basis for his detention by the requested state changes.

A suspect should not be informed in a particular form, nor should this information consist of a complete list of charges held against the suspect.\textsuperscript{414} The European Commission for Human Rights held that the information provided can be even less in case of an arrest with a view to extradition, a view which was also adopted by the ECtHR.\textsuperscript{415} Consequently, it could be argued that less information is required when a state is requested to provisionally arrest a suspect at the behest of one of the tribunals. Nevertheless, at the same time, the Court reiterated that the accused should be informed in an adequate manner, for him or her to know the reasons for the arrest.\textsuperscript{416} In any case the information should be conveyed in a language which is understood by the person.\textsuperscript{417} While no such obligation is included in the wording of Article 9 (2) ICCPR, this requirement follows from the jurisprudence of the HRC.\textsuperscript{418} Lastly, when suspects are interrogated upon their arrest, this may allow these suspects to infer the reasons for the arrest from these interrogations.\textsuperscript{419}

\textsuperscript{413} ECtHR, Shamayev and others v. Georgia and Russia, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005, par. 414-415 (“there is no call to exclude the applicants from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention”).


\textsuperscript{415} ECommHR, K v. Belgium, Application No. 10819/84, D.R. 38, Decision of 5 July 1984, p. 230. The Commission seems to reason that, where the suspect had not been arrested pursuant to Article 5 (1) (c) ECHR, insufficiency of information may not affect the broader right to a fair trial under Article 6 ECHR, as these proceedings are not concerned with the determination of a criminal charge; ECtHR, Kaboulov v. Ukraine, Application No. 41015/04, Judgment of 19 November 2009, par. 144; ECtHR, Khudyakova v. Russia, Application No. 13476/04, Judgment of 8 January 2009, par. 80; ECtHR, Bordovskiy v. Russia, Application No. 49491/99, 8 February 2005, par. 56.

\textsuperscript{416} ECtHR, Shamayev and others v. Georgia and Russia, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005, par. 413.

\textsuperscript{417} See the wording of Article 5 (2) ECHR, supra, Chapter 9, V.2, fn. 405. Consider also ECtHR, Ladent v. Poland, Application No. 11036/03, Judgment of 18 March 2008, par. 64.

\textsuperscript{418} Nevertheless, the HRC jurisprudence of the HRC seems to reveal that the person who is arrested should be informed in a language he or she understands, see HRC, Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.2.

\textsuperscript{419} ECtHR, Fox, Campbell and Hartley v. United Kingdom, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 41.
The procedural regime of the ICTY specifies that the accused person can be informed of the indictment and the rights of the accused person either in oral form (in a language he or she understands) or in written form where a translation is served on the accused in a language the accused understands and is able to read.\(^{420}\) The procedural regime of the ICTR and the SCSL provides that the accused is to be informed in oral form.\(^{421}\) Regarding the transfer and provisional detention of the suspect pursuant to Rule 40bis, the ICTR and SCSL RPE provide that ‘copies of the order (including the provisional charge and the ground justifying the order) and the request by the Prosecutor’ shall be served on the suspect and his or her counsel, without specifying the form in which this should happen.\(^{422}\) Rule 40bis of the ICTY RPE refers to Rule 55 on the execution of the arrest of the accused which implies that the suspect may be informed either orally or in written form.\(^{423}\) This should be done in a language the suspect understands and is able to read respectively.\(^{424}\)

However, it is not so much the level of information to be provided to the person arrested but rather the timing of the information that has proven to be controversial in international criminal proceedings. The requirement to be informed ‘promptly’ (ECHR) or ‘at the time of the arrest’ (ICCPR) under international human rights law has been more controversial.\(^{425}\) The ECtHR has accepted delays of several hours,\(^{426}\) or 24 hours but found a delay of 76 hours\(^{427}\) or four\(^{428}\) or ten\(^{429}\) days to be in violation of Article 5 (2) ECHR. Similarly, the HRC did not find a violation when there had been a delay of several hours.\(^{430}\) Where a delay of one week

\(^{420}\) Rule 55 (E) and (F) ICTY RPE.
\(^{421}\) Rule 55 (C) (ii) and (iii) SCSL and ICTR RPE.
\(^{422}\) Rule 40bis (E) ICTR and SCSL RPE.
\(^{423}\) Rule 40bis (E) ICTY RPE juncto Rule 55 (E) ICTY RPE.
\(^{424}\) Rule 40bis (E) ICTY RPE juncto Rule 55 (E) and (F) ICTY RPE.
\(^{425}\) Note that Article 9 (2) ICCPR requires that the information concerning the reasons for the arrest is provided ‘at the time of the arrest’, while the information on the charges should follow ‘promptly’.
\(^{426}\) ECtHR, Fox, Campbell and Hartley v. United Kingdom, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 42; ECtHR, Murray v. the United Kingdom, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 78.
\(^{427}\) ECtHR, Saadi v. the United Kingdom, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 84.
\(^{429}\) ECtHR, Rau v. Austria, Application No. 34082/02, Judgment of 2 October 2008, par. 43.
ICTR Prosecutor informed the authorities on 16 May 1996 that it would not proceed against Barayagwiza. A
authorities, while the accused contended he was arrested at the request of the Prosecutor) and ended when the
already detained since 15 April 1996, according to the Prosecutor at the request of the Rwandese and Belgian
with the first Rule 40 request by the Prosecutor to the authorities of Cameroon (at that time, Barayagwiza was
by the authorities of Cameroon at the behest of the tribunal during two different periods. The first period started
against him was violated” (emphasis added). As to the
responsible, the inescapable conclusion is that the Appellant’s right to be promptly informed of the charges
facts remain that the Appellant spent an inordinate amount of time on provisional detention without knowledge
extradition request from Rwanda, as the Office of the Public Prosecutor had referred to the request by the
the nature of the crimes was 3 May 1996, the day the Yaoundé Court of Appeal deferred judgement on an
moments where the suspect was clearly being held at the behest of the Tribunal), the Chamber argued that “the
Appeals Chamber distinguished between two periods where Semanza was held by the authorities of Cameroon at the behest of the tribunal. The first period started on 15 April 1996, where the Prosecutor made a Rule 40 request (at that time, Semanza was already arrested since 26 March 1996 on the basis of an international arrest warrant issued by the Rwandese authorities). The first period ended when the Prosecutor informed the authorities in Cameroon on 17 May 1996 that it was no longer interested in proceeding against Semanza. Regarding this first period of detention, the Appeals Chamber established that the earliest available date the suspect was informed of the nature of the crimes was 3 May 1996, the day the Yaoundé Court of Appeal deferred judgement on an extradition request from Rwanda, as the Office of the Public Prosecutor had referred to the request by the Tribunal in its submissions, informing the suspect in substance of the nature of the charges for which the ICTR Prosecutor sought his arrest. The Appeals Chamber reasoned that the counsel for Semanza (and based on the counsel/client relationship also Semanza) had received the submission by the Office of the Public Prosecutor at the latest at the moment the verbal request by the Public Prosecutor was made in court (ibid., par. 81 – 87). The second period of detention started with a second Rule 40 request on 21 February 1997 and ended with the transfer of -the then accused- Semanza to the tribunal on 19 November 1997. The Appeals Chamber reasoned that at the moment Semanza was taken into custody he was aware of the nature of the Prosecutor’s charges against him where he was informed of them during the first period of detention (ibid., par. 89).

In Semanza, the Appeals Chamber identified an 18 day gap between the arrest and the moment the suspect was informed of the charges. It concluded that the suspect’s right to be promptly informed of the nature of the charges had been violated. A “fitting remedy” was therefore required. In Barayagwiza, the Appeals Chamber concluded to an 11 months gap between the initial Rule 40 request and the moment he was informed of the general nature of the charges through being shown a copy of the Rule 40bis order. In its review decision of

and of nine days, respectively, was found, the HRC concluded that this was a violation of Article 9 (2) ICCPR. Longer delays were also held to violate Article 9 (2) ICCPR.

In Semanza, the Appeals Chamber identified an 18 day gap between the arrest and the moment the suspect was informed of the charges. It concluded that the suspect’s right to be promptly informed of the nature of the charges had been violated. A “fitting remedy” was therefore required. In Barayagwiza, the Appeals Chamber concluded to an 11 months gap between the initial Rule 40 request and the moment he was informed of the general nature of the charges through being shown a copy of the Rule 40bis order. In its review decision of

433 ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 87. The Appeals Chamber distinguished between two periods where Semanza was held by the authorities of Cameroon at the behest of the tribunal. The first period started on 15 April 1996, where the Prosecutor made a Rule 40 request (at that time, Semanza was already arrested since 26 March 1996 on the basis of an international arrest warrant issued by the Rwandese authorities). The first period ended when the Prosecutor informed the authorities in Cameroon on 17 May 1996 that it was no longer interested in proceeding against Semanza. Regarding this first period of detention, the Appeals Chamber established that the earliest available date the suspect was informed of the nature of the crimes was 3 May 1996, the day the Yaoundé Court of Appeal deferred judgement on an extradition request from Rwanda, as the Office of the Public Prosecutor had referred to the request by the Tribunal in its submissions, informing the suspect in substance of the nature of the charges for which the ICTR Prosecutor sought his arrest. The Appeals Chamber reasoned that the counsel for Semanza (and based on the counsel/client relationship also Semanza) had received the submission by the Office of the Public Prosecutor at the latest at the moment the verbal request by the Public Prosecutor was made in court (ibid., par. 81 – 87). The second period of detention started with a second Rule 40 request on 21 February 1997 and ended with the transfer of -the then accused- Semanza to the tribunal on 19 November 1997. The Appeals Chamber reasoned that at the moment Semanza was taken into custody he was aware of the nature of the Prosecutor’s charges against him where he was informed of them during the first period of detention (ibid., par. 89).
434 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 85 and 101. While the Appeals Chamber concluded that only 35 days are clearly attributable to the Tribunal (those moments where the suspect was clearly being held at the behest of the Tribunal), the Chamber argued that “the facts remain that the Appellant spent an inordinate amount of time on provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal - and not any other entity - that is currently adjudicating the Appellant’s claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant’s right to be promptly informed of the charges against him was violated” (emphasis added). As to the facts, similar to the Semanza case, Barayagwiza was held by the authorities of Cameroon at the behest of the tribunal during two different periods. The first period started with the first Rule 40 request by the Prosecutor to the authorities of Cameroon (at that time, Barayagwiza was already detained since 15 April 1996, according to the Prosecutor at the request of the Rwandese and Belgian authorities, while the accused contended he was arrested at the request of the Prosecutor) and ended when the ICTR Prosecutor informed the authorities on 16 May 1996 that it would not proceed against Barayagwiza. A

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31 March 2000, which is open to criticism, the Appeals Chamber concluded from several “new facts” that the period that Barayagwiza had not been informed of the general nature of the charges was not 11 months but was only 18 days. Nevertheless, the Appeals Chamber found this delay to still be in breach of the suspect’s right to be informed without delay of the charges against him. In determining the delay in informing the suspect or the accused person, the ICTR has inferred knowledge of the charges by the suspect from the constructive

second period started with the second Rule 40 request on 21 February 1997 (the same day a Cameroon court rejected the extradition request of Rwanda; as a result the court ordered Barayagwiza’s release but he was immediately rearrested at the request of the ICTR Prosecutor) and ended with the transfer to the ICTR on 19 November 1997. While a Rule 40bis order for the arrest and transfer of Barayagwiza was signed and filed on 4 March 1997, he was only transferred over eight months later. Consider the ‘Chronology of Events’, ibid., Appendix A.

ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 54-55 (transcripts presented of proceedings before the Cameroonian courts showed that Barayagwiza was already informed of the nature of the crimes by the Prosecutor on 3 May 1996). The Appeals Chamber established a new fact where transcripts of proceedings before the Cameroonian courts showed that Barayagwiza knew of the nature of the charges on 3 May 1996. These transcripts show that the appellant opposed his extradition to Rwanda and stated “c'est le tribunal international qui est compétent.” Therefore, the Appeals Chamber reasoned, “it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor.”

One author argues that the transcript does not prove that the suspect was informed about the general charges on that date. Therefore, he argues that the suspect should presumably have known of the charges prior to 3 May 1996, from the moment of his arrest and, most certainly, from the moment he appeared in court in Cameroon to answer the Rwandan and Belgian extradition requests. See W. SCHABAS, Barayagwiza v. Prosecutor in «The American Journal of International Law», Vol. 94, 2000, p. 570. However, it is for the Prosecutor to provide information that the suspect was informed of the reasons for his arrest, as clarified by the Appeals Chamber in the Kajelijeli case referred to below (see infra, Chapter 7, V.2.1. (§ burden of proof). The mere ‘presumption’ that the suspect was informed about the reasons for his arrest at the moment he was taken into custody in the absence of any information, does clearly not suffice. Such argumentation is flawed and should henceforth be rejected.

Besides, it is clear that the statement provided only shows that Barayagwiza understood that the ICTR had jurisdiction over the case. Whereas the statement made by Barayagwiza arguably proves that Barayagwiza knew why he was initially arrested (following an international arrest warrant by Rwanda and Belgium), it does not prove that the suspect knew the reasons why the ICTR sought his arrest. As previously held, the right to be informed about the reasons for the arrest equally applies where the basis for the arrest and detention changes. Besides, in no way does such statement prove that the Prosecutor fulfilled its obligation to inform the suspect of the reasons for his arrest. For a confirming view on this latter point, consider M. MOMENI, Why Barayagwiza is Boycotting his Trial at the ICTR: LESSONS in Balancing Due Process Rights and Politics, in «ILSA Journal of International and Comparative Law, Vol. 7, 2000 – 2001, pp. 323 – 324 (arguing that “the new facts did not show that the Prosecutor had fulfilled the obligation to timely inform the Accused of his right.” “They simply showed that Barayagwiza knew the nature of the charges against him in Cameroon in 1996, although not through the actions of the OTP”). Consider also S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 718 (calling the holding by the ICTR “a remarkable non sequitur.” “Even if Barayagwiza understood which court has sought jurisdiction over his case, that is a far cry from being informed in clear language of the essential legal and factual grounds for his arrest”).

ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 55. The Appeals Chamber added that “this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.”
knowledge by his defence counsel. In turn, it derived this constructive knowledge on behalf of the defence counsel from his opposition to a motion for further provisional detention.438

§ Burden of proof

In the Kajelijeli case, the accused argued that at the time of his arrest, he asked the authorities of Benin to be informed about the reasons of his arrest, only to be told that he would find them out at a later date. Since the Prosecutor failed to rebut this argument, the Appeals Chamber concluded that in the absence of any evidence to the contrary, the right to be informed about the reasons as to why he was deprived of his liberty had been violated.439 This holding is in keeping with the case law of the HRC, which emphasised that “[i]n the absence of any state party information to the effect that the author was promptly informed of the reasons of his arrest”, the HRC would have to rely on the statement provided by the accused.440 Consequently, it is recommendable to have the arrest proceedings organised in a manner allowing the Chamber to check whether the rights of the suspect or accused to be informed about the reasons for the arrest were respected. However, since the arrests are effectuated by states at the request of the tribunal, the arrest procedure will depend on domestic law. Nevertheless, the modalities of the cooperation request may yet accommodate these concerns.

§ No right to be ‘promptly’ charged?

Occasionally, the jurisprudence of the ad hoc tribunals refers to the right to be ‘promptly charged’. If the right refers to the time limitations under Rule 40bis for charging the suspect, the reference to this right seems to be rather unproblematic. Nevertheless, the ICTR Appeals Chamber, in Barayagwiza, seemed to argue the existence of a right to be promptly charged

440 HRC, Mc Lawrence v. Jamaica, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997, par. 5.5 (noting that “it is […] not sufficient for the State party simply to reject the author's allegations as unsubstantiated or untrue. In the absence of any State party information to the effect that the author was promptly informed of the reasons for his arrest, the Committee must rely on Mr. Mc Lawrence's statement that he was only apprised of the charges for his arrest when he was first taken to the preliminary hearing, which was almost three weeks after the arrest”).
under international human rights law. The case law referred to by the Appeals Chamber refers to instances in which the HRC found that the person has not been “promptly” informed of the charges against him, which is something different than the right to be “promptly” charged.

V.2.2. The International Criminal Court

The procedural framework of the ICC does not expressly provide for the right of suspects or accused persons to be informed of the reasons for their arrest. However, it was discussed previously that pursuant to Article 59 (2) (c) ICC Statute, the competent judicial authority in the custodial state should determine whether the suspect’s rights have been respected. It has been argued that the notion of the ‘rights of the person arrested’ should be understood as including the internationally protected rights of the suspect. The right of suspects to be informed of the reasons for their arrest is clearly included in this latter category. Consequently, this right should be respected by the requested state in the execution of the arrest. This obligation follows first from the human rights treaties to which the requested state is a party. Furthermore, as mentioned previously, the ICC RPE provide that the Court should ensure that as soon as the person is arrested by the requested state, he or she will receive a copy of the arrest warrant and of the relevant parts of the Statute. This should be done in a

441 Consider e.g. ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 100 (“We find, therefore, that the Appellant’s right to be promptly charged pursuant to international standards as reflected in Rule 40bis was violated.”); ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 91. However, note that in the Semanza Decision, as previously noted, the Appeals Chamber changed its opinion as to the starting point of the right to be promptly charged. See supra, Chapter 7, III.1.3.


443 S.L. RUSELL-BROWN, Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During the Pre-Trial Phase, in «UCLA Journal of International Law and Foreign Affairs», Vol. 8, 2003, p. 146 (“nor is it entirely clear whether [the Rome Statute] articulates a right to be informed of the reasons for an arrest at the time of arrest”).

444 Consider the discussion supra, Chapter 7, II.4.2.

445 Consider e.g. G. SLUITER, Surrender of War Criminals to the ICC, in «The Loyola of Los Angeles International and Comparative Law Reviews», Vol. 25, 2003, p. 623 (“Commentators have suggested that the drafters essentially had international human rights in mind, especially the arrested person’s right to be informed about the charges and the grounds for detention, as protected by Article 9(2) of the ICCPR”); C.K. HALL, Article 59, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1152 (“The rights referred to in this Subparagraph would include both rights under national law and under international law […] includ[ing] the suspect’s right to be informed about the charges and the grounds for detention”). Consider however the practice of the ICC with regard to Article 59 (2) ICC Statute, discussed above, supra, Chapter 7, II.4.2.
language the person fully understands and speaks. Notably, the ICC Appeals Chamber has recognised the existence of the right to be informed of the reasons of the arrest “of every individual”. With regard to accused persons, reference should be made to the related right “to be informed promptly and in detail of the nature, cause, and content of the charge”, as provided for under the Statute.

V.2.3. The internationalised criminal tribunals

As far as the internationalised criminal tribunals are concerned, it should be noted that the STL RPE state that when an arrest warrant is issued, it should be accompanied by the indictment and a statement of the rights of the accused. These documents should be in a language the accused understands ‘where practicable’. The Registrar should instruct the person or authorities that effectuate the arrest to read the indictment and the statement of the rights of the accused to the accused in a language he or she understands at the moment of the arrest. As far as the provisional arrest and transfer of suspects is concerned, it follows from Rule 63 (A) STL that a request should set forth the basis of the Prosecutor’s application, the provisional charge and the legitimate ground. While it is not expressly provided that the suspect should be informed about the reasons for his or her arrest, the application mutatis mutandis of Rule 79 STL RPE arguably implies that the Registrar should instruct the person or authorities effectuating the arrest to have the order or request read to the suspect in a language he or she understands, together with a statement of the rights of suspects. Noteworthy too is Rule 101 (A) STL RPE, which provides that when a suspect, accused person or a detained person is transferred to the tribunal, or when an accused person is arrested upon voluntary appearance, the Pre-Trial Judge or Chamber will inform itself whether the accused has been informed about the crimes for which he stands accused or is

446 Rule 117 (1) ICC RPE. See supra, Chapter 7, II.4.2.
447 ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 29 (“It is the human right of every individual to be informed of the grounds and reasons for which the deprivation of his/her liberty is sought”).
448 Article 67 (1) (a) ICC Statute.
449 Rule 79 (C) STL RPE.
450 Rule 79 (E) STL RPE. Alternatively, the indictment and the statement of rights may be served on the accused in a language he or she understands and is able to read (Rule 79 (F) STL PPE).
451 Rule 63 (E) juncto Rule 79 (E) and (F) STL RPE.
suspected and of his or her rights, including his or her right to apply for release. The TRCP provided that when a suspect was taken into police custody by the SPSC, ‘upon arrest and at the review hearing, the suspect should be informed of the reasons of the arrest and any charges against him and of his rights’. Lastly, the ECCC provide for the general right of every person to be informed about any charges against him or her. During the initial appearance, the charged person brought before the Co-Investigating Judges should be notified of the charges. No specific right for the suspect to be informed of the reasons for his or her arrest is provided for; this is also true for the time when he or she is brought before the Co-Investigating Judges.

V.3. Right to be promptly brought before a judge or ‘judicial officer’

The right of any person detained on a criminal charge to be promptly brought before a judge (or another officer authorised by law to exercise judicial power) is recognised by international human rights instruments. The importance of this right lies where it ensures that the person deprived of liberty is promptly and physically brought before a judicial officer. As such, according to the ECtHR, the right protects against “arbitrary behaviour, incommunicado detention and ill-treatment,” by means of “expedited judicial scrutiny.” The right should be distinguished from the right to challenge the lawfulness of the detention (inter alia Article 9

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452 Rule 101 (A) STL RPE.
453 Section 6 (2), Sections 19A.3 and 20.3 TRCP.
454 Rule 21 (1) (d) ECCC IR. Consider also Rule 51 (1) ECCC IR.
455 Rule 57 (1) ECCC IR.
456 The right is to be found in almost identical terms in Article 9 (3) ICCPR ("anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power"); Article 5 (3) ECHR ("[e]veryone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power"); Article 7 (5) ACHR ("[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power"). Consider also HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 2 ("[p]aragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect"). The STL Pre-Trial Judge held, obiter, that this norm constitutes an international principle of jus cogens. See STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 14.

457 See e.g. ECtHR, Medvedev and others v. France, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 118; ECtHR, Öcalan v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 103; ECtHR, Brogan and others v. The United Kingdom, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 58.
(4) ICCPR; Article 5 (4) ECHR) given its 'automatic nature'. Therefore, compliance with Article 5 (3) ECHR cannot be ensured by providing a right to challenge the lawfulness of the detention. The jurisprudence of the ECtHR clarified what should be understood under an 'other officer authorised by law to exercise judicial power'. First, what is required is that this officer is independent. This is a requirement that was equally confirmed by the HRC. Furthermore, the jurisprudence of the ECtHR emphasised that the right encompasses both a procedural requirement, to know that the judge or judicial officer should hear the person brought physically before him or her as well as a substantial requirement, since it requires the judicial officer to not only review circumstances in favour of and against detention but also to assess whether the detention in the given case was justified (and thus to consider the merits of the detention). Consequently, it is of the utmost importance that the judge or

458 Consider e.g. ECtHR, Medvedyev and others v. France, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 122; ECtHR, McKay v. The United Kingdom, Application No. 543/03, Reports 2006-X, Judgement (Grand Chamber) of 3 October 2006, par. 34.


460 The Court held in the Schiesser case that 'independence from the executive and the parties' does not prohibit that an 'officer' is a member of the prosecutor's office, where he or she only intervenes in the proceedings in an investigative authority and does not act as a Prosecutor. In its later jurisprudence, the Court overturned its previous case law and held that the 'officer' of the prosecutorial office could not be considered "independent of the parties." ECtHR, Schiesser v. Switzerland, Application No. 7710/76, Series A, No. 34, Judgment of 4 December 1979, par. 31; ECtHR, De Jong, Baljet and Van den Brink v. The Netherlands, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 49; ECtHR, Huber v. Switzerland, Application No. 12794/8740, Series A, No. 188, Judgment of 23 October 1990, par. 40 – 43. Consider also ECtHR, Medvedyev and others v. France, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 124 (noting that "[t]he judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority"). In a similar vein, consider ECtHR, Nikolova v. Bulgaria, Application No. 31195/96, Reports 1999-II, Judgment of 25 March 1999, par. 49.

461 In Kulomin v. Hungary, the HRC held that "[T]he Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public Prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3)." See HRC, Kulomin v. Hungary, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992, 22 March 2006, par. 11.3.

462 This procedural requirement encompasses at least three specific elements. First, the judge or 'other officer authorised by law to exercise judicial power' should hear the person him or herself (see ECommHR, Skoogström v. Sweden, Application No. 8582/79, Decision of 15 July 1983, par. 80 (holding that there can be no total or partial delegation of the powers under Article 5 (3) ECHR)), (2) the person should automatically be brought before the judge or 'officer' and (3) the requirement that the judge or officer must hear the person implies that the simple appearance of the person is not sufficient. See D. CHATZIVASSILIOU, The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention on Human Rights, in «ERA Forum», Vol. 5, 2004, p. 511.

‘officer’ has the power to order the release of the person.464 A decision on detention should set out the facts upon which the decision is based and, thus, be reasoned.465

The period of time a person can be held before being brought before a judicial authority depends on the circumstances of the case. In its General Comment No. 8, the HRC clarified that the right to be brought before a judicial authority ‘promptly’ entails that delays should not exceed “a few days.” This led the HRC to find a violation where there had been a four day delay or a longer delay.466 On the other hand, a delay of 73 hours was found not to be in violation of Article 9 (3) ICCPR.467 The ECHR found a delay of four days and six hours not to be in compliance with Article 5 (3) ECHR, even in complex cases involving terrorist offences.468 Periods of detention of up to four days before being brought before a judge have been accepted by the ECHR.469 The ECHR underlined that Article 5 (3) ECHR leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision.470 Longer periods have exceptionally been accepted, e.g.

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465 See e.g. ECtHR, Hood v. The United Kingdom, Application No. 27267/95, Reports 1998-VIII, Judgment of 18 February 1999, par. 60.
468 ECtHR, Brogan and others v. The United Kingdom, Application Nos.11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 62; ECtHR, De Jong, Baljet and Van den Brink v. The Netherlands, Application Nos. 8805/79; 8806/79; 9242/81; Series A, No. 77, Judgment of 22 May 1984, par. 52 – 54 (seven, eleven and six days respectively); ECtHR Öcalan v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 104 – 105 (seven days).
469 ECtHR, Tay v. Turkey, Application No. 24396/94, Judgment of 14 November 2000, par. 86. Where the national law provides for a shorter period and such period is ignored, there is no violation of Article 5 (3). However, there would be a violation of Article 5 (1) ECHR where the deprivation of liberty would be unlawful.
470 ECtHR, Brogan and others v. The United Kingdom, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 121; ECtHR, Pantice v. Romania, Application No. 33343/96, Judgment of 3 June 2003, par. 240.
when the arrest took place at sea, and it was ‘materially impossible’ to bring the detainee before the judge faster.\textsuperscript{471} None of the international (regional) human rights instruments provide for a precise time limitation.

V.3.1. The \textit{ad hoc} tribunals and the Special Court

As far as the \textit{ad hoc} tribunals and the Special Court are concerned, the procedural norms which guarantee the right to be promptly brought before a judge upon arrest depend on two familiar variables, to know (1) the place of detention (in the requested state or at the seat of the tribunal) and, (2) in cases where the person is detained at the seat of the tribunal, upon the status of the person (suspect or accused person).

It has been argued previously that the procedure of the \textit{ad hoc} tribunals and the Special Court with regard to the provisional arrest of suspects at the urgent request of the Prosecutor (‘Rule 40 requests’) does not provide the suspect with any procedural rights upon his or her arrest by the requested state (or by an international organisation). However, when the suspect is transferred and provisionally detained at the seat of the tribunal, the suspect will, as previously mentioned, be brought, without delay, before the Judge who previously confirmed the Rule 40\textsuperscript{bis} order.\textsuperscript{472} This Judge will ensure that the rights of the suspect have been respected. In the \textit{Bagosora} case, the Trial Chamber determined that there had been a 27-day gap between the transfer of the then suspect Kabiligi and his first appearance before a Judge (pursuant to Article 40\textsuperscript{bis} (J) ICTR RPE). According to the Trial Chamber, this amounted to a delay, in violation of Rule 40\textsuperscript{bis} (J) ICTR RPE, requiring an appropriate remedy. However, the Chamber noted that where the Defence only raised this issue in its closing brief, this “indicates that any prejudice suffered by Kabiligi is at most minimal.”\textsuperscript{473} Furthermore, the


\textsuperscript{472} Rule 40\textsuperscript{bis} (F) ICTY RPE and Rule 40\textsuperscript{bis} (J) ICTR and SCSL RPE. For an example, see ICTR, \textit{Prosecutor v. Renzaho}, Minutes of Hearing Pursuant to Rule 40\textsuperscript{bis} (J) of the Rules of Procedure and Evidence, Case No. ICTR-97-31-DP, Judge, 3 October 2002.

\textsuperscript{473} ICTR, Judgement and Sentence, \textit{Prosecutor v. Bagosora et al.}, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 89 – 90; ICTR, \textit{Prosecutor v. Bagosora et al.}, Judgement, Case No. ICTR-98-41-A, A. Ch., 14 December 2011, par. 31. Compare ICTR, Judgement and Sentence, \textit{Prosecutor v. Bizimungu}, Case No. ICTR-99-50-T, T. Ch. II, 30 September 2011, par. 54 (“The Chamber has some reservations that the initial appearances by Bizimungu after his transfer to the Tribunal comported with the requirement that he be brought, without delay, before a judge as set forth in Rule 40\textsuperscript{bis} (J). Nevertheless, duty counsel raised no objections on
Trial Chamber stated that the failure to promptly bring a challenge “has also prevented the development of a full record which would allow the Chamber to properly determine to what extent the delay is attributable to the Tribunal as opposed to any waiver of the right or other circumstances attributable to the Defence.”474 The Trial Chamber subsequently determined that Kabiligi’s right to counsel had been violated during the initial period of his detention. This is not without importance where “[o]ne of the key purposes of bringing a suspect promptly before a judge after his transfer is to ensure that his rights are being respected.”475 As far as the delay in the initial appearance before a judge is concerned, the Trial Chamber concluded that the appropriate remedy was the formal recognition that this violation occurred.476

The procedural regime is flawed insofar that, as previously held, there is no time limitation on the period that the suspect may spend in detention in the requested state.477 However, an obligation for the tribunals to provide for a right to be promptly brought before a judge or a ‘judicial officer’ in Rule 40 proceedings derives from the international human rights norms discussed previously, as has been acknowledged by the ICTR Appeals Chamber.478 Furthermore, likewise, this obligation is incumbent upon the national authorities of the requested state, since this obligation follows from international human rights treaties that they are bound to respect.479

The ICTR Appeals Chamber in Kajelijeli found that the detention in Benin for 95 days without being promptly brought before a Judge (either an ICTR Judge or a Judge from the requested state) was “clearly unlawful” and was in violation of the suspect’s rights under the

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475 Ibid., par. 91.
476 Ibid., par. 97.
477 See supra, Chapter 7, III.1.3.
478 ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 219 (“[t]he Appeals Chamber notes that the Statute and Rules of the Tribunal are silent with regard to the manner and method in which an arrest of a suspect is to be effected by the cooperating State under Rule 40 […] no mention is made of ensuring the suspect’s right to be promptly informed of the reasons for his or her arrest or the right to be promptly brought before a Judge. It is for the requested State to decide how to implement its obligations under international law” (emphasis added)).
479 Consider e.g. ibid., par. 220 (“the cooperating State still remains under its obligation to respect the human rights of the suspect as protected in customary international law, in the international treaties to which it has acceded, as well as in its own national legislation” (footnote omitted)).
Statute and under international human rights law. Consequently, the Appeals Chamber attributed responsibility for this violation to the Prosecutor. According to the Chamber, the Prosecutor failed to make a request, within a reasonable time, pursuant to Rule 40 and Rule 40bis for the provisional arrest and transfer of the suspect to the tribunal. When the suspect, Kajelijeli (then accused), was transferred to the tribunal, he was also not brought before a Judge promptly. The Appeals Chamber referred to the underlying purposes of the right, including the right to be promptly informed of the provisional charges, to ascertain the identity of the suspect, to ensure that the rights of the suspect have been respected in detention and to give an opportunity to the suspect to voice any complaints. While the Chamber acknowledged that the Prosecutor was not solely responsible for the violation of the rights of the suspect, it recalled that the suspect had been apprehended, arrested, and detained at the request of the Prosecutor.

In this sense, the Appeals Chamber confirmed the attribution of pre-transfer violations to the Prosecutor and established the existence of a ‘shared burden’ between the requested state and the tribunal with regard to the safeguarding of the rights of the suspect in international cooperation in criminal matters.

“A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect’s identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee and consular officers. It is however not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.”

481 Ibid., par. 231-232, 252.
482 Ibid., par. 232.
483 In particular, the Appeals Chamber refers to a decision of the Constitutional Court of Benin, where it found that the detention in Benin was in violation of Article 18 (4) of the Constitution, which stipulates that “no one can be held for a period beyond 48 hours without a decision from a Magistrate to whom the person is presented, this timeframe can only be exceeded exceptionally as provided for by law and that cannot exceed a period of eight days.”
484 Ibid., par. 221.
From this follows a dual obligation for the Prosecution to, on the one hand, include a notification to the judiciary of the requested state in its request for provisional arrest, or at least, a clause reminding the national authorities to bring the suspect promptly before a judge or ‘officer’ and, on the other hand, to notify the tribunal to enable the Judge to furnish the requested state with a provisional arrest and transfer order.485

The ICTR Appeals Chamber confirmed, in Rwamakuba, that when the person arrested and detained is an accused, he or she equally enjoys the right to be promptly brought before the Judge.486 In cases where the person arrested and transferred is an accused, the RPE of the ad hoc tribunals and the Special Court provide that the accused should be brought before a Judge or a Trial Chamber ‘without delay’, and should be formally charged.487 The provision is flawed where it provides the accused with such right ‘upon transfer’.488 It does not encompass a right for the accused to be brought before a judge in the requested state. Since this right follows from international human rights norms, the Prosecution should instruct the national authorities to ensure this right.489 Furthermore, its application to suspects which are already detained at the UN Detention Centre (as suspects) is not crystal clear. While, as previously explained, a right for suspects which are transferred to the tribunal to be brought before a judge is provided under Rule 40bis ICTY, ICTR, and SCSL RPE, it should be made clear that Rule 62 also applies to this category of defendants, upon confirmation of the indictment. However, this is not clear from the formulation of the provision (‘upon transfer’).

485 Ibid., par. 222.
486 In the case at hand, the accused had been arrested and detained by the Namibian authorities from 2 August 1995 until 7 February 2000. Whereas the OTP on 22 December 1995 requested the Namibian authorities to keep Rwamakuba in custody, it informed the authorities on 18 January 1996 that they did not have sufficient evidence against Rwamakuba. He was subsequently released. On 29 August 1998, an indictment was confirmed against him and an order for his arrest and transfer was issued. He was re-arrested in Namibia on 21 October and transferred to the tribunal on 22 October 1998. See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamakuba et al., Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, p. 2.
487 See Rule 62 ICTY, ICTR and SCSL RPE, which is based on Article 20 (3) ICTY Statute and Article 19 (3) ICTR Statute. According to the Appeals Chamber, the assistance of counsel is ideal for the purpose of the initial appearance. See ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 248.
488 Rule 62 (A) ICTY, ICTR and SCSL RPE.
489 Compare S. TRECHSEL, Rights in Criminal Proceedings under the ECHR and the ICTY Statute – A Precarious Comparison, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p. 163 (“My proposal would be to link to the arrest warrant a request to the arresting state that the arrestee be brought promptly before a judge there”).
As noted by the ICTR Appeals Chamber, the purpose of the initial hearing is not limited to the entering of a plea. On this occasion, the accused must be made familiar with the charges, his or her identity should be checked, obvious challenges to the case should be examined, the medical condition of the accused should be checked and a person enjoying the confidence of the detainee as well as consular officers should be notified.\(^{490}\) Furthermore, a date for a sentencing hearing without delay in case of a guilty plea may also be scheduled. However, neither Rule 62 nor international human rights norms indicate a specific period of time after which the delay becomes excessive. In *Semanza*, the accused was transferred to the tribunal on 19 November 1997, only to have his initial appearance on 16 February 1998, or a time lapse of 89 days.\(^{491}\) When the accused requested that his initial appearance be postponed thirteen days, the Appeals Chamber found that this request had the effect of a waiver of the right to be brought before a Trial Chamber without delay and be formally charged.\(^{492}\) This reasoning is flawed insofar as Rule 62 ICTR RPE reflects the human right to be promptly brought before a judge or a judicial officer and insofar as it deviates from established human rights jurisprudence which holds that the right to be brought before a judge promptly cannot be waived.\(^{493}\) Nevertheless, a similar reasoning was adopted by the Trial Chamber in *Bagosora*, where 125 days had passed between the confirmation of the indictment of Kabiligi (who was already detained at the seat of the tribunal pursuant to Rule 40bis) and his initial appearance pursuant to Rule 62 ICTR RPE. The Trial Chamber found that the 125 day delay was not attributable to the tribunal because Kabiligi’s counsel had objected to the first date proposed. This objection together with the failure to bring a claim for nine years suggested, according to the Trial Chamber, a waiver of this right.\(^{494}\) In *Kajelijeli*, the Appeals Chamber


\(^{491}\) ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 107.

\(^{492}\) Ibid., par. 108-111; consider the dissent of Judge Lal Chand Vohrah, who argued that the waiver of thirteen days does not imply a waiver of the extra 76 days: ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 10.

\(^{493}\) S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 506 (noting that where the right to be promptly brought before a judge or ‘officer’ cannot be waived, such “highlights a general distrust of the police authorities and concerns as to whether such a waiver would truly be voluntary”).

found a 211-day delay between transfer and initial appearance to constitute “extreme undue delay”. In *Barayagwiza*, a delay of 96 days existed between the transfer of the accused and his initial appearance, without there being any evidence that he was afforded the opportunity to appear before an independent judge during the period of provisional detention. The Appeals Chamber concluded that a violation of the right to be brought before a judge *without delay*, had occurred pursuant to Rule 62 and Articles 19 and 20 ICTR Statute as well as pursuant to ‘internationally recognised human rights standards’. In the *Bagosora et al.* case, Trial Chamber I, while noting that the delay was less excessive than in the *Rwanakaba* and the *Kabiligi* cases, found a delay of 28 days in holding the initial appearance of Bagosora to be in violation of his right to be brought before a judge without delay.

As far as the ICTY is concerned, TRECHSEL concluded, on the basis of 125 cases, that the average time for an initial appearance is four-and-a-half days, with delays of up to 62 days.

In *Kajelijeli*, the ICTR Appeals Chamber rejected arguments that the difficulties in the assignment of counsel were responsible for the delay of the initial appearance and held that “[i]t constitutes a violation of Rule 44bis (D) of the Rules and provision 10bis of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice, *in light of the outstanding initial appearance.*” Indeed, Rule 44bis (D) provides that whenever an accused or suspect, transferred pursuant to Rule 40bis, is unrepresented at any time after being transferred to the tribunal, the Registrar will summon duty counsel as soon as practicable until counsel is engaged or assigned. Similarily, where

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496 Ibid., par. 253.
497 ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 71. However, the Appeals Chamber added that this violation does not result in the Tribunal losing jurisdiction over the case. Judge Shahabuddeen disagreed with such finding and argued that Rule 62 “is susceptible of the interpretation that non-compliance would result in loss of jurisdiction, on the view that jurisdiction was granted by the Statute to the tribunal subject to defasance of certain fundamental principles stated or implied by the Statute.” See ibid., Separate Opinion of Judge Shahabuddeen (subheading 1. Post-transfer delay).
498 S. TRECHSEL, Rights in Criminal Proceedings under the ECHR and the ICTY Statute – A Precarious Comparison, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p.163 (the author adds that for 37 cases, there was a delay of four days and that for 31 of these cases, the duration was between two and nine days).
500 It was noted by an ICTR Trial Chamber that an inconsistency exists between the right to counsel under Rules 40bis (I) and 44bis (D) ICTR Statute, which only apply after transfer, while Rule 45bis sets forth that Rules 44 and 45 (on the qualifications and assignment of counsel) apply to “any person detained under the authority of the
the Trial Chamber in *Rwamakuba* found a delay of four months and a half between the transfer and the initial appearance of the accused to be mainly attributable to the difficulties in having counsel assigned, the Chamber subsequently concluded to the Registrar’s failure to have duty counsel appointed, which led to a violation of Rule 62 ICTR RPE and Article 20 (4) (c) (right to be tried without undue delay). However, the request for immediate and unconditional release was dismissed because the delay did not cause Rwamakuba ‘serious and irreparable damage’ and due to the absence of other violations.

Remarkably, some case law followed a different approach. In *Kanyabashi*, ICTR Trial Chamber II concluded that the function and purpose of the initial appearance before the Trial Chamber is not to ensure the lawfulness for the continuous detention of the accused. While the Trial Chamber acknowledged that the wording of the Rule 62 is similar to international provisions guaranteeing the right to be promptly brought before a judge, the Chamber held that these provisions do not apply to the setting of the *ad hoc* tribunals. Consequently, the interpretation given to “without delay” should not necessarily be the same as the interpretation given to “promptly” in Article 9 (3) ICCPR and other similar provisions. The Chamber reasoned that the procedural set-up differs from that in national societies in that Judges are involved in the arrest and detention of an accused through the confirmation of the indictment and the issuance of arrest warrants and orders for transfer. The international provisions of Article 9 (3) ICCPR, Article 5 (3) ECHR are, according to the Trial Chamber, based on national criminal justice systems where the judicial organs do not play a role in the arrest of individuals. In these criminal justice systems, the municipal law needs those provisions to

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502 Ibid., par. 63.

503 Ibid., par. 63.
place the executive action under judicial control after arrest and detention of individuals and
to minimise the unlawful deprivation of the individual’s right to liberty.506

This interpretation by the Trial Chamber is misguided and is based on a partial reading of the
jurisprudence of the ECtHR and the HRC. The ECtHR has emphasised in its jurisprudence
that, whereas the main goal of the stated right is to protect the individual from arbitrary
interferences with his or her right to liberty, the obligation equally applies when an arrest
warrant has been issued by a judicial authority.507 When the initial detention was ordered by a
domestic court, this does not preclude the subsequent application of the right to be promptly
brought before a judge when, inter alia, the defendant was not heard when his detention was
being considered.508 Similarly, Article 9 (3) ICCPR applies “regardless of whether a person
has been arrested on the basis of a court order or due to action taken directly by executive
authorities […]”509

V.3.2. The International Criminal Court

At the ICC, Article 59 (2) ICC Statute guarantees the protection of the right to be promptly
brought before the ´competent judicial authority´ in the custodial state. This provision has
already been analysed at length.510 While the express right for the suspect to be brought
before a competent judicial authority is a remarkable improvement, bearing the flawed
jurisprudence of the ICTR in particular in mind, it is in the referral to national law that the
primary threat to the potential of this procedural mechanism lies. Indeed, the chapeau of
Article 59 (2) refers back to the law of the custodial state.

Firstly, what is to be understood under ´competent judicial authority´ under Article 59 (2) ICC
Statute needs to be clarified. This concept should be understood in a normative way. Hence,

506 Ibid., par. 62.
507 ECtHR, McGoff v. Sweden, Application No. 9017/80, Series A, No. 83, Judgment of 26 October 1984, par. 27
(emphasis added).
508 ECtHR, Milošević v. Serbia, Application No. 31320/05, Judgment of 28 July 2009, par. 52; ECtHR, Vrenčev
509 M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein,
510 See supra, Chapter 7, II.4.2.
appearance before a competent \emph{judicial} authority is required.\footnote{In this regard, it should be noted that the other provisions of Article 59 ICC Statute refer to the 'competent authority'.} This concept should be interpreted in light of relevant international human rights norms, including Article 9 (3) ICCPR, Article 5 (3) ECHR or Article 7 (5) ACHR.\footnote{C.K. HALL, Article 59, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1150 (noting the similarity between Article 59 (2) ICC Statute and international human rights norms); W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 718; B. SWART, Arrest Proceedings in the Custodial State, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1252.} Indeed, it follows from Article 21 (3) ICC Statute that the provisions of the Statute should be interpreted in light of internationally recognised human rights. Consequently, and secondly, the 'competent judicial authority' should be independent. Thirdly, this authority should respect the procedural and substantial requirements that were outlined above.\footnote{See supra, Chapter 7, V.III.}

It has been explained previously how it follows from human rights law that the judicial officer before which the detained person is brought should have the power to review the merits of the detention and to order release. However, it follows from Article 59 (4) ICC Statute that it is not open to the competent judicial authority to determine whether the warrant of arrest was properly issued in accordance with Article 58 ICC Statute. Hence, the scope of this right seems too narrow to satisfy international human rights norms. Nevertheless, the power to review the legality of the arrest warrant is reserved to the Pre-Trial Chamber by virtue of Rule 117 (2) and (3) ICC RPE. Still, the accordance of this mechanism with international human rights norms remains uncertain. First and central to the right to be promptly brought before a judge or a judicial officer is the 'automatic nature' of this right. This feature seems absent insofar as the suspect arrested in the custodial state should apply to the Pre-Trial Chamber to have the legality of the warrant of arrest reviewed. The usefulness of the proceedings before the Pre-Trial Chamber depends on the suspect being informed of the possibility of such challenge and on the cooperation by the custodial state.\footnote{G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 469, fn. 24.} Moreover, the power to order release seems absent from Article 59 (2) ICC Statute. Whereas interim release can be ordered in exceptional circumstances,\footnote{See \textit{infra}, Chapter 7, V.3.} this implies that the re-arrest of the suspect remains possible.\footnote{\textit{Ibid.}, p. 469.} It does not seem open to the competent judicial authority to order the final release.
of the suspect.\textsuperscript{517} At this point, the limited role the Pre-Trial Chamber takes upon itself in reviewing the proceedings in the custodial state should be recalled.\textsuperscript{518}

Once the person is transferred to the ICC (or appears voluntarily pursuant to a summons), Article 60 (1) ICC Statute guarantees the right to be promptly brought before a judge or a ‘judicial officer’, since it provides that the Pre-Trial Chamber should satisfy itself that the person has been informed of the crimes which he or she allegedly committed, the rights he or she enjoys under the Statute (Article 55 ICC Statute)\textsuperscript{519} and his or her right to apply for interim release pending trial. No time limitation is included in the provision. Nevertheless, Rule 121 (1) ICC RPE clarifies that the suspect should appear ‘promptly upon arriving at the Court’.

V.3.3. The internationalised criminal tribunals

Lastly, as far as the internationalised criminal tribunals are concerned, the following provisions ensure the right to be promptly brought before a judge or a judicial officer. Firstly, before the SPSC, upon arrest, the person had to be brought before the Investigating Judge within 72 hours and a review hearing was organised.\textsuperscript{520} Disturbingly, it seems that this requirement was not always respected in practice.\textsuperscript{521} During this hearing, the lawfulness of the

\textsuperscript{517} Consider however the argumentation that release should be possible in exceptional cases, \textit{supra}, Chapter 7, II.4.2.
\textsuperscript{518} See \textit{supra}, Chapter 7, II.4.2.
\textsuperscript{519} Note that according to Rule 121 (1) ICC RPE, the rights under Article 67 ICC Statute are guaranteed, ‘subject to the provisions of articles 60 and 61’.
\textsuperscript{520} Sections 6.2 (e) and 20 (1) TRCP.
\textsuperscript{521} The Court found no violation of these provisions where the Prosecution ‘tried twice to have a hearing within 72 hours.’ Consequently, the obligation to organise the review hearing within 72 hours is fulfilled where the Prosecutor made a ‘genuine effort’ to schedule such hearing, but the hearing did not take place. In fact, the accused had been arrested twice. First, the accused was arrested on 21 April 2004 for an ordinary offence (illegally trespassing the border). On the 24\textsuperscript{th}, while the accused was retained, he was ‘arrested’ a second time by an investigator on the basis of the charges in the indictment filed before the SPSC. The review hearing was only organised on 27 April, or seven days after the deprivation of liberty. However, in assessing the 72 hours limitation, the Court only calculated the time from the second ‘arrest’. Even in that latter case, it seems that the review hearing did not take place within 72 hours where the Court reasoned that the Prosecution “tried twice to have a hearing within 72 hours,” which seems to imply that a genuine effort by the Prosecutor to respect the 72 hours time limit would suffice. Consider SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, Prosecutor v. Aprecio Mali Dao, Case No. 18/2003, SPSC, 29 April 2004, par. 42. See also S. KATZENSTEIN, Hybrid Tribunals: Searching for Justice in East Timor, in ‘Harvard Human Rights Journal’, Vol. 16, 2003, p. 253 (“Until relatively recently, the accused have been routinely detained beyond the seventy-two-hour limit and before their preliminary hearings. Some of the accused have been left in prisons for months or even years while awaiting trial”); JSMP, Dili District Court: Final Report, November 2003, p. 33 (http://unpan1.un.org/intradoc/groups/public/documents/UNCTC/UNPAN014017.pdf, last visited 15 January 2014) (“In the period of monitoring, JSMP came to know about numerous cases in which the accused was only
arrest and ensuing detention was reviewed. On this occasion, the legal representative had to be present, if they had been appointed or retained.522 Victims had the right to be heard at the review hearing.523 The Investigating Judge could confirm the arrest and order detention, release the suspect or order substitute restrictive measures.524 This order could be appealed by the parties.525 The family had to be notified of the detention as soon as practicable, which requirement is missing in the procedural frameworks of other international(ised) criminal tribunals. This safeguard protects against arbitrary arrests.526 Furthermore, upon arrest, the suspect enjoyed the right to contact a relative or a close friend and to be visited by this person.527

At the STL, the transferred suspect should be brought before the Pre-Trial Judge without delay.528 Similarly, when the accused has been arrested pursuant to an arrest warrant, the accused should be brought before the Judge or Trial Chamber without delay to be formally charged.529 In line with the procedural framework of the ad hoc tribunals and the SCSL, no general right for the suspect or accused to be promptly brought before a national judge or judicial officer upon arrest and prior to transfer, is provided for. After the Prosecutor requested the Lebanese judicial authority seized with the case of the attack against Prime Minister Raïf Hariri and others to defer its competence, and to submit a list of all persons detained in connection with the investigation to the Pre-Trial Judge,530 the Prosecutor was presented for the “initial detention hearing (72 hour hearing)” after the expiration of the time period. Two main reasons for the hearings not occurring within the requisite time were: (1) the difficulties experienced by police in transporting suspects from outside of Dili and, (2) a lack of investigating judges present at the court, especially at weekends”).

522 Section 20.1 TRCP.
523 Section 12.3 TRCP.
524 Section 20.6 TRCP.
525 Section 21 (3) TRCP.
526 Section 19A.9 TRCP. No such safeguard is provided for in the procedural frameworks of other international(ised) criminal tribunals. Besides, such safeguard does not seem to be afforded in practice by these institutions. Consider in this regard the following excerpt from the testimony of an investigator in the Sesay case (SCSL). Q. […] Mr Sesay is crying in the interview and he says: “You know, I said, what got me so shattered, when you asked me about my children, because presently they don’t even know my whereabouts. You know, that caused me to cry.” Do you remember that? A. [investigator] Yes, I do. Q. Why didn’t his children know his whereabouts? A. That’s the day of the arrest. Q. Yes. Well, isn’t it customary, I think in most jurisdictions, to give an accused or a suspect a phone call so he can inform his family where he is? A. We didn’t know where the family was. Q. Well, why didn’t you at this point say to him: “Let’s stop the interview. I don’t want to take unfair advantage of you. Let’s inform your family where you are. They must be worried”? Why didn’t you do it? A. I did not do it. See SCSL, Trial Transcript, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 13 June 2007, p. 65.
527 Section 6.2 (b) TRCP.
528 Rule 63 (F) STL RPE.
529 Rule 98 (A) STL RPE.
530 Article 4 (2) STL Statute and Rule 17 (A) STL RPE.
under the obligation to file an application with the Pre-Trial Judge ‘as soon as possible’ indicating whether or not he requests the continued detention of the persons on the list. The Pre-Trial Judge held that this provision should also be interpreted in light of the right to be promptly brought before a judge and on that basis reduced the time proposed by the Prosecutor to file his application.531

Finally, as far as the ECCC are concerned, a distinction should again be drawn. A suspect may already be in police custody (garde à vue) during the preliminary inquiry.532 This police custody is limited in time and may not exceed 48 hours (which may be extended once by another 24 hours).533 Whereas the person who is taken into police custody must be brought before the Co-Prosecutors as soon as possible, and enjoys the assistance of counsel on this occasion, this does not safeguard the right to be promptly brought before a judge or a judicial officer where the Co-Prosecutors, being themselves a party in the proceedings, lack the necessary independence.534 At the end of the police custody, the person should either be released or be presented before the Co-Investigating Judges for an ‘initial appearance’.535

When a suspect, a charged person or an accused person is deprived of his or her liberty pursuant to an arrest warrant (mandat d’amener) or a charged person or an accused person pursuant to an arrest and detention order, that person should immediately be presented before the Co-Investigating Judges. If this is not possible, the person should be placed in detention and the rules on the police custody apply mutatis mutandis.536 Therefore, the person should be brought before the Co-Investigating Judges ‘as soon as possible’ and in any case before the end of the 48 hours period (which may be extended by 24 hours). This provision applies, notwithstanding the more stringent conditions for persons deprived of liberty pursuant to an arrest warrant (mandat d’amener) as provided for under the Cambodian code of criminal procedure.537

532 See supra, Chapter 7, III.3.
533 Rule 51 (3) ECCC IR.
534 Consider the discussion of the requirements of a ‘judicial officer’ under human rights law as previously discussed. See supra, Chapter 7, V.3.
535 Rule 51 (7) ECCC IR.
536 Rule 45 (4) ECCC IR.
537 Consider Article 193 of the Cambodian code of criminal procedure (“If, due to the circumstances, the cited individual cannot be brought before the investigating judge immediately after the arrest, that person shall be brought to the police unit or military police office in the detention center or prison. That person shall be
When, upon arrest, the person is brought before the Co-Investigating Judges who can order provisional detention, the question arises as to whether the dual role of the Co-Investigating Judges in the Extraordinary Chamber’s procedural scheme casts doubts as to their impartiality. On the one hand, they conduct the judicial investigation and, on the other hand, they rule on provisional detention and on the extension of that detention. The Co-Investigating Judges held that ‘international law principles’ do not reveal the existence of one single approach regarding the determination of the authority which is responsible for ordering provisional detention. All that is required by international human right norms is that the person arrested or detained on a criminal charge be brought before a judge or judicial officer, offering guarantees of independence and impartiality. They reminded that their role in the proceedings is different from the role of the parties and that they are ‘judges’ in their own right. The fact that they are charged with ordering provisional detention “does not objectively affect their impartiality or give rise to the appearance of bias.”

V.4. The right to challenge the lawfulness of detention (habeas corpus)

V.4.1. The ad hoc tribunals and the Special Court

§ Nature of the right

With the exception of Rule 40 bis (G) ICTY RPE and 40 bis (K) ICTR and SCSL RPE (which apply only to suspects where an order for the provisional transfer and detention has been issued), no express provision is made under the Statute or the RPE of the ad hoc tribunals for a right to challenge the legality of the deprivation of liberty. However, the ICTR Appeals
Chamber established that a *writ of habeas corpus* in the sense of “the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority’s act is well established by the Statute and the RPE.”\(^{543}\) Whereas the ICTR Appeals Chamber referred to the ‘writ of habeas corpus’, referring to the ‘right to challenge the lawfulness of the deprivation of liberty’ is to be preferred, as the former term refers to a legal procedure, known by certain common law jurisdictions, which possesses a broader meaning than the way it is normally used at the international level.\(^{544}\) Furthermore, no prerogative writs, in the sense of documents issued in the name of the Sovereign ordering a defendant to carry out a particular action, exist in international criminal proceedings.\(^{545}\) The *ad hoc* tribunals and the SCSL have the power and procedure to resolve challenges to the lawfulness of the detention of a detainee, as firmly established by their case law.\(^{546}\) It allows the person

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\(^{543}\) ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 88 (the Appeals Chamber noted that “[a]lthough neither the Statute nor the Rules specifically address *writs of habeas corpus* as such the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority’s acts is well-established by the Statute and Rules.” “Moreover, this is a fundamental right and is enshrined in international human rights norms.” The Appeals Chamber argued that the *habeas corpus* right derives, *inter alia*, from Article 19 and 20 ICTR Statute and from Rule 40bis (J) ICTR RPE); ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 112. A similar reasoning can be found in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Vlahović*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Mladić*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 38 – 40. Consider also e.g. ICTR, Decision on the Defence Motion for the Release of the Accused, *Prosecutor v. Nshamihigo*, Case No. ICTR-2001-63-I, T. Ch. I, 8 October 2001, par. 5.

\(^{544}\) ICTR, Decision, on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 28. Consider also L. MAY, Habeas Corpus and the Normative Jurisprudence of International Law, in «Leiden Journal of International Law», Vol. 23, 2010, p. 304 (arguing that in international criminal procedural law, the concept of *habeas corpus* is much narrower construed than in some common law countries, such as the United States). See also G-J. KNOOPS, Commentary, in A. KLIP and G. SLUITER (eds.), Annotated Leading Cases of International Tribunals: The International Criminal Tribunal for Rwanda 2000-2001, Vol. VI, Antwerp, Intersentia, 2003, pp. 217, 219 (the Appeals Chamber referred to the ‘writ of habeas corpus’ calling it to challenge the *lawfulness of the deprivation of liberty*’ is to be preferred, as the former term refers to a legal procedure, known by certain common law jurisdictions, which possesses a broader meaning than the way it is normally used at the international level. Moreover, this is a fundamental right and is enshrined in international human rights norms.” The Appeals Chamber argued that the *habeas corpus* right derives, *inter alia*, from Article 19 and 20 ICTR Statute and from Rule 40bis (J) ICTR RPE); ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 112. A similar reasoning can be found in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Vlahović*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Mladić*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 38 – 40. Consider also e.g. ICTR, Decision on the Defence Motion for the Release of the Accused, *Prosecutor v. Nshamihigo*, Case No. ICTR-2001-63-I, T. Ch. I, 8 October 2001, par. 5.

\(^{545}\) ICTR, Decision, on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 28. Consider also L. MAY, Habeas Corpus and the Normative Jurisprudence of International Law, in «Leiden Journal of International Law», Vol. 23, 2010, p. 304 (arguing that in international criminal procedural law, the concept of *habeas corpus* is much narrower construed than in some common law countries, such as the United States). See also G-J. KNOOPS, Commentary, in A. KLIP and G. SLUITER (eds.), Annotated Leading Cases of International Tribunals: The International Criminal Tribunal for Rwanda 2000-2001, Vol. VI, Antwerp, Intersentia, 2003, pp. 217, 219 (the Appeals Chamber referred to the ‘writ of habeas corpus’ calling it to challenge the *lawfulness of the deprivation of liberty*’ is to be preferred, as the former term refers to a legal procedure, known by certain common law jurisdictions, which possesses a broader meaning than the way it is normally used at the international level. Moreover, this is a fundamental right and is enshrined in international human rights norms.” The Appeals Chamber argued that the *habeas corpus* right derives, *inter alia*, from Article 19 and 20 ICTR Statute and from Rule 40bis (J) ICTR RPE); ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 112. A similar reasoning can be found in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Vlahović*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Mladić*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 38 – 40. Consider also e.g. ICTR, Decision on the Defence Motion for the Release of the Accused, *Prosecutor v. Nshamihigo*, Case No. ICTR-2001-63-I, T. Ch. I, 8 October 2001, par. 5.


\(^{546}\) Consider e.g. ICTY, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, *Prosecutor v. Delić*, Case No. IT-96-21-A. Ch., 22 November 1996, par. 6 (while the bench of the Appeals Chamber argued that the defendant has a right to challenge the lawfulness of his detention and deprivation of liberty, providing him or her with an effective judicial remedy for any alleged violation of the right to liberty, an ‘effective’ remedy does not require that the application has to succeed); ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 5; ICTR, Decision on Musabyimana’s Motion on the Violation of Rule 55 and
detained to have the legality of the detention reviewed by the judiciary.\textsuperscript{547} This right should be distinguished from the right to apply for provisional release.\textsuperscript{548} The right applies to all persons, \textit{irrespective whether they are detained by a State or by the tribunal.}\textsuperscript{549}

The absence of an express provision in the statutory framework of the \textit{ad hoc} tribunals and the SCSL is striking in light of the fundamental character of this procedural right to review the lawfulness of the deprivation of liberty,\textsuperscript{550} as evidenced by various international human rights norms.\textsuperscript{551} It has been labelled an “internationally recognised standard regarding the rights of accused.”\textsuperscript{552} The importance of the right lies where it serves to protect substantive rights, such as the right against arbitrary or unlawful deprivation of liberty.\textsuperscript{553}
Based on these human rights norms, the Appeals Chamber repeatedly expressed its concerns that such motions were not heard by the tribunal.554 When a *habeas corpus* motion is filed the tribunal has the duty to hear it and rule upon it without delay.555 If the motion is filed, but is not subsequently heard by the tribunal, a fundamental right of the accused has been violated.556 The confirmation of the indictment and the fact that the initial appearance has taken place, does not excuse the failure to resolve the motion.557

§ Procedure

In Brđanin, the ICTY Trial Chamber held that where the tribunal has to resolve challenges to the lawfulness of the deprivation of liberty, these challenges should be entertained through Rule 72 ICTY RPE when they amount to a challenge of jurisdiction or through Rule 73 in other cases.558 The SCSL seems to have taken a different approach. The SCSL entertained on the notion of *habeas corpus* in the Brima case.559 Single Judge Itoe considered that the writ of *habeas corpus* cannot be found in the Statute or the RPE, but that the entertaining of this writ is dictated by the imperative of “universally ensuring the respect of human rights and

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558 ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 5-6 (“The Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of a detainee’s detention. With respect, it did not need the decision of the Appeals Chamber of the ICTR to establish the existence of such a power. A detained person whose case has been assigned to a Trial Chamber has recourse to the Tribunal in order to challenge the lawfulness of his detention by way of [a] motion pursuant to Rule 72 of the Rules of Procedure and Evidence (“Rules”) if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 if it does not”). See also e.g. ICTR, Decision on Musahiymana’s Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musahiymana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002, par. 25.

“liberties” and establishing its inherent power to do so. Nevertheless, Judge Itoe acknowledged that this motion can alternatively be brought under Rule 73 SCSL RPE.

The provision for habeas corpus challenges under Rule 40 bis (G) ICTY RPE and 40 bis (K) ICTR and SCSL RPE requires that challenges to the propriety of the provisional detention or the suspect’s release should be heard by the three Judges and not only by the Judge that signed the Rule 40bis order.

§ Duty of diligence

In the Semanza case, after determining that the failure of the Trial Chamber to hear the habeas corpus writ filed amounted to a violation of a fundamental right of the accused, the Appeals Chamber declined to offer a remedy. According to the Appeals Chamber, while the Defence originally filed its ‘writ’ on 29 September 1997, the Defence failed to follow up on it. This is in violation of the defence counsel’s duty of diligence. The Appeals Chamber found that where the results sought by the writ were achieved shortly thereafter, by the confirmation and by the transfer of the accused, the violation did not cause material prejudice as required by Rule 5.


562 As noted by the SCSL Trial Chamber in SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, Prosecutor v. Kondewa, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 29; SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, Prosecutor v. Fojana, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 29. In both cases, the Trial Chamber noted that the provision provides “a reinforced guarantee of fairness” where it requires that the decision on arbitrary arrest and detention should be made by all three Judges of the Trial Chamber.

563 The Appeals Chamber underlined that “[i]t is therefore apparent that the Appellant became interested in the fate of his writ of habeas corpus only after the Appeals Chamber’s 3 November 1999 Decision in the Barayagwiza case”: ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 118.

564 Such duty derives from the ICTR Code of Professional Conduct’s Article 6: “Counsel must represent a client diligently in order to protect the client’s best interests. Unless representation is terminated, Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal representation (emphasis added).”

565 ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 124. Note the Declaration of Judge Lal Chand Vohrah, who strongly disagrees with the majority and argues that where ignoring the writ was found to be in violation of the defendant’s rights, a remedy should be available. The Judge disagrees with attributing the primary responsibility to counsel for the accused and states that “when an accused is defending himself against charges of genocide, crimes against humanity or war crimes before the Tribunal, he should not also be required to diligently ensure that the Tribunal is not itself contributing to a violation of his rights as that should rest with the Tribunal.” See ICTR, Decision, Prosecutor v. Semanza, A. Ch.,
§ Scope of the judicial review

International human right norms require that the habeas corpus writ be heard, irrespective of the underlying legality or illegality of the initial detention. The ECtHR held that where the right is limited to the lawfulness of the deprivation of liberty, this lawfulness should be interpreted in a broad sense, not only referring to the domestic legislation, but also in light of the requirements of the Convention, the general principles laid therein and the aim of the restrictions of Article 5 (1) ECHR. Similarly, the HRC held that the lawfulness requirement should be interpreted in a broad sense, allowing the court to order release not only when the detention is unlawful in terms of the domestic law but also when the detention is incompatible with the requirements of Article 9 (1) ICCPR. However, the ECtHR has emphasised that the right to challenge the lawfulness of detention is not of such a scope as to empower the court to substitute its own discretion in all aspects of the case, including questions of pure expediency.

Several accused before the ICTY have tried, as part of a challenge of the lawfulness of the arrest, to have the court reconsider the evidence that was put before the Confirming Judge at the moment of the confirmation of the indictment to prove that there was not a sufficient evidentiary basis for the arrest. Whereas the ad hoc tribunals have refused such requests to review the evidentiary basis for the challenged arrest, it has been questioned whether this holding does not deny the suspect or accused the right to challenge the lawfulness of the arrest.  

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Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 11-12. Consider also C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 557 (“it appears that the Appeals Chamber is trying to turn the ICTR’s own fault […] into a fault of the Defence because the latter has not sufficiently stressed the importance of this writ for his case. Is this not the world turned upside-down?”).  


ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, Prosecutor v. Brđanin, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 16.
with respect to the ‘reasonable suspicion requirement’, especially in light of the absence of a periodic detention review procedure.\textsuperscript{571} In \textsuperscript{Talić}, Judge Hunt held that where the accused had been arrested upon an arrest warrant, which requires the confirmation of the indictment and the existence of a \textit{prima facie} case, the ECtHR case law “does not call for any further examination by the Tribunal of the reasonableness of the decision to arrest and detain the accused.”\textsuperscript{572} This would imply the review of the decision taken by the Confirming Judge by way of appeal for which the Trial Chamber does not have the power.\textsuperscript{573}

However, the ECtHR has underlined that the court should not only have the possibility to examine the compliance with the procedural requirements set out in the domestic law but also the \textit{reasonableness of the suspicion} on which the arrest was based and the legitimacy of the purpose pursued by the arrest and detention. Indeed, the persistence of a ‘reasonable suspicion’ that the accused person has committed an offence is a condition \textit{sine qua non} for the lawfulness of the continued detention.\textsuperscript{574} The \textit{ad hoc} tribunals and the Special Court deny the accused the right to challenge the lawfulness of his or her arrest, based on the absence of a reasonable suspicion justifying the deprivation of liberty in the first place, by relying on the confirmation procedure.

\textsuperscript{571} G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), International Criminal Law Developments in the Case Law of the ICTY, Brill Academic Publishers, Leiden, 2003, p. 210 (arguing that it is clear from the jurisprudence of the ICTY that “the process of confirming the indictment prior to the arrest of an accused has been interpreted as subsuming the right to challenge the lawfulness of the arrest on that basis”). See also H. FRIMAN, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003 – 2004, Vol. IX, Antwerp, Intersentia, 2006, p. 347.

\textsuperscript{572} ICTY, Decision on Motion for Release, \textit{Prosecutor v. \textsuperscript{Talić}}, Case No. IT-99-36/1-T, T. Ch. II, 10 December 1999, par.17.

\textsuperscript{573} \textit{Ibid}., par. 17.

\textsuperscript{574} ECtHR, \textit{Brogan and others v. The United Kingdom}, Application Nos.11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 65 (“the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”); ECtHR, \textit{Ilijkov v. Bulgaria}, Application No. 33977, Judgment of 26 July 2001, par. 94; ECtHR, \textit{A And others v. The United Kingdom}, Application No. 3455/05, Judgment of 19 February 2009, par. 204; ECtHR, \textit{Fox, Campbell and Hartley v. United Kingdom}, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 44. Nevertheless, it should be noted that where the right to be promptly brought before a judge culminates in a decision ordering or confirming the detention of the person, the judicial control of the lawfulness under Article 5 (4) is incorporated in this initial decision. Contrary to the right envisaged in Article 5 (3), the judicial control of the lawfulness should be renewed ‘at regular intervals’ (ECtHR, \textit{De Jong, Baljet and Van den Brink v. The Netherlands}, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 57; M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2\textsuperscript{nd} edition), Kehl am Rhein, Engel, 2005, p. 235.
In other decisions, where the accused challenged the continued detention and applied for provisional release, pursuant to ‘pre-amendment’ Rule 65 (B) ICTY RPE\(^{575}\), the ICTY allowed for a revision of the material on which basis the indictment was confirmed.\(^{576}\) The Trial Chamber noted that the ‘reasonable suspicion’ requirement under human rights law is substantially similar to the terminology used in Rule 47 (A) ICTY RPE and the \textit{prima facie} standard for the confirmation of the indictment.\(^{577}\) Moreover, the Trial Chamber referred to Articles 5 (4) ECHR and 9 (4) ICCPR and the \textit{prima facie} standard for the confirmation of the indictment.\(^{577}\) Moreover, the Trial Chamber referred to Articles 5 (4) ECHR and 9 (4) ICCPR and the fact that the detention of the accused must be reviewed to assure that the reasons justifying the detention remain valid. This led the Trial Chamber to review the Prosecution’s case in a cursory manner, to determine whether the accused had demonstrated the absence of reasonable suspicion.\(^{578}\) It has been argued that only by providing the possibility to review the reasonable grounds on which the arrest and detention are based, can the right to challenge the deprivation of liberty provided for by the case law of the \textit{ad hoc} tribunals and the SCSL be in conformity with international human rights norms. Nevertheless, it should be noted that this approach adopted in the second set of decisions (on motions for provisional release) deviates from international human rights norm in one crucial respect. It effectively puts the burden to prove the absence of reasonable suspicion on the suspect or the accused. While there is no direct case law on the onus of proof under Article 5 (4) ECHR, it is implicit in the jurisprudence of the ECtHR that the burden to prove that an individual satisfies the requirements for compulsory detention is on the authorities.\(^{579}\)

\(^{575}\) Under which provision the Trial Chamber had to establish the presence of ‘exceptional circumstances’. See in more detail, infra, Chapter 8, II.1.


\(^{577}\) ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, \textit{Prosecutor v. Đelalić et al.}, Case No. IT-96-21-T, T. Ch., 25 September 1996, par. 23.

\(^{578}\) \textit{Ibid.}, par. 24. ICTY, Decision on Provisional Release, \textit{Prosecutor v. Đrlajić et al.}, Case No. IT-97-24-PT, T. Ch., 20 January 1998, par. 16 and 21. The burden of proof to show the absence of reasonable suspicion was put on the accused. Besides, the Trial Chamber allowed the accused to adduce evidence additional to the evidence on which basis the indictment was confirmed, in accordance with the requirement under human rights law that the review should be judged according to the circumstances and facts known at the time of the review. See \textit{ibid.}, par. 24. It has been argued that where reasonable grounds for suspecting that the applicant for provisional release has committed the crime(s) are lacking, the accused may not only request for provisional release but also the rejection of the indictment, given the similarity with the standard for the confirmation of the indictment. See A.-M. LA ROSA, A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with those of Fair Trial, in «International Review of the Red Cross», No. 321, 1997.

The arrested person may also consider turning to the authorities of the state requested to execute the (provisional) arrest to challenge the detention. In that regard, it should be mentioned that Article 5 (4) ECHR *juncto* Article 5 (1) (f) ECHR explicitly provides for the right of the person deprived of his or her liberty to turn to the courts of the requested state for relief in extradition cases.\(^{580}\) This review may, nonetheless, be narrow. Indeed, it should be noted that the extent of the judicial review under Article 5 (4) ECHR is not identical for every sort of deprivation of liberty listed in Article 5 (1) ECHR.\(^{581}\) Article 5 (1) (f) ECHR does not require that detention with a view to deportation can reasonably be considered necessary (cf. Article 5 (1) (c) ECHR). All that is required is that action is being taken with a view to deportation. Hence, Article 5 (4) ECHR does not require that the domestic courts have the power to review whether the underlying decision to extradite could be justified under national or convention law.\(^{582}\) Furthermore, it should be noted that the obligation on states to comply with arrest warrants and requests for the provisional detention of suspects is *unconditional* in nature.\(^{583}\) Consequently, the usefulness of this recourse to the national courts to challenge the lawfulness of the deprivation of liberty can strongly be doubted.\(^{584}\)

§ Requirement of speediness

In the cases of *Semanza* or *Barayagwiza*, challenges to the deprivation of liberty were filed but not subsequently heard by the tribunal. This is a clear violation of international human rights norms. Article 5 (4) ECHR requires that a challenge regarding the lawfulness of the deprivation of liberty should be dealt with speedily. The ICCPR requires that the court decide on the lawfulness of the detention without delay.\(^{585}\) However, the speediness-requirement

\(^{580}\) B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999, Vol. II, Antwerp, Intersentia, 2001, p. 205 (noting that there are good reasons for providing the arrested person with a judicial remedy against his or her arrest in traditional extradition law where normally much discretion is left to the requested state how to execute the request).


\(^{582}\) Consider, *mutatis mutandis*, ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Reports 1996-V, Judgement (Grand Chamber) of 15 November 1996, par. 128 (with regard to deportation).

\(^{583}\) See supra, Chapter 7, II.3.2.


\(^{585}\) Article 9 (4) ICCPR.
should be considered in light of the special circumstance of each case.\textsuperscript{586} Factors such as the conduct of the applicant and the way the authorities have handled the case may be taken into consideration.\textsuperscript{587} For example, a period of 23 days between the lodging of the request and the decision was not found to satisfy the speediness requirement by the ECtHR.\textsuperscript{588} A delay of three months between the filing of a challenge and the decision was found to be too extended ‘in principle’ by the HRC.\textsuperscript{589}

§ Other requirements

This right to challenge the legality of the deprivation of liberty arises immediately after the arrest or detention. The right is fully independent from the right to be brought promptly before the Judge upon arrest.\textsuperscript{590} The ECtHR held that there cannot be any delay.\textsuperscript{591} In addition, given its remedial character, international human rights norms require that the challenge be effective, in the sense that the judicial authority should possess the competence to order release.\textsuperscript{592} If the deprivation of liberty is found to be unlawful, the person should be released.\textsuperscript{593} Other requirements follow from the requirement that the remedy should be ‘of a judicial nature’.\textsuperscript{594} While Article 5 (4) ECHR is silent on the right to have the assistance of counsel in order to challenge the legality of the detention, the ECtHR has clarified that where Article 5 (4) proceedings are judicial in nature, some form of legal assistance may be required.

\textsuperscript{586} ECtHR, 

\textsuperscript{587} See e.g. ECtHR, 

\textsuperscript{588} ECtHR, 

\textsuperscript{589} HRC, 
Torres v. Finland, Communication No. 291/19 88, U.N. Doc. CCPR/C/38/D/191/1988, 2 April 1990, par. 7.3. The HRC declined to find a violation of Article 9 (4) ICCPR as it did not know the reasons for the judgement only being issued that late.

\textsuperscript{590} ECtHR, 

\textsuperscript{591} Ibid., par. 58-59.

\textsuperscript{592} HRC, 
A. v. Australia, Communication No. 560/93, U.N. Doc. CCPR/C/59/D/560/1993, 3 April 1997, par. 9.5. Consider e.g. ECtHR, 
Khaysarov v. Russia, Application No. 21055/09, Judgment of 20 May 2010, par. 137 (“[t]hat review should be capable of leading, where appropriate, to release”); ECtHR, 
Abdolkhani and Karimnia v. Turkey, Application No. 30471/08, Judgment of 22 September 2009, par. 139.


\textsuperscript{594} ECtHR 
Öcalan v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 66; ECtHR, 
Winterwerp v. The Netherlands, Application No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 60.
where the detained person is unable to defend him or herself.\textsuperscript{595} The HRC has also linked the right to challenge the deprivation of liberty with access to \textit{legal representation}.\textsuperscript{596} Whereas a right for the accused to be assisted by counsel is provided for,\textsuperscript{597} the \textit{ad hoc} tribunals and the SCSL only provide for this right where the suspect is questioned.\textsuperscript{598} When an order for the detention and transfer of a suspect has been made, Rule 40\textit{bis} (G) ICTY RPE (Rule 40\textit{bis} (K) ICTR and SCSL RPE) expressly refers to the possibility for the suspect’s counsel to challenge the legality of the deprivation of liberty, falling short of providing the provisionally detained with the assistance of counsel \textit{as of right}. In a similar vein, Rule 44\textit{bis} (D) ICTR RPE on the assignment of duty counsel is limited where it only applies after the transfer of a suspect or accused person to the tribunal pursuant to Rule 40\textit{bis}.\textsuperscript{599} Lastly, it is important that the detained person is heard in person\textsuperscript{600} and that an oral hearing is required when a person is detained on remand.\textsuperscript{601} Consequently, it will be important for the tribunal, when a challenge is brought pursuant to Rule 72 or 73 ICTY, ICTR or SCSL RPE, to provide for an oral hearing.\textsuperscript{602} Since the proceedings should be of an adversarial nature, equality of arms between the Prosecutor and the detained person should be ensured.\textsuperscript{603} As noted previously, and in deviation from international human rights norms, it follows from the jurisprudence of the tribunals that the burden of proof in challenges to the lawfulness of arrests lies with the suspect or accused person.\textsuperscript{604}

\textsuperscript{595} ECtHR \textit{Öcalan} v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 70; ECtHR, \textit{Bouamar} v. Belgium, Application No. 9106/80, Series A, No. 129, Judgment of 29 February 1988, par. 62; ECtHR, \textit{Lebedev} v. Russia, Application No. 4493/04, Judgment of 25 October 2007, par. 77 (note the partly dissenting opinion of Judges Kovler, Hajiyev and Jebens, arguing that there were no ‘special circumstances’ in the case at hand, calling for mandatory legal assistance).


\textsuperscript{597} Article 21 (4) (d) ICTY Statute; 20 (4) (d) ICTR Statute and Article 17 (4) (d) SCSL Statute.

\textsuperscript{598} Rule 42 (A) (i) and (B) ICTY, ICTR and SCSL RPE.

\textsuperscript{599} See the discussion supra, Chapter 7, V.3.1, fn. 500 and accompanying text.

\textsuperscript{600} ECtHR \textit{Öcalan} v. Turkey, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 68; ECtHR, \textit{Winterwerp} v. The Netherlands, Application No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 60.


\textsuperscript{602} Consider in that regard the general practice not to hear oral arguments on preliminary motions prior to trial, unless good reason is shown for its need in the particular case. See ICTY, Decision on Defence Preliminary Motion on the Form of the Indictment, \textit{Prosecutor v. Krnjić}, Case No. IT-97-25-PT, T. Ch. II, 24 February 1999, par. 65.


\textsuperscript{604} ICTY, Decision on Appeal by Stéfan Tudorović against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III, Case No. IT-95-9-AR.732, A. Ch., 13 October 1999, p. 3 (finding no error where the Trial Chamber determined that “the Motion does not contain sufficient factual and
V.4.2. The International Criminal Court

The ICC Statute also does not explicitly provide for the possibility to challenge the lawfulness of the deprivation of liberty (*habeas corpus*). Only a protection against arbitrary or unlawful arrest or detention is included in Article 55 (1) (d) ICC Statute. However, the right to obtain compensation for unlawful arrest or detention (Article 85 ICC Statute), arguably, implies the existence of a right to challenge the legality of the arrest.\textsuperscript{605}

The right to effectively contest the deprivation of liberty has been recognised by the ICC Appeals Chamber.\textsuperscript{606} It follows from Article 60 (2) ICC Statute that in the context of an application for interim release, the Pre-Trial Chamber should review the conditions of Article 58 (1) ICC Statute, and this review should not only include a review of the justification for the provisional detention but should also be a review of the existence of ‘reasonable grounds’ (pursuant to Article 58 (1) (a) ICC Statute).\textsuperscript{607} Consequently, a review of the lawfulness of the detention is provided for in Article 60 (2) ICC Statute.

The jurisprudence of the ICC equally confirmed that Article 60 (2) “provides the detainee with an early opportunity to contest his or her arrest and sequential detention.”\textsuperscript{608} More generally, the Appeals Chamber held that “[t]he human right to have judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute.”\textsuperscript{609} In that sense, the Appeals Chamber confirmed “[t]hat the provisions of the Statute relevant to detention, like
every other provision of it, must be interpreted and applied in accordance with “internationally recognized human rights.”

However, as underlined by Judge Pikis in a dissenting opinion, Article 60 (2) ICC Statute does not envisage a review of the legality or correctness of the initial decision that authorised arrest, but requires the Pre-Trial Chamber to decide anew, whether the detention of the person can find justification in law, by reference to the criteria of Article 58 (1) ICC Statute. Therefore, whereas international human rights norms provide for the right of the detainee to challenge his or her deprivation of liberty, including both the arrest and detention, an application for provisional release does not guarantee the right afforded by these norms to the full extent.

The equality of arms requirement under human rights law with regard to habeas corpus proceedings, which was mentioned previously, also encompasses a requirement that access be granted to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of the deprivation of liberty. The Prosecutor should “not only disclose the general tenor of the evidence relied upon but the evidence itself.” This issue arose in the Bemba case. In its decision of 16 December 2008, the Appeals Chamber acknowledged the jurisprudence of the ECtHR and held that “in order to ensure both equality of arms and an adversarial procedure, the Defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness

of detention, bearing in mind the circumstances of the case.” The right to disclosure is not unqualified, and is limited by (1) the need to ensure the protection of victims and witnesses and (2) the need to safeguard the ongoing investigation. Furthermore, (3) priority should be given to “those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention.” Arguably, the ECtHR adopted a more stringent approach to disclosure as a prerequisite to effectively challenge the lawfulness of the detention, as acknowledged by Judge Pikis. Where the ECtHR acknowledged legitimate concerns, such as the prevention of tampering with evidence or the undermining of the course of justice, it held that “this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence.” Hence, “information which is essential for the assessment of the lawfulness of the person’s detention should be made available in an appropriate manner to the suspect’s lawyer.”

The Appeals Chamber concluded that the Pre-Trial Chamber did not err when it decided on an application for interim release at a point at which not all documents and evidence had yet been disclosed, given that the Pre-Trial Chamber had ensured that Bemba was provided with the material underpinning the warrant of arrest “in as timely a manner as possible.” The Appeals Chamber noted that the person can raise arguments in relation to interim release at a point when he or she has not yet received full disclosure in order to have the issue decided

614 ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 32. The limitation in the granting of access, included in the wording “to the largest extent possible” is drawn from the decision of the ECtHR in the Migoń v. Poland case. See ECtHR, Migoń v. Poland, Application No. 24244/94, Judgment of 25 June 2002, par. 55 (“in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure” (emphasis added)).

615 ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 33. Note that Rule 121 (3) ICC RPE imposes disclosure obligations on the Prosecutor, prior to the confirmation hearing, vis-à-vis the suspect.


618 Ibid., par. 38-40.
upon speedily by the Pre-Trial Chamber. In this case, the suspect may file a new application for interim release once the disclosure process has been completed.\footnote{Ibid., par. 39-40.}

The periodic review mechanism provided for under Article 60 (3) ICC Statute is also relevant for the present discussion. The ECtHR held that a periodic review mechanism can also satisfy the requirements of Article 5 (4) ECHR.\footnote{ECtHR, Egmez v. Cyprus, Application No. 30873/96, Reports 2000-XII, Judgment of 21 December 2000, par. 94 (“It is not excluded that a system of automatic periodic review of the lawfulness of the detention by a court may ensure compliance with the requirements of Article 5 § 4”); ECtHR, Megyeri v. Germany, Application No. 13770/88, Series A, No. 237-A, Judgment of 12 May 1992, par. 22.}

According to Article 59 (3) ICC Statute, upon arrest by the requested state, the suspect holds the right to apply for provisional release to the competent authority in the custodial state.\footnote{The right of the suspect to apply for interim release pending surrender to the ICC will be discussed in detail, infra, Chapter 8, II.3.} However, since the competent authority does not hold the power to review the lawfulness of the warrant of arrest, this procedure seems not to be in line with the right to challenge the lawfulness of the detention. Nevertheless, a right to challenge the lawfulness of the deprivation of liberty pending surrender to the ICC is provided for where such habeas corpus right is included in Rule 117 (3) ICC RPE, which confers the general competence to hear challenges to the legality of the arrest warrant to the Pre-Trial Chamber.

Notably, in the Katanga and Ngudjolo cases, both the Trial Chamber and the Appeals Chamber declined to look into the lawfulness of the initial detention of Katanga, because the motion was filed too late. This is regretful because it arguably prevented Katanga from exercising his right to challenge the lawfulness of his detention.\footnote{C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 992 (“However, the refusal of the judges in the Katanga case to look into the motion of the suspect challenging the lawfulness of his pre-trial arrest and detention, for the only reason that the motion was filed too late, might perhaps be interpreted as a violation of this right and thus of the ICC law”).} This issue will be dealt with in a subsequent section.\footnote{See infra, Chapter 7, VII.}
V.4.3. The internationalised criminal tribunals

Laudable was the express provision of the procedural remedy of *habeas corpus* in the TRCP. A strict time limitation was provided for where, upon the assignment of the petition to a Judge, it had to be heard within 24 hours. However, this time limitation was not always respected in practice. This express provision was a remarkable improvement when compared to the procedural framework of the international criminal tribunals, notwithstanding their recognition of this right in their respective practices. Through such proceedings, every person was entitled to the substantial remedy of immediate release in cases where any arrest or detention was found to be unlawful. This automatic entitlement stands in stark contrast with the jurisprudence of the international criminal tribunals, which reserves this remedy to the exceptional scenario where breaches of the rights of the suspect or the accused constitute an abuse of process or render a fair trial impossible. In explaining such difference, regard should be had to the different characteristics of the SPSC vis-à-vis the international criminal tribunals. First and foremost, the SPSC do not have to rely on states or international organisations in the execution of arrests.

Where Section 47.2 TRCP provides that 'unlawful arrest or detention' means any arrest or detention made in violation of this or other UNTAET Regulations, it should be read as including international human rights norms. As argued previously, an arrest and detention may be in accordance with the law and still be considered arbitrary.

Regrettably, the Extraordinary Chambers and the STL do not follow the example set by the SPSC. A *habeas corpus* right is not expressly provided for in their respective procedures.

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624 Section 47 TRCP.
625 Section 47 (3) TRCP.
626 Section 47 (4) TRCP.
628 Section 47 (1) and 47 (7) TRCP.
629 See *infra*, Chapter 7, VII.
630 See *supra*, Chapter 7, V.1.
631 As far as the Extraordinary Chambers are concerned, it is to be noted that the Article 12 ECCC Agreement, which outlines that the Extraordinary Chambers will exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, only refers to Article 14 and 15 ICCPR, leaving out Article 9 ICCPR. Whereas the residual application of Cambodian Law (which should be in accordance with the ICCPR) may resolve this omission, it has been argued that a risk exists that the Judges consider the ECCC agreement to
VI. IRREGULARITIES IN THE EXECUTION OF THE ARREST

Apart from the examples provided above, other instances of unlawful or arbitrary arrest and detention have emerged in the practice of the international(ised) criminal tribunals. A closer look at the jurisprudence of the ICTY reveals that it has, on different occasions, been confronted with instances in which the accused was ‘irregularly’ rendered to the jurisdiction of the court. These ‘irregularities’ include a vast array of potential scenarios that relate either to acts that occurred before the actual arrest, to the arrest itself, to the pre-transfer detention or to the transfer itself. The present subsection focuses on certain irregularities which relate to the effectuation of the arrest. Different forms of irregularities may occur in relation to the arrest of a suspect or accused by the international criminal tribunals. These forms of irregular arrests have the fact that they encompass a violation of the right of the suspect or the accused not to be arbitrarily arrested or detained in common. In general, three main scenarios can be established. First, (1) a suspect or accused may be forcibly abducted, whereby state agents or private individuals arrest a suspect or accused person in another state and abduct the person to their state in order to prosecute him or her. Alternatively, (2) the person may be lured into a state in which he or she can be arrested and prosecuted or from where he or she can be extradited to the state that is willing to prosecute the person. Lastly, (3) the accused or suspect can be brought before the court following a disguised

be lex specialis and the omission to be deliberate. See G. SLUITER, Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 316 – 317. One could more generally refer to forms of “irregular rendition”. See e.g. R.J. CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 349; Ö. ÜLGEN, The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 441 (the author defines ‘irregular rendition’ as the “apprehension of an accused against his/her free will by coercive or covert means, such as abduction and luring, and without the consent of the State in which he/she is present”).

extradition. These forms of irregular deprivation of liberty violate the right not to be unlawfully or arbitrarily deprived of liberty, but are not limited to them alone. Some of these forms also violate the principle of state sovereignty or the rule of law.

It will be shown that the international criminal tribunals’ jurisprudence does not consider all irregular deprivations of liberty to be illegal. Furthermore, when the ICTY was confronted with abductions and the luring of defendants, the tribunal has not refused to exercise jurisdiction and has “adopted a limited reading of the circumstances under which a court may refuse to exercise jurisdiction over a defendant who has been abducted.”

In Đokmanović, the ICTY Trial Chamber determined that the accused had been lured into Eastern Slovenia, distinguishing ‘luring’ from ‘forcible abduction’ and holding that the former “is consistent with principles of international law and [...] sovereignty.” SCHARF rejected the distinction drawn by the Trial Chamber (between ‘luring’ and ‘forcible abductions’) where he considered it to be artificial and where it “may needlessly discourage future apprehensions undertaken by NATO and UN troops in the territory of the former Yugoslavia.”

636 H. VAN DER WILT, Het Joegoslavië Tribunaal en het beginsel male captus, bene judicatus, in «Delikt & Delinkwents», Vol. 18, 2004, p 276. According to BASSIOUNI, a disguised extradition is a means “by which to achieve extradition through other processes, which are lawful but sometimes used abusively.” See M.C. BASSIOUNI, International Extradition, United States Law and Practice (5th ed.), Oxford, Oxford University Press, 2007, p. 203. PAULUSSEN argues that it refers to the situation where “a mechanism, set up for other purposes, is unlawfully used to make an impossible extradition possible or to make a possible, but, for example, too slow or expensive extradition quicker or cheaper. See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 35.


640 ICTY, Decision on the Motion for Release by the Accused Slavko Đokmanović, Prosecutor v. Đokmanović et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 57. The Trial Chamber acknowledged that “it may be difficult to distinguish the abduction of a person from the coerced luring of such a person.” However, it added that “on the continuum between force and fraud, the Trial Chamber does not believe that the accused was coerced in a way that would justify our comparing the case at bar to a forcible abduction or kidnapping case” (emphasis in original). See ibid., par. 57, fn. 73.

641 M.P. SCHARF, The Prosecutor v. Slavko Đokmanović: Irregular Rendition and the ICTY, in «Leiden Journal of International Laws», Vol. 11, 1998, p. 369 (the author argues that similar to abductions, the luring operation violated the sovereignty of the FRY where an agent of the OTP physically entered its territory with the purpose of engaging in a law enforcement activity without the FRY’s permission and that, contrary to the argumentation of the Trial Chamber, most national states do not distinguish between ‘abduction by fraud’ and ‘abduction by
As discussed above, international human rights law forbids any deprivation of liberty which is unlawful or arbitrary. In this regard, the Trial Chamber first determined that Dokmanović had been arrested lawfully, in accordance with the procedures established in the Statute and the RPE. The Trial Chamber sought further guidance in the case law of the ECtHR with regard to luring and abduction. Normally, forms of forcible abduction are viewed by the human rights supervisory bodies to be a human rights violation. The ECtHR was confronted with a situation comparable to that of Dokmanović when Mr. Stocké was arrested and detained in Germany through the trickery of a French police informant, who lured him into boarding an airplane bound for Luxembourg which landed in Germany (where Mr. Stocké was sought for violations of the conditions of his provisional release for suspected tax offences). The ECtHR determined that there had not been a violation of Article 5 (1) ECHR. Central to the Court’s finding was the determination that it had not been established whether the German authorities had been involved in the luring. The Commission had suggested that if the German authorities would have been involved in the return, against Mr. Stocké’s will, and without the consent of the state in which he resided, a violation of Article 5 (1) ECHR could have occurred. Hence, the case law of the ECtHR on this point may be interpreted as providing that in cases where the Prosecution is involved in the luring operation (as was arguably the case in Dokmanović), one should conclude to a violation of Article 5 (1) ECHR. Alternatively, in Bozano v. France, Mr. Bozano, who had been convicted in
abSENTIA in Italy, was abducted by French plain-clothed officers to Switzerland, from where he was extradited to Italy. The ECtHR found that the deprivation of liberty was unlawful (under Article 5 (1) (f) ECHR) and incompatible with the ‘right of security’ under Article 5 (1) ECHR, since it amounted to a disguised form of extradition to circumvent a negative court order. Nevertheless, the decision by the ECtHR did not have any influence on the proceedings against Bozano in Italy. Lastly, the Öcalan case concerned the abduction of the leader of the PKK from Kenyan soil (where he had found refuge in the Greek embassy) by Turkish officials. The ECtHR’s Grand Chamber found no violation of Article 5 (1) ECHR where the sovereignty of the refuge state was not violated and where no extradition agreement or other cooperative agreement had been violated. The ECtHR considered that “even an atypical extradition could not as such be seen as being contrary to the Convention, ‘provided that the legal basis for the order for the fugitive’s arrest is an arrest warrant issued by the authorities of the fugitive’s State of origin.’” However, this decision can be criticised because it is difficult to see how this deprivation of liberty could be in ‘accordance with a procedure prescribed by law.’ Indeed, no formal procedure for extradition between Turkey and Kenya exists. In turn, likewise, the HRC concluded to a violation of Article 9 (1) ICCPR where the deprivation of liberty encompassed the cross-boundary abduction of persons.

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652 Ibid., par. 89.
654 HRC, López Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, par. 13 (the author of the complaint stated that her husband was abducted from Brazil to Uruguay by members of the Uruguayan security and intelligence forces. Before concluding that the abduction constituted an arbitrary arrest and detention, the Committee held that where the abduction was committed on foreign soil by Uruguayan agents, the ICCPR could be applied extraterritorially); HRC, Celiberti de Casariego v. Uruguay, Application No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1989, par. 11 (the complainant was abducted from Brazil with the aid of the Brazilian police and brought to Uruguay); HRC, Almeida de Quinteros et al. v. Uruguay, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983, par. 13 (where an Uruguayan national (daughter of the applicant) was abducted from the premises of the Venezuelan embassy in Uruguay by policemen, the HRC concluded to a violation of Article 9 ICCPR); HRC, García v. Ecuador, Communication No. 319/1988, U.N. Doc. CCPR/C/43/D/319/1988, 5 November 1991, par. 6.1 (a Colombian citizen had been abducted from Ecuador to the U.S. at the behest of the U.S., notwithstanding in the existence of a valid extradition treaty between Ecuador and the U.S.).
In *Dokmanović* the Trial Chamber concluded that the ECtHR and the HRC “discuss illegality of arrest in relation to violations of specific, established procedures for obtaining custody of a suspect (often relating to an extradition treaty) or in relation to forcible kidnapping, which has been considered manifestly arbitrary.” The Trial Chamber consequently noted that no extradition treaty exists between the ICTY and UNTAES (where neither of them is a state) and that no ‘long-standing, detailed arrangement’ existed detailing the transfer of accused persons, comparable to an extradition treaty. This analysis is not convincing. First, the fact that no formal extradition treaty or cooperation agreement exists between the tribunal and UNTAES should not come as a surprise, since the arrest and transfer of suspects and accused persons to the ICTY does not constitute extradition. Nevertheless, as noted by SCHARF, where no request for surrender was addressed to the FRY (but the arrest warrant was immediately transmitted to UNTAES pursuant to Rule 59bis ICTY RPE), the same concerns could be raised as in the situation where the tribunal would have circumvented an established extradition treaty. It is true, as discussed previously, that the resorting to Article 59bis is not problematic in itself, as it offers an alternative route to arrest pursuant to Rule 55 ICTY RPE. However, what is more problematic is the method of arrest relied upon. Whereas addressing the arrest warrant to UNTAES was in compliance with the procedures established, this does not entail a licence to lure Dokmanović from the territory of the FRY. Rather than resorting

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655 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mršić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 67.
656 ibid., par. 67.
658 M.P. SCHARF, The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY, in «Leiden Journal of International Law», Vol. 11, 1998, p. 376; confirming, see G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 153. However, as rightly noted by VAN DER WILT, extradition treaties cannot easily be compared to the unqualified cooperation obligations incumbent on states in relation to the ICTY. VAN DER WILT further argues that in the absence of its own police force, the tribunal should be more tolerant where states do not live up to their cooperation obligations and accused persons are otherwise brought before it. Directing an order to the FRY for the arrest of Dokmanović is in such scheme rather a courtesy, and the states should accept minor intrusions of their sovereignty for their failure to live up to their cooperation obligations. See H. VAN DER WILT, Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*, in «Delikt & Delinquenten», Vol. 18, 2004, pp. 293 – 294; Consider also S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 232 (noting that “the extradition regime has no counterpart in relations between the Tribunal and Member States”).
to luring, a request to the FRY should have been made to arrest and transfer Dokmanović to the ICTY. Consequently, the arrest of Dokmanović may well be considered unlawful. While noting that the analysis of domestic case law reveals several instances in which luring was found to be a violation of an international law principle or of the rights of the suspect, the Trial Chamber argued that in these instances there had either been (1) the circumvention of an established extradition treaty or (2) the use of unjustified violence against the accused. Additionally, there was nothing about the arrest that would shock the conscience and there had not been any “cruel, inhumane and outrageous conduct” which would have required dismissal. Regrettably, the Trial Chamber did not consider it necessary to clarify the circumstances under which the tribunal may exercise jurisdiction over a defendant that had been illegally obtained from abroad.

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661 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 68.

662 Ibid., par. 74. LAMB adds ‘official collusion’ to this list. See S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia in «The British Yearbook of International Law», Vol. 70, 2000, p. 231.

663 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 75. In Tosciano, a U.S. Court of Appeals established the principle that a court should divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the “Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” See United States v. Tosciano, 500 F.2d 267 (Court of Appeals, 2nd Circuit), 15 May 1974, at 275. As such, it forms an exception to the ‘Ker-Frisbie rule’, which will be explained further on (infra, Chapter 7, VI, fn. 688 - 689 and accompanying text). Later jurisprudence has interpreted the Tosciano rule as implying that jurisdiction should be declined only in case of “cruel, outrageous and inhuman treatment” “raising the level of outrageousness” which “shocks the conscience” (consider e.g. the Lujan and Yunis cases: U.S. ex rel. Lujan v. Gengler, 510 F.2d 62 (Court of Appeals, 2nd Circuit), 8 January 1975, at 65 and U.S. v. Yunis, 981 F. Supp. 909 (United States district Court, District of Columbia), 23 February 1988, at. 915. PAULUSSEN has argued that such Tosciano seems broader and “does not seem to require such high standard.” See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 199.

664 ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkić et al., Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 78 (the Court reasoned that it did not have to address this issue which had been raised by the Prosecutor and the defence) where it had determined that the “method of
When the Defence also reasoned that the sovereignty of the FRY had been violated, the Trial Chamber concluded that the arrest had not taken place on the territory of the FRY, given that he was lured into Croatian territory. At the same time, when the Trial Chamber hinted that there could have been a violation insofar that the accused was lured by another state, it referred to the vertical relationship between the ICTY and the FRY. Nevertheless, it is difficult to ignore that there had been a physical intrusion on the FRY territory and, thus, a violation of the sovereignty of the FRY.

The decision has been lauded insofar as it does not look only at the tribunal’s own procedures, but makes a “full review” of the right to liberty and security, including whether the national authorities executing the arrest (or the international forces involved in it) have respected the national procedure (or the relevant procedures of the international forces). In this manner, the Trial Chamber gives due regard to how the arrest was effectuated by UNTAES.
An issue of forcible abduction subsequently arose in the Todorović case. Todorović claimed to have been forcibly abducted from the FRY by four individuals who handed him over into the custody of SFOR at the Tuzla Air Force base on the territory of Bosnia and Herzegovina. The accused filed several motions to order SFOR to disclose certain documents to him, a request that was eventually honoured by the Trial Chamber. Whereas both parties raised the issue of the illegality of the arrest, the Trial Chamber did not rule on this issue in its decision. Soon after this decision, the accused entered into a plea agreement with the Prosecutor. Consequently, the issue of the effect of the irregular arrest for the proceedings, including its effect on the tribunal’s jurisdiction, remain unanswered. Notable is the argument put forward by both SFOR and the Prosecution that the motion should be dismissed where even if the contentions of Todorović were accepted to be true, Todorović would not be entitled to the relief sought (release). The Trial Chamber dismissed this argument holding that only the disclosure would allow Todorović to present all the evidence and make it possible for the Trial Chamber to decide whether he is entitled to the remedy sought. Indeed, as noted by the Trial Chamber, it could only decide on the appropriate remedy provided that the evidence was complete.

The ICTY was first able to address the question as to what the consequences of an irregular rendition are and whether it impedes the exercise of in personam jurisdiction by the tribunal.  


671 ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. Simić, Case No. IT-95-9, T. Ch., 18 October 2000, par. 59. SLOAN noted that notwithstanding the OTP’s argumentation that the facts were not in dispute (where the OTP seemed to agree to the Defence allegations ‘at their highest’), it seemed obvious that the facts were in fact in dispute. See J. SLOAN, Prosecutor v. Todorović: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction, in «Leiden Journal of International Law», Vol. 16, 2003, p. 97.

672 As noted by SLOAN, “there was nothing to say that disclosure of the full story of his arrest would not show treatment that was significantly worse than [Todorovic] had alleged.” See ibid., p. 98.
in the Nikolić case. Nikolić challenged the legality of his apprehension. Both parties were in agreement that Nikolić had been forcibly abducted from the territory of the FRY by individuals not connected to SFOR or the Prosecution, had been smuggled into Bosnia and Herzegovina and consequently delivered to SFOR. The accused was subsequently delivered into the custody of the tribunal and transferred to The Hague. The Defence sought the release of the accused, the dismissal of the case or such relief as the Trial Chamber would consider appropriate. The Defence’s concession that the individuals that apprehended Nikolić were not related to the SFOR or the OTP notwithstanding, the Defence argued that SFOR had ‘actual or constructive’ knowledge of the fact that Nikolić had been unlawfully apprehended, and that SFOR ‘took advantage’ of the situation by taking the accused in custody and by handing him over to the Prosecutor. Hence, the illegal conduct could be attributed to SFOR and to the tribunal. The Trial Chamber dismissed this argument.

673 While Nikolić did not complain about the way he was apprehended and brought before the tribunal at the occasion of his initial appearance, the Defence subsequently filed a motion to that extent.

674 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 21 (facts on which the Defence and the Prosecution agree) and p. 33 (VII. Conclusion). It is important to note that in the Nikolić case, an arrest warrant had been addressed to the Federation of Bosnia and Herzegovina and to the Bosnian Serb administration in Pale. Prior to that, a Rule 61 hearing had been organised, at which occasion it was also determined that the failure of the Prosecution to effectuate the arrest of Nikolić “was due wholly to the failure or refusal of the Bosnian Serb administration in Pale to cooperate.” Consequently, the Security Council was notified of this failure to cooperate by the President of the tribunal. The agreed facts on which both the Trial Chamber and the Appeals Chamber based their decision were very limited. Neither the Trial Chamber nor the Appeals Chamber convincingly engaged in a comprehensive effort to elicit the exact facts surrounding the arrest of Nikolić. Consider e.g. See J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. McCORMACK and McDONALD (eds.), Yearbook of International Humanitarian Law, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 339 - 341 (criticising the Appeals Chamber’s failure to further explain the proprio motu review of all the facts of the case it purported to have engaged in).

675 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 21.

676 Ibid., par. 18.

677 Ibid., par. 58. In response, the Prosecution argued that SFOR was only the “fortuitous recipient” of the accused (ibid., par. 59).

678 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 29. It was argued by Nikolić that SFOR de facto and de jure acted as an agent for the Prosecution and the Tribunal. Consequently, the conduct can be attributed to the Prosecution.

679 The Trial Chamber relied on the Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/34-4/L.602/Rev.1, 2001. Whereas it acknowledged that these Articles had not yet been adopted, the Trial Chamber noted that it followed from the Draft Articles that for conduct which was not attributable to a state at the moment of its commission, it is required that the state ‘acknowledged and adopted’ the conduct as its own, which did not happen in the case at hand. ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 64; Article 11 of the Draft Articles on the Responsibility of States for Internationally wrongful Acts (‘Conduct acknowledged and adopted by a State as its own’). Interestingly, the ILC has drafted articles on the responsibility of international organisations (United Nations, International Law Commission: Report on the Work of its sixty-first Session (4 May to 5 June and 6 July to 7 August 2009), U.N. Doc. A/64, 2009).
Furthermore, the Trial Chamber held that from the moment the accused person “comes into contact” with SFOR, it follows from the cooperation obligations incumbent on SFOR that it should arrest the person and transfer him or her to the tribunal.\footnote{ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, \textit{Prosecutor v. Nikolić}, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 67 (“SFOR did nothing but implement its obligations under the Statute and Rules of this Tribunal”).} Indeed, even when SFOR would consider the apprehension of the accused to be illegal, it does not have the liberty to release the person where such determination needs to be made by the tribunal.\footnote{Ö. ÜLGEN, The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, pp. 462, 465. Unfortunately, in light of its finding that the conduct of these private individuals cannot be attributed to SFOR, it did not consider the exact relationship that exists between SFOR and the Prosecution. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, \textit{Prosecutor v. Nikolić}, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 69.}

As part of its inherent powers, the Court subsequently considered whether the arrest \textit{in itself} was an impediment to the exercising of jurisdiction, since the Defence alleged that the breaches that had occurred prior to the delivery of the accused into the custody of SFOR and the tribunal entailed a violation of state sovereignty, human rights, and due process rights.\footnote{Ibid., par. 29. As asserted by SMEULERS, at issue was not only the question whether rights have been violated, but also what the consequences are of such violations. See A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 106.} In so doing, given that not much guidance could be found in the case law, the Trial chamber (as did the Appeals Chamber) considered national approaches to irregularities in bringing the accused before the court. The Trial Chamber cautioned that (1) some countries follow the notion of \textit{male captus bene detentus} more closely than others, (2) that the case law on the issue is still developing and developments are more advanced in certain jurisdictions, and (3) that different conceptual interpretations of cross-border abductions were relied upon by the parties.\footnote{Ibid., par. 75.} Furthermore, (4) all case law is based on cross-border abductions occurring on a horizontal level. This presupposes a ‘translation’ of the national case law in order to apply it to the particular context in which the tribunal operates.\footnote{Ibid., par. 76, 78, 95.}

In general\footnote{Here, only a general picture is drawn on national approaches towards irregular renditions. Such overview unavoidably makes certain generalisations and simplifies matters. A fully-fledged discussion of the relevant national jurisprudence is outside the scope of this study. For a very detailed analysis, the reader is referred to C.} two distinct approaches may be discerned in how national courts deal with forms of illegal inter-state arrest.\footnote{ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, \textit{Prosecutor v. Nikolić}, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 75.} Neither of them has yet been recognised as customary
international law. On the one hand, some national jurisdictions support the male captus bene detentus maxim, according to which a court can exercise jurisdiction over the accused person regardless of how the person has been brought within the jurisdiction of that court. The interest in prosecuting the person prevails over the violation of sovereignty and the prohibition of arbitrary deprivation of liberty. In U.S. jurisprudence, this maxim has traditionally been referred to as ‘the Ker-Frisbie Rule’. Other jurisdictions have also traditionally subscribed to this principle. An example of the male captus bene detentus maxim can be found in the heavily criticised U.S. Alvarez-Machain case. The maxim dates


Ibid., p. 359.

A. SRIDHAR, Note: The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 345-346 (arguing that the principle entails that where an individual has been abducted across state borders, he cannot complain of any violation of international law, where such is the exclusive right of the state and that ‘transnational abduction was a violation of international law that offended the sovereign, not the individual”).

This name derives from two decisions by the Supreme Court affirming this maxim. First, in Ker v. Illinois, a U.S. citizen had forcibly been abducted from Peru to the U.S., by a private messenger. The U.S. Supreme Court held that the defendant had not been deprived from due process of law. See Ker v. Illinois, 119 U.S. 436 (1886). In Frisbie v. Collins, the accused had been forcibly abducted from Chicago to Michigan. The Supreme Court held that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a forcible abduction.” Consequently, no violation of due process of law was found. See Frisbie v. Collins, 342 U.S. 436 (1952).

Examples which are often referred to include the Ex parte Scott case (UK) (where a British woman had been apprehended from Belgium and returned to the UK to face charges of perjury. The court held that it could not inquire into the circumstances under which a person was brought before the court). See Ex parte Scott, 109 Eng. Rep. 166 (1829), at 167. A similar line of argumentation has been followed in the case of Ex parte Elliott, where a person charged with desertion was arrested in Belgium. See Regina v. O.C. Depot Bataillon, R.A.S.C. Colchester (Ex parte Elliott), 1 All E. R. 373 (K.B.) (1949), at 376-377. For France, consider the Argoud case (the accused was abducted in Munich and transported to France. The Cour de Cassation held that the violation of the sovereignty of Germany did not prevent the exercise of jurisdiction. See Argoud, 45 I.L.R. 90 (Cour de Cassation, 1964). This line of reasoning was followed by European as well as Commonwealth courts in the late nineteenth century and throughout the majority of the twentieth century. See A. SRIDHAR, Note: The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 344 – 345.

United States v. Alvarez-Machain, 504 U.S. 655 (1992). This case encompassed the forcible abduction of a Mexican doctor by Mexican agents (agents retained by the US Drug Enforcement Agency (DEA)). The accused was brought to the US, to stand trial for kidnapping and murder. Importantly, U.S. agents had participated in the kidnapping and no extradition of the accused had been sought. The Supreme Court had to decide whether the existing extradition treaty between the U.S. and Mexico prohibited this abduction. The majority of the Supreme Court found that the abduction did not entail a violation of the extradition treaty as there was no explicit provision prohibiting such abduction and where the extradition treaty did not have an exclusive character. Therefore, the Ker-Frisbie rule applied and the court should not divest itself from jurisdiction. However, at the same time the Supreme Court seems to have conceded that the government’s actions amounted to a violation of international law. Note that different from the Ker and Frisbie cases, U.S. agents participated, rather than private citizens.
back to the *Eichmann* case.\(^{692}\) Where both the *Eichmann* case and the *Barbie* case were concerned with crimes comparable to those falling within the subject-matter jurisdiction of the international criminal tribunals, they are of specific interest.\(^{693}\) In both cases, the court referred to the specific category of crimes concerned as a reason not to set aside jurisdiction.\(^{694}\)

The *United States v. Toscanino* case, to some extent, limited the U.S. application of the *male captus bene detentus* maxim by recognising an exception to the principle of non-inquiry into the manner by which the accused was brought before the Court.\(^{695}\) The court held that “the court should divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” Central to the Court’s decision, to divest itself of jurisdiction, was the mistreatment (torture) to which the accused was subjected.\(^{696}\) The Trial Chamber in *Nikolić* interpreted the rule as applying only where: (i) the abduction itself

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\(^{692}\) The Attorney-General of the Government of Israel v. Eichmann, 36 I.L.R. 18 (District Court of Jerusalem, 1961) and 36 I.L.R. 277 (Sup. Ct., 1962). See M. P. SCHARF, The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, in *DePaul Law Review*, Vol. 49, 2000, p. 968. Eichmann had been kidnapped from Argentina by Israeli agents and brought to Israel where he was tried, convicted and eventually executed. The District court determined that the accused did not have standing to challenge the legality of the criminal proceedings on the basis of which he was brought within the jurisdiction of the state where the illegality arises out of an international delict. After the abduction of Eichmann, the UN Security Council adopted a resolution determining that the sovereignty of Argentina had been violated and requesting Israel to make the appropriate reparations (rather than requesting the return of Eichmann to Argentina) (U.N. Doc. S/4349 S/RES/138, 23 June 1960). On the historical origins of the maxim, consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 19-28.

\(^{693}\) Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie, 78 I.L.R. 130 (Cour de Cassation, 1983). The *Cour de Cassation* exercised jurisdiction over the accused, notwithstanding his claim that he had come before the court by means of a disguised extradition.

\(^{694}\) ICTY, *Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 23 – 24. Such led the Appeals Chamber to conclude that the special nature of the crimes concerned may be a good reason for not setting aside jurisdiction (*ibid.*, par. 24-26). In this regard, some authors speak of the ‘Eichmann exception’. Consider e.g. H. VAN DER WILT, Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*, in *Delict & Delinkwent*, Vol. 18, 2004, p. 279.


amounts to “grossly cruel and unusual barbies” or “shock[s] the conscience”, (ii) the abduction was the work of state agents or (iii) there was a protest by the injured state.697

On the other hand, other national courts have held that it should be open to the court to inquire into the way in which the accused was brought before the court (male captus, male detentus).698 Underlying this doctrine is the understanding that “a court has an inherent duty to protect the dignity, legitimacy and legality of its process.”699 This implies that the state should come to the court “with clean hands.”700 The case of Ex parte Mackeson has been considered as the first sign of the abandonment of the male captus bene detentus maxim.701 In casu, the accused was found in Zimbabwe, arrested by the local authorities, and deported to the UK to be subsequently arrested upon arrival. The proceedings were stayed since his rendition had been organised in such a way as to circumvent the regular extradition proceedings.702 Similarly, in the well-known Ex parte Bennett case, the British House of Lords concluded to an abuse of process where a person (a citizen of New Zealand) was forcibly abducted from South Africa to the UK, disregarding the existing extradition procedures.703 As noted by CURRIE, it was not so much the circumvention of the existing extradition procedures that was offensive to the court but it was rather the matter of “respect for the rule of law in the global sense.”704 It is to be noted that this second approach (‘abuse of process’) to some extent more

697 Ibid., par. 81. Consider the interpretation given by U.S. jurisprudence to Toscanino, supra, fn. 663.
699 Ibid., p. 356.
700 State v. Ebrahim, Supreme Court (Appellate Division), 26 February 1991, 95 I.L.R. 417, at 442. As noted by SRIDHAR, the rationale underlying many national court decisions on abuse of process is to police its executive branch by not allowing it to profit it from its own illegal behaviour. See A. SRIDHAR, Note: The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 357 – 358.
701 Regina v. Bow Street Magistrates (Ex Parte Mackeson), 77 I.L.R. 336 (High Court (Divisional Court), 1981).
702 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolic, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 86.
703 R. v. Horseferry Road Magistrates’ Court (Ex Parte Bennett), 95 I.L.R. 180, at 195 (House of Lords, 24 June 1993) (“The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused”). Other cases that may be referred to include the New Zealand Hartley case (R. v. Hartley, Court of Appeal, 5 August 1977, [1978] 2 N.Z.L.R. 1999) and the Levinge case (Levinge v. Director of Custodial Services, 9 N.S.W.L.R. 546 (1987)).
closely aligns with the approach taken by the supervisory human rights instruments, inquiring into the manner the person concerned was brought before the court.

From the analysis of national case law, the Trial Chamber in Nikolić cautiously derived a number of ‘elements’ that played a role in the case law. They include (1) the involvement (direct or indirect) of the executive of the forum state in the illegal transfer, (2) whether the accused was a national of the injured state or of the forum state, (3) whether the injured state protested against the rendition of the person, (4) whether an extradition treaty existed and whether there first was an attempt to apply the extradition treaty, (5) the treatment of the accused during the period of deprivation of liberty between the moment of apprehension and the official arrest in the forum state, and (6) the nature of the crimes for which the accused was sought. 705

Nikolić complained inter alia that (i) the violation of state sovereignty in his arrest, as well as (ii) the violation of human rights and due process should lead the tribunal to set jurisdiction aside. On the first point (i), the Trial Chamber held, in line with Tadić, that the defendant could invoke a violation of state sovereignty. 706 However, the Trial Chamber did not find that state sovereignty had been violated. First, the concepts of sovereignty and equality of states are closely connected. In that regard, the legal context in which the international criminal tribunals operate (verticality) is different and sovereignty considerations cannot play the same role. 707 Secondly, there was no involvement of the Prosecution and/or SFOR in the abduction prior to the crossing of the border between the FRY and Bosnia and Herzegovina, nor did

705 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 95.
706 Ibid., par. 97. The traditional view in international law is that the violation by one state of the rights of another state does not automatically provide the individual concerned standing to request a remedy. See R.J. CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 354.
707 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 100. On this point, consider SLOAN, submitting that while indeed different considerations apply, “there must nevertheless be some limits on the ICTY’s power to intervene in a state.” He notes, as an example, that one such limit may be that interferences with the sovereignty of a state must be specifically provided for under the Statute. See J. SLOAN, Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture, in «Leiden Journal of International Law», Vol. 16, 2003, p. 549, fn. 68; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 223, fn. 201 (stating that “while arrest warrants may constitute enforcement measures, these oblige custodial States to effect arrests or direct international forces to carry them out.” “They stop short of authorizing such States or forces to launch incursions into third States in order to do so”). Consider also C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 455.
SFOR or the Prosecution offer any incentives. In this regard, the Trial chamber reasoned, the situation differed from those instances in which national courts declined to exercise jurisdiction. In all these cases, there was an involvement of the executive authorities of the forum state.\(^{708}\) Notably, the scenario in Nikolić differs from that in Đokmanović, where the Prosecution and UNTAES had been involved in the luring operation. Thirdly, unlike several national cases, there was no circumvention of other means to bring the accused within the jurisdiction of the court.\(^{709}\) Similar to the arguments made in relation to the Đokmanović case, and as argued by SCHARF, the situation in which no arrest warrant was addressed to the FRY may be compared to the situation in which an extradition treaty is circumvented. As an obiter dictum, the Trial Chamber added that even where the Trial Chamber would have concluded that state sovereignty had been violated, this would imply that the accused would be returned to the FRY, which would be under the immediate obligation to arrest the accused and to surrender him to the tribunal.\(^{710}\)

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708 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 101; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1, A. Ch., 2 October 1995, par. 100. Consider also ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 26, where the Appeals Chamber held that “the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organization or other entity, do not necessarily in themselves violate State sovereignty.” Several authors noted that in this regard, the agreed statement of facts was fatal to the Defence’s motion. See R.J. CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 366; J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. MCCORMACK and McDONALD (eds.), Yearbook of International Humantiarian Law, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 327.

709 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 103.

710 Ibid., par. 104. Consider A. SMEULERS, Commentary, in A. KLIP and G. SLUFFER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 108 (noting that in general, “relying on the violation of State sovereignty will […] be to little avail of individuals”). Consider C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 456 - 457 (the author distinguishes between two distinct scenario’s and argues that (1) in case the violation necessitates that jurisdiction is set aside, the argumentation (of the Trial Chamber) “overlooks the fact that […] a new transfer would make no sense if the Tribunal has earlier refused jurisdiction in this case.” “[T]here is no point in transferring a person to a Tribunal which has earlier determined that it cannot try the person.” Consequently, the author argues, there is no corresponding obligation incumbent on the injured state to transfer the person. Where (2) less serious violations occurred, the tribunal can still exercise jurisdiction and the obligation to arrest and surrender remains. Where such would result in a mere pro forma remedy, the author argues that other remedies stand to be preferred to release to the injured state).
On appeal, the Appeals Chamber started instead from the question of under what circumstances a violation of state sovereignty requires that jurisdiction be set aside. First, the Appeals Chamber considered that the ICTY Statute does not provide for remedies in cases where states do not comply with requests for the arrest and surrender of persons. Consequently, it is not clear under which circumstances SFOR or individuals acting on its behalf may enter the territory of another state, without obtaining any approval, ex ante or ex post. It stated, based on the analysis of national case law, that where the tribunal is dealing with ‘universally condemned offences’, jurisdiction should not be set aside by reason of violations of state sovereignty “brought about by the apprehension of fugitives from international justice.” The Appeals Chamber held that a balancing act is required between the legitimate expectation that those accused of these crimes are brought to justice swiftly and the principle of state sovereignty. According to the Appeals Chamber, “the damage caused to international justice by not apprehending fugitives accused of serious violations of international law is none.”

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711 As noted by CURRIE, the framing of the issue (whereby the Appeals Chamber first addressed this question and to only subsequently address whether the violations were attributable to SFOR and/or OTP) already betrayed that the Appeals Chamber held the view that the sovereignty violations were not sufficiently grave to warrant setting aside jurisdiction. R.J. CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 368. Or, as PAULUSSEN argues, the Judges first addressed the issue of remedies, before turning to the specific case. See C. PAULUSSEN, Male Captus Bene Detenus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 465.

712 ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Šturić, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 20.

713 A. CARCANO, the ICTY Appeals Chamber’s Šturić Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, p. 82.

714 ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Šturić, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 26. The Appeals Chamber relied on the national cases against Eichmann and Barbie, where jurisdiction was not set aside, despite the abduction or alleged disguised extradition of the accused respectively. See ibid., par. 23. As noted by LAMB, “one feature that distinguishes the forcible arrest of a Tribunal indictee from the ordinary case of intervention is the fact that a person indicted for serious breaches of international humanitarian law is a suspect whom the international community as a whole has a strong interest in bringing to justice.” See S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Laws», Vol. 70, 2000, p. 225. Consider also CARCANO, who speaks in this regard of an ‘emergent principle of customary international law’. See A. CARCANO, the ICTY Appeals Chamber’s Šturić Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, p. 85. A forceful critique of the jurisprudence cited in support of such principle is given by SLOAN and by PAULUSSEN. However, the latter author asserts that other case law may be referred to in support of the existence of such principle. Consider C. PAULUSSEN, Male Captus Bene Detenus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 470 – 473. J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. MCCORMACK and MCDONALD (eds.), Yearbook of International Humanitarian Law», Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 328 – 330.

715 The Appeals Chamber added that “[a]ccountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internece conflicts.” See ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Šturić, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 25 - 26.
international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State’s cooperation.” Nevertheless, the reasoning of the Appeals chamber risks being interpreted, as would the severity of the crimes provide an excuse for irregularities that occurred on the occasion of the apprehension. Furthermore, (2) the Appeals Chamber derived the principle from the national jurisprudence that when there had been no complaint by the injured state or when a diplomatic resolution had been found the jurisdiction will more easily uphold jurisdiction. According to the Appeals Chamber, this may be explained by the fact that “[t]he initial iniuria has in a way been cured and the risk of having to return the accused to the country of origin is no longer present.” Nevertheless, the reasoning of the Appeals Chamber seems to betray that even where any complaint would have been lodged by the injured state, jurisdiction should not be set aside. The necessity of accountability to realise international criminal justice outweighs state sovereignty considerations. Furthermore, (3) it is clear from the wording of the Appeals Chamber that the jurisdiction should not be set aside irrespective of the involvement of SFOR (or the Prosecution).

This conclusion may not be surprising since the violation of state sovereignty does not necessarily entail a violation of the rights of the accused. Indeed, since states and not individual persons, are the beneficiaries of sovereignty they are not automatically entitled to a

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716 Ibid., par. 26.
717 C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 470 – 487 (arguing that the Appeals Chamber should have disapproved such conduct more forcefully); J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. MCCORMACK and MCDONALD (eds.), Yearbook of International Humanitarian Law», Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 334 (noting that it is understandable that the Appeals Chamber was not overly concerned about a minor breach of state sovereignty in view of Serbia and Montenegro’s lack of cooperation. Nevertheless, “to simply observe that the violation may lead to ‘consequences for the international responsibility of the State or organization involved’, without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice.” “If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperation member states, the ramifications could be very damaging to international peace and security”).
718 As noted by SLOAN, the Appeals Chamber ignores the absence of any established procedure for states to lodge a complaint for violation of sovereignty with the tribunal itself or with another body. See ibid., p. 332.
720 Ibid., par. 27, 33. Concurring, see J. SLOAN, Prosecutor v. Drašan Nikolić: Decision on Defence Motion on Illegal Capture, in «Leiden Journal of International Law», Vol. 16, 2003, p. 552 (“in the view of the Appeals Chamber, in the circumstances, nothing turned on whether or not the conduct of the kidnappers was attributable to SFOR”).
remedy for a violation of state sovereignty.\textsuperscript{721} In addition, the remedy of rendering the person to the state would imply that the FRY would be under the immediate obligation to arrest Nikolić and to return him to the ICTY.\textsuperscript{722}

As to Nikolić’s argument that the human rights of the accused and due process of law had been violated by the abduction (ii), the Trial Chamber stated that the concept of due process of law is broader than ensuring the fair trial of the accused and includes questions as to the comportment of the parties in the proceedings and the question how the accused had been brought before the tribunal.\textsuperscript{723} In that regard, the Prosecutor should come before the Trial Chamber ‘with clean hands’.\textsuperscript{724} Hence, the Trial Chamber rightly adopted a conception of the right to a fair trial as being equally relevant to the pre-trial stage. The Trial Chamber concurred with the Appeals Chamber in Barayagwiza that the abuse of process doctrine may be applied if proceeding with the case would contravene the Court’s sense of justice. The application of the abuse of process doctrine as a remedy in case of unlawful arrest or detention will be discussed in a subsequent section.\textsuperscript{725} For now, it suffices to note that the Trial Chamber held that the application presupposes that the rights of the accused have been “egregiously violated.”\textsuperscript{726} In cases where the accused has been very seriously mistreated, or even subjected to inhuman, cruel or degrading treatment or torture, prior to his or her surrender to the tribunal, this may be an obstacle to the exercising of jurisdiction.\textsuperscript{727} Furthermore, it follows the Trial Chamber’s reasoning that it is irrelevant what entity or entities is/responsible for the egregious conduct.\textsuperscript{728}


\textsuperscript{722} Nevertheless, whether the FRY would live up to that obligation is a distinct matter.

\textsuperscript{723} ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 111.

\textsuperscript{724} \textit{Ibid.}, par. 111.

\textsuperscript{725} See infra, Chapter 7, VII.

\textsuperscript{726} \textit{Ibid.}, par. 111.


\textsuperscript{728} ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 (“even without […] involvement [of persons acting for SFOR or the Prosecution] this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated”). A different opinion is held by LAMB, who argued that “none of the national authorities previously cited suggest that a court should decline to exercise jurisdiction over a defendant, in circumstances where the authorities of the forum State have acted with propriety, merely because the authorities of another State or individual may have acted irregularly. Consequently, where the ICTY or its agents were themselves
These findings by the Trial Chamber were confirmed by the Appeals Chamber. Nevertheless, the Appeals Chamber underlined the exceptional character of this remedy and held that “[a]part from such exceptional cases […] the remedy of setting aside jurisdiction will, in the Appeals Chamber’s view, usually be disproportionate.” However, the Appeals Chamber did not clarify what remedies would be appropriate for lesser violations. Furthermore the Appeals Chamber did not offer any indication how ‘egregious’ violations of human rights violations can be distinguished from non-egregious violations and rather emphasised that such assessment cannot be made in abstracto, but rather required a consideration of all relevant circumstances. Similar to the Trial Chamber, where the Appeals Chamber first referred to ‘egregious violations of the rights of the accused’, it subsequently only considered that the treatment of the accused was not egregious in nature, apparently leaving out serious violations other than instances of serious mistreatment.

Whereas the Trial Chamber acknowledged that it follows from human rights jurisprudence that the person should be released if he had been forcibly abducted, it held that the

neither involved nor complicit in any irregularities which may have occurred in the course of effecting an arrest, these irregularities would not suffice to vitiate the ICTY’s jurisdiction, at least where the jurisdiction was otherwise well-founded.” Different from the Trial Chamber, LAMB links this argument to the fact that the underlying purpose of the inherent jurisdiction of any judicial body to prevent an abuse of process is to impose a form of discipline and control over the law enforcement officials of the forum state, an object which would not have been promoted by preventing a trial where the prior unlawful conduct was committed by a third state or by private individuals. S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 237. Nevertheless, this power also serves other purposes, in particular the protection of the integrity of the proceedings, which should not be overlooked.
jurisprudence deals with the specific situation in which a state is held responsible for the violation of the right to liberty it was bound to respect. In addition, in all cases, the state was itself implicated in the forced abduction.\textsuperscript{734} This led the Trial Chamber to reject the allegations that the human rights of the accused person have been violated and that proceeding with the case would violate the fundamental principle of due process of law.\textsuperscript{735} This conclusion seems to imply that when the abduction is carried out by private individuals, there is no violation of the right to liberty where “[i]nfringements which cannot be attributed to [s]tate authorities should be considered ordinary criminal offences and not human rights violations.”\textsuperscript{736}

While the Trial Chamber did not explicitly choose to adhere to the \textit{male captus male detentus} doctrine, the mere fact that the Trial Chamber was willing to look into the manner in which the accused was brought before it may be regarded as proof that the Trial Chamber adheres to this view.\textsuperscript{737} Far from the ‘wholesale’ adoption of the \textit{male captus male detentus} maxim, the Trial Chamber limited its application to serious violations of the rights of the accused and did not state that every serious violation should automatically lead to release.\textsuperscript{738} Overall, it may be argued that both the Trial Chamber and the Appeals Chamber did not give sufficient attention to remedies other than the setting aside of jurisdiction (such as a reduction of the sentence in cases of conviction or financial compensation in cases of release). Indeed, when the accused requested release ‘or such relief as the Trial Chamber considers appropriate’, it would have

\textsuperscript{734} ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, \textit{Prosecutor v. \textsuperscript{\textcopyright}Nikolić}, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 113. \textsuperscript{\textcopyright}CURRIE holds that this argument “appeared to equate to a finding that there [had] been no human rights violations in the strict sense.” See R.J. \textsuperscript{\textcopyright}CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 367.

\textsuperscript{735} ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, \textit{Prosecutor v. \textsuperscript{\textcopyright}Nikolić}, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 115.

\textsuperscript{736} A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 110 (the author adds that the authors of these crimes should be prosecuted (it should be noted that the alleged abductors of Nikolić were in fact prosecuted and convicted) and Nikolić should have the right to demand financial compensation from his abductors). Consider also C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 462 (“This can probably only be explained by the fact that the Trial Chamber must be of the opinion that private individuals \textit{cannot} violate human rights”).


been proper to also consider other possible remedies.\textsuperscript{739} Furthermore, it should be noted that the tribunal proved willing to look into irregularities in the arrest, irrespective of the attribution of these irregularities to the tribunal.\textsuperscript{740} However, the tribunal failed to shed light in the exact circumstances of \textsuperscript{741}Nicolić\textsuperscript{741} arrest.\textsuperscript{741}

The risks involved in the holdings of both the Trial Chamber and Appeals Chamber in the \textit{Nikolić} case may be illustrated through the Tolimir case. In this case, Tolimir alleged that he had been abducted from his apartment in Serbia by an organised group of men and transported across the border of the Republika Srpska. The Prosecutor denied these allegations and argued that, even if there had been a violation of the sovereignty of Serbia, the consequence would have been that Tolimir be returned to Serbia, which would be under an obligation to re-arrest the accused.\textsuperscript{742}

The Trial chamber followed the approach of the Appeals Chamber in the \textit{Nikolić} decision and successively discussed (1) the circumstances under which the violation of state sovereignty requires jurisdiction to be set aside and (2) the circumstances under which the violation of human rights require jurisdiction to be set aside. On the first point, the Trial chamber unsurprisingly concluded that given the crimes the accused is charged with, even if a violation of state sovereignty would have occurred (‘assuming, without deciding’), this would not suffice to set aside jurisdiction.\textsuperscript{743} As far as the second point is concerned, the Trial Chamber accepted the allegations of the accused concerning his initial abduction “[f]or the purpose of

\textsuperscript{739} Ibid., p. 466 (arguing that such limited consideration turned the question of remedies in an “‘all or nothing’ formula, which leaves no room for differentiation and which will ensure that the suspect will rarely come off best”).

\textsuperscript{740} Compare S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 210 (the author holds that collusion of the Prosecution or the tribunal should necessarily be shown in order to establish the responsibility of the ICTY).

\textsuperscript{741} Consider J. SLOAN, Breaching International Law to Ensure its Enforcement: the Balance by the ICTY on Illegal Capture, in T. McCORMACK and MCDONALD (eds.), Yearbook of International Humanitarian Law, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 342 (“It would seem right that observers of the ICTY would look to this, the ICTY’s most authoritative Chamber, for a well-reasoned decision: one which was comprehensive in its scope, addressed difficult issues head on and provided a workable precedent for future cases. Moreover, the defendant himself was entitled to a decision that would explain why his motions were unsuccessful, as well as providing him with an understanding of what really occurred on the night of his capture and who was behind it. Unfortunately, the Appeals Chamber did not feel compelled to provide such a decision”).

\textsuperscript{742} ICTY, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, \textit{Prosecutor v. Tolimir}, Case No. IT-05-88/2-PT, T. Ch. II, 14 December 2007, par. 13. A similar argumentation was put forward by the Trial Chamber in \textit{Nikolić}.

the present analysis only.” The Trial Chamber held that the only irregular aspect of the arrest was the alleged removal (abduction) of Tolimir from his apartment in Serbia. The Chamber added that this abduction “is not so egregious as to merit declining jurisdiction over this Accused in relation to the grave crimes against him.” Furthermore, there was no evidence on the participation of the NATO or the Prosecution in the alleged abduction. However, the argumentation seems to betray that even where the Prosecution or the NATO had been involved, there would not necessarily be a human rights violation of so serious a nature as to warrant that jurisdiction be declined. Whereas the Defence subsequently filed a new submission, in which it referred to ‘new circumstances’ (a reference in the book written by former Chief Prosecutor Carla del Ponte and a quote by the Serbian Minister of Interior on television), the Trial Chamber considered that where the first Trial Chamber decision assumed the Defence allegations to be true, there were no new circumstances justifying a revisitation of the decision. Again, the analysis of the Trial Chamber only duly considered the most severe remedy, which is the setting aside of jurisdiction. Where the Trial Chamber considered - ‘assuming, not deciding’ – the Defence allegations to be true, it considered that there was no reason to set aside jurisdiction. Subsequently, the Trial Chamber did not see any reason to further consider the circumstances of the arrest and to grant less severe remedies.

745 Ibid., par. 25; ICTY, Decision on Submissions of the Accused Concerning the Legality of Arrest, Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008, par. 14.
747 The Defence requested to establish that Tolimir was arrested in Serbia and denied the right to have a competent court decide about his transfer. Whereas the Trial Chamber determined that it did not have the power to examine the circumstances of his arrest “for the purpose of providing some form of declaration”, the Trial Chamber considered the motion insofar as the circumstances of the arrest would impact on the jurisdiction of the ICTY to adjudicate his case. As far as other remedies are concerned, the Chamber reasoned that “the accused may have remedies to pursue in national courts in relation to an alleged illegal arrest.” See ICTY, Decision on Submissions of the Accused Concerning the Legality of Arrest, Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008, par. 12.
748 Ibid., par. 12.
749 Ibid., par. 17. Where the Defence subsequently appealed the decision, the Appeals Chamber refused to consider the matter where the Defence should have requested certification to appeal. See ICTY, Decision on Zdravko Tolimir’s Appeal against the Decision on Submissions of the Accused Concerning Legality of Arrest, Prosecutor v. Tolimir, Case No. IT-05-88/2-AR72.2, A. Ch., 12 March 2009.
750 Such is surprising in view of the Defence appeal against the 18 December 2008 decision where it proposed that a declaration that the circumstances of his arrest violated his rights as an accused could in itself be an appropriate remedy. See the argumentation in ICTY, Decision on Zdravko Tolimir’s Appeal against the Decision on Submissions of the Accused Concerning Legality of Arrest, Prosecutor v. Tolimir, Case No. IT-05-88/2-AR72.2, A. Ch., 12 March 2009, par. 7. See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 499 – 500, 503.
Overall, the case law of the ICTY depicts that uncertainty remains as to the situations in which proceedings will be halted and jurisdiction set aside. For example, it remains unclear in which instances the involvement of the tribunal in irregularities in the arrest leads the tribunal to relinquish jurisdiction. In any case, given, as was clarified in Nikolić, that the Prosecutor should come to the tribunal with clean hands and given the necessity of relying on states and other actors in the effectuation of arrest warrants, the consideration of the level of attribution of the violation to the tribunal in the exercising of the tribunal’s discretion to set aside jurisdiction seems entirely justified.

VII. FORMS OF SUBSTANTIVE REDRESS

From the consideration of the relevant jurisprudence, it emerges that both the ad hoc tribunals and the ICC provide for different remedies in case of unlawful or arbitrary arrest or detention. Whereas international human rights law requires granting an effective remedy in cases of breaches of the rights of the accused, NAYMARK discerns two 'systemic obstacles' to granting these remedies which are peculiar to international criminal proceedings. First, since the Barayagwiza saga, no one will seriously challenge the important political considerations that come into play in granting remedies to persons suspected of the crimes within the subject matter jurisdiction of the international criminal tribunals. Secondly, it emerges from the case law, regarding at least some of the remedies included, that the seriousness of the allegations against the suspect or the charges against the accused are an

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751 For an argumentation that the jurisprudence should be interpreted as implying that the Prosecutor should come to the court with clean hands and that therefore, jurisdiction should be set aside where employees of the tribunal intentionally committed serious irregularities, see C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 480, 645 and 648, fn. 122. The author elsewhere acknowledges that this implies that the threshold would be lower than the corresponding threshold in the inter-state context, where it requires (i) an abduction together with serious violations of mistreatment or (ii) followed by a protest by the injured state and a request to return the person (ibid., p. 650).

752 G. SLUITER, International Criminal Proceedings and the Protection of Human Rights, in «New England Law Review», Vol. 37, 2002 – 2003, p. 946 (arguing that a one crucial factor in determining whether a violation should lead to the termination of the proceedings is “[t]he degree of attribution of the violation to the Tribunal, in particular the Prosecutor (significant involvement in the violation by the Prosecutor could damage the integrity of the proceedings to such an extent that the trial cannot be continued”).


754 Ibid., p. 3; S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 717 - 718 (stating that releasing of the accused for violations of his or her rights “contravenes the Tribunals’ transitional justice objectives and is potentially politically disastrous”).
important factor which ought to be taken into the equation. In turn, borrowing from United States legal scholarship, STARR (speaking solely on the remedy of release or retrial) refers in this regard to “remedial deterrence”. International criminal tribunals face particularly potent remedial deterrence pressures in ordering ex post remedies, including factors such as the costs, the length, and the political prominence of trials which make it prohibitively costly for the tribunals to order the standard remedies for serious and prejudicial criminal procedure violations. In addition, ordering release “would undermine its goal of ending impunity for atrocities and moreover would be so politically explosive as to endanger the Tribunal’s continued viability.” As a result, international criminal tribunals have avoided the granting of remedies. The author identifies three ways in which tribunals have avoided doing so. They either: (1) redefine the right that is violated, narrowing it down, (2) erect procedural hurdles to avoid addressing the violation fully or (3) require a “high burden of proof of prejudice.” For example, arguably, both the ICC Pre-Trial Chamber and the Appeals Chamber in Katanga created a procedural hurdle for it not to have to consider the merits of several allegations of pre-transfer irregularities regarding the arrest and detention proceedings. STARR notes that such reasoning bears “an obvious remedial-cost-avoidance

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755 D. NAYMARK, Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy, in «Journal of International Law and International Relations», Vol. 4, 2008, p. 3 (the author argues that whereas in some instances the Judges explicitly acknowledge that they do take the seriousness of the alleged crimes into consideration, it may well be that in other instances, such factor is taken into consideration in the absence of any explicit analysis).

756 S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 695 – 697, 710. However, it should be noted that the author focuses solely on the “standard remedies for serious and prejudicial criminal procedure violations, namely release or retrial.” Consider in this regard J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 211 - 212 (the author argues that under a balancing approach to the granting of remedies, courts may “less likely” engage in “remedial deterrence”. On this balancing approach, consider infra, Chapter 7, VII, fn. 755).

757 S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 696. Moreover, the author notes that at the ad hoc tribunals, the number of defendants is limited and that all cases are high profile. Consequently, the tribunals cannot afford to issue high-cost remedies in one case “to preserve a better doctrinal rule for the long run” (ibid., p. 731).

758 Ibid., p. 710.

759 Ibid., p. 743.

760 Ibid, pp. 697; 711 – 730. The author refers to the danger of possible spill-over effects to other instances of procedural violations in procedures before international criminal tribunals where the remedial costs are not that elevated but also to other courts and to the domestic level which may follow the example set by the international tribunal even where they do not face similar costs.

761 See the detailed discussion of both decisions, infra, Chapter 7, VII, fn. 760.

762 See the discussion thereof, infra, Chapter 7, VIII.
advantage for the Tribunals, where the capture of suspects often depends on the cooperation of states with poor human rights records.” This form of remedial deterrence may be more appealing than remedial deterrence at the merits stage, where “it avoids distorting rights interpretations.”

VII.1. The ad hoc tribunals and the Special Court

In this subsection, several types of remedies will be discussed. At the outset it should be noted that several authors have criticised the jurisprudence, since it focuses too much on the most severe remedy of setting aside jurisdiction. It is hard to disagree with this criticism. This implies that the international criminal tribunals should consider all possible remedies at their disposal.

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763 S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 725. Another example is the refusal by the Appeals Chamber to consider breaches of the rights of the accused not raised before the Trial Chamber. STARR argues that such waiver has been applied more stringent in some cases. She gives the example of the judgment of the Appeals Chamber in Akayesu where the Chamber refused to consider the merits of the defendant’s claim that his right to be promptly informed of the reason of his arrest had been violated, notwithstanding the fact that he had previously filed a motion to that extent, because the defendant had not previously argued that the Prosecution was responsible for such violation. See ICTR, Judgement, Prosecutor v. Akayesu, Case No. ICTR-96-4-A, A. Ch., 1 June 2001, par. 375 (“The Appeals Chamber finds no evidence that the specific facts and arguments cited in this limb of the ground of appeal were, as asserted by Akayesu, raised before the Trial Chamber. The submissions made at the time did not allege any error on the part of the Prosecution such as is being raised now before the Appeals Chamber. Rather, Akayesu confined himself to a general allegation that he had not been informed of the cause for his arrest, presumably as a result _inter alia_ of an error by the authorities of Zambia. No clarification was provided thereon during the hearing of 26 September 1996. As a result, the Appeals Chamber finds that in this case too Akayesu has waived his right to raise this issue on appeal”).

764 S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 741 – 742. At the same time, the author recognises that procedural avoidance also comes with a certain cost where erecting procedural hurdles to invoking a substantial right unavoidably “substantially affect[s] that right’s practical value.”

765 Consider e.g. D. NAYMARK, Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy, in «Journal of International Law and International Relations», Vol. 4, 2008, p. 16 (arguing that “a more flexible, responsible approach to remedies must be taken.” ”[C]ourts must attempt to provide alternative remedies where exclusions and stays cannot be awarded despite a rights violation or where such an alternative would be more appropriate in a given situation”); G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 471 (“With the focus being on the ultimate remedy, no [exercise of] jurisdiction, the core of the matter – have violations occurred? – and the need for alternative remedies, tend to be overlooked.” Besides, and criticizing the Appeals Chamber decision in _Lubanga_ of 3 October 2006 on this point, the author holds that any violation raised that concerns the arrest or detention of an individual should be assessed in light of Article 85 ICC Statute (this article will be discussed in this section)); J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, p. 181, 191, 204 – 212 (the author notes with approval how the ICC moved from an ‘absolutist’ approach to remedies (focusing only on the defendant’s rights), to a ‘balancing approach’ (focusing on the different competing interests at the remedial stage) where (i) it better serves the competing goals of international criminal justice by not only focusing on the goal of providing a fair trial and where other competing goals are more pressing at the international level, considering the gravity, scope and systematic nature of the crimes; where it (ii) better accommodates the practical difficulties in prosecuting international crimes and (iii) where it exposes the interests considered by judges in determining remedies and ensures that the interests of all parties are considered).
disposal and adopt a ‘flexible’ approach in this regard.\textsuperscript{766} If the Judge considers all possible remedies, this ensures the proportionality of the remedy awarded.\textsuperscript{767}

According to the ICTR Appeals Chamber, “any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy.”\textsuperscript{768} Although the statutory framework of the ad hoc tribunals or the SCSL does not provide for the right to an effective remedy for violations of human rights, this right derives from international human rights instruments.\textsuperscript{769}

\textsuperscript{766} This is probably also the opinion of STARR where she argues in favour of “a candid interest-balancing approach to remedies for human rights violations in international courts.” She argues that such approach “would give heavy weight to the victim’s interest in receiving an effective remedy for rights violations, but courts would be permitted to choose lesser remedies (or in some cases, no remedy) in face of sufficiently compelling countervailing considerations.” See S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 752. Nevertheless, the author further submits that “the interest-balancing approach would alter the [international criminal tribunals’] remedial analysis only when the rights violation has caused the defendant harm that does not impair the fairness of the trial. This category encompasses the serious violations most prevalent at the ICT’s namely, most pretrial violations, including speedy trial problems as well as unlawful arrests and initial detention” (ibid., p. 761). Such reasoning should be rejected and reveals a very narrow interpretation of what is to be considered a fair trial. It is clear that the fairness of the trial may equally be affected by events that occurred pre-trial.

\textsuperscript{767} Consider e.g. D.J. HARRIS, M. O’BOYLE and C. WARBRICK, Law of the European Convention on Human Rights, Oxford, Oxford University Press, 2009, p. 197 (the authors argue (on Article 5 (ECHR) that while the ECHR’s power of review is limited where states enjoy large discretion, such remedies may not be entirely disproportionate).


\textsuperscript{769} ICTR, Decision on Appeal against Decision on Appropriate Remedy, Prosecutor v. Rwamukuba, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 25; ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamukuba, Case No. ICTR-98-44C-T, T. Ch. Ill, 31 January 2007, par. 40. Consider in particular Article 2 (3) (a) ICCPR (states parties should ensure “that any person whose rights or freedoms as herein [in the Covenant] recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); Article 8 UDHR (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law”); Article 25 (1) ACHR (affording the right “to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties”); Article 13 ECHR (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”); Article 14 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible”). Consider in that regard the Declaration of Judge Rafael Nieto-Navia in the Barayagwiza case (noting that “[h]uman rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate
and arguably forms part of customary international law. 770 It should be noted that Rule 5 ICTY, ICTR and SCSL RPE provides for a right to relief for the parties in the proceedings in cases of non-compliance with the Rules and regulations if the Trial Chamber determines that the non-compliance is proved and where it has caused material prejudice to the party. However, this provision is limited in scope and applies only to breaches of the Rules and regulations where a material prejudice to the party is proven. 771 The Trial Chamber in Rwamakuba reasoned that its power to grant an effective remedy for human rights violations “arises out of the combined effect of the Tribunal’s inherent powers and its obligation to respect generally accepted international human rights.” 772 On the latter point, the Trial Chamber rightly held that as a subsidiary organ of the UNSC, it “is bound to respect and ensure respect for generally accepted human rights norms.” 773 On the first point, the Trial Chamber reasoned that it “has an inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being tried before [the] tribunal.” 774 The Trial Chamber reasoned that this power “is essential for the carrying out of judicial functions [including the fair and proper administration of justice] and for complying with its obligation to respect generally accepted international human rights

domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party.” Consider also ICTR, Prosecutor v. Barayagwiza, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, Declaration of Judge Rafael Nieto-Navia, par. 28.


771 In Rwamakuba, the Trial Chamber determined that Rule 5 ICTR RPE did not apply, where the Trial Chamber had previously determined that the violations that occurred did not cause “a serious and irreparable prejudice” which implied that no material prejudice was proved. See ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 33 – 39.

772 Ibid., par. 45.

773 Ibid., par. 48. The Chamber added that such is in keeping with the stated purpose of the United Nations to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all (cf. Article 1 (3) of the UN Charter).

774 Ibid., par. 49. The Trial Chamber defined ‘inherent powers’ as those powers “a court should be recognized as having been implicitly conferred […], which prove necessary to the exercise of [the Court’s] mandate” (ibid., par. 46). The Trial Chamber based its definition, among others, on the Nuclear Tests Case (ICJ, Nuclear Test Case (Australia v. France), I.C.J. Reports 1974, Judgment of 20 December 1974, pp. 259 – 260). In doing so, the Trial Chamber deviated from the definition given to ‘inherent powers’ by the Appeals Chamber in Blaškić as “those functions of the International Tribunal which are judicial in nature and not expressly provided for in the Statute.” Compare: ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 25, fn. 27.
norms.” In turn, the Appeals Chamber in *Rwanakuba* held that the power to offer an effective remedy derives from the general obligation which is incumbent on the Trial Chamber to ensure that the trial is fair and that the rights of the accused are fully respected. “The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement.” The Appeals Chamber, thus, holds that this is an implied power. Importantly, the nature and form of the effective remedy should be proportionate to the gravity of the harm that has been suffered.

Previous jurisprudence had stated that the accused was entitled to a remedy for violations related to his or her arrest and detention, without enquiring about the authority for the tribunal to order such remedies. For example, in the case of *Semanza*, discussed previously, in which the accused had suffered a violation of his right to be promptly informed of the nature of the charges against him, the Appeals Chamber stated that the accused would be entitled to financial compensation, were he not to be found guilty by the Trial Chamber, or to a reduction of his sentence, if he were to be found guilty. Similarly, the Appeals Chamber in *Kajelijeli* considered the proper remedy to be awarded, without enquiring on its authority to do so. It concluded that notwithstanding various violations of the procedural rights of the accused during the initial arrest and detention in the requested state and prior to his initial appearance, dismissing the case for lack of jurisdiction would be disproportionate. The Appeals Chamber reiterated that the correct balance must be maintained between “the fundamental rights of the accused and the essential interests of the international community in the

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776 ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwanakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 26. Consider Article 20 (1) ICTY Statute and Article 19 (1) ICTR Statute. The Appeals Chamber additionally argued that the letters sent by the Presidents of the *ad hoc* tribunals to the Security Council seeking an amendment of the Statute to provide for compensation do not suggest that a financial compensation cannot be ordered but rather expressed a preference for a statutory provision. See infra, fn. 784.
778 Implied powers are the powers “which, although not expressly conferred upon an organ by its constitutive document, arise by necessary implication as being essential to the performance of the organ’s duties and can be derived from the express powers of an organization or its function.” See G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, p. 28.
781 Ibid., par. 206, 255.
prosecution of persons charged with serious violations of international humanitarian law.”

Consequently, the Appeals Chamber ordered that the accused’s sentence be reduced.

§ A right to (financial) compensation?

Does the right to an effective remedy for violations of the rights of the suspect or accused equally entail a right to financial compensation? This right is not provided for under the Statute, the RPE of the ad hoc tribunals or the SCSL. Furthermore, no budgetary allocation has been made to pay such financial compensation from. Nevertheless, the ICTR Appeals Chamber held in Rwamakuba that “while there is no right to compensation for an acquittal per se, there is a right in international law to an effective remedy for violations of the rights of the accused, as reflected in Article 2 (3) (a) of the ICCPR. In that regard, the Appeals Chamber noted that international human rights treaties expressly provide for a right to compensation for persons who have been unlawfully (or arbitrarily) arrested or detained. Consequently, the

785 BERESFORD argued that “[s]uch authority is a significant power that raises legitimate budgetary considerations, as well as doubts whether the courts, as organs of the United Nations, may unilaterally create financial liability for the Organization as a whole. While their Statutes may be interpreted liberally in many respects, particularly as to provide the ad hoc Tribunals with the power to carry out their mandates, they contain no language implying that the Security Council intended to allow them to make such awards. Moreover, should they unilaterally decide to award compensation, the courts may be seen by some members of the Security Council as overstepping their authority and violating their Statutes.” See ibid., p. 641.
787 Article 9 (5) ICCPR and Article 5 (5) ECHR. See ibid., par. 25. The Appeals Chamber also referred to the Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Resolution 60/147, 16 December 2005. Also other human rights instruments expressly provide for the possibility to provide for compensation for human rights violations. Consider, e.g. Article 63 (1) ACHR ("If the Court finds that there
ICCPR specifically envisions compensation to be an appropriate remedy in certain circumstances, such as unlawful arrest or detention. The Trial Chamber in *Rwamakuba* noted that if the tribunal were not to have this power, “it would lead to the untenable conclusion that it could not give effect to the right to an effective remedy in circumstances where financial compensation formed the only effective remedy for a human rights violation.” Indeed, if no reparation would be provided to the individuals whose human rights have been violated, the obligation to provide an effective remedy is not discharged. Instead, the Trial Chamber “must have the inherent power to make an award of financial compensation.” “Were the provision of financial compensation never available, then an individual’s right to an effective remedy would be unjustifiably restricted in cases where such compensation was necessary to adequately and efficaciously address the previous human rights violation.” In *casu*, the Trial Chamber decided to grant Rwamakuba 2000 U.S. dollars “for the moral injury sustained as a result of this violation.” This holding confirms has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that *fair compensation* be paid to the injured party” (emphasis added)). Also the jurisprudence of the regional human rights confirms that compensation has been awarded. See in detail D. SHELTON, Remedies in International Human Rights Law (2nd ed.), Oxford, Oxford University Press, 2005 pp. 294 - 301 (citing case law from the ACommHPR, the ECtHR and the IACtHR). Besides, the ECtHR and the IACtHR have both granted financial compensation for unlawful detention (ibid., p. 305).

One further comment should be made regarding the different scope of Article 9 (5) ICCPR and 5 (5) ECHR. It was argued by NOWAK that whereas the right to compensation under the former provision attaches to *every* unlawful arrest and detention (whether it is unlawful because it violates Article 9 (1) – (4) ICCPR or because it violates domestic law), compensation under Article 5 (5) ECHR requires a violation of Article 5 ECHR. In that regard, consider e.g. the previously quoted Murray Judgment of the ECtHR. See ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 82 (“As the Court has found no violation of Article 5 paras. 1 or 2 (art. 5-1, art. 5-2), no issue arises under Article 5 para. 5 (art. 5-5). There has accordingly been no provision of this latter provision in the present case”). Consider also M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 238. However, it should be noted that the lawfulness under Article 5 ECHR presupposes lawfulness under domestic law. Consequently, the difference which seems to derive from the different wording of the said provisions may, at least in some instances, be more apparent than real. For a confirming view, consider S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 497.
the earlier jurisprudence of the ICTR Appeals Chamber where it had stated that if the defendants were found to be not guilty, they would be entitled to financial compensation. 794 Similarly, the Trial Chamber in Kārādžić confirmed that financial compensation can be awarded when the accused would be acquitted. 795 This statement presupposes that compensation will not be considered to be a proper remedy if the accused would be found guilty. Hence, such remedy can only be considered at the end of the trial. 796

§ Sentence reduction

The unlawful arrest or detention of suspects or accused persons can also be remedied through the reduction of the sentence, in cases where the person is found guilty. While such practice exists at both ad hoc tribunals, no express authority is provided for this form of compensation under the Statute or the RPE of the ad hoc tribunals or the Special Court. 797 As to the procedure to be followed, no separate procedure is provided for and this remedy is in practice offered at the end of the proceedings. It was held by the Trial Chamber in Kārādžić that a request for the reduction of the sentence before the end of the trial proceedings would be premature, since it should be done on the assumption that the accused will be found guilty. 798


794 Consider e.g. ICTR, Prosecutor v. Barayagwiza, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 75; ICTR, Decision, Prosecutor v. Semanza, Case No. ICTR-97-20-A, A. Ch., 31 May 2001, p. 24 (disposition, sub VII). In the Barayagwiza case, the sentence of life imprisonment was reduced to 35 years. Consider ICTR, Judgment, Prosecutor v. Nahaimana et al., Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003, par. 1107 (“The Chamber considers that a term of years, being by its nature a reduced sentence from that of life imprisonment, is the only way in which it can implement the Appeals Chamber decision. Taking into account the violation of his rights, the Chamber sentences Barayagwiza in respect of all the counts on which he has been convicted to 35 years’ imprisonment”). Where Semanza was convicted to 25 years imprisonment, his sentence was reduced with six months, see ICTR, Judgement and Sentence, Prosecutor v. Semanza, Case No. ICTR-97-20-T, T. Ch., 15 May 2003, par. 580, 590.

795 ICTY, Decision on Accused’s Motion for Remedy for Violation of Rights in Connection with Arrest, Prosecutor v. Kajelijeli, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 5.

796 Ibid., par. 5 (the Trial Chamber held that it “would be premature […] to award compensation to the Accused at this point in time, as it would have to make this decision on the assumption that he will be acquitted”).

797 In addition to the Semanza and the Barayagwiza cases, referred to above (in 794), a reduction of the sentence was also awarded in the Kajelijeli case, where the sentence of life and fifteen years imprisonment was converted into a single sentence of 45 years of imprisonment. See ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 320 – 324. At the ICTY, the Trial Chamber confirmed the possibility to reduce the sentence imposed as a remedy in ICTY, Decision on Accused’s Motion for Remedy for Violation of Rights in Connection with Arrest, Prosecutor v. Kārādžić, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 5.

798 Ibid., par. 5. In casu, the Defence had requested a finding that the rights of the accused had been violated and for an “appropriate remedy at the conclusion of these proceedings”, which could either be a financial compensation if the accused would be acquitted or a reduction of the sentence in case of conviction (ibid., par.
Moreover, this would imply that this sentence reduction is decided upon before the accused is given the opportunity to present arguments that are relevant to the sentence.\(^{799}\)

§ Declaratory relief

A simple declaration that the rights of the suspect or accused have been violated in the course of the arrest or during the subsequent detention may also be a proper remedy.\(^{800}\) In fact, it has been argued that this constitutes “the most commonly awarded remedy in international law.”\(^{801}\)

§ Setting aside jurisdiction

When irregularities in the course of the effectuation of the arrest have been addressed, it was already indicated that the ICTY has embraced the abuse of process doctrine. Both \textit{ad hoc} tribunals adopted the view that violations of the rights of the suspect or of the accused in relation to the arrest and detention may lead to the non-exercising of jurisdiction in exceptional cases. This power normally follows from the inherent powers of the tribunal.\(^{802}\) The concept was first adopted by the ICTR Appeals Chamber in \textit{Barayagwiza} and later by the ICTY in the \textit{Nikolić} case.

Under international criminal procedural law, the abuse of process doctrine implies that proceedings which were initiated lawfully be terminated following the use of improper or illegal procedures in pursuing an otherwise lawful process.\(^{803}\) The doctrine is \textit{discretionary} in

1. The defendant asserted that irregularities occurred during his arrest in Serbia, where he was allegedly kept incommunicado for four days, without being promptly brought before a judicial officer, without being informed of the reasons of his arrest and in violation of the domestic and the ICTY’s legal framework as well as international human rights law (\textit{ibid.}, par. 2).

799 \textit{Ibid.}, par. 5.

800 ICTR, Decision on Appeal against Decision on Appropriate Remedy, \textit{Prosecutor v. Rwamukuba}, Case No. ICTR-98-44C-A., A. Ch., 13 September 2007, par. 27 (“the effective remedy accorded by a Chamber will almost always take the form of equitable or declaratory relief”).


802 This is the case as far as the \textit{ad hoc} tribunals are concerned. The Special Court codified such practice “to enhance and further protect the rights of the accused” in Rule 72 (B) (v) SCSL RPE. See SCSL, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of \textit{Nullum Crimen Sine Lege} and Non-Retroactivity as to Several Counts, \textit{Prosecutor v. Brimak et al.}, Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 18.

nature and allows the court to decline to exercise jurisdiction where exercising that jurisdiction in light of serious or egregious violations of the accused’s rights would prove detrimental to the court’s integrity. Thus, while the Chamber may exercise its discretion to decline to exercise jurisdiction, “it should only do so ‘where to exercise that jurisdiction would prove detrimental to the Court’s integrity’.”

The discrentional character of this tool notwithstanding, the discretion is arguably very limited in cases in which serious violations of the rights of the accused have occurred. Characteristic of the interpretation given to the abuse of process doctrine at the international echelon, as underscored by the Appeals Chamber in *Barayagwiza*, is the irrelevancy of the entity or entities which were responsible for the violation of the rights of the suspect or the accused. In this regard, the application of the abuse of process doctrine differs from the application of its counterpart in the inter-state context. While it seems logical to accept that the abuse of process doctrine applies equally

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805 Concurring, see C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 636, fn. 86 (noting that “one can imagine that if the judges were to determine that to exercise jurisdiction under certain conditions would prove detrimental to the court’s integrity, that there is one option left, namely to refuse jurisdiction”). Consider ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30 (“certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined”); ICTY, Decision on Preliminary Motions, *Prosecutor v. Mladić*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 48 (“the international community will exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused”).

806 ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 73. The Appeals Chamber referred to the case of R. v. Horserfly Road Magistrates’ Court *ex parte* Bennett, [1994] 1 AC 42, 95 I.L.R. 380 (House of Lords, 1993), where it was argued that “[a] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case” (emphasis added). Also the Trial Chamber in the Nikolić case confirmed that it is irrelevant which entity or entities are responsible for the violations. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 (the Trial Chamber added that this would certainly be the case where the Prosecution itself or states or international forces executing the arrest at the behest of the tribunal are involved in the serious mistreatment). Also the Appeals Chamber confirmed in Karić that the abuse of process doctrine applies irrespective of the entity which carried out the misconduct and does not allow for a dual standard, based on whether the entity responsible was a third party or not. See ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5-18-AR73.4, A. Ch., 12 October 2009, par. 47. Consider also ECCC, Decision on Request for Release, *KAING Guek Eav “Duch*”, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 33.

807 PAULUSSEN notes that in the relevant national jurisprudence, it is relevant whether the authorities were involved in the violations. See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 529, pp. 636 – 637. Nevertheless (as the author subsequently considers), it is to be reminded that these national cases cannot neatly be translated to the
in case states and/or international forces, which effectuate an arrest at the behest of the tribunal, are responsible for the serious violations that occurred, it may be more difficult to accept that jurisdiction should be set aside because of serious violations that have been committed by an entity unrelated to the tribunal.\footnote{International forces and states act as a sort ‘enforcement arm’ of the ad hoc tribunals where they execute an arrest warrant. In that regard, Judge Robinson noted that SFOR exercises a function analogous to that of a police force in a domestic context. Where SFOR exercises “a quasi police function”, “it virtually operates as an enforcement arm of the Tribunal.” See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. 

\textit{Simić}, Case No. IT-95-9, T. Ch., 18 October 2000, Separate Opinion of Judge Robinson, par. 6. Judge Robinson further noted that there exists a “strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor.” Notably, in the Todorović case, SFOR argued that it was to be considered a third state, and not to be likened to the enforcement arm of the forum state. See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. 

\textit{Simić}, Case No. IT-95-9, T. Ch., 18 October 2000, par. 19 (“SFOR points out that, in the current case, it is the Office of the Prosecutor, not SFOR, that stands analogous to the agents of a prosecuting State”). Similarly, the OTP argued that national case law does not suggest that the tribunal should decline jurisdiction over the defendant where the authorities of another state have acted irregularly. The Prosecutor added that whereas the ICTY lacks an enforcement arm and has to rely on state cooperation in the arrest and surrender of persons, “[t]he conduct of States and multi-State entities such as NATO and SFOR, cannot be imputed to the Prosecutor, when the Prosecutor was not involved in that conduct.” “They are not agencies of the Tribunal and should not be treated as if they were.” See ICTY, Prosecutor’s Response to the “Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Dismiss Indictment” Filed by Stevan Todorović on 10 February 1999, Prosecutor v. 


This seemed to have been the underlying thought where the Trial Chamber in Karadžić reasoned that “it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.”\footnote{ICTY, Decision on the Accused’s Holbrooke Agreement Motion, \textit{Prosecutor v. Karadžić}, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85.}

It will be explained that this holding should not be understood as implying that the tribunal may not exercise its discretion to stay the proceedings and not exercise jurisdiction where a third party unrelated to the Court is responsible for the violation(s).\footnote{See infra, Chapter 7, VII.1., fn. 833 - 843 and accompanying text.}

The application of the abuse of process doctrine results in the halting of proceedings. In that regard, the ad hoc tribunals distinguish between a permanent stay of proceedings and a stay of
proceedings of a non-permanent nature. The latter form is temporary in nature and should prevent further breaches of the rights of the accused. A stay of proceedings of a non-permanent nature has been imposed on many occasions, at the ad hoc tribunals, including the obstructive behaviour of states, issues related to the legal representation of the accused or awaiting the resolution of issues regarding the allocation of resources for defence preparations.811 Because violations relating to arrest and detention concern breaches that have occurred previously, these violations cannot be remedied by the imposition of a non-permanent stay of proceedings.812 The proceedings should be halted permanently.813 Where the suspect or the accused seeks the permanent stay of proceedings, a motion should be brought under Rule 73 ICTY and ICTR RPE. Such motion is not a preliminary motion challenging jurisdiction pursuant to Rule 72 (A) (i) and (D) ICTY and ICTR RPE.814

As to the applicable threshold, the Appeals Chamber in Barayagwiza determined that the abuse of process doctrine can be relied upon in two distinct scenarios, to know (1) where delay has made a fair trial for the accused impossible, and (2) where in the circumstances of a particular case, proceeding with the trial would contravene the court’s sense of justice, due to impropriety or misconduct.815 The second prong refers to situations “where to exercise that

811 As summarized by the Appeals Chamber in Lubanga. See ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 82. See further ICTY, Judgment, Prosecutor v. Tadić, Case No. IT-94-1, A. Ch., 15 July 1999, par. 55; ICTY, Decision on Second Motion by Brđanin and Talić, Prosecutor v. Brđanin and Talić, Case No. IT-99-36-PT, T. Ch., 16 May 2001, par. 5 (the Pre-Trial Judge argued that if a “Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial”); ICTY, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Prosecutor v. Blagojević, Case No. IT-02-60-AR73.4, A. Ch., 7 November 2003, par. 7 (“the only option open to a Trial Chamber, where the registrar has refused the assignment of new counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar”); ICTR, Decision on Ngeze’s Motion for a Stay of Proceedings, Prosecutor v. Nahimana et al., Pre-Appeal Judge, 4 August 2004, p. 2 (staying the proceedings until a new lead counsel has been assigned to represent him).


814 Such would not prevent subsequent proceedings in another jurisdiction.

815 Notably, the Special Court explicitly provides for the bringing of preliminary motions based on the abuse of process doctrine. See Rule 72 (B) (v) SCSL RPE as amended during the 2nd plenary session in March 2003. See SCSL, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts, Prosecutor v. Brima et al., Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 18.

816 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 77. In a similar vein, consider ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged
jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.” As discussed previously, in the Nikolić case, the Trial Chamber further clarified this test and held that it presupposes that the rights of the accused have been “egregiously violated.” If the accused has been very seriously mistreated, or even subjected to inhuman, cruel or degrading treatment or torture, prior to his or her surrender to the tribunal this may be an obstacle to the exercising of jurisdiction, irrespective of the entity or entities responsible for this conduct. In turn, the Appeals Chamber underlined the exceptional character of such remedy and held that “[a]part from such exceptional cases […] the remedy of setting aside jurisdiction will, in the Appeals Chamber’s view, usually be disproportionate.” It was noted previously that while the Nikolić case focused primarily on serious mistreatment, the first Barayagwiza Appeals Chamber decision, as well as other jurisprudence, prove that the test can also be applied to instances of serious procedural violations (arguably also including abductions in which the Prosecution is involved), the absence of serious mistreatment notwithstanding.

Holbrooke Agreement, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 45. The Appeals Chamber later referred to these two distinct scenarios as the two prongs of the test. See ibid., par. 51.

ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 74, as further clarified in ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 45 and 51.


Whereas in the Đokanović case the Trial Chamber focused on the distinction between luring and abduction, it did not clearly determine whether jurisdiction may be refused in case of an abduction in which the Prosecutor is involved. Also other cases, such as Nikolić, failed to resolve these uncertainties. Consider PAULUSSEN, who noted that the application of the abuse of process doctrine in cases of abductions, absent serious mistreatment, is not entirely clear and argues that the tribunal should have the power to refuse jurisdiction in case of an abduction in which the Prosecution was involved. See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 460 – 461, 529, 639 – 642 (and accompanying footnotes). The author notes that in such scenario, it is not the minimal harm caused to the accused or the harm inflicted on the sovereignty of a State which justifies setting aside jurisdiction but rather the “integrity and credibility of the Tribunal as an institution based on (international) law which would be harmed if the trial continued.” Such conduct would undermine the mission of the tribunal and set an example that would be followed by national states. Consider also J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. McCORMACK and McDONALD (eds.), Yearbook of International Humanitarian Law, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 342 – 343 (commenting on the Nikolić case, the author argues that if a thorough examination of the facts would have shown foreknowledge of the Prosecution of SFOR’s plans of carrying out an illegal capture operation, the tribunal should have provided a remedy reflecting the tribunal’s disproval of such act, a remedy that may well have taken the form of ordering the release).
In *Barayagwiza*, the Appeals Chamber had to decide on the proper remedy to be awarded for the violations of the rights of Barayagwiza, including the 11 month gap he spent in illegal detention before being transferred, the 96 day lapse between his transfer and the initial appearance, and the fact that he was never heard on the *writ of habeas corpus* he filed. The Appeals Chamber held that the prosecutorial conduct was “egregious” and concluded “that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.” Consequently, proceeding with the case “would cause irreparable damage to the integrity of the judicial process” and release “is the only effective remedy for the cumulative breaches of the accused’s rights.” The Appeals Chamber expressed the hope that this remedy may deter future violations. Moreover, it avoids that the Appeals Chamber places its imprimatur on these violations. The tribunal thus seemed willing to accept responsibility for these violations even if the accused were not in the constructive custody of the tribunal.

Moreover, the Appeals chamber argued that the stay of proceedings should be ordered with prejudice to the Prosecutor. The Appeals Chamber based this decision on a controversial reading of Rule 40bis (H) (holding that ‘shall’ implies (effective interpretation) that release is imperative and should not allow the Prosecutor to file a new indictment and re-arrest the suspect). Otherwise, the release would remedy the illegal detention. Consequently, if the Prosecutor would decide to re-arrest the accused, he would not be entitled to credit for that delay.

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821 Other decisions confirm that the doctrine may equally apply in other situations. Consider e.g. ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206 (referring to ‘serious mistreatment’ as an example of a situation where the tribunal may exercise its discretion to decline to exercise jurisdiction, given that in light of serious and egregious violations of the accused’s rights, such would prove detrimental to the court’s integrity); ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73-A, A. Ch., 12 October 2009, par. 47 (in referring to the first Barayagwiza Appeals Chamber decision, the Appeals Chamber noted with approval that the Trial Chamber considered “whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights”); ICTY, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, T Ch. III, 3 June 2005, p. 38; ICTR, Decision on Édouard Karemera’s Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T Ch. III, 23 June 2009, par. 6.

822 ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 106. The Appeals Chamber argued that this remedy was in line with Rule 40 bis (H) ICTR RPE, which requires that the suspect is released if not charged within 90 days after arrest and with Rule 40 (D), which requires release if the suspect is not charged within 20 days upon transfer to the tribunal.

823 Ibid., par. 108.

824 Ibid., par. 108, 112.

825 Ibid., par. 100. See infra, Chapter 7, VIII.

826 Ibid., par. 108.

827 See the discussion of Article 40bis (H) ICTY RPE, *supra*, Chapter 7, III.1.3.
period of detention (pursuant to Rule 101 (D) ICTR RPE (present Rule 101 (C))). On 31 March 2000, the Appeals Chamber reviewed its decision, in light of new facts discovered, and concluded that the remedy of a stay of proceedings with prejudice to the Prosecutor was disproportionate.

In addition to the cases which were discussed previously in the section on irregularities in the execution of the arrest, the ICTY had additional chances to further illuminate the scope of the remedy of setting jurisdiction aside. In the Karadžić case, the defendant’s motion on the Holbrooke agreement included a subsidiary claim to stay the proceedings because of abuse of process where the Trial Chamber would (1) confirm the existence of this agreement and (2) conclude to the non-binding character thereof vis-à-vis the tribunal. Both the Trial Chamber and the Appeals Chamber subsequently had a chance to discuss the application of the abuse of process doctrine. The Trial Chamber (not entirely accurately) repeated the understanding of the doctrine by the ICTR Appeals Chamber in Barayagwiza and by the Trial Chamber and Appeals Chamber respectively in Nikolić. More worrisome is the determination by the Trial Chamber that not every situation of “serious mistreatment” should lead to a stay of proceedings where such situation involves a third party not connected to the tribunal. According to the Trial Chamber, such mistreatment “is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding evidence obtained by torture at the hands of the third party.”

While stating that the Trial Chamber in Nikolić did acknowledge (as an obiter dictum) that in such cases jurisdiction should not be exercised irrespective of the entity responsible for it, the Trial Chamber in Karadžić noted that this decision was based on (1) a hypothetical situation of torture or cruel or degrading treatment of

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828 Ibid., par. 110. The Appeals Chamber added that “[t]he net result of this would be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.”
829 ICTY, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 71 (according to the Appeals Chamber, “[t]he new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the appellant. The cumulative effect of these elements thus being reduced, the reparation now appears disproportionate in relation to the events”).
830 ICTY, Decision on the Accused’s Holbrooke Agreement Motion, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 11.
831 Ibid., par 82. For example, in its discussion of the Nikolić Appeals Chamber decision, the Trial Chamber only considered the possibility of setting aside jurisdiction as a consequence of human rights violations, where the Appeals Chamber’s analysis also included the possibility of setting aside jurisdiction as a consequence of violation of state sovereignty.
832 ICTY, Decision on the Accused’s Holbrooke Agreement Motion, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85.
833 Ibid., par. 85.
the accused just prior to his or her transfer to the tribunal (which was not the case in casu) and (2) events of delays in the pre-trial detention of the accused caused by the Prosecutor, which compounded delays by the custodial state prior to surrender (Barayagwiza). Furthermore, the Trial Chamber reasoned that it was explicitly held in Barayagwiza that the state authorities were acting on behalf of the ICTR Prosecutor. The Trial Chamber concluded that “it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.”

This limited interpretation of the abuse of process doctrine is obviously at odds with the definition provided by the Appeals Chamber. According to the definition given in Barayagwiza, which was discussed previously, this doctrine not only implies that jurisdiction may be declined where a fair trial is not longer possible but also “where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice, due to pre-trial impropriety or misconduct.”

Although the abuse of process only allows that jurisdiction be set aside in exceptional cases, this depends on the specific circumstances of each case. Therefore, any distinction between third parties and other parties should be prevented. However, it has been pointed out by some authors, based on national case law that the abuse of process doctrine would not normally apply in the absence of the participation or involvement of the authorities of the forum state. Therefore, the nature of the actor is an important element in the consideration of the abuse of process doctrine and whether the actions are serious enough to warrant that the exercise of jurisdiction be declined.

Karadžić argued on appeal that the Trial Chamber erred in applying a ‘dual abuse of process standard’, depending on whether the misconduct has been committed by the tribunal or by

\[834 \text{ Ibid., par. 85.} \]
\[835 \text{ Ibid., par. 85.} \]
\[836 \text{ ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 77.} \]
\[837 \text{ However, consider PAULUSSEN: “one can concur with the Chamber that some third parties can be seen as being more connected with the Tribunal than others.” “For example, irregularities caused by a State which is acting on the Prosecutor’s behalf may be deemed more serious than the same irregularities committed by third parties which have a less strong connection with the Tribunal, such as private individuals acting on their own.” See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 508.} \]
third parties not related to the tribunal. The Appeals Chamber considered that the Appeals Chamber in Nikolić and Barayagwiza did not introduce a dual standard depending on the entity that committed the conduct. The Appeals Chamber stated, nonetheless, that in casu, “the Trial Chamber adopted the common standard established by the Appeals Chamber in the Barayagwiza Decision and in the Nikolić Appeal Decision, and not a higher one by considering whether the Appellant suffered a serious mistreatment or whether there was any other egregious violation of his rights.” “The jurisprudence of the Appeals Chamber does not allow the abuse of process doctrine to deploy a standard lower than this, irrespective of the author of the alleged misconduct.

Overall, the remedy of terminating the proceedings is “an extraordinary remedy applicable in exceptional circumstances.” According to the Appeals Chamber, “[i]t is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation.” These powers are closely related to the abuse of process doctrine, and the exercising thereof, and serve three distinct purposes: (1) to provide a remedy for the violation of the accused’s rights, (2) to deter future misconduct, and (3) to enhance the integrity of the judicial process.

Importantly, the Judges factor in the severity of the crimes the person has been charged with, in their assessment. Indeed, the application of the abuse of process necessitates that the Judges “undertake a balancing exercise in order to assess all the factors of relevance in the case at hand in order to conclude whether, in the light of these factors, the Chamber can exercise

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839 ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73-A, A. Ch., 12 October 2009, par. 43.
840 Ibid., par. 47. Therefore, the argumentation put forward by RYNGAERT that the more liberal abuse of process standard put forward by the Appeals Chamber in Barayagwiza only applies to “specific situations”, “where the tribunal itself carries responsibility” or cases of concerted action (and is limited to instances of torture or serious mistreatment absent such involvement) should be rejected where it, likewise, introduces a dual standard. Consider C. RYNGAERT, The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, p. 735.
841 ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73-A, A. Ch., 12 October 2009, par. 47.
842 ICTR, Decision on Édouard Kamerera’s Motion Relating to his Right to be Tried Without Undue Delay, Prosecutor v. Kamerera et al., Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 6.
843 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 76. Note that the tribunal exclusively refers to U.S. Supreme Court cases.
jurisdiction over the Accused.”

It was stated by the Appeals chamber in Nikolić that this exercise requires that “a correct balance between “the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law” be maintained.” Factoring in the ‘gravity of the crime’ seems acceptable since the application of the abuse of process doctrine is discretionary in nature. However, in relying on this factor, some tension with the presumption of innocence is unavoidable.

It is to be recalled that the Trial Chamber in Nikolić concluded that SFOR, and by extension the Prosecution, did not adopt the illegal conduct where the accused had been abducted by unknown individuals. From there, it has been argued that in considering the seriousness of the violation, the international criminal tribunals should equally have regard for the level of attribution of these violations to the tribunals. This would be justified by the fact that the tribunals have to rely necessarily upon cooperation by states and international organisations, since they lack their own enforcement arm. This is not at odds with the holding, discussed previously, that the doctrine applies, irrespective of the entity or entities responsible. It only indicates that this degree of attribution is a factor which is taken into consideration by the tribunals in their assessment of whether or not the seriousness of the violations justifies exercising its discretion not to exercise jurisdiction.

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845 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 112.
847 C. RYNGAERT, The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, pp. 731 – 732 (“Because the tribunal’s decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them”).
848 ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 67. See supra, Chapter 7, VI.
850 These two factors, to know the seriousness of the offences charged and the level of attribution to the court organs are, according to PAULUSSEN, the two factors which explain the absence of any male captus male detentus case in the practice of the international criminal tribunals. See C. PAULUSSEN, Male Captus Bene
VII.2. The International Criminal Court

§ (Financial) compensation pursuant to Article 85

Taking over verbatim the wording of Article 9 (5) ICCPR, Article 85 (1) ICC Statute recognises that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” An almost identical formulation is to be found in the ECHR. In line with Article 9 (5), the mere fact of having been deprived of liberty and later acquitted does not entitle the person to compensation. The general formulation of the right to compensation implies that this right likewise applies to the arrest proceedings in the custodial state in which the suspect is arrested and detained at the behest of the ICC. The Court held in the Muthaura and Kenyatta case that this requires that the domestic arrest (1) breaches a provision of the Court’s statutory framework and (2) is attributable to the Court. In turn, the latter implies that an arrest or detention occurred “in respect of an investigation” within the meaning of Article 55 (1) (d), which as a minimum requires a concerted action between the Court and the national authorities. The procedure applicable to obtaining compensation is...
outlined in Chapter 10 of the ICC RPE.\textsuperscript{856} It follows from Rule 173 (1) ICC RPE that the victim of the unlawful arrest or detention seeking compensation should submit a request to the ICC President who will designate three Judges to deal with the request.\textsuperscript{857} He or she should do so within six months after being informed about the unlawfulness of the arrest or detention.\textsuperscript{858} The Prosecutor has the opportunity to respond to a request for compensation.\textsuperscript{859}

An important obstacle to the granting of a remedy, in keeping with what was argued earlier regarding the \textit{ad hoc} tribunals is the absence of any funds or budgetary allocation to pay these compensations from. In the absence of any clarity in that respect in the Statute or the RPE, the compensation should arguably be paid from the ICC’s general budget.

The wording of Article 85 is broad enough to include not only forms of financial compensation but also other forms of compensation, including the reduction of sentences and forms of declaratory relief. However, while at the \textit{ad hoc} tribunals the possibility of reducing the sentence is considered at the moment the sentence is handed down, the separate compensation proceedings under Rule 173 ICC RPE imply that this reduction is to be determined separately. Since this request is to be made within six months following notification of the decision on the unlawfulness of the arrest or detention, a decision may precede the final judgment. The approach of the \textit{ad hoc} tribunals should be preferred insofar that it allows the Trial Chamber to take the sentence into consideration in its assessment of the sentence reduction. Indeed, a reduction of the sentence only gets meaning in light of the length of the sentence eventually imposed. For example, a sentence reduction of six months may become meaningless when a life sentence is later imposed.

\textsuperscript{856} Rules 173 – 175 ICC RPE.

\textsuperscript{857} These Judges may not have participated in an earlier judgment of the Court regarding the person submitting the request. The underlying idea is “to ensure that the Chamber dealing with the request for compensation would be completely impartial.” See G. BITTI, Compensation to an Arrested or Convicted Person, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, p. 627. ZAPPALÀ notes that it may have been preferable to leave this competence with the Chamber that decided on the unlawfulness of the arrest or detention. “It does not seem appropriate to burden the system of the Court with several micro-proceedings unrelated to the main object of its jurisdiction.” S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, p. 75; S. ZAPPALÀ, Compensation to an Arrested or Convicted Person, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, pp. 1584 - 1585.

\textsuperscript{858} Rule 173 (2) ICC RPE.

\textsuperscript{859} Rule 174 (1) ICC RPE.
Also relevant is Article 85 (3) ICC Statute, which Article provides for a right to compensation in cases of “a grave and manifest miscarriage of justice” limited to exceptional circumstances. A request should be made within six months following the decision notifying the miscarriage of justice. The Judges should take the consequences of the miscarriage of justice on the personal, family, social, and professional situation of the person into consideration in determining the amount to be awarded. Importantly, far from being an enforceable right on the part of the victim of the miscarriage of justice, this remedy is discretionary in nature. This remedy surpasses obligations under international human rights law.

When Rwamakuba upon his acquittal requested a remedy for the alleged grave and manifest injustice suffered (and referred to Article 85 (3) ICC Statute which allows the Judges to exercise their discretion to award compensation to an acquitted person in cases of a grave and manifest miscarriage of justice), ICTR Trial Chamber III noted that no such power was provided for under the statutory framework or the practice of the ad hoc tribunals and that Article 85 (3) ICC Statute cannot be regarded as customary international law. Surprisingly, some years later, Trial Chamber III, constituted differently, concluded that Article 85 (3) ICC Statute “reflects the current state of customary law with respect to compensation for acquitted persons”, but underlined its permissive, rather than compulsory character.

860 Rule 173 (2) (c) ICC RPE.
861 Rule 175 ICC RPE.
863 ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 23 – 31. Nevertheless, the Trial Chamber underlined, obiter, that “it is notable that under the Tribunal’s Rules, an accused person who is sentenced is given credit for the period during which he was detained in custody pending his or her surrender to the Tribunal or pending trial or appeal. By analogy, the Chamber is of the view that the possibility to grant some sort of remedy or compensation would be fair in circumstances where, although the arrest or detention of an acquitted person was not unlawful, he or she was subject to a lengthy detention during the pre-trial and trial stages. Such an award of compensation would be exercised in light of the circumstances of the case, and could not be applied, for instance, where an accused had intentionally caused his or her arrest or where it would be unreasonable to award compensation. In the Chamber’s view, such a provision would offer an acceptable balance between the fundamental right to freedom of any individual and the realities of the investigation and prosecution of international crimes” (ibid., par. 30).
Setting aside jurisdiction

The practice of the ICC reveals that in exceptional cases, the Court may relinquish jurisdiction. The consequence thereof will be that proceedings will be halted. In line with the ad hoc tribunals, the case law of the ICC distinguishes between a conditional and a permanent stay of proceedings. According to the ICC Appeals Chamber, “a conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.”

By its nature, a conditional stay of proceedings is “potentially only temporary.” The Appeals Chamber emphasised that a conditional stay is not irreversible and for a stay to be lifted it is required that “a trial that is fair in all respects becomes possible as a result of changed circumstances.” The Trial Chamber should review its decision to impose a stay from time to time and when a trial has become “permanently and incurably impossible”, a permanent stay should be imposed. Since the violations addressed in the present chapter relate to the unlawful arrest and detention of the suspect or accused, it is clear

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865 ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 4, 80. Consider also ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 94 (clarifying that the stay of proceedings imposed can be lifted); ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 84.

866 Ibid., par. 80 – 81. The Appeals Chamber reminded, in referring to the Preamble to the ICC Statute, that “there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes - deeds which must not go unpunished and for which there should be no impunity. At the same time, the Appeals Chamber reiterated that such lift should not occasion unfairness to the accused for other reasons, in particular in case a trial would become unfair because the right of the accused to be tried without undue delay (Article 67 (1) (c) ICC Statute) has been violated. It follows from this right that a conditional stay cannot be imposed indefinitely. See also ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 85.

867 ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Situation in the DRC, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 81.
that these violations do not involve circumstances that can be changed. Consequently, only the remedy of a *permanent* stay of proceedings is relevant here.

In general, the Appeals Chamber has confirmed the ‘drastic’ and ‘exceptional’ nature of the remedy of staying the proceedings. This measure may or does (depending on whether the stay of proceedings is permanent or conditional in nature) “frustrat[e] the objective of the trial of delivering justice in a particular case as well as [affect] the broader purposes expressed in the Preamble to the Rome Statute.”

When a decision to stay the proceedings has been rendered, the Trial Chamber should immediately determine the consequences thereof for the detention of the accused. There is no need to wait for the decision on a possible appeal of the decision. When an arrest warrant has lawfully been issued, the validity of it remains unaltered by a stay of proceedings. The decision to stay the proceedings has no influence on the existence of ‘reasonable grounds’. More problematic, then, is the second prong under Article 58 ICC Statute, to know that the detention is necessary for one of the grounds indicated in Article 58 (1) (b) ICC Statute. When proceedings have been stayed *sine die*, the detention cannot be necessary in order to ensure the appearance at trial, to safeguard the investigation or prosecution or for the ‘purely preventative’ reason of deterring the further commission of crimes. Therefore, Trial Chamber I decided in the *Lubanga* case that Lubanga Dyilo should be released. The whole

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871 ICC, Decision on the Release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, *Situation in the DRC*, Case No. ICC-01-04-01-06-1418, T. Ch. I, 2 July 2008, par. 28 (the Appeals Chamber argued that the stay imposed on the proceedings does not undermine the validity of the warrant since it is no more than the direct result of the present impossibility of trying the accused fairly).

872 Ibid., par. 30.
justification for his detention had been removed because of the estimation that a fair trial was no longer possible.\textsuperscript{873} This holding was overturned by the Appeals Chamber. The Appeals Chamber found that the Trial Chamber had erred by not distinguishing between a \textit{permanent} or \textit{irreversible} stay on the one hand and a \textit{conditional} stay of proceedings on the other.\textsuperscript{874} The latter does not necessarily imply a permanent bar on the exercising of jurisdiction in respect of the person concerned. The Appeals Chamber reasoned that the Trial Chamber should have considered “whether further developments since the imposition of the conditional stay make it likely that the stay might be lifted in the not-too-distant future.”\textsuperscript{875} The Chamber erred by not considering all options, including conditional release. At the same time, the Chamber must vigilantly check the reasonableness of any continued detention.\textsuperscript{876} Where the Appeals Chamber subsequently identified different important developments which aimed at correcting the situation which led to the imposition of the stay of proceedings, it concluded that the Trial Chamber had incorrectly concluded that unconditional release was inevitable and remanded the matter to the Trial Chamber.\textsuperscript{877}

Similarly, in its oral decision of 15 July 2010, Trial Chamber I decided in \textit{Lubanga} that where the proceedings had been halted because the trial was no longer fair, the accused could not be held in preventative custody on a speculative basis, to know that the proceedings may continue at some stage in the future.\textsuperscript{878} Importantly, where this second stay of proceedings was unconditional in nature and taking into consideration the ‘wholesale uncertainty’
regarding the possible continuation of proceedings as well as the length of Lubanga’s detention, the Trial Chamber ordered the unconditional release of the accused.879

§ Setting aside jurisdiction for violations of the rights of the suspect or accused in the effectuation of the arrest

In Lubanga, as referred to previously, the Defence filed a jurisdictional challenge (pursuant to Article 19 (2) (b) ICC statute), based on the abuse of process doctrine.880 The Defence alleged that Lubanga had been arbitrary arrested and unlawfully detained in the DRC.881 The Defence argued that “Article 21 (3) […] vests the Court with the obligation to consider whether its exercise of personal jurisdiction over Thomas Lubanga Dyilo is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances.”882

The Pre-Trial Chamber made a distinction in considering whether irregularities in the arrest and detention may lead to the setting aside of jurisdiction. First, (1) in relation to violations of the rights of Lubanga relating to his arrest and detention which occurred at the time when he was not yet held at the behest of the Court883 (prior to the sending of the cooperation request),

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879 Ibid., p. 22. The order could not be enforced during the five day time limit for appeal. The appeal was filed and the Appeals Chamber granted the request that the appeal be given suspensive effect. On appeal, the decision to impose an unconditional stay was reversed, as the unconditional stay of proceedings was the essential element in the decision to release Lubanga. See ICC, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2583 (OA17), A. Ch., 8 October 2010.


881 Among others, he had allegedly not been informed of the reasons for his arrest when he was deprived of liberty, no warrant of arrest had been served on him, he had been detained for 30 months without being charged, his family had not been informed of his arrest for 33 months and he was not brought before the competent judicial authority within a reasonable time. Besides, he argued that the military judicial authorities deprived him of his liberty, which was unlawful because they did not have jurisdiction over him (ibid., par. 9 – 12).

882 Ibid., par. 9.

883 While the main text does not refer to the ‘held at the behest of the tribunal’ criterion, such emerges from the reference in the accompanying footnote to the Semanza case, where the tribunal declined to take responsibility for the illegal arrest and detention of the accused where it was not carried out at the behest of the tribunal. The paragraph referred to in the Semanza case may not entirely justify such general conclusion. In this paragraph, the Appeals Chamber only clarified, with regard to the right to be informed promptly about the nature of the charges, that it would look into two periods where the accused was held at the behest of the tribunal. More relevant then is the reference to the earlier discussed Rwamakuba decision of 12 December 2000, where the Chamber refused to take responsibility for violations that occurred at the time the accused was not yet held at the behest of the ICTR Prosecutor. Therefore, challenges regarding that period of time should be brought before the
the Pre-Trial Chamber held that these will only be examined in the case of a concerted action between the Court and the national authorities.884 However, the Pre-Trial Chamber adopted the holding by the Appeals Chamber in Nikolić and viewed the abuse of process doctrine to be “an additional guarantee of the rights of the accused” in the absence of a concerted action between organs of the Court and the authorities of the custodial state.885 Moreover, (2) the Pre-Trial presumably takes responsibility for violations that occur at the time the person is being arrested and held at the behest of the tribunal.

The Pre-Trial Chamber narrowed the application of the abuse of process doctrine in several unfortunate ways. Among others, it emerges from the Pre-Trial Chamber’s reasoning that its present (“to date”) application is limited to “instances of torture or serious mistreatment by the national authorities in the custodial state.” Moreover, this behaviour should “in some way be related to the process of arrest and transfer of the person to the relevant international criminal tribunal.”887 The Pre-Trial Chamber relied on the Nikolić, the Đokmanović and the Kajelijeli case. Not all references do entirely justify the findings by the Pre-Trial Chamber. Where the ICTR Appeals Chamber in Kajelijeli stressed the exceptional character of setting aside jurisdiction, its reference to the serious mistreatment or the subjecting to inhuman, cruel or degrading treatment or torture is clearly meant to be an example. The abuse of process doctrine is not limited to these instances.888 Similarly, the decision of the Trial Chamber in Namibian authorities. See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamahuba et al., Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 30.

884 ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 9. PAULUSSEN argues that the criterion of ‘concerted action’ is too narrow where instances where the Court adopts the conduct of third parties as its own should be included. See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 864. It is argued that the Court should take responsibility for all violations. In the determination of the remedy, the nature of the relationship between the tribunal and the violation can be taken into consideration.

885 ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 10.

886 It has been argued that the definition of the abuse of process doctrine given by the Pre-Trial Chamber does not exclude its future application to other instances than serious mistreatment. However, the further analysis (which is limited to instances of serious mistreatment), contradicts such view. Consider C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 869.

887 ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206 (“For example, in circumstances where an accused is very seriously mistreated, maybe even subjected to inhuman,
Dokmanović does not seem to support this narrow view. Only in Nikolić, the Appeals Chamber seemed to have limited the application of the abuse of process doctrine to egregious violations constituting serious mistreatment. Nevertheless, it was argued previously that other cases, Barayagwiza in particular, suggest that the material scope of the abuse of process doctrine in international criminal law ought not to be restricted to instances of serious mistreatment solely. The Pre-Trial Chamber determined that no instances of serious mistreatment had arisen at the period of time during which he was not held by the national authorities at the behest of the Court and that there was no evidence indicating that this detention was the result of a concerted action. The jurisdictional challenge was, therefore, refused. The Pre-Trial Chamber did not look into other remedies.

On appeal, the Appeals Chamber equally considered the applicability of the abuse of process doctrine to proceedings before the ICC. It first considered what the defendant sought, which was that the Court would abstain from exercising jurisdiction. Hence, rather than a challenge to the jurisdiction of the Court, the application should be labelled a sui generis application, in the sense of “a procedural step not envisaged by the [procedural framework] of the Court invoking a power possessed by the Court to remedy breaches of the process in the interest of justice.”

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Unlike the decision by the Pre-Trial Chamber, the Appeals Chamber decision inquired into the legal foundation for applying this doctrine. Following a perfunctory analysis, the Appeals Chamber determined that the ICC Statute does not leave room for the application of the doctrine because the grounds upon which the Court may relinquish jurisdiction are exhaustively detailed under the Statute (Article 17 ICC Statute). In a next step, the Appeals Chamber reasoned that it is not possible to have recourse to other sources of law (in particular Article 21 (1) (b) and (c) ICC Statute). Moreover, the Appeals Chamber did not consider the doctrine to be an inherent power of every court of law where the doctrine “is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power.” However, the Appeals Chamber considered the relevance of the doctrine in light of Article 21 (3) ICC Statute since this doctrine “had ab initio a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of […] the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.” In so doing, the ICC effectively reduced the abuse of process doctrine to its human rights component. Nevertheless, the category of “breaches of the rights of the accused” is rather broad, and seems not necessarily to be limited to instances of serious mistreatment. The Appeals Chamber referred to Article 85 (1) ICC Statute providing a right to compensation to the victims of illegal arrest and the rights of accused and other persons under Article 55 and 67 ICC Statute. Article 21 (3) implies that “every aspect of the Statute”, including the exercise of jurisdiction by the court

895 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC. Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 34. PAULUSSEN argues that (1) where the Court would have engaged in a more detailed analysis, it would have found that the statutory documents do leave a gap and are not exhaustive on the matter. Besides, (2) the ‘reasoning behind the abuse of process doctrine’, to know the refusal of jurisdiction in very serious male captus instances may qualify as a principle or a rule of international law or a general principle of law. The author criticises the narrow focus of the Appeals Chamber on the ‘abuse of process’ label. Consider C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 884 – 886. See also ibid., p. 994 (“it seems far to easy to conclude that the ICC Statute is exhaustive on the matter simply because the abuse of process doctrine is not explicitly mentioned or implicitly covered”).

896 Ibid., par. 36.

897 Ibid., par. 36.

898 C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 977 (arguing that it could include all sorts of male captus situations, including abductions and instances of luring).
should be interpreted in light of internationally recognised human rights including the right to a fair trial. From there, it follows that:

"[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be contradiction in terms to put the person on trial."

This test was repeated in subsequent decisions. Consequently, while dismissing the abuse of process doctrine in the ICC’s context, the Appeals Chamber confirmed that the accused person can bring a motion challenging his or her pre-transfer arrest and detention as being unlawful with a view to seeking the stay of proceedings. The reference to “his or her accusers” seems to exclude acts by third parties (e.g. private individuals). Consequently, arguably, it cannot be argued that the test applies irrespective of the entity responsible for the violation. The meaningful interpretation of this reference entails that the test does not apply to third parties.

899 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01-04-01-06-772 (O/A4), A. Ch., 14 December 2006, par. 37.


902 PAULUSSEN argues that it was the interpretation of the ECCC Co-Investigating Judges that the Appeals Chamber’s decision should be understood as entailing that jurisdiction should be refused irrespective of the entity or entities responsible for serious mistreatment. See the argumentation: C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 898 - 900; 969 – 970. However, rather, where the Co-Investigating Judges argued that “the International Criminal Court adopted the same solution [as the ICTY in Njikoli]”, the Co-Investigating Judges were referring to the fact that, both in Njikoli and the Lubanga case, the setting aside of jurisdiction was limited to acts or torture or serious mistreatment. At no point the Co-Investigating Judges expressly stated that the Appeals Chamber’s decision in Lubanga must be interpreted as implying that jurisdiction should be refused in cases of torture or serious mistreatment, irrespective of the entity responsible. They simply did not address this issue. See ECCC, Order of Provisional Detention, KAİNG Güçek Eav “Duch”, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 18 – 19, 21.
This implies that the Court upholds a narrower view than the ad hoc tribunals as to which violations in the arrest and detention of the suspect may lead the Court not to exercise jurisdiction.903

Next, the Appeals Chamber reformulated its test in a more puzzling manner. It argued that

"[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."904

Whereas the previous formulation required that proceedings must be stayed, the second formulation, in line with the abuse of process doctrine, introduces a discretionary element (‘can’). Moreover, similar to the previous formulation, it does not reserve the setting aside of jurisdiction to instances of torture or serious mistreatment. Furthermore, the formulation narrows the fair trial yardstick to the in-court setting by referring to the impossibility to make a defence, which arguably excludes certain pre-trial violations that do not make it impossible to make his/her defence within the context of his rights.905 Nevertheless, reading the paragraph as a whole clarifies that the Appeals Chamber referred to a broader notion of violations where it consequently referred to “[u]nfairness in the treatment of the suspect or the accused [that] rupture[s] the process to an extent making it impossible to piece together the constituent elements of a fair trial.”906 That the Appeals Chamber envisaged a broader notion is also

903 Such interpretation would put the ICC on par with the interpretation given in inter-state cases to the abuse of process doctrine (which requires the involvement of the forum state in the violations). See C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 983.
904 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 39.
905 A stance which is rightly criticised by C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 890 – 891; 966 – 967; 996.
906 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA 4), A. Ch., 14 December 2006, par. 39. Consider also e.g. ICC, Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2583 (OA 17), A. Ch., 8 October 2010, par. 55; ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010, par. 30 (the test applied by the Trial Chamber is incorrect (that the proceedings should be halted where they constitute an abuse of process), in that the abuse of process doctrine was explicitly rejected by the Appeals Chamber. See supra, Chapter 7, VII.2.,
confirmed by the Appeals Chamber subsequent assessment of the Pre-Trial Chamber’s decision and consideration that the Pre-Trial Chamber should have considered “whether a fair trial remained possible in the particular circumstances of the case.” No showing of mala fides is required as a precondition to relinquish jurisdiction. The Appeals Chamber concluded that the Pre-Trial Chamber adopted a broader standard to the relinquishment of jurisdiction than the one that was warranted in law where it did not require the condition that the fair trial was no longer possible under the specific circumstances. In the words of the Appeals Chamber “[t]he findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal.”

Moreover, the Appeals Chamber further narrowed the application of a permanent stay of proceedings to breaches that are part of “the process of bringing the appellant to justice for crimes that form the subject-matter of the proceedings before the Court.”

Some authors have criticised the approach taken by the Appeals Chamber, which implies that the Court does not embrace the abuse of process doctrine but nonetheless derives a power to stay proceedings from Article 21 (3) ICC Statute where a fair trial is not longer possible. In short, their arguments boil down to the problem that abductions and other forms of irregular renditions would not suffice to set jurisdiction aside. This is unconvincing. After all,

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fn. 894 - 898 and accompanying text); ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 93.
907 ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA 4), A. Ch., 14 December 2006, par. 40.
908 ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 90.
909 Notably, the Defence appealed the decision of the Pre-Trial Chamber, inter alia, on the ground that the Pre-Trial adopted “an unduly restrictive approach to the relinquishment of jurisdiction for violations of the fundamental rights of the accused” (ibid., par. 40).
911 Ibid., par. 44.
abductions entail that the right to be free from arbitrary deprivation of liberty has been violated and a fair trial is no longer possible. To be fair, some situations (such as the luring situation of Đokmanović) violate the sovereignty rights of states but do not necessarily amount to a human rights violation.912

Also in the Katanga and Ngudjolo Chui case, the Defence of Katanga introduced a “motion for a declaration on unlawful detention and stay of proceedings.”913 The Defence submitted that Katanga had been arbitrarily arrested and detained in the DRC (the custodial state) prior to his transfer to the Court and alleged that several illegalities occurred in the implementation of the request for Katanga’s arrest and surrender.914 In view of the violations, Katanga requested that his arrest and detention in the DRC be declared unlawful and that the proceedings against him be stayed.915 Alternatively, the Defence requested that a financial compensation for the breaches and/or, in the event of Katanga’s conviction, a reduction of the penalty would be imposed.916 However, the Trial Chamber concluded that the motion had been filed too late.917 “[A] challenge to the lawfulness of the arrest and detention of an accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings.”918 The Trial Chamber emphasised that it would be in the interest of all participants, including the suspect, that issues relating to the unlawfulness of their detention be addressed as early as

914 Ibid., par. 34.
915 Ibid., par. 2, 121 – 122, 132 – 135 and 136 – 138 respectively.
916 Ibid., par. 2.
918 Ibid., par. 39. As an example, the Trial Chamber referred to Article 19 ICC Statute which stipulates that challenges to admissibility or jurisdiction must be made at the earliest opportunity. Nevertheless, it was previously explained that the Appeals Chamber held in Lubanga that a challenge to stay the proceedings is an application sui generis. The Trial Chamber also referred to Rule 122 (2), (3) and (4) ICC RPE, according to which compliance with the provisions of expeditiousness (prescribed by Rule 58 ICC RPE) must be provided and according to which “objections or observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be raised at the start of the hearing, failing which it will no longer be possible to do so subsequently” (ibid., par. 41). The Trial Chamber equally referred to Article 64 (2) ICC Statute, according to which the Trial Chamber must ensure that the trial is fair and expeditious and conducted with full respect of the rights of the accused. Lastly, the Trial Chamber referred to the right of the co-accused, Ngudjolo Chui, to be tried without undue delay (Article 67 (1) (c) ICC Statute).
This approach was confirmed by the Appeals Chamber. While recognizing the right of every defendant to challenge his or her pre-transfer unlawful arrest and detention, the Appeals Chamber concurred with the Trial Chamber that in principle, these challenges should be brought at the pre-trial stage. It added that this principle is not unfair towards the accused, because it allows for flexibility. While the statutory framework does not expressly stipulate the time limits that apply for the filing of motions that allege the unlawful arrest and detention prior to the transfer to the Court, Article 64 (2) ICC statute provides the Trial Chamber with discretion to decide on the timeliness of such motions. The Trial Chamber did not err in exercising its discretion under Article 64 (2) ICC Statute where it held that the motion was filed too late because the Defence submitted the issue seven months after the Chamber’s request to submit relevant issues on which it wanted the latter to rule, and despite their many opportunities to do so.

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919 Ibid., par. 40.
920 The Appeals Chamber argued that the reasoning of the Trial Chamber was based on (1) the role of the Pre-Trial Chamber in having “primary responsibility of ensuring the protection of the rights of suspect during the investigations stage of the proceedings” and (2) on the purpose of the confirmation proceedings ensuring “efficiency and judicial economy within the procedural framework of the Court” by filtering the cases. Expeditiousness is a “recurrent theme” in the statutory framework of the Court and a duty that applies to all parties and participants. More than just a component of the right to a fair trial, it is “an independent and important value in the Statute to ensure the proper administration of justice.” See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40-41, 43 and 48.
921 See ibid., par. 48 (“only in instances where the accused could not reasonably be expected to raise the matter at that stage will he or she be permitted to raise it at the trial stage”). The Appeals Chamber referred to the holding in Nyiramahoro, where an ICTR Trial Chamber refused to offer a remedy where a challenge that the accused’s right to be promptly informed of her rights and to promptly appear before a judge was only raised long time (almost six years) after the arrest.
922 See ibid., par. 1. Note the criticism of Judges Kourula and Trendafilova, who argue in their dissenting opinion that the majority erred in not entertaining the motion on its merits. Among others, the Judges hold that the majority wrongly focused on the request to stay the proceedings, whereas the Defence also made requests concerning compensation and mitigation of sentence. See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 28 July 2010, par. 8 - 10.
923 While in casu, the Defence raised the issue at several instances since his initial appearance, it never submitted a motion to the Pre-Trial Chamber, either claiming that the detention was unlawful or in the form of a challenge to jurisdiction. Nevertheless, the Trial Chamber considered that a previous holding by the Pre-Trial Chamber may have led the Defence to believe that it could file its motion under Article 19 of the ICC Statute, also after the start of the confirmation hearing. However, after the commencement of the trial phase, the Defence did not longer pursue the alleged unlawfulness of the Katanga’s detention. Relying on the Chamber’s general duty to ensure the expeditiousness of the trial under Article 64 (2) ICC Statute, the Trial Chamber held that it is incumbent on the parties to file motions in a timely fashion, in particular where these motions may have repercussions on the conduct of the proceedings and to inform the Chamber if the filing of such motion depends on receiving documents or information. Hence, the Trial Chamber concluded that the reasons put forward by the Defence could not justify the inaction, where the Defence submitted the issue up to seven months after the
It could be argued that the Appeals Chamber and Trial Chamber’s decisions may well be justified in light of the long delay before the Defence submitted the motion. However, one can agree with PAULUSSEN (commenting on the Trial Chamber’s decision) that the end result is unfortunate where the merits were not considered and the absence of any violations of the rights of the accused, with regard to his pre-transfer arrest and detention, cannot be guaranteed.\(^{924}\) It contrasts with the way the Pre-Trial Chamber previously conceived of its role, at the pre-trial stage of proceedings as the “ultimate guarantor of the rights of the Defence.”\(^{925}\) Moreover, it was argued that the failure to address the merits of the case may also be a way through which the tribunal seeks to avoid having to address the issue of remedies, through a process of erecting procedural hurdles.\(^{926}\)

Also in Gbagbo, the Defence asserted that Gbagbo was subjected to arbitrary arrest by the Ivorian authorities and subjected to conditions of detention amounting to inhuman treatment and torture, prior to his transfer to the Court.\(^{927}\) However, in the absence of any involvement of the Court in the detention of Gbagbo in Côte d’Ivoire following his arrest, either before or after the notification of the request for arrest and surrender, the Pre-Trial Chamber concluded that no violation of the fundamental rights of Gbagbo could be attributed to the Court.\(^{928}\) Therefore it refused to stay the proceedings. Hence, Pre-Trial Chamber I interpreted the test for setting aside jurisdiction as to always require attribution to a Court organ.\(^{929}\) It seems to follow that the phrase ‘his/her accusers’ not only excludes third parties unrelated to the Court but likewise excludes the national authorities who execute the request for arrest and surrender,
in the absence of further involvement of a Court organ. This interpretation denies the fact that in relation to the arrest proceedings and the detention in the custodial state, the national authorities function as the ‘enforcement arm’ of the Court. It ignores the fact that the Ivorian authorities were holding Gbagbo at the behest of the Court. Regrettably, although the Defence appealed the argumentation by the Pre-Trial Chamber in relation to its request to stay the proceedings, this appeal was dismissed, where this issue could only be appealed with leave from the Appeals Chamber.

VII.3. The internationalised criminal tribunals

As far as the internationalised criminal tribunals are concerned, it should be noted that the TRCP provided, in line with the ICC, for compensation where (1) a conviction was reversed on the basis of new evidence showing a miscarriage of justice (cf. Article 85 (2) ICC Statute) or (2) in case of an unlawful arrest or detention. The provision should be preferred to the ICC provisions where it explicitly provided that compensation should be paid “from a source of public funds […] allocated to the administration of justice and to be determined by the competent court.” Rather than providing for a separate procedure, the TRCP provided that compensation may be made as part of the final disposition or by means of a separate civil action.

Following their amendment, the STL RPE include a right for the accused person to request compensation in case of a final judgment of release or a final decision that the accused has been illegally arrested or detained ‘under the authority of the tribunal’, if such results from ‘a serious miscarriage of justice’. The rule thus merges Article 85 (1) and (3) ICC Statute in one provision. The formulation of the provision is regrettable where it (i) falls short of an

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930 Ibid., par. 110 (“The same holds true for the period between the notification of the request for arrest and surrender of Mr Gbagbo and his transfer to the Court. During this period, he was still detained by the Ivorian authorities and the conditions of his detention were within their competence. In particular, while organs of the Court were involved in the process of surrender of Mr Gbagbo to the Court, there is no evidence indicating any violation of Mr Gbagbo’s fundamental rights that can in any way be attributed to the Court”).


932 Section 52 TRCP.

933 Section 52.2 TRCP.

934 Rule 170 (D) STL RPE, as amended on 10 November 2010. See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 75.
enforceable right but rather leaves the Chamber the discretion whether or not to grant such compensation and where (ii) it makes the awarding of compensation for unlawful deprivation of liberty dependent on an additional requirement, to know that a ‘serious miscarriage of justice’ has occurred. As such, the compensation regime falls short of guaranteeing the enforceable right of any victim of unlawful arrest or detention to compensation, as provided for under international human rights law.935 Furthermore, (iii) the provision refers to illegal arrest or detention ‘under the authority of the tribunal’, which provision further narrows the scope of the provision.

A request should be filed with the STL President within six months following the final judgement or decision.936 The request will be assigned to a panel of three Judges who will decide thereupon after having heard from the Prosecutor. They will consider the consequences the miscarriage of justice has had on the personal, family, social and professional situation of the person filing the request.937

While a comparable provision seems absent from the procedural framework of the Extraordinary Chambers, the ECCC embraced the abuse of process doctrine in relation to violations relating to the arrest and detention of a person.938 When the Co-Investigating Judges ordered the provisional detention of Duch, the Co-Investigating Judges, the Pre-Trial Chamber as well as the Trial Chamber had a chance to address this issue.939 The Co-Investigating Judges had to consider whether “the more than 8 year detention of the Charged Person in separate proceedings before another jurisdiction taint the present proceedings?” “Or rather, is such detention so excessive and prejudicial to the rights of the defence as to affect the very ability to bring this case within the jurisdiction of the Extraordinary Chambers […] to no longer allow the detention of the Charged Person within the jurisdiction of the

935 See supra, Chapter 7, VII.2.
936 Rule 170 (D) STL RPE.
937 Rule 170 (E) STL RPE.
939 ECCC, Order of Provisional Detention, KAÍNG GUEK ÉAV “Duch”, Case No. 002/14-08-2006, OCIJ, 31 July 2007; ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, KAÍNG GUEK ÉAV alias “Duch”, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007; ECCC, Decision on Request for Release, KAÍNG GUEK ÉAV “Duch”, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009. Where these decisions also addressed the issue of the length of detention, this issue will be considered in detail, infra, Chapter 8, II.4.1.
Extraordinary Chambers, or even to require the Co-Investigating Judges to stay the proceedings? Duch had been detained for over eight years by the Military Court in Phnom Penh without any form of trial before the Co-Investigating Judges decided to detain him provisionally.

The Co-Investigating Judges noted that whereas almost all precedents on *male captus bene detentus* are based on the initial arrest and more rarely on the conditions of their prior detention, the reasoning remains the same. In relying on a partial reading of national and international case law, they argued that there “exists a strong tradition supporting the strict separation of, on the one hand, a legal procedure before one jurisdiction and, on the other hand, the prior illegal arrest and detention ordered by a different authority.” Nevertheless, the Judges argued that such tradition is limited by the discretionary abuse of process doctrine.

The Co-Investigating Judges reviewed national case law as well as the abuse of process doctrine as elaborated in the Barayagwiza, the Nikolić and the Lubanga case, acknowledging that under certain circumstances the actions of the organs of the tribunal or of third parties may undermine the integrity of the judicial process. However, the Co-Investigating Judges consequently held that they do not have the jurisdiction to consider the legality of the prior detention insofar that the Extraordinary Chambers were only established after the moment Duch had been taken into custody. Therefore, there could not have been a concerted action

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940 ECCC, Order of Provisional Detention, KAING Guek Eav “Duch”, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 3.
941 Ibid., par. 1.
942 Ibid., par. 5.
943 Ibid., par. 5 – 11. In particular, several of the ICTR decisions referred to by the Co-Investigating Judges may be seen as supportive of the idea that the tribunal will take responsibility for some violations that occur prior to transfer, as far as they occur in the context of the case. See also C. PAULUSSENS, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 588 – 589 (“it is in any case difficult to connect these ICTR cases with the idea that there is a strict separation between, on the one hand, *male captus* problems caused by other entities and stemming from a pre-transfer jurisdiction and, on the other hand, the jurisdiction of the Tribunal”).
944 These cases were previously discussed, see supra, Chapter 7, VII.1, VI and VII.2 respectively.
945 Ibid., par. 20. Some authors criticise the reasoning of the Co-Investigating Judges on this point. They refer to the fact that the charges under which Duch was held in detention by the Military Court were based on the ECCC Law and were crimes over which the ECCC has jurisdiction and argue that he was detained “in anticipation of the ECCC’s authority and jurisdiction.” See M. MOHAN, Schisms in Humanitarianism, - The Khmer Rouge Tribunal’s First Hearing, in «Asian Journal of Comparative Law», Vol. 4, 2009, pp. 14 - 15; C. PAULUSSENS, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 593 (“One can wonder whether the link between the ECCC and the Military Court is indeed as weak as the Co-Investigating Judges present it here. […] [I]t can be argued that, even if one cannot speak of concerted action here, there was certainly a link between Duch’s provisional detention, at least from 2002, and the ECCC, even if the matter was not yet operational.” “It could be argued that this link entails the violations being seen as
with the Military Court. Secondly, the Co-Investigating Judges concluded that the abuse of process doctrine does not apply in the absence of ‘grave violations’ of the rights of the accused.946 The Co-Investigating Judges limited the application of the abuse of process to acts of torture or serious mistreatment.947

The Co-Investigating Judges emphasised that the courts that have applied this doctrine “have always considered the proportional relationship between the alleged violations and the proposed remedy.”948 Since the allegations against Duch at that time included crimes against humanity, the Co-Investigating Judges considered that a balancing exercise was justified and reasoned that the prolonged detention under the jurisdiction of the Military Court, in comparison to the alleged crimes, cannot be considered “a sufficiently grave violation of the rights of the accused.” While one might agree that the violation of rights may not have been sufficiently grave to justify the setting aside jurisdiction, this does not entail that the Extraordinary Chambers “do not have jurisdiction to determine the legality of DUCH’s prior detention”, and may not review these violations and offer an appropriate remedy (such as a reduction of the sentence), where this violation is, arguably, linked to the case put before the Extraordinary Chambers.949

The Pre-Trial Chamber argued, on appeal, that in order to take this violation of Article 9 ICCPR (length of pre-trial detention) into consideration, the organ responsible for the violation should be connected to an organ of the ECCC or should have been acting on behalf of the ECCC, or was acting in concert with organs of the ECCC.950 The Pre-Trial Chamber subsequently determined that no direct relationship exists between the ECCC and the Military

falling within the context of the ECCC case more generally and that as a result of that, the violations must be remedied by the ECCC”).

946 ECCC, Order of Provisional Detention, KAING Guek Eav “Duch”, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 21.

947 Ibid., par. 19. The Co-Investigating Judges based this narrow interpretation on the Trial chamber’s decision in Nikolić and, incorrectly, on the Appeals Chamber’s decision in Lubanga (consider the discussion, supra, Chapter 7, VII.2.

948 Ibid., par. 21; ECCC, Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, NUON Chea et al., Case No. 002/19-09-2007, OCIJ, 31 December 2009, par. 32.

949 C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 594 – 595. The Co-Investigating Judges do not seem to exclude the possibility of a future remedy where they state that “an eventual remedy for the prejudice caused by the prior detention (in the form of a reduction of sentence or by any other means decided by the Chamber) is not at issue during the investigative phase” (ibid., par. 21).

Court, as the ECCC is an independent entity within the Cambodian Court structure.\textsuperscript{951} Moreover, no evidence was adduced that the Military Court acted on behalf of the ECCC or of any concerted action between the two organs.\textsuperscript{952} Lastly, the ECCC only came into existence after the swearing-in of the Judges on 3 July 2006 and it did not adopt its Internal Rules prior to 12 June 2007.\textsuperscript{953} Consequently, the Pre-Trial Chamber found that the Co-Investigating Judges and Co-Prosecutors acted in accordance with Article 9 ICCPR.\textsuperscript{954} Like the Co-Investigating Judges, the Pre-Trial Chamber left the door open for the eventual taking into consideration of this violation at a later stage of the proceedings.\textsuperscript{955}

The Trial Chamber also considered the issue following a request by Duch for provisional release. The Trial Chamber agreed with the Pre-Trial Chamber that the ECCC is an independent entity in the Cambodian Court structure.\textsuperscript{956} However, contrary to the Pre-Trial Chamber, the Trial Chamber held that “international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of the detention.”\textsuperscript{957} “[A] violation of an accused person’s rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even where

\textsuperscript{951} Ibid., par. 19. The factors taken into consideration by the Pre-Trial Chamber included the fact that the ECCC Agreement, the ECCC Law, the Internal Rules and Cambodian Law do not provide the Court with jurisdiction to decide on matters related to decisions or actions of the Investigating Judges of the Military Court or of other courts in the Cambodian Court system as well as the different jurisdiction \textit{ratiome materiae}; the different composition of the ECCC (the presence of international judges in the latter, which would not normally qualify for appointment within the Cambodian court structure) and the self-contained character of the ECCC from the start of the investigation to the determination of the appeals, including the absence of outside review of its decisions. Overall, such reasoning does not convince where it is clear that the Extraordinary Chambers in the courts of Cambodia form part of the Cambodian criminal justice system (see \textit{e.g.} Article 2 new ECCC Law “Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court”). As rightly noted by one author, the Chamber’s analysis “is deceptive in its simple elegance.” […] “Even while emphasising that there is no connection between the organs of the ECCC and other Cambodian courts, the Chamber was unable to state unreservedly that the ECCC is separate from the Cambodian judicial structure; at best, it can claim to be a completely independent entity within that structure.” See N. JAIN, Conceptualising Internationalisation in Hybrid Criminal Courts, in «Singapore Year Book of International Law», Vol. 12, 2008, p. 86.

\textsuperscript{952} ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, \textit{KAING Guek Eav alias “Duch”}, Case No. 001/18-07-2007-ECCC-OCIJI, PTC, 3 December 2007, par. 21.

\textsuperscript{953} Ibid., par. 22.

\textsuperscript{954} Ibid, par. 24.

\textsuperscript{955} Ibid, par. 25.

\textsuperscript{956} ECCC, Decision on Request for Release, \textit{KAING Guek Eav * Duch*}, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 10 - 17. Factors taken into consideration by the Trial Chamber to determine its independent character include the fact that the ECCC is entitled to adopt its own internal rules in accordance with international standards, taking into consideration the specific mechanisms necessary to adjudicate mass crimes; its mixed composition; the additional privileges and immunities of ECCC Judges; the invalidity of amnesties or pardons for crimes within the competence of the ECCC and the absence of a "procedural basis for commencing investigations before a domestic Cambodian court and concluding them before the ECCC where there does not exist a line of authority between the ECCC and other Cambodian courts”.

\textsuperscript{957} Ibid., par. 16 (referring to the \textit{Barayagwiza case}, which was discussed, \textit{supra}, Chapter 7, VII.1.).
that violation cannot be attributed to that tribunal."\textsuperscript{958} The Trial Chamber concluded that Duch’s detention prior to his transfer to the ECCC was illegal under domestic laws and violated the rights of the accused under international law to a trial within a reasonable time and to detention in accordance with the law.\textsuperscript{959}

In its assessment of the appropriate remedy, the Trial Chamber reiterated (referring to Nikolić) that a balance must be struck between the fundamental rights of the accused and the “essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”\textsuperscript{960} The Trial Chamber subsequently held that where external authorities were responsible for the violation of the rights of the accused, that they will only be attributed to the international criminal tribunal when a concerted action has taken place between that tribunal and the authorities in respect of these violations.\textsuperscript{961} At the same time, the Trial Chamber recognised the abuse of process doctrine to be an ‘additional guarantee’ requiring the tribunal to decline jurisdiction where illegal conduct “is such as to make it repugnant to the rule of law to put the accused on trial.” This doctrine also applies to violations which are not attributable to the tribunal in cases or instances of torture or serious mistreatment by external authorities.\textsuperscript{962} As argued previously, this view may be too narrow where the abuse of process in international criminal proceedings may be applied in instances of grave violations, a category which is arguably broader than serious mistreatment or torture.\textsuperscript{963} Moreover, it introduces a ‘dual notion’ of abuse of process, depending on the entity responsible. As discussed above, such dual notion should be rejected.\textsuperscript{964} In casu, the Trial Chamber did not find that serious mistreatment took place. Nevertheless, the Chamber held that even where the violations could not be attributed to an international tribunal or did not amount to an abuse of process, the accused is still entitled to seek a remedy for the violation of his rights by national authorities.\textsuperscript{965} In case of conviction the accused would be entitled to a

\textsuperscript{958} Ibid., par. 16.
\textsuperscript{959} The Law on Duration of Pre-Trial Detention 1999 applied, which imposed a maximum length of three years of provisional detention. Besides, no serious investigative actions were undertaken during the period of pre-trial detention, no reasoned decisions were taken on the detention; the extension of the detention seemed to have been ordered by the Prosecutor and not by the investigating judge and several laws on which the Military Court relied seemed to have been applied retroactively. See ibid., par. 20 – 21.
\textsuperscript{960} Ibid., par. 31. Hence, a ‘balancing approach’ was adopted. See J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 217 – 218.
\textsuperscript{961} Ibid., par. 32.
\textsuperscript{962} Ibid., par. 33.
\textsuperscript{963} See supra, Chapter 7, VII.1.
\textsuperscript{964} See supra, Chapter 7, VII.1.
\textsuperscript{965} Ibid., par. 35.
remedy to be decided upon at the sentencing stage or, in case of an acquittal, “to pursue remedies available within the Cambodian national law in relation to time spent in detention and any violation of his rights whilst in custody of the Cambodian Military Court.”

This reasoning by the Trial Chamber confirms the prevailing view in the jurisprudence of the international criminal tribunals that monetary compensation is not awarded in cases where the reduction of sentence is possible. When the Trial Chamber rendered its judgment in the Duch case, it decided to reduce the sentence of 35 years imprisonment to 5 years. However, the Supreme Court later held that the “Trial Chamber misinterpreted the relevant international jurisprudence to mean that violations of KAING Guek Eav’s rights should be redressed by the ECCC even in the absence of violations attributable to the ECCC and in the absence of abuse of process.”

The Trial Chamber erred in granting a remedy where the detention of Duch could not be attributed to the ECCC and because the abuse of process doctrine did not apply. Furthermore, the Supreme Court Chamber confirmed that the doctrine applies to cases of illegal conduct, which make it repugnant to the rule of law to put the accused on trial, irrespective of the entity responsible for the conduct. It encompasses “torture or other serious mistreatment” and “egregious violations of [the accused person’s] rights which would prove detrimental to the ECCC’s integrity.”

Hence, the Supreme Court did not uphold the ‘dual standard’ which was advanced by the Trial Chamber. In Case No. 002, the Pre-Trial Chamber likewise confirmed the interpretation given to the abuse of process doctrine by the Appeals Chamber in Barayagwiza and Karadžić. It considered “whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights.”

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966 Ibid., par. 36-37.
967 ECCC, Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, par. 627.
968 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 390 (emphasis in original).
969 Ibid., par. 393 - 399.
970 Ibid., par. 392 – 394. Where the Pre-Trial Chamber later also had the chance to consider the abuse of process doctrine in Case No. 002, it confirmed that its application is to be limited to instances of serious and egregious violations of the accused’s rights which would prove detrimental to the Court’s integrity.
971 ECCC, Decision on Ieng Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of an Abuse of Process (D264/1), IENG Thirith, Case No. 002/19-09-2007-ECCC/OCLJ (PTC 42), PTC, 10 August 2010, par. 23 – 27.
VIII. ALLOCATING RESPONSIBILITY FOR UNLAWFUL ARREST AND DETENTION

VIII.1. The ad hoc tribunals and the SCSL

§ Shared responsibilities

It was shown that, regrettably, the procedural frameworks of the ad hoc tribunals do not include a provision equivalent to Article 59 of the ICC Statute, offering clear protection to persons who have been arrested and detained in the custodial state. However, as will be explained, the ad hoc tribunals accepted responsibility, sometimes to varying extents, for certain aspects of the arrest and pre-transfer detention of suspects and accused persons. This should not come as a surprise where, from the picture outlined above, it emerges that in the effectuation of arrests, the Prosecutor and the requested state have overlapping responsibilities during the period that a person is detained in the requested state, at the Prosecutors’ request. Remarkably, the ICTR Appeals Chamber found these shared responsibilities to derive from an underlying rationale that the international division of labour in prosecuting crimes should not be to the detriment of the apprehended person.972 In this regard, the Appeals Chamber referred to the prosecutorial duty of due diligence. It requires the Prosecutor to ensure, once it initiates a case that “the case proceeds to trial in a way that respects the rights of the accused.”973 This obligation derives from the Prosecutor’s authority to set the whole legal process in motion by starting an investigation and by submitting an indictment for confirmation.974 An ethical duty of due diligence is equally reflected in the ICTY and ICTR Standards of Professional Conduct.

973 Ibid., par. 220; ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91-92. The Appeals Chamber in Barayagwiza made a comparison with extradition procedures. In referring to internal US extradition law jurisprudence, the Appeals Chamber argued that the prosecuting authorities have a due diligence obligation with regard to accused persons awaiting extradition. The Appeals Chamber held that notwithstanding the apparent differences between ‘extradition’ and ‘surrender’, “extradition procedures offer analogies that are useful to this analysis.” In this regard, the Appeals Chamber referred to the holding in Smith v. Hooey, where the U.S. Supreme Court found that the government had the obligation to make a diligent, good-faith effort to bring the defendant before the Court (see Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969), p. 383). Similarly, in United States v. McCohany, the court stated that the government’s obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and were unsuccessful or can prove that such an effort would prove futile (U. S. v. McCohany, 505 F.2d 770 (Court of Appeals, 7th Circuit), 1974.
974 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91. The Appeals Chamber emphasised that the ultimate responsibility to bring a defendant to trial rests with the Prosecutor.
[for] Prosecution Counsel (Regulation No. 2). According to these standards, counsel for the prosecution should always adopt the ‘highest standards of professional conduct’ in the course of investigations and must ‘exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith’.

The prosecutorial duty of due diligence led the Appeals Chamber to conclude in Barayagwiza that “the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion.”975 This finding was altered in the Review Decision of 31 March 2000. On the basis of new facts, the Appeals Chamber concluded that Cameroon was not prepared to extradite Barayagwiza prior to the date of his transfer. Consequently, the finding of prosecutorial negligence, in that the Prosecutor failed to act was mistaken.976 A failure to effect the prosecutorial duty of due diligence was also found by the Appeals Chamber in Kajelijeli.977

Similarly, the Trial Chamber acknowledged in Rwamakuba that the tribunal is responsible for some aspects of the detention of an individual at its behest.978 These findings stand in stark contrast to previous case law of the ICTR, where it was consistently held that the tribunal has no jurisdiction over the conditions of arrest, detention or other measures carried out by sovereign states at the tribunal’s request979 or that “an accused, before his transfer to the

973 Ibid., par. 98. The Appeals Chamber held that “the Appellant made several inquiries of Tribunal officials regarding his status.” “It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal’s detention unit until after he filed the writ of habeas corpus. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about” (ibid., par. 96).


978 See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamakuba et al., Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 23.

979 Consider e.g. ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, Prosecutor v. Ngirumpatse, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Evidence Seized, Prosecutor v. Niyamanushaho, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, Prosecutor v. Ngirumpatse, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which May be Used by the Prosecutor in Preparing an Indictment against the Applicant, Prosecutor v. Karemera, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, Prosecutor v. Nzirorera, Case No. ICTR-98-38, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused, Prosecutor v. Ndaume, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2.
custody of the Tribunal, has no remedy under the Statute and Rules for the detention and acts by sovereign States over which the Tribunal does not exercise control.\textsuperscript{980}

In \textit{Kajelijeli}, in turn, the Appeals Chamber clarified the corresponding responsibilities of the requested state regarding the manner and method of arrest (in relation to suspects). It held that the obligations of the requested state are twofold. First, the requested state has to comply with the request for assistance from the tribunal. Secondly, the requested state is under the obligation to respect the rights of the suspect as protected in customary international law, under the treaties to which that state has acceded and under their national law.\textsuperscript{981} The consequence thereof is burden-sharing in the protection of the safeguards of the fundamental rights of the suspect in international cooperation on criminal matters.\textsuperscript{982} What this shared burden entails for both parties in terms of the duty to inform the person of the reasons for his or her arrest has been discussed previously.\textsuperscript{983}

§ Violations attributable to the tribunal

It is clear that where a shared burden exists in the apprehension and the first phase of the detention, difficulties arise regarding the responsibility of the tribunal for pre-transfer violations of the rights of the suspect or the accused as well as to the entitlement of the suspect or accused to remedies before the tribunal for procedural violations.

In \textit{Kajelijeli}, the Appeals Chamber, after establishing that the rights of the accused had been violated during the first period of detention, held that “irrespective of any responsibility of Benin for violations of the Appellant’s rights during the first period of arrest and detention, on which this Tribunal does not have competence to pronounce, the Appeals Chamber finds that fault is attributable to the Prosecution for violations to the Appellant’s rights during this first period of arrest and detention.”\textsuperscript{984} This attribution was, according to the Appeals Chamber, warranted because of the failure of the Prosecution “to effect its prosecutorial duties with due

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\textsuperscript{980} ICTR, Decision on the “Motion to Set aside the Arrest and Detention of Laurent Semanza as Unlawful, Prosecutor v. Semanza, Case No. ICTR-97-20-I, T. Ch. III, 6 October 1999, par. 30.
\textsuperscript{981} ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220.
\textsuperscript{982} Ibid., par. 221.
\textsuperscript{983} See supra, Chapter 7, V.2.1.
\end{flushright}
diligence out of respect for the Appellant’s rights following its Rule 40 request to Benin.\footnote{Ibid., par. 252.} Rather than taking responsibility for all of the pre-trial violations, such reasoning thus requires the attribution of pre-transfer violations and some responsibility of the tribunal in the violation before a remedy may be granted. The Appeals Chamber decided that such attribution was necessary, it’s finding that it was the Prosecutor’s request that triggered the apprehension, arrest, and detention, notwithstanding.\footnote{Ibid., par. 232.}

According to one commentator, the Appeals Chamber did not say that the suspect would solely be entitled to a remedy where certain pre-transfer violations can be attributed to the Prosecutor.\footnote{C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Interentia, 2010, p. 570.} Hence, it may well be the view of the Appeals Chamber that the tribunal should take responsibility for all pre-transfer violations that occurred in the context of the case. This is indeed correct but because the Appeals Chamber did not address that issue, nothing meaningful can be said about these violations. It is clear that the Appeals Chamber in casu made the granting of a remedy dependent on its finding “that fault is attributable to the Prosecution.”\footnote{ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 232. Compare ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 396 (“the Barayagwiza case […] concerned an instance in which abuse of process was indeed established. It is therefore impossible to affirm whether the Appeals Chamber in Barayagwiza would have granted a remedy in the absence of violations attributable to the Tribunal and in the absence of abuse of process” (emphasis in original)).}

Likewise, in Karadžić, the Trial Chamber suggested that the attribution of the infringement of the rights to one of the organs of the tribunal or a showing that at least some responsibility lays with the tribunal is required.\footnote{ICTY, Decision on Accused’s Motion for Remedy for Violation of Rights in Connection with Arrest, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 6 (“there is substance in the Prosecution’s submission that, before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal. The Tribunal does not have an enforcement agency, such as its own police force, which could effectuate arrest of persons against whom an indictment has been issued and confirmed by the Tribunal’s organs. Accordingly, it must rely on the international community for the arrest and transfer of such persons”). Compare ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 392.}
Support for the opposite view that the offering of a remedy should not be made dependent on the attribution of the breach to the tribunal, may be found in the argumentation by Judge Lal Chand Vohrah where he held that:

“if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.”

In this regard, in Barayagwiza, the ICTR Appeals Chamber adopted the concept of ‘constructive custody’ (‘detainer process’) borrowing it from internal U.S. extradition law. More precisely, the Appeals Chamber held that Barayagwiza was in the constructive custody of the tribunal after a Rule 40bis order was filed on 4 March 1997 (at which point Barayagwiza was only held by Cameroon at the behest of the tribunal). Therefore, the provisions of that rule applied prior to the accused person’s transfer to the tribunal. The Appeals Chamber determined that “Cameroon was holding Barayagwiza in constructive custody for the Tribunal by virtue of the Tribunal’s lawful process or authority.” The Appeals Chamber added that “[t]his finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant’s detention, but only for the decision to place and maintain the Appellant in detention.” While such acceptance of responsibility for procedural violations occurring before the actual transfer of the suspect or the accused person is to be welcomed, it remains difficult to marry this holding with the aforementioned string of

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990 ICTR, Decision, Prosecutor v. Semanza, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 6; ICTR, Judgement, Prosecutor v. Kajelijie, Case No. ICTR-98-44-A-A, A. Ch., 23 May 2005, par. 223 (the Appeals Chamber noted that the statement made by Judge Vohrah was made in relation to the status of an accused, but emphasised that it applies to suspects as well).
991 Such is a device whereby the requesting state can obtain the custody of the detainee upon his release from the detaining state, upon the filing of a special warrant (‘detainer’ or ‘hold order’). In such situation, the detaining state acts as an agent for the demanding state and the accused is in the constructive custody of the requesting state. See ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 56.
992 See the discussion supra, Chapter 7, V.2.1., fn. 1.
993 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 61. Judge Shahabuddeen was critical of this approach and underlined that the requested state cannot be considered an agent of the tribunal where the state is discharging its own obligations and not those of the Tribunal. Where the Rule 40bis order triggers these obligations it does not create a relationship of agent and principal (ibid., Separate Opinion of Judge Shahabuddeen, sub 5).
994 Ibid., par. 61.
jurisprudence denying any responsibility for procedural violations that occurred prior to transfer.995

The concept of ‘constructive custody’ was also relied upon by the Trial Chamber in *Rwamakuba*. However, the Trial Chamber found that the Namibian authorities had not arrested Rwamakuba at the behest of the tribunal, following a Rule 40 request.996 The Prosecutor, according to the Trial Chamber, only became aware of the detention later, on 21 December 1995, when he was notified by the Namibian authorities, whereas the accused had been held in custody by the Namibian authorities since 2 August 1995.997 Consequently, violations that occurred during that first period of detention could not be attributed to the tribunal and “any challenges in this respect are to be brought before the Namibian jurisdictions.”998 Where the tribunal considered that after this date, (until the moment the Prosecutor informed the Namibian authorities that they had not sufficient evidence against Rwamakuba), there had not been a Rule 40 request by the ICTR Prosecutor, the Trial Chamber likewise concluded that Rwamakuba was not being held at the request of the tribunal.999 Therefore, any challenges should likewise be brought before the Namibian jurisdictions.1000

In *Rwamakuba*, the Trial Chamber was only willing to take responsibility for the pre-transfer breaches that occurred while the suspect was held in the tribunal’s constructive custody. Therefore, it was only willing to take responsibility for “some aspects” of the detention by the requested state, but at the same time upheld the view that the tribunal has no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign state at the request of the tribunal.1001

995 See also C. DEFRANCIA, Due Process in International Criminal Courts, in «Virginia Law Review», Vol. 87, 2001, pp. 1404 -1405 (the author argues that “[i]n resolving the question of where supervisory responsibility attaches, international criminal law walks a fine line between punishing the requesting institution for the erroneous acts of its agents and allowing cover for violations of due process that may take place as a result of its requests”); G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, p. 220.
§ Violations not attributable to the tribunal

In Barayagwiza the Appeals Chamber, with regard to ‘abuse of process’, proved willing to look beyond the ‘constructive custody’ of the suspect, as well as the attribution of acts to the tribunal and considered all violations that occurred in the context of the case at hand, further complicating matters. The Appeals Chamber held that:

“under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations for the Appellant’s rights.”

Other jurisprudence of the ad hoc tribunals and the Special Court confirmed that under the abuse of process doctrine, whatever entity was responsible for the violation is not relevant. Hence, as far as the abuse of process doctrine or setting aside jurisdiction is concerned, these tribunals prove willing to take responsibility for pre-transfer violations, even where these violations cannot be linked to the tribunal.

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1002 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 73, 85 and 101 (with regard to the right to be informed about the charges, the Appeals Chamber concluded that only 35 days were clearly attributable to the Tribunal (those moments where the suspect was clearly being held at the behest of the Tribunal). The Chamber argued that “the facts remain that the Appellant spent an inordinate amount of time on provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant’s claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant’s right to be promptly informed of the charges against him was violated” (emphasis added)). See the discussion supra, Chapter 7, V.2.1.

1003 See ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A-A, A. Ch., 23 May 2005, par. 206; ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 (“even without […] involvement [of persons acting for SFOR or the Prosecution] this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated”); less explicit in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić, Case No. IT-94-2-2-AR73, A. Ch., 5 June 2003, par. 30; ICTY, Decision on Preliminary Motions, Prosecutor v. Mladić, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 51; ICTY, Decision on the Accused’s Holbrooke Agreement Motion, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85; ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73-4, A. Ch., 12 October 2009, par. 47; SCSL, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nulsum Crimen Sine Lege and Non-Retroactivity as to Several Counts, Prosecutor v. Brima et al., Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 26 (holding that it follows from the 3 November 1999 Appeals Chamber decision in Barayagwiza that “the finding of specific fault by one section of the court is not required”); ECCC, Order of Provisional Detention, KAING Guék Eav “Duch”, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 27. Consider also ECCC, Decision on Request for Release, KAING Guék Eav “Duch”, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 33; ECCC, Appeal Judgement, KAING Guék Eav “Duch”, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 392.
It has been argued that the ICTR Appeals Chamber’s jurisprudence further supports the idea that the tribunal should take responsibility for any violation that occurs in the context of a case, irrespective of its attribution to the Prosecutor and not with regard to the abuse of process doctrine exclusively.\textsuperscript{1004} In support of this view, reference is made to the Barayagwiza Reconsideration Decision and the holding of the Appeals Chamber “that the Appellant’s rights were violated, and that all violations demand a remedy.”\textsuperscript{1005} A similar holding can be found in other decisions by the Appeals Chamber, including in the \textit{Semanza}\textsuperscript{1006} case and the \textit{Kajelijeli} case.\textsuperscript{1007} However, such general principle, that all violations should be remedied, falls short of taking responsibility to remedy all such violations. While the author agrees that the tribunal should, ideally, accept responsibility for any violation that occurs in the context of a case, at present there is no case law supporting this argument \textit{outside the context of the abuse of process doctrine}.\textsuperscript{1008} There is only one exception. As a matter of fact the ECCC Trial Chamber clearly established that:

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“[e]ven if a violation of the Accused’s rights cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention. The ICTR Appeals Chamber decision in Barayagwiza held that a violation of an accused person’s rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that violation cannot be attributed to that tribunal.”\textsuperscript{1009}
\end{quote}

\textsuperscript{1004} C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 515, 526, 527, 533, 546, fn. 919, 556, 558, 667 – 668. While the criterion of violations that occurred ‘in the context of the case’ is vague, the author clarifies that such limitation is necessary to avoid that the tribunal “has to take responsibility for every violation ever suffered by the suspect.” The author proposes that the criterion may be interpreted as including violations that occurred after the Prosecution started its case against a particular person and for the period during which the Prosecution, even were the person was not in its constructive custody, was involved in the case (ibid., p. 533).


\textsuperscript{1008} Confirming, consider ECCC, Appeal Judgement, \textit{KAING Guek Eav “Duch”}, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 397 (“the totality of cases in which the ICTR Appeals Chamber awarded a remedy reveal that the violations taken into account by that Tribunal were committed after the Prosecutor had requested the arrest or transfer of the accused pursuant to Rules 40 and 40bis of the ICTR RPE, thus demonstrating at least some level of involvement by the ICTR”).

\textsuperscript{1009} ECCC, Decision on Request for Release, \textit{KAING Guek Eav “Duch”}, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 16.
process, an accused may be entitled to seek a remedy for violations of his rights by national authorities.\textsuperscript{1010}

However, the sources referred to by the ECCC Trial Chamber only concern the doctrine of abuse of process and do not allow drawing such general conclusions. The ECCC Supreme Court Chamber later held that the “Trial Chamber misinterpreted the relevant international jurisprudence where it held that violations of KAING Guek Eav’s rights should be redressed by the ECCC even in the absence of violations attributable to the ECCC and in the absence of abuse of process.”\textsuperscript{1011} Where (i) the detention of Duch could not be attributed to the ECCC and where the (ii) abuse of process doctrine did not apply, the Trial Chamber erred in granting a remedy.\textsuperscript{1012}

It can be concluded that, with the notable exception of the abuse of process doctrine, the ad hoc tribunals and the SCSL (and the ECCC) are not willing to take responsibility for all violations of the rights of the suspect or the accused which relate to his or her arrest and pre-transfer detention. This picture of the present-day jurisprudence is unsatisfactory. It has convincingly been argued that “[i]f the tribunal is willing, under the abuse of process, to take the ultimate responsibility for actions of third parties, it should also be perfectly able to take responsibility for less serious violations. It would be strange for the tribunal to take responsibility for a suspect who suffered egregious violations, but to refuse to do so if the suspect suffered less serious violations because these violations could not be attributed to the tribunal.”\textsuperscript{1013} The basis for such responsibility, as argued by SLUITER, follows from the “overall responsibility” that international criminal tribunals have over the proceedings and their duty to ensure that the accused person receives a fair trial.\textsuperscript{1014} The tribunals should watch over the integrity of their proceedings, a duty that is not limited to the seat of the tribunal.\textsuperscript{1015}

\textsuperscript{1010} Ibid., par. 35.
\textsuperscript{1011} ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 390 (emphasis in original).
\textsuperscript{1012} Ibid., par. 393 - 399.
\textsuperscript{1015} A. ZAHAR and G. SLUITER, International Criminal Law: a Critical Introduction, Oxford, Oxford University Press, 2008, p. 286 (the authors note that putting a responsibility upon the tribunal to remedy all violations may seem unfair, where the tribunals “interact with a wide variety of actors, not all of whom may
The transfer of suspects and accused persons to international criminal courts and tribunals should never allow these institutions to turn a blind eye to serious violations of fundamental rights prior to this transfer.\textsuperscript{1016} The involvement or lack thereof of the tribunal in pre-transfer violations should then be a factor which is taken into consideration in the determination of the proper remedy.\textsuperscript{1017}

Some Judges interviewed confirmed that the tribunal should remedy all human rights violations in the course of the investigation, even in cases where they cannot be attributed to a tribunal organ.\textsuperscript{1018} Other Judges are more hesitant and consider that, with the exception of “\textsuperscript{[v]}ery fundamental violations”, attribution of the violation to the Court should be a prerequisite for the provision of a remedy.\textsuperscript{1019} Legal officers of the ICTR also held different opinions as to whether the ICTR should take responsibility for all violations. Some legal officers held the view that attribution should be a prerequisite,\textsuperscript{1020} while others were more hesitant.\textsuperscript{1021} In this regard, proponents emphasise the exemplary function of international
criminal tribunals.\textsuperscript{1022} One legal officer emphasised that offering a remedy for all human rights violations in the context of a criminal investigation does not necessarily entail that proceedings should be stayed.\textsuperscript{1023} This corresponds with the view expressed that the tribunal should consider all of the remedies and choose the most appropriate remedy, rather than focussing on abuse of process solely.

VIII.2. The International Criminal Court

As far as the ICC is concerned, the Court has so far refused to take responsibility for all pre-transfer violations of the rights of the suspect or accused person. As noted previously, Pre-Trial Chamber I held that no obligation is incumbent upon the competent national authorities (pursuant to Article 59 (2) ICC Statute) to review the pre-transfer arrest and detention prior to the cooperation request by the Court which are not linked to the proceedings before the Court.\textsuperscript{1024} Both the Pre-Trial Chamber and the Appeals Chamber held that violations occurring prior to the sending of the cooperation request will only be considered once a ‘concerted action’ between the Court the external entities has been established.\textsuperscript{1025} Hence, the Court refuses responsibility for the arrest and detention which was not at the behest of the tribunal.

\textsuperscript{1022} Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8 (“Je pense que toute violation des droits de l’homme doit être réparée. J’en suis personnellement convaincu, je le dis et je le répète, que ce soit attribuable à un organe du Tribunal ou pas, il s’agit d’un tribunal international qui doit donner l’exemple à tout le reste. Donc, je pense qu’on doit toujours réprimer. C’est-à-dire, si on retourne, par exemple, au cas de Barayagwiza, ce n’est pas forcément parce que ses droits ont été violés qu’il faut arrêter la procédure sur des crimes sérieux pour lesquels on a des éléments de preuve contre lui. Je ne suis pas sûr que la fin des poursuites soit la meilleure réparation possible. Mais je pense, que ce soit la responsabilité du Procureur du Cameroun ou de n’importe qui, que le Tribunal se doit d’en tenir compte et de montrer à cet individu accusé qu’on vit dans un monde où les droits de l’homme sont mieux respectés que ce qu’on connaît dans certains systèmes nationaux”); Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 7.

\textsuperscript{1023} Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8.

\textsuperscript{1024} ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, 
Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6 (holding that the detention prior to 14 March 2006 was solely related to national proceedings in the DRC).

\textsuperscript{1025} Ibid., p. 9; ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 
Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42; ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), 
Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 44.
However, in the absence of any ‘concerted action’ between the Court and the authorities of the custodial state, the Court may decide not to exercise jurisdiction. As far as the relinquishment of jurisdiction is concerned, the ICC Appeals Chamber held that this is only warranted where a fair trial is no longer possible “because of breaches of the fundamental rights of the suspect or accused by his/her accusers.”\(^{1026}\) This formulation excludes acts committed by third parties who are unrelated to the Court or not carried out at the behest of the Court. Pre-Trial Chamber I in Gbagbo interpreted this test as always requiring attribution to a Court organ.\(^{1027}\) The Court may only refuse to exercise jurisdiction in cases where there is an involvement of the Prosecution in the violation of the fundamental rights of the accused, either in the period before or in the period following the notification of the request for arrest and surrender. The Pre-Trial Chamber held that also after the sending of the request, “he [Gbagbo] was still detained by the Ivorian authorities and the conditions of his detention were within their competence.”\(^{1028}\) Hence, no violation of the fundamental rights of Gbagbo could be attributed to the Court.\(^{1029}\) From this reasoning, it seems to follow that the phrase ‘his/her accusers’ excludes the national authorities who execute the request for arrest and surrender, in the absence of further involvement of a Court organ.

Once more, the underlying problem turns out to be the fragmentation of the procedure over different jurisdictions. It was argued previously that it is often difficult for the national authorities to offer the remedy sought.\(^{1030}\) This holds all the more true where the violations relate to the apprehension and the detention of the suspect or accused person in the custodial state. Once the person has been transferred to the tribunal, it will be difficult for the national Judge to offer the appropriate remedy (release).\(^{1031}\) Moreover, the national authorities may be reluctant to accept responsibility where they effectuated an arrest at the request of an international criminal tribunal. Therefore, it suffices to repeat the leidmotiv that the suspect or


\(^{1028}\) Ibid., par. 110.

\(^{1029}\) Ibid., par. 110.

\(^{1030}\) Compare, *supra* Chapter 6, I.7.1.

accused person should never be the victim of the fragmentation of proceedings over different jurisdictions.\textsuperscript{1032} Lacunae in the protection of the suspect or accused should be prevented.\textsuperscript{1033} The Court should take responsibility for all pre-trial violations of the rights of the suspect or the accused which occur \textit{in the context of a case}. While the vagueness of this concept may be objected to, inspiration as to how to further define can be found in the case law of the Appeals Chamber. As will be explained in the next chapter, the Appeals Chamber proved willing, in the assessment of the length to the pre-trial detention, to look to the pre-transfer detention, as long as it is part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.”\textsuperscript{1034}

VIII.3. The internationalised criminal tribunals

Whereas the STL avoids using the term ‘constructive custody’, the jurisprudence of the tribunal indicates that it may also seek to evade responsibility for pre-transfer violations of the rights of suspects in relation to arrest and detention. As explained previously, the STL Statute provides that the tribunal will request the Lebanese judicial authorities to defer competence over the investigation of the attack against Hariri and others.\textsuperscript{1035} After this request was sent on 27 March 2009,\textsuperscript{1036} the Lebanese authorities referred to the Prosecutor the results of the investigation and a copy of the court’s records regarding the Hariri case on 10 April 2009.\textsuperscript{1037} The Pre-Trial Judge held that, from that day on, the tribunal had officially been seized of this case. According to the Pre-Trial Judge, this implies that the persons detained in connection with that case will “have been under the legal authority of the Tribunal since that

\begin{itemize}
\item \textsuperscript{1033} See supra, Chapter 6, III.
\item \textsuperscript{1034} See infra, Chapter 8, II.3.6.
\item \textsuperscript{1035} Article 4 (2) STL Statute and Rule 17 (A) STL RPE.
\item \textsuperscript{1036} STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009.
\item \textsuperscript{1037} See STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 5; STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 5.
\end{itemize}
date.”1038 In this manner the STL may seek to avoid the attribution of any violations of the rights of the suspect during the pre-transfer arrest and detention in much the same manner as the international criminal courts and tribunals.1039

PRELIMINARY FINDINGS

The principle, according to which the issuance of an arrest warrant presupposes a judicial authorisation, is firmly established in international criminal procedural law. Furthermore, all tribunals provide for a material threshold for the issuance of an arrest warrant where they make this issuance dependent on the showing either of a ‘prima facie case’ (ICTY, ICTR, STL) or of ‘reasonable grounds to believe’ (ICC, SPSC). How far these thresholds differ remains uncertain. The SCSL provides for a lower threshold, which is at odds with human rights law. The ECCC, while not providing for a material threshold for the issuance of an arrest warrant or an arrest and detention order, requires ‘well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary submission’ for the provisional detention of the charged person. Furthermore, it was established that only some tribunals provide for a requirement of necessity for the issuance of an arrest warrant and provide for legitimate grounds upon which the ordering of the arrest warrant should be based (ICC, STL). The ECCC require the presence of legitimate grounds for the ordering of the provisional detention of the charged person.

A further distinction can be drawn between the ad hoc tribunals, the Special Court, the STL and the SPSC on the one hand and the ICC on the other in their approach to the effectuation of arrests in instances for which some urgency is required. The ICC always requires a prior judicial authorisation, while the former tribunals in this case allow for the deprivation of liberty in the absence of a judicial authorisation. The ICC Statute only allows for a postponement in the presentation of the request for surrender and the documents supporting it.

1038 See STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 5; STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 5.
The only requirement for the deprivation of liberty in the absence of an arrest warrant at the ad hoc tribunals, the SCSL, and the STL (‘Rule 40 requests’) is the existence of ‘reliable information, which tends to show that a person may have committed a crime within the jurisdiction of the court’. In the absence of further requirements, such arrest warrant is executed in accordance with the laws of the requested state. The ICTR provides for the additional requirement that an indictment is confirmed within 20 days following the transfer of the suspect to the tribunal. It was concluded that this provision insufficiently protects the rights of the suspect where this requirement does not guarantee the prompt transfer of the suspect to the tribunal. A better solution was found in the RPE of the Special Court, which requires that where a suspect is deprived of his or her liberty following a Rule 40 request, the Prosecutor should apply for his or her transfer within ten days.

The ad hoc tribunals (following the amendment of their RPE), the Special Court and the STL all provide for the transfer and the provisional detention of suspects at the seat of the tribunal (‘Rule 40bis requests’). In stark contrast to the scarcity of the regulation regarding Rule 40 requests, the transfer and provisional detention of suspects is set out in considerable detail, offering better protection of the rights of the suspect. The prerequisites for this transfer include (1) the need for a judicial authorisation, (2) a material threshold (a consistent body of material which tends to show that the suspect may have committed a crime over which the tribunal has jurisdiction) and (3) the showing of a legitimate ground (necessity requirement). Furthermore (4) a strict time limitation (30 days, which can be extended to maximum 90 days) is provided for. In addition, (5) the inclusion in the order of provisional charges and (6) of a summary of the evidence on which the Prosecutor relies is also required.

In sum, it has been shown that the procedural schemes of the ad hoc tribunals and the Special Court do not prevent that the suspect ends up lingering in detention in the custodial state. The examples of suspects simply being forgotten about leave important marks on the legacy left behind by the ICTR. Where a Rule 40bis order is made, there is clearly no limitation on the amount of time the suspect may spend in pre-transfer detention. Similarly, where a Rule 40 request is made, such limitation is absent. Where a preference was expressed for Rule 40 SCSL RPE (given the time limitation it puts on the time a person can be detained in the custodial state before a request for his or her transfer is made), it should be acknowledged that this provision fails to prevent the person spending an inordinate amount of time in pre-transfer detention pending his transfer to the tribunal pursuant to Rule 40bis. It is regrettable that the
STL did not learn from these shortcomings and its procedural framework reveals the same gaps in the protection of the rights of the suspect.

The ECCC also provides for the deprivation of liberty without judicial authorisation where a person has been placed in police custody (garde à vue). This deprivation of liberty without judicial intervention is limited in time to 48 hours, which may be extended once by another 24 hours; no urgency is required.

The international criminal tribunals have in common that they have to rely on states for the effectuation of the arrest. While all international criminal tribunals allow for the possibility to address arrest warrants to international organisations, it is regrettable that no express provision is made under the ICC Statute for addressing warrants of arrests to international organisations and other non-state entities. As far as the ad hoc tribunals are concerned, a request for the arrest and surrender of a suspect or accused entails an obligation of result for that state. As far as the ICC is concerned, the arrest and surrender cooperation regime is far more detailed than is the case at the ad hoc tribunals. Leaving voluntary cooperation aside, there are situations where states not party may also be under an obligation to cooperate with the ICC. While no formal grounds of refusal are included in the ICC Statute, several provisions qualify the obligation of States Parties to immediately arrest and surrender the person in relation to parallel national proceedings.

It has been found that all international criminal tribunals as well as the STL provide for the possibility that indictments or warrants of arrest are issued under seal and not publicly disclosed.

Only the ad hoc tribunals provide for a specific procedure in cases of failure to execute an arrest warrant (‘Rule 61 proceedings’). These proceedings have become obsolete and cannot be found in the procedural framework of the ‘newer’ international(ised) criminal tribunals. As far as the STL is concerned, this vehicle, which allows for the presentation of evidence by the Prosecutor in open court in the absence of the accused, would not serve a useful purpose because in absentia trials can be held.

Some tribunals (ICC, STL, ECCC) provide for an alternative to arrest and provisional detention where they foresee the possibility of a summons to appear. Practice has proven that
a summons is a viable alternative to the deprivation of liberty. It was argued that it should always be open for the Judge who authorises an arrest warrant to summon the person to appear before the court. This approach fully protects the principles of proportionality and subsidiarity. Conditions imposed upon the person should relate to the justifications for the deprivation or limitation of liberty provided for by the procedural framework of the tribunal concerned.

The procedural set-up of the ICC is preferable in that it further regulates the arrest proceedings in the custodial state, thereby adding to the protection of persons deprived of their liberty. The ICC Statute imposes obligations on states and provides certain rights to the persons arrested. Nevertheless, the precise scope of the rights these persons are entitled to and the proper process to be followed are not entirely clear. Moreover, the Court held that where the suspect is brought before the competent judicial authority in the custodial state, absent concerted action, there is no obligation to review the pre-transfer arrest and detention preceding the sending of the cooperation request. The limited role the Pre-Trial Chamber took upon itself in reviewing the arrest proceedings in the custodial state was criticised in light of its self-proclaimed role in protecting the rights of suspects and accused persons at the pre-trial stage. In particular, the Court should be clear that such review should encompass an assessment in light of international human rights norms and the rights provided for under Article 55 ICC Statute.

It has been noted with surprise that the legal framework of most tribunals (the ad hoc tribunals, the Special Court, the STL, and the ECCC) do not expressly provide suspects or accused persons with the right to be free from arbitrary or unlawful arrest and detention. This right follows from the application of human rights norms. Whereas international human rights law provides that where an arrest or detention is found to be unlawful, the remedy should be release, the international(ised) criminal tribunals were found to avoid granting this remedy.

Several other procedural and substantive rights were identified which derive from international human rights law and should be upheld by all tribunals where persons are deprived of their liberty. Firstly, the right to be promptly informed of the reasons of one’s arrest should be clearly protected. Whereas this right is not always clearly provided for in international criminal procedural law, practice has established the existence thereof. The importance of this right lies where it enables persons to challenge their detention. While this
information should be provided ‘promptly’ or ‘at the time of the arrest’, it was found that the practice of the ICTR reveals several instances where this right was violated because information was conveyed much too late. Secondly, the existence of the right of every person deprived of liberty to be promptly brought before a judge or a ‘judicial officer’, while not always explicitly provided for, has also been confirmed. The obligation to promptly bring a person deprived of his or her liberty before a judge or judicial officer applies irrespective of the status of the person concerned or the place of the deprivation of liberty. As far as the ad hoc tribunals and the SCSL are concerned, it has been argued that to ensure that this right is also upheld during the pre-transfer deprivation of liberty, an arrest warrant, a request for the provisional arrest or a provisional arrest and transfer order should include a notification to the authorities of the requested state to bring the person promptly before a judge or a judicial officer or a clause reminding the national authorities to do so. It has been argued that whether the right is fully protected by Article 59 (2) ICC Statute remains uncertain, where the competent judicial authority cannot review whether the warrant of arrest was properly issued and where it cannot order release. The mechanism providing that the legality of the warrant of arrest may be challenged before the Pre-Trial Chamber may not fully resolve these shortcomings because this procedure is not automatic in nature. Where at the ECCC, the person deprived of liberty is brought before the Co-Investigating Judges, this was found not to be in violation with international human rights norms. Thirdly, the right to challenge the lawfulness of detention (habeas corpus) was found to be fully established in international criminal procedural law. This has been confirmed by the practice of all international criminal tribunals. This right was expressly provided in the TRCP (including a strict time limitation to hear this challenge). Disturbingly, the practice of the ICTR reveals several instances in which habeas corpus challenges were not heard. While the picture of the practice is mixed, it was argued that in the context of a habeas corpus challenge, the tribunal should also have the possibility to examine the reasonableness of the suspicion on which the original deprivation of liberty was based. The importance of this procedural right is that it protects the other rights identified previously. The person filing this challenge bears a duty of due diligence to pursue it.

With regard to instances of ‘irregular’ rendition of suspects or accused, it was noted that the relevant practice stems from one tribunal (ICTY). Hence, no general conclusions could be drawn regarding the law of international criminal procedure. The jurisprudence of the ICTY was positively evaluated insofar as it expressed a willingness of the tribunal to review the
manner in which the arrest was executed by states or international forces. The practice further revealed that the notion of state sovereignty in the context of the vertical relationship between the ICTY and states, does not play the same role as in an inter-state context. Accountability for the crimes within the tribunals’ subject matter jurisdiction outweighs considerations of sovereignty. The jurisprudence was found to be unclear in several respects. For example, it fails to clearly state whether the involvement of the tribunal or one of its organs in illegal renditions should lead the tribunal to decline to exercise *in personam* jurisdiction.

It has been argued that where remedies for violations of the rights of suspects and accused persons related to the deprivation of liberty are considered, these remedies should be proportionate. Hence, the Judge should *proprio motu* consider all possible remedies. While none of the statutory frameworks of the *ad hoc* tribunals and the Special Court provide so, the practice of these tribunals has acknowledged the existence of an inherent or implied power to provide compensation to persons that have been the victim of unlawful or arbitrary arrest or detention. In turn, the ICC’s Statute, the Statute of the STL as well as the TRCP explicitly provide for a right to compensation. The STL, short of providing a right to compensation for unlawful arrest or detention, provides for a right to *request* this compensation, and the awarding of this compensation is made dependent upon a showing of a ‘serious miscarriage of justice’.

The international criminal tribunals have proven their willingness to acknowledge that the right to an effective remedy encompasses a right to financial compensation, provided that no other remedies (*e.g.* the reduction of sentence) would be effective (where the person is acquitted). Moreover, a reduction of the sentence can be granted or a simple declaration that the rights of the suspect or the accused have been violated in the course of the arrest and detention.

In exceptional circumstances, violations of the rights of the suspect or the accused related to the deprivation of liberty may lead the tribunal to refuse to *exercise* jurisdiction. The jurisprudence of the *ad hoc* tribunals confirmed that the abuse of process doctrine may be applied, as part of its inherent powers, where proceeding with the case would contravene the Court’s sense of justice. This is the case where in light of serious or egregious violations of the rights of the suspect or accused, exercising jurisdiction would prove detrimental to the court’s integrity. This implies that a fair trial is no longer possible, or where in the
circumstances of the case, proceeding with the case would contravene the court’s sense of justice, due to pre-trial impropriety or misconduct. While the application of the abuse of process doctrine is discretionary in nature, the discretion may in some cases be very limited.

While the ICC has rejected the application of the abuse of process doctrine, it has confirmed the existence of its power, under Article 21 (3) ICC Statute, to stay or discontinue proceedings where a fair trial is no longer possible as a consequence of violations of the rights of suspects and accused persons by acts of his/her accusers. Where the ad hoc tribunals and the SCSL consider that, in declining to exercise jurisdiction, it is irrelevant what entity or entities are responsible for the violations, the ICC reserves the remedy of setting aside jurisdiction to violations committed by ‘his/her accusers’.

It has been argued that the jurisprudence of the international criminal tribunals (some decisions to the contrary notwithstanding) should not be understood as reserving the application of the abuse of process doctrine to instances of torture or serious mistreatment. The seriousness of the crimes charged is taken into consideration where the tribunals consider setting jurisdiction aside. Likewise, the level of attribution of the violations to the tribunal or its organs is considered.

The ad hoc tribunals, the SCSL and the SPSC consider remedies for unlawful arrest or detention other than setting jurisdiction aside at the end of the proceedings (or in the case of the SPSC as part of a separate civil action). Alternatively, the ICC Statute and RPE, in line with the STL, provide that compensation should be sought within six months after being informed of the unlawfulness of the arrest or the detention as part of a distinct procedure. It has been argued that it is preferable that the remedy, other than the setting aside of jurisdiction, is decided upon at the end of the proceedings, where this allows the sentence imposed to be taken into consideration.

Some jurisprudence to the contrary notwithstanding, the ad hoc tribunals seemingly accepted the view that shared responsibilities exist between the tribunal and the requested state in the effectuation of the arrest and detention in the requested state. The tribunal is responsible for some aspects of the deprivation of liberty at its behest. In this regard, the Prosecutor has a duty of due diligence. Where some authors have argued that the court should take responsibility for all violations that have occurred in the context of the case (including all pre-
transfer violations of the rights of the suspect or accused person), this stance seems only to be confirmed with regard to the remedy of setting aside jurisdiction. However, this current stance of the jurisprudence has been criticised where it is illogical to take responsibility for the violations of third parties where these amount to an abuse of process but to refuse to take this responsibility for lesser violations by third parties. None of the international(ised) courts and tribunals under review proved willing to take responsibility for all violations of the person’s rights, even where they cannot be attributed to the tribunal, as has been shown.

The ICC has, so far, refused to take responsibility for violations that occurred prior to the sending of the cooperation request where there had not been a concerted action. Also, where the Court considers staying the proceedings and declining to exercise jurisdiction, the test formulated by the ICC Appeals Chamber prevents the Court from taking responsibility for violations committed by third parties unrelated to the Court. One Pre-Trial Chamber interpreted this test as always requiring attribution to a Court organ, even after the sending of the cooperation request. In order to prevent gaps in the protection of the suspect or accused, it has been argued that the Court should take responsibility for all violations in the context of a case.