The investigation phase in international criminal procedure: in search of common rules
de Meester, K.F.G.

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INTRODUCTION

Following the discussion on the arrest and surrender of persons to the international(ised) criminal tribunals, the present chapter will focus on the pre-trial detention and release regime of the jurisdictions under review. Whereas provisional detention and release are equally relevant to the trial phase, the subject of detention on remand during trial will not be included here.\(^1\) It is important to underline the fact that different, and sometimes more stringent, conditions apply to provisional release during the trial proceedings. The incarceration of suspects and accused persons before their guilt has been established highlights the tension between the presumption of innocence and the risks that a suspect or accused person poses to the criminal justice system and to society in general. This tension is equally present in all national criminal justice systems.

The analysis below reveals a rather diverse picture. It will be shown that no single procedural scheme can be distilled which could be readily applied to the different international criminal tribunals. Divergent views continue to exist with respect to such prominent questions as the need for material grounds to justify the (continued) deprivation of liberty, the party that carries the burden of proof in provisional release cases, the applicable standard of proof or the presence and scope of judicial discretion. Where questions of provisional detention and provisional release bear on the fundamental right to liberty and security of the person, the

\(^1\) Consider e.g. ICTY, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, Prosecutor v. Mladić et al., Case No. IT-05-87-AR65.2, A. Ch., 14 December 2006, par. 6-10 (the Appeals Chamber noted that Rule 65 (B) ICTY RPE applies to provisional release issues during trial proceedings, just as it applies to pre-trial and pre-appeal proceedings); on the detention on remand during trial, consider e.g. C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 1-70 (labelling it a "de facto 'detention for trial' regime").
jurisprudence is voluminous. Most relevant decisions on the subject are included in the analysis but not all decisions are exhaustively referenced.

Roughly three different approaches will be discerned regarding the detention-release issue. Initially, (1) the procedural model of the ad hoc tribunals (and, to some extent, the SCSL) clearly envisaged a procedural scheme where detention was the rule and release was the exception. Later, (2) following the amendment of their respective procedures, the ad hoc tribunals as well as the SCSL intended an approach whereby release would neither be the norm nor the exception. Finally (3) the ICC, as well as the internationalised criminal justice systems, proclaim that their respective procedures imply a system in which pre-trial release would be the norm and detention the exception. This chapter will scrutinise the validity of these claims, the implications of these procedural choices for their respective practice as well as the conformity of these approaches with international human rights norms. Prior to the discussion of these different approaches to pre-trial detention and release, this chapter will first seek to answer the question as to whether or not provisional release constitutes a ‘right’ for suspects and accused persons.

I. PROVISIONAL RELEASE, A PROPER RIGHT?

International human rights instruments do not provide a general right to provisional release. One commentator, speaking on the ‘right to bail’, noted that ‘the concept of bail can be seen not as the ‘right’ it is generally assumed to be but, conversely, as a mechanism by which a state may qualify the liberty interests of an accused person.’ Indeed, as previously stated, human rights instruments recognise that the right to liberty is not absolute. Rather, these instruments protect against arbitrary and unlawful interferences with this right.

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3 M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1106. The author adds that where bail is seen from this perspective, “it is clear that the opportunity to utilize the mechanism provides a far more attractive alternative than the forfeiture of one’s freedom.” She adds that “[i]f one deems release to be “the right at stake”, the right may well be viewed too narrowly and ensuing analysis may, in turn, fail to conform to established standards.”
4 See supra, Chapter 7, V.1.
§ Exceptional character of pre-trial detention

It follows from a plain reading of Article 9 (3) ICCPR that “it may not be the general rule that persons awaiting trial are detained in custody.” In its General Comment No. 8, the HRC stressed the exceptional nature of pre-trial detention. This has also been confirmed by its case law. In a similar vein, the regional ECtHR and the IACtHR firmly established the principle that pre-trial detention will not be the rule but the exception and that release should not be limited to ‘exceptional circumstances’.

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5 According to Article 9 (3) ICCPR, “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody.”
6 HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 3 (according to which “[p]re-trial detention should be an exception and as short as possible”).
7 HRC, Hill and Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.3 (”The HRC reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”).
8 ECtHR, McKay v. The United Kingdom, Application No. 543/03, Reports 2006-X, Judgment (Grand Chamber) of 3 October 2006, par. 41 (“The presumption is in favour of release”); ECtHR, Iljikov v. Bulgaria, Application No. 33977/96, Judgment of 26 July 2001, par. 82 – 85 (the Court states that Article 5 is “a provision which makes detention an exceptional departure from the right to liberty and that is only permissible in exhaustively enumerated and strictly defined cases.” “In casu, the Bulgarian code of criminal procedure only allowed for provisional release of accused persons charged with serious crimes in exceptional circumstances” (which implied that release on bail was only possible where there did not even exist a theoretical possibility of absconding, re-offending or perverting the course of justice (Article 152 of the Bulgarian Code of Criminal procedure)). Comparable to the ad hoc tribunals, there existed a presumption that detention was necessary for serious crimes, which presumption was only rebuttable in exceptional circumstances. Where the defendant failed to prove the existence of exceptional circumstances, he was detained on remand throughout the proceedings.

Judge Robinson noticed the similarity between the Iljikov case and the provisional release regime prior to the amendment of Rule 65 (B) (still to be discussed). See ICTY, Decision on Momoliţo Krajišnik’s Notice of Motion for Provisional Release, Prosecutor v. Krajišnik and Plavšić, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 8. DEFRANK is critical of such comparison, where he reasons that “[u]ndoubtedly, these two rules are very similar; however they are not “exactly similar” as Judge Robinson asserts.” Whereas the Bulgarian criminal procedural code seemed to ‘impose’ that there was a danger of absconding, re-offending or obstructing the investigation, the tribunals’ pre-amendment procedural scheme ‘merely’ allocated the burden to the Defence, rather than presuming a risk of absconding, interfering or re-offending. However, this difference is smaller than suggested by this author. Where the defendant had to satisfy the Trial Chamber of the existence of exceptional circumstances before the existence of a risk of absconding, re-offending or interfering would be considered, the result is a de facto presumption of such risk, given the high burden put on the defendant to proof the presence of ‘exceptional circumstances’. See M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Reviews», Vol. 80, 2001 – 2002, pp. 1445 – 1446. The IACtHR confirmed this exceptional nature in: IACtHR, Case of Tibi v. Ecuador, Series C, No. 114, Judgment of 7 September 2004, par. 106 (considering that “preventive imprisonment is the most severe measure that may be applied to the person accused of a crime, for which reason its application should be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society”); IACtHR, Case of Acosta-Calderon v. Ecuador, Series C No. 129, Judgment of 24 June 2005, par. 74; IACtHR, Case of Children’s Rehabilitation, Series C No. 112, Judgment of 2 September 2004, par. 228.
From the exceptional character of pre-trial detention follows “an indirect entitlement for release from pre-trial detention in exchange for bail or some other guarantee.” Consequently, there should at least be some nuance to statements that there is no right to bail or release during trial. In this context, the Appeals Chamber of the SCSL referred to a “right to apply for provisional release, rather than a ‘right to bail’.”

§ Link with the presumption of innocence

The statutory documents of all international(ised) criminal tribunals as well as human rights instruments provide for the presumption of innocence. Although the formulation of the presumption in the Statutes of at least some of the international(ised) criminal tribunals may lead one to conclude that the presumption only applies to the trial phase, such a strict

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9 M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 234 (emphasis added). Consider e.g. HRC, Hill and Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.3. Such entitlement equally derives from the authority to order conditional release, as referred to in Article 9 (3) ICCPR. Consider also S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 503 (noting that where Article 5 (3) and Article 7 (5) ACHR do not expressly provide that detention should be the exception, “it is part of the spirit of the guarantee of personal liberty in the two other instruments”).

10 C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 14. The author refers to the Decision of the SCSL’s Appeals Chamber refusing bail to Fofana, as proof that international human rights law rather “recognizes the right to have a court decide the lawfulness of a defendant’s detention promptly after arrest.” Nevertheless, in the paragraph referred to, the Appeals Chamber distinguishes between the right to challenge the legality of the detention and “additionally, in the event the detention is lawful, to apply for provisional liberty pending the conclusion of trial.” SCSL, Fofana - Appeal Against Decision Refusing Bail, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 32.

11 Ibid., par. 32.

12 It should be noted that the ad hoc tribunals, the SCSL, the STL and the SPSC seem to limit its application to accused persons and to exclude suspects. Compare Article 21 (3) ICTY Statute, Article 20 (3) ICTR Statute; Article 17 (3) SCSL Statute, Article 16 (3) STL Statute (‘The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute’) and Section 6.1 TRCP (‘All persons accused of a crime shall be presumed innocent’) with Article 66 ICC Statute (‘Everyone’) and Rule 21 (1) (d) ECCC IR (‘Every person suspected or prosecuted shall be presumed innocent’). However, other provisions in the ECCC’s procedural framework limit the right to accused persons. Consider Article 35 new ECCC Law (‘The accused’) and Article 13 ECCC Agreement (‘the accused’). On Article 66 ICC Statute, it should be noted that whilst Article 66 is to be found in ‘Part 6 The Trial’, it applies to everyone. See e.g. W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 785 (the author notes that it requires little explanation that the presumption also applies to the investigation stage). W.A. SCHABAS, Article 66, 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. 1236 (noting that where the original ILC Draft reserved the presumption to “[a]n accused”, this was changed to “[e]veryone” by the Preparatory Commission). The presumption of innocence is recognised by all major human rights instruments: see Article 14 (2) ICCPR, Article 6 (2) ECHR, Article 8 (2) ACHR; Article 7 (1) (b) ACHPR; Article 11 (1) UDHR; Article 48 (1) Charter of the Charter of Fundamental Rights of the EU; Principle 36 (1) of the United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, 9 December 1988.
application should be rejected. The presumption of innocence is equally relevant to the pre-trial stage. The HRC as well as several regional human rights courts subscribed to the idea that there is a link between the length of pre-trial detention and the presumption of innocence. The HRC concluded in Cagas et al. v. The Philippines that the excessive length of pre-trial detention violated the presumption of innocence as outlined in Article 14 (2) ICCPR. Similarly, Strasbourg case law has consistently held that it “takes into account the presumption of innocence when assessing whether the length of a period of pre-trial detention was justified.”

In turn, the IACtHR held that “[t]he guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial detention is too long.”

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13 S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, pp. 84 - 85 (arguing that “the scope of the principle is very broad and covers all situations, even prior to the formulation of charges, irrespective of where the provisions on the presumption of innocence are placed in the Statute of the ad hoc Tribunals and the ICC.” The author distinguishes between three consequences of the presumption of innocence. “Firstly, there is the general consequence that it should affect the overall treatment of the individual, both within the proceedings and externally. Secondly, there is the more specific effect of imposing the burden of proof on the Prosecutor. Finally, the third effect relates to the establishment of a certain standard of proof and the procedure that must be followed in the determination of guilt.”) On these latter three ‘implications’, DAVIDSON argued that all three aspects are relevant to provisional release decisions. See C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 16 – 19.

14 Whereas international human rights instruments seem to limit the application of the principle to the trial phase, its applicability to the pre-trial stage has generally been upheld. Consider e.g. M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rein, Engel, 2005, pp. 329 – 330 (noting that “[t]he prevailing view, which is confirmed by Strasbourg holdings, is that the presumption of innocence […] is available not only to the defendant in the strictest sense of the word but also to an accused person prior to the filing of a criminal charge”); S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, pp. 155 – 156. For a detailed comparative overview of the pre-trial application of the presumption of innocence to pre-trial detention in national criminal justice systems, consider: M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1109 – 1113.

15 HRC, Cagas et al. v. the Philippines, Communication No. 788/1997, U.N. Doc. CCPR/C/73/D/788/1997, 23 October 2001, par. 7.3. See also the Committee’s concluding observations to (among others) the following state reports, where the HRC is critical of national legislation determining that the maximum length of pre-trial detention is determined by the reference to the penalty of which the accused stands accused: HRC, Concluding Observations of the Human Rights Committee: Argentina, U.N. Doc. CCPR/CO/70/ARG, 15 November 2000, par. 10. (“holding that all aspects of pre-trial detention, should be reformed in accordance with the requirements of article 9 and the principle of innocence under article 14”); HRC, Concluding Observations of the Human Rights Committee: Italy, U.N. Doc. CCPR/C/79/Add.94, 18 August 1998, par. 15.

16 ECtHR, Cherchi v. Germany, Application No. 6565/01, Reports 2006-XII, Judgment of 26 October 2006, par. 51; ECtHR, Kudła v. Poland, Application No. 30210/96, Reports 2000-XI, Judgement (Grand Chamber) of 26 October 2000, par. 110; ECtHR, Labita v. Italy, Application No. 26772/95, Reports 2000-IV, Judgment (Grand Chamber) of 6 April 2000, par. 152. Where the applicants invoke Article 5 (3) and Article 6 (2) ECHR simultaneously, the Court will deal with the matter of the presumption of innocence in its consideration of Article 5 (3) ECHR (lex special derogat generalis). It held that “[c]ontinued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.” See 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. 14579/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, Tomsa v. France, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84.
imprisonment is prolonged unreasonably." Likewise, the literature has highlighted the intrinsic link between provisional release prior to trial and the presumption of innocence. The exceptional character of pre-trial detention, as provided for under Article 9 (3) ICCPR or Article 5 (3) ECHR, is reflective of such a presumption. Besides, it is exactly the presumption of innocence that puts limitations on the pre-trial detention regime and prohibits restrictions to the right of individual liberty going beyond what is strictly necessary for public interest considerations, be it the preservation of evidence or the prevention of flight. Since pre-trial detention sits uneasily with the presumption of innocence, such detention should serve (a) goal(s) that is (are) not punitive in nature. The ICTY Trial Chamber clarified that the rationale behind the institution of detention on remand is to ensure that the accused will appear for trial. It does not have a penal character. At the same time, though, the ICTY Appeals Chamber confirmed that the presumption is not a “determinative” factor in provisional release applications. Otherwise, “no accused would ever be detained, as all are

17 IACtHR, Gíménez v. Argentina, Case No. 11.245, OEA/Ser.L/V/II.91, 1 March 1996, par. 80.
20 Consider in that regard Article 10 (2) (a) ICCPR which requires that accused persons should, safe in exceptional circumstances, be segregated from convicted persons and should be subjected to a separate treatment due to their status as unconvicted persons (emphasis added).
21 IACtHR, Suárez-Rosero v. Ecuador, Series C, No. 35, Judgment of 12 November 1997, par. 77 (holding that the presumption of innocence entails an obligation “not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure”); D. J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, p. 577; M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1116 (adopting a ‘strict necessity requirement’, entailing that “courts must carefully assess punitive and nonpunitive distinctions where they are made” and that “the nonpunitive purpose must be established in the case at hand”); A. TROTTER, Pre-Conviction Detention in International Criminal Trials, in «Journal of International Criminal Justice», Vol. 11, 2013, p. 352 (”Pre-conviction detention is justifiable only by procedural necessity, not as pre-emptive punishment”).
presumed innocent.”23 This argument, however, is mistaken. The presumption of innocence simply entails that the grounds for ordering an individual’s detention should not be punitive in nature. The notion does not prohibit pre-trial detention where an acceptable justification exists.

In turn, the SCSL Appeals Chamber adopted a narrow interpretation of the presumption of innocence (as the principle is sometimes given), treating it as an evidentiary principle which is relevant only to the trial stage. The Appeals Chamber held that:

“for all its resonance at criminal trials and appeals to put the Prosecution to proof of the elements of the offence charged, it has no application or relevance to the preconditions for bail which must be established under Rule 65 (B). Whether a defendant will turn up for trial or intimidate witnesses cannot logically be affected by the burden of proof that will prevail at trial.”24

It based this narrow view on the jurisprudence of the U.S. Supreme Court, which adopts the view that the concept has no relevance during the pre-trial phase.25 Such an interpretation of the presumption of innocence is too limited and should be rejected. It is clear that the presumption, as it is enshrined in human rights instruments, has some relevance before the start of the trial sensu stricto. Where detention on remand involves a balancing of the right to individual liberty (including the presumption of innocence) with public interest considerations, it is evident that where such a balance is not rightly struck, the presumption of innocence may be impaired.

It has been argued that the ICTY does not consider the relevance of the presumption of innocence in provisional release cases to be static. In fact, its value diminishes as the case proceeds. The ‘diminishing value’ of the presumption is inferred from the fact that the ICTY’s

23 ICTY, Decision on Interlocutory Appeal of Denial of Provisional Release During the winter Recess, Prosecutor v. Vladičić et al., Case No. IT-05-87-AR65.2, A. Ch., 14 December 2006, par. 11 – 12.
24 SCSL, Fofana - Appeal Against Decision Refusing Bail, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 37.
25 Bell v. Wolfish, 441 U.S. 520 (1979), p. 533 (“The presumption of innocence is a doctrine that allocates the burden of proof in criminal trial” […] “But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun”).
jurisprudence requires a higher standard for provisional release (‘sufficiently compelling humanitarian circumstances’) once the Prosecutor has rested its case.26

§ Applicability of international human rights law

The applicability of international human rights norms to the proceedings of the ad hoc tribunals and the SCSL was confirmed above.27 The jurisprudence of the ICTY confirmed the relevance of international human rights norms on the presumption of innocence and on the release of persons awaiting trial for the interpretation of Article 65 (B) ICTY RPE, which provision deals with provisional release. In Blagojević et al., an ICTY Trial Chamber noted (1) that the ICCPR and ECHR are part of public international law, (2) that as a tribunal of the UN, the ICTY is committed to the standards of the ICCPR and that parts of the former Yugoslavia are parties to the ICCPR and the ECHR, (3) that justice also entails respect for the alleged perpetrator’s fundamental rights and, therefore (4) that no distinction can be drawn between persons facing criminal procedures in their home country or on an international level. Consequently, Rule 65 (B) should be read in light of the ICCPR, the ECHR and the relevant jurisprudence.28

At the same time, however, the jurisprudence sometimes seems to favour a contextual application of these norms.29 For example, in Brdjanin and Talić, a bench of the Appeals Chamber determined “that internationally recognised standards to release of persons awaiting trial are applicable to proceedings before the International Tribunal, that in applying them account has to be taken of the different circumstances and situations envisaged by those standards which did not visualise the nature and character of the International Tribunal, and that the International Tribunal does not have the same facilities as are available to national courts to enforce appearance.”30

27 See supra, Chapter II, III.
29 On the contextual application of international human rights norms, see supra, Chapter II, III.5.
30 ICTY, Decision on Application for Leave to Appeal, Prosecutor v. Brdjanin and Talić, Case No. IT-99-36-AR65, A. Ch., 7 September 2000, p. 3. Likewise, some authors seem sympathetic towards such arguments. Consider, e.g. K. DORAN, Provisional Release in Human Rights Law and International Criminal Law, in «International Criminal Law Review», Vol. 11, 2011, p. 743 ("The defence team [sic] at the ad hoc tribunals have continually stressed that the failure to have regard to the provisions of the European Convention and
II. PROVISIONAL DETENTION AS THE RULE OR AS AN EXCEPTION

II.1. The early practice: provisional release as the exception, detention as the rule

Rule 64 ICTY, ICTR and SCSL RPE provides for the mandatory detention upon transfer of an accused person to the seat of the tribunal. While an ‘Order for detention on remand’ will normally be issued, such an order is not strictly necessary. It was noted in Part I of this Chapter that contrary to other international(ised) criminal tribunals, the existence of legitimate grounds is not a prerequisite for the pre-trial detention of the suspect or the accused.

The Statutes of the ad hoc tribunals and the SCSL are silent on the matter of pre-trial release. The procedural regime that governs provisional release (before and also during and after trial) is outlined in Rule 65 of the ICTY, ICTR and SCSL RPE. No provision is made for the provisional release of suspects or accused prior to their transfer to the tribunal. Prior to its amendment, one of the principal requirements put forward by Rule 65 (B) was the presence of ‘exceptional circumstances’. This criterion led to a ‘presumption against provisional release’.

ICCPR, is tantamount to breaching international human rights standards. However, is this necessarily the case? It has been illustrated that the ad hoc tribunals are operating under entirely different circumstances than that of international human rights’ bodies”).

31 Consider in this regard: ICTY, Decision on Motions by Mornor Talic (1) To Dismiss the Indictment, (2) For Release, and (3) For Leave to Reply to Response of Prosecution to Motion for Release, Prosecutor v. Brđanin, Case No. IT-99-36-PT, T. Ch. II, 1 February 2000, par. 21 (noting that the order for detention made by the Trial Chamber “was, strictly, otiose”).

32 Consider in that regard the views of a Judge of the SCSL: “The one thing that does really bother me with our Rule 65, and I speak personally now, not necessarily as a judge of this court, is that there is an automatic mandatory detention. That is unusual in my experience. […] However, in the concept of human rights law, take for example the ECHR and African human rights rules, a person is considered innocent until guilt is proven. And they are entitled to liberty until they are deprived of it after a hearing or for good reason are held in remand. The concept is that they should be at liberty unless there are reasons for detaining them. And this is really a reversal. So this does cause me personal concern from a human rights perspective but as a judge of this tribunal I am aware procedures are available to an accused to apply for bail and have an impartial hearing.”). See Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 11.


Under the former rule, granting provisional release depended on the fulfilment of four conjunctive conditions.35 Besides (i) the presence of exceptional circumstances, the Defence had to satisfy the tribunal that (ii) the accused would appear for trial and (iii) that the person, if released, would not pose any danger to any victim, witness or other persons. Finally, (iv) the host country had to be heard. If no exceptional circumstances were identified by the tribunal, the other criteria were not considered.36 The burden of proof rested on the accused.37 Only one of these four criteria, the ‘exceptional circumstances’ criterion, will be discussed here. Where there were usually no exceptional circumstances identified, there was also no need to consider the other requirements.38

The length of the detention on remand was an important element considered in the assessment of the presence of ‘exceptional circumstances’.39 Although the jurisprudence accepted that the length of detention may constitute an ‘exceptional circumstance’—on top of the fact that many ICTR suspects and accused have argued that the exceptional circumstances requirement was fulfilled because of undue delay—, exceptional circumstances were never accepted.40

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35 See e.g. ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, Prosecutor v. Delalić, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 1.
37 The amendment of Rule 65 (B) left the allocation of the burden of proof untouched. This burden of proof will be discussed, infra, Chapter 8, II.2.2.
39 In Bagosora, the Trial Chamber underlined that while the length of detention is one factor in the assessment of the presence of ‘exceptional circumstances’, it is not the determining factor. See ICTR, Decision on Defence Motion for Release, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22.
40 ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 9 (whereas the Trial Chamber accepted that the length of detention is a factor in the consideration of exceptional circumstances, it found the pre-trial detention of over five years to be in acceptable limits, in light of (1) the general complexity of the proceedings, (2) the number of motions filed by the parties and (3) the further complexity caused by the joinder of trials (par. 9 – 13)); ICTR, Defence Motion for Provisional Release of the Accused, Prosecutor v. Makimana, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par. 8 (the Trial Chamber referred to the argumentation of the Prosecutor that it follows from the jurisprudence of the ECHR and the ECommHR that the complexity of the case, the gravity of the offences charged and/or the severity of the corresponding penalty may warrant provisional detention up to five years); ICTR, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, Prosecutor v. Nahimana, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002, par. 11-14 (noting that the Defence failed to show any irregularities with regard to the length of the current proceedings given the complexity and the seriousness of the case and also noting that the case is already at an advanced stage); ICTR, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, Prosecutor v. Bicamumpaka, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 19 (the Trial Chamber
Factors routinely discussed in the assessment of the length of detention included: the actual length of the detention, the length of the detention in light of the nature of the alleged crimes, the relation between the length of the detention and the sentence that may be imposed, the general (legal and factual) complexity of the case and the investigations, including the need to obtain evidence abroad, the conduct of the parties in the proceedings and the physical, psychological and other consequences of detention beyond the normal consequences of detention. Most disturbingly, the ICTR Trial Chamber did not consider a pre-trial detention of over six-and-a-half years to constitute ‘exceptional circumstances’. The Trial Chamber reasoned that:

[Further discussion on the assessment criteria and case law references provided in the text]
“the length of current or potential future detention of the Accused cannot be considered material in these circumstances because it does not mitigate in any way that the Accused, who is charged with the grave offences coming under the subject matter jurisdiction of this Tribunal, which offences carry maximum term of imprisonment is life [sic], may be a flight risk or may pose a threat to witnesses or to the community if he were to be released. Detention under Rule 65 is intended to ensure the safety of the community and the integrity to the trial process.”

Another element scrutinised under the ‘exceptional circumstances’ requirement was the existence of a serious illness (humanitarian grounds). The jurisprudence clarified a serious illness as a case in which it would be impossible for the tribunal to administer adequate medical treatment. The suspect or accused should show that his or her state of health is incompatible with any form of detention. The suspect or accused must indicate why he or she cannot be treated in the host state or host prison. According to the ICTR Trial Chamber, the illness does not amount to an ‘exceptional circumstance’ if the accused’s condition is not ‘terminal’ or ‘immediately life threatening calling for an immediate change in the conditions of custody’. On this basis, Đukić and Simić were granted provisional release. Under former Rule 65 (B) ICTY RPE, short-term release was also granted on humanitarian grounds in two instances to allow the accused to attend a relative’s funeral. In fact, provisional release has only ever been granted under pre-amendment Rule 65 (B) on humanitarian grounds.
Other factors which were normally considered in determining whether ‘exceptional circumstances’ were present included the reasonable suspicion that the person committed the crime(s) charged as well as the accused’s alleged role in the said crime.

Overall, the former Rule 65 (B), which limited provisional release to exceptional circumstances, was a clear violation of international human rights law and jurisprudence, according to which pre-trial detention will not be the rule but the exception.\(^50\) Commentators have also been highly critical of the ‘exceptional circumstances’ requirement.\(^51\) The criterion was unduly vague. As several commentators state, “[t]he judges were often clear in what did not constitute exceptional circumstances; less so in defining what they were.”\(^52\)

§ Justification for the ‘exceptional circumstances’ requirement

The analysis of early ‘pre-amendment’ jurisprudence of the ad hoc tribunals reveals that two factors were used to justify the ‘exceptional circumstances’ requirement and the deviation from international instruments on pre-trial detention. They reflect at least some of the distinctive characteristics of international criminal tribunals vis-à-vis national criminal justice systems. These are (1) the extreme gravity of the offences concerned and (2) the unique circumstances under which the tribunal operates, including the absence of a police force and the absence of any control over the areas in which the accused would reside if released.\(^53\) The tribunal necessarily has to rely on national governments and other entities.

The literature provided additional justifications for the divergence between international human rights law and the ‘detention as a rule’ approach as evidenced by the ‘exceptional circumstances’ requirement. WALD and MARTINEZ discern 5 factors that distinguish

\(^{50}\) As discussed, supra, Chapter 8, I.

\(^{51}\) Consider e.g. D. J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, p. 585 (“this requirement should be removed on the legal grounds that it is impermissibly vague and because it adds nothing to the analysis”).


\(^{53}\) ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnul Delalić, Prosecutor v. Delalić, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 19 - 20; ICTY, Decision on Motion for Provisional Release Filed by the Accused Hamzin Delić, Prosecutor v. Đelalić et al., Case No. IT-96-21, T. Ch., 24 October 1996; ICTY, Decision Denying a Request for Provisional Release, Prosecutor v. Aleksic, Case No. IT-95-14/1-T, T. Ch., 23 January 2008, p. 4; ICTY, Order on Miodrag Jokić Motion for Provisional Release, Prosecutor v. Jokić, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 11.
provisional release in the international context from the national context. They include: (1) the gravity of the crimes charged (including the likelihood of a severe sentence if convicted (in this regard, reference is made to domestic jurisdictions which often reverse the burden for murder and other serious crimes)), (2) the perceived inconsistency in requesting the UN and international peacekeeping forces to risk their lives to apprehend indicted war criminals and to subsequently release them,54 (3) the necessary reliance on national agents to check on the accused, exacerbated by the absence of the tribunal’s own enforcement capacity, (4) the lack of sanctions available in case of any violation of the release conditions (including the absence of an additional penalty for the failure to appear) also given the absence of a police force of its own55 as well as (5) difficulties in detecting and preventing intimidation of victims, witnesses or other persons where the accused has been released to a place that is geographically removed from the tribunal.56 Other commentators have listed further justifications, including the ‘desire to avoid a public outcry’57 or even ‘judicial insecurity’.58

54 Consider in this regard M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1130 (criticising such justification for a reversal of the burden where such course of action affects all cases (also where there is no risk of absconding and danger caused to the persons responsible for apprehending the individual) whereas human rights jurisprudence has emphasised that release determinations should be made on a case-by-case basis).

55 WALD and MARTINEZ recognize that according to Rule 65 (H) ICTY RPE, the Trial Chamber can issue a new arrest warrant to ensure the presence of the accused where he or she has previously been released, but notes that the execution of such warrants would be hampered where the state had previously guaranteed the return of the accused but was subsequently not living up to this guarantee. See P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., Essays on ICTY Procedure and Evidence, Kluwer Law International, The Hague, 2001, p. 236.

56 Ibid., pp. 234-237; D. J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, pp. 581 -582; For a different set of factors, consider 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. 233 (referring to the extremely serious violations of international humanitarian law the detained persons are charged with; the lack of support of a domestic framework; the sentences to be expected if an accused is convicted and the fact that certain authorities have been prepared to harbour indictees as proof of the unique circumstances under which the ICTY operates).

57 D.D. NTANDA NSEREKO, Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, in «Criminal Law Forum», Vol. 5, 1994, p. 532 (it remains unclear what is the source of this justification; it seems that this justification derives from an intuitive reasoning and not from inside information). Consider also M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1132 (“if public reaction in some way affected either the drafting of the original Rule 65 (B) or its subsequent interpretation, it did not so in a way that conforms to internationally accepted standards. Rather than allowing for case-by-case determinations, which would permit detention in a narrow set of circumstances, detention was presumed for all accused.”)

58 M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1132-1133 (arguing that “financial dependence and the wish to be re-elected may entice members of the judiciary to act in a manner that they anticipate will be positively perceived by the U.N. organs.” Consequently, Judges may be inclined to deny requests for provisional release (to avoid interferences with justice or the commission of further offences) and “succumb to external pressures” where they “find that they are navigating veritable landmines in determining the pre-trial fate of certain accused individuals”).
On a more practical level, during the early days of the ICTY, the number of accused persons before the ICTY was low. Consequently, there were no considerable delays during which the accused were detained. 

Besides, the Dutch government opposed the release of accused persons on its own territory.

II.2. The ad hoc tribunals and the SCSL: release as neither the rule nor the exception

§ Removal of the ‘exceptional circumstances’ requirement

Rule 65 ICTY RPE was amended in 1999 during the twenty-first plenary session. There are divergent views regarding the rationale behind this rule amendment. According to the Annual Report, the amendment was made “to reflect the circumstances in which the International Tribunal found itself (long delays, together with the number of detainees in custody), while continuing to protect the interests of the International Tribunal.”

According to Judge Robinson, the Rule was changed “because the original [r]ule, in imposing a burden on the accused to establish exceptional circumstances to justify his release, came close to a system of mandatory detention.” The rule change was intended to bring the provision in line with “customary international law as reflected in the international human rights instruments.”


61 Rule 65 as amended during the 21st plenary session, 7 December 1999 (IT32/17.Rev.17).


64 Ibid., par. 2. This view was shared by ICTR Trial Chamber III where it noted that “[the] ICTY [has] indeed amended its Rule 65 regarding provisional release in order to harmonize its provisions with internationally recognized standards” (emphasis added). See ICTR, Decision on Defence Motion for Release, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 24. For a similar view, consider R. SZNAIDER, Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 111.
Judge WALD and MARTINEZ disagree and provide a different narrative, holding that the rule was amended as a matter of practicality rather than necessity. 65 The amendment was “prompted in part by an investigation into the death of two defendants in the detention unity, [when] the judges became increasingly concerned about the depressive effects of lengthy pre-trial detention without regular contact with the Court.” 66 They add that “[t]he Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the ECHR approach in full, with a presumption in favour of release and automatic review of detention every 90 days.” 67

Ultimately, it seems that the rule-change was part of an exercise to liberalise the practice in cases where the defendant had voluntarily surrendered, following recommendations by the U.N. More precisely, an expert group indicated that the tribunal “may wish to consider a rule that would expand the ‘exceptional circumstances’ possibility for provisional release to avoid unduly long pre-trial detention of an accused who had voluntary surrendered following public notice of his indictment.” “This might facilitate the provisional release of some indictees and in such cases reduce unduly long pre-trial detentions.” 68 Importantly, in the experts’ opinion, this more liberal approach should be combined with the possibility of the accused person to waive his or her right to be tried in person. 69 The Working Group report referred to concerns that had been raised concerning the ‘generally recognised right to a speedy trial’. They also raised the more practical concern that the detention facilities in Arusha and The Hague might become overtaxed. 70 The ICTY commented on this recommendation by stating that the Rule

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67 Ibid., p. 233.


69 Ibid., par. 54. Consequently, at the provisional release hearing, the Trial Chamber may be in a better position to grant provisional release where (1) the accused had freely and knowingly consented to trial in absentia, and (2) the personal circumstances of the accused, including character, and integrity as well as formalised state guarantees for cooperation and for his appearance, bail and other proper conditions, were such that the likelihood of him not appearing at trial was minimal. If the accused consequently fails to appear for trial, his prosecution could nevertheless go forward to a conclusion, as the accused previously agreed to that.

70 Ibid. par 51.
65 (B) had already been amended and the ‘exceptional circumstances’ criterion deleted. The tribunal and the OTP were more critical of the proposal that provisionally released persons waive their right to be present. The accused’s presence at large in the former Yugoslavia may, according to the OTP, have an impact on the Prosecution’s ability to maintain witness cooperation. In the end, the Working Group’s recommendation was not implemented. Nevertheless, other amendments to the RPE were adopted to help reduce the length of pre-trial detention, including the introduction of a Pre-Trial Judge and the recognition of a role for senior legal officers in pre-trial management. Remarkably, the conclusions mention that the amendment of the rule may have led to an increase of the number of voluntary surrenders.

The corresponding ICTR Rule 65 (B) was amended considerably later, in 2003. Since the ICTR did not follow the ICTY amendment, several accused argued that the ICTR should apply the ICTY Rule 65 (B), as this amendment was in accordance with internationally recognised standards on the rights of the accused that the tribunal is bound to respect. However, such arguments have been uniformly rejected. The ICTR kept defending the provision as “an appropriate rule governing provisional release, especially in light of the

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72 Ibid., par. 7.
73 The proposal was discussed during the plenary meeting of July 2000, at which occasion a policy paper on the issue was circulated, but no amendment to the Rules was agreed upon. See UNITED NATIONS, Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002, par. 17.
74 Ibid., par 18. See Article 65ter ICTY RPE and Rule 65ter (D) (i) ICTY RPE on the role of the senior legal officers.
75 Ibid., par 20. The report notes that in 2001, eight indictees surrendered themselves to the custody of the Tribunal.
76 Rule 65 (B), as amended at the thirteenth plenary session of 27 May 2003; Consider also Rule 65 (B) SCSL RPE, as adopted at the plenary meeting of judges on 7 March 2003.
77 ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 4-5 (according to Article 14 ICTR Statute, the Judges adopt the ICTY RPE “with such changes as they deem necessary.” Consequently, the ICTY amendment of Rule 65 (B) could only be incorporated in the ICTR RPE if the Judges of the ICTR decide to do so, and to the extent they deem necessary); ICTR, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, Prosecutor v. Nahimana, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002, par. 10 – 11; ICTR, Defence Motion for Provisional Release of the Accused, Prosecutor v. Muhimana, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par 1 (a) and 5; ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, Prosecutor v. Ndayambaje, Case No. ICTR-98-42-T, T. Ch. II, 21 October 2002, par. 19 – 20; ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 25 – 27.
gravity of the charges.” The ICTR noted that even where the ‘exceptional circumstances’ requirement was removed from ICTY Rule 65, “provisional release continues to be the exception and not the rule” and that “the ICTY has generally denied provisional release, unless the accused demonstrated exceptional circumstances or similarly strong grounds for release.”

§ Provisional release following the amendment of Rule 65 (B)

When the amended Rule 65 (B) was first applied in the Kvočka case, the Trial Chamber clarified that the amended provision did not have the effect of establishing release as the norm and detention as the exception. This constituted the majority view which has been upheld in subsequent jurisprudence. The minority view was that, based on international human rights standards, detention should now be the exception de jure. Because of the lack of enforcement powers, however, detention de facto appears to be the rule. Later decisions confirmed that the effect of the amendment was that it neither made release the rule, nor that detention

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79 Ibid. par. 11.

80 ICTY, Decision on Motion by Momir Talić for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 17 (“it cannot be said that provisional release is now the rule rather than the exception”); ICTY, Decision on Motion for Provisional Release of Miroslav Kvočka, Prosecutor v. Kvočka, Case No. IT-98-30-PT, T. Ch., 2 February 2000, p. 2.


82 See e.g. ICTY, Decision Granting Provisional Release to Enver Hadžihanović, Prosecutor v. Hadžihanović, Case No. IT-01-47-PT, T. Ch. II, 19 December 2000, par. 7. Similarly, see ICTY, Decision Granting Provisional Release to Amir Kubura, Prosecutor v. Hadžihanović et al., Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 7; ICTY, Decision on Darko Mrđa’s Request for Provisional Release, Prosecutor v. Mrđa, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 29; ICTY, Decision on Momočilo Krajniškić’s Notice of Motion for Provisional Release, Prosecutor v. Krajniškić and Plavšić, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 12 (“Furthermore, the change in the rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants”). At the SCSL, this view is reflected in SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, Prosecutor v. Kontevo, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 38-39; and 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. 38-39. In these two cases, the Trial Chamber cited the decision in the Hadžihasanović case with approval but added that the Trial Chamber “wishes to insist on the fact that it is indispensable necessary to bear in mind its specificity as opposed to any other domestic tribunal or court; indeed, given the very serious mature of crimes which fall under its jurisdiction, certain procedural guarantees may require to be applied differently before it.” “It is the Chamber’s view that this would certainly be the case with regard to provisional release.”
remained the rule, but suggested that the focus should be on the particular circumstances of each individual case.83

One important exception should be mentioned. Some of the SCSL’s earlier decisions on bail held that deleting the ‘exceptional circumstances’ criterion created a regime whereby release was the rule and detention the exception. The consequence is a burden which is equally shared between the accused and the Prosecutor. As the eventual beneficiary of the provisional release, the accused bears the onus to satisfy the Chamber that he fulfils the conditions for provisional release. After this, the burden shifts to the Prosecutor to satisfy the Judge or Trial Chamber that the accused is, rather, not likely to fulfil the necessary conditions.84 Therefore, the Prosecutor has an ‘equally formidable burden’ to negate the facts advanced by the Defence and to prove that the requirements of Rule 65 (B) have not been met.85 Single Judge Itoe ultimately based such holding on the presumption of innocence, as enshrined in 17 (3) SCSL Statute.86 In Fofana, the Appeals Chamber rejected such holding and held that the burden “falls squarely on the accused.”87 In line with the ad hoc tribunals’ case law, the Appeals Chamber held that there is no presumption either way and that each case must be decided on its own merits.

The Prosecution asserted in the Šimić case that the amendment of Rule 65 (B) was ultra vires and, therefore, should be disregarded. Nevertheless, the Trial Chamber determined that the amendment was not inconsistent with any provision of the ICTY Statute and was consistent with “internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect.”88

84 SCSL, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, Prosecutor v. Brima, Case No. SCSL-03-06-PT, T. Ch., 22 July 2002, p. 9; SCSL, Fofana - Decision on Application for Bail Pursuant to Rule 65, Prosecutor v. Norman et al., T. Ch., 5 August 2004, par. 93.
85 Ibid., par. 95.
86 SCSL, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, Prosecutor v. Brima, Case No. SCSL-03-06-PT, T. Ch., 22 July 2002, p. 9.
87 SCSL, Fofana - Appeal against Decision Refusing Bail, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 41.
88 ICTY, Decision Miroslav Tadić’s Application for Provisional Release, Prosecutor v. Šimić et al., Case No, IT-95-9-PT, T. Ch., 4 April 2000, pp. 5-6.
Currently, there are five requirements to obtain provisional release which can be discerned: (1) the host state should be heard, as well as (2) the state or entity to which the person seeks to be released, (3) the Trial Chamber should be satisfied, on a balance of probabilities, that the person will appear for trial and (4) the Trial Chamber should be satisfied, on a balance of probabilities, that the person will not pose a danger to any victim, witness or other person when released. Finally, (5) there is an overarching requirement that the detention on remand be proportionate (nevertheless, this condition does not seem to be consistently applied). These material conditions will be discussed later on.

In practice, the amendment of Rule 65 (B) led to an upheaval in the tribunal’s provisional release practice and an important increase in the number of provisional releases granted. While the boost in requests for provisional release granted can, to some extent, be explained by the 1999 amendment, other factors are probably as (if not more) important in explaining the phenomenon. Without a doubt, the most important factor in explaining this increase are the stabilisation of the political situation in the territories of the former Yugoslavia and the better cooperation by these countries with the tribunal. Where cooperation improved, the chances that the accused would try to abscond during his or her release, diminished. Further proof that the amendment of Rule 65 (B) ICTY and the deletion of the ‘exceptional circumstances’ requirement is not the only factor explaining the increase of the number of provisional releases follows from the comparison with the respective ICTR ‘post-amendment’ amendment.

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89 This requirement was inserted in ICTY Rule 65 following an amendment adopted on 30 January 1995, during the fifth plenary session (U.N. Doc. IT/32/Rev.3).
90 Note that the notion of ‘Trial Chamber’ under Rule 65 (B) entails that also the Appeals Chamber may consider requests for provisional release pending appeal. Consider ICTY, Order of the Appeals Chamber on the Motion of the Appellant for a Provisional and Temporal Release, Prosecutor v. Dafić et al., Case No. IT-96-21, A. Ch., 19 February 1999 and the dissenting opinion of Judge Bennouna attached thereto.
91 See infra, Chapter 8, II, 2.6.
92 DAVIDSON notes that as of 2010, 35 defendants had been released pre-trial and 32 had been released during varying times after the commencement of the trial. See C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Reviews», Vol. 60, 2010, p. 36.
94 Ibid., p. 185.
practice. While ICTR Rule 65 (B) was also amended, this identical amendment did not have any impact on the number of provisional releases granted.95

The lack of any pre-trial release at the SCSL and the ICTR is remarkable. Interviews with practitioners of the ICTR and the SCSL highlighted a number of factors that may help explain this divergent practice. The most commonly referred to factor is the lack of voluntary surrenders to the tribunal.96 In this regard, many interviewees referred to the risk that if persons were released, they would go into hiding.97 While this is certainly a relevant consideration, this factor taken in isolation cannot suffice to explain the absence of any provisional release practice. In cases where accused persons voluntarily surrendered to the ICTR and requested provisional release, their applications were also refused.98

Staff interviewed considered the different context in which the tribunal operates to be equally important. Accused persons cannot readily return to their home countries, and they do not enjoy the support of states which agree to provide security in the case of provisional release, to drive them to the airport, fly them back and bear the costs of the provisional release etc., unlike the ICTY.99 Where the defendants at the ICTR are in exile from their home country,

95 Neither the ICTR nor the SCSL have ever granted provisional release.

96 Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 6 (“most of the people before this Tribunal were arrested from various countries after they fled from Rwanda. They did not voluntary surrender, except for one or two cases”); Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 5; Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8; Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 11.

97 Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 5; Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 7.

98 ICTR, Decision on Defence Request for Provisional Release, Prosecutor v. Kalimanzira, Case No. ICTR-05-88-1, T. Ch. I, 5 June 2007, par. 3 (while the accused person voluntary surrendered to the tribunal, the Trial Chamber argued that the accused had not demonstrated that he was fully aware of the seriousness of the charges at the moment of his arrest. In cases, the arrest warrant had been subjected to confidentiality and only made public during the initial appearance of the accused. This holding puts an insurmountable burden on the accused and is contrary the established case law of the ad hoc tribunals in that the fact that an arrest warrant was issued under seal cannot be held against the accused (infra, Chapter 8, II, 2.6.1.) It is relevant to underscore that this was the only factor considered by the Trial Chamber in concluding that it is was not convinced that the person would appear for trial and in turning down the application). Consider also ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008 (the Trial Chamber stated that the accused person had surrendered voluntarily and that in a similar contempt case before the ICTY, an accused had been granted provisional release. However, while the Trial Chamber considered that “the voluntary surrender of the Accused may be seen as an indication that he would not try to evade justice if provisionally released, it held that the Defence failed to provide supporting material to show that the Accused would appear for trial”). On the practice of sealed arrest warrants and its influence on provisional release applications, see infra, Chapter 8, II, 2.6.1.

99 Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 8 (in that regard, the interviewee notes that “[the nature of the conflict may dictate a lot of factors that may facilitate things like provisional release or make it more difficult which has nothing to do with the Judges and their approach”).
the accused before the ICTY are supported by governments and granted the necessary state guarantees. On one hand, there is no incentive for the Rwandan authorities to accept detainees of the former regime. On the other hand, however, there is likely a fear of retaliation that prevents the accused from seeking to be released to Rwanda. As far as the SCSL is concerned, the fact that the Court was situated in the country where the crimes were committed plays an important role in explaining why no bail was ever granted. In Sesay, the Court made reference to the fact that if the Trial Chamber grants bail, the person will be released in the same country where he is alleged to have committed the crimes that he has been indicted for.

Overall, it is the lack of countries willing to accept the person released and willing to offer the necessary state guarantees which seems to be a primary factor in explaining the divergent practice between the ICTY and the ICTR. The ICTR’s jurisprudence confirms the importance of this single factor, as will be explained below. In cases where the person seeks to be released to the host state (Tanzania) or other African states, logistical problems as well as financial constraints may play a role in the decision regarding their release. In this sense, the lack of resources at the disposal of African states and the state of their security systems may render any monitoring of provisionally released persons rather problematic. Responsibilities including observing the accused, meeting with the police, transportation from and to the airport, etc. put a substantial burden on any state that agrees to receive the

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100 Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 7.
102 SCSL, Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 26 (“What I will say is that the fact that this Tribunal took place in the country, made getting bail illusory. […] There is no right to bail in Sierra Leone, simply because we are in the country where the war happened”).
104 Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 6; Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 10; Interview with Mr. Gershon Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11; Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 6; Interview with Peter Robinson, Defence Counsel ICTR, Arusha, 22 May 2008, p. 7.
105 See infra, Chapter 8, II.2.6.1.
107 Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 8; Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.
108 Interview with a Legal Officer of the ICTR, ICTR-38, Arusha, 5 June 2008, pp. 9-10 (noting that fewer resources are available and states are less accustomed to the rule of law).
accused.\textsuperscript{109} Such constraints also apply to the Special Court. The SCSL Appeals Chamber emphasised the reality on the ground, including the overall security situation in these countries, and the lack of police facilities to enforce and monitor conditions of bail.\textsuperscript{110} Since it is difficult for African states to guarantee that a person will return for trial, they may be reluctant to authorise provisional release.\textsuperscript{111} For instance, the Sierra Leonean government noted that it is not in a position to prevent an accused from fleeing or hiding.\textsuperscript{112} In some instances, there may not even be a functioning state.\textsuperscript{113} Moreover, legitimate concerns may exist about the accused’s security when released.\textsuperscript{114}

More disturbing are the references made by one Judge of the ICTR and one legal officer of the ICTR Chambers as to the possible impact of political considerations on provisional release applications.\textsuperscript{115} In a similar vein, most defence counsels before the ICTR held that the reasons for the divergent practice were primarily political.\textsuperscript{116} Some defence counsels speak in this


\textsuperscript{110} SCSL, Fofana - Appeal Against Decision Refusing Bail, \textit{Prosecutor v. Norman et al.}, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 31. Consider also Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (“What guarantee would the Court have had to go after them if they decided to jump bail?”).

\textsuperscript{111} Consider e.g. Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.


\textsuperscript{113} Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.

\textsuperscript{114} Interview with Judge Egorov, Arusha, 20 May 2008, p. 6; Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, p. 5; Interview with Mr. Philpot, Defence Counsel, ICTR-25, Arusha, 29 May 2008, p. 6 (with regard to the possibility of releasing the accused person in Tanzania, the interviewee notes that he would be safer in prison).

\textsuperscript{115} Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 7 (noting, where asked about the different provisional release practice at the ICTR and the ICTY, that “especially in Rwanda, the reaction was sometimes very emotional. There even has been some interruption of cooperation. This is not something I should take into account as a Judge: to consider the reactions of others, or if something will not be pleasant for Rwanda […] Still, I think it could play a role in the thinking of some Judges: “If I make such a decision, what will be the reaction of the countries in the region?”); Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5 (noting that “[t]he reasons that explain the differences and the disparities between the ICTY practice vis-à-vis provisional release at the ICTR have much more to do with political factors.” In addition, he notes that “[w]e all know that this institution does not function in a vacuum,” and that “I am not sure whether the Tribunal itself, in light of all of the pressures that are levied on the Tribunal, if the Tribunal itself is actually willing to take on the regime in Rwanda and argue the case for provisional release.” “So I think that there are political sensitivities that are incapacitating or debilitating the ability of the Tribunal to grant accused persons these rights.” “But I think that these sensitivities lead down to disadvantage for the accused, and you could actually say that they violate the rights of the accused.”)

\textsuperscript{116} Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 14 (“They will not grant [provisional release], because of persistent pressure from the government of Rwanda”); Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 10 (“The political consequences of allowing the current detainees to go free pending or during trial would be mountainous. The Rwandese government would throw a fit. And the Tribunal has enough trouble with that. When they have done things that the Rwandans have not liked in the past the Rwandese have simply stopped the flow of witnesses”). One defence counsel of the
regard of a “racist implementation of policy.” Although it is impossible to verify the claims that political considerations play a role in the Trial Chamber’s assessment of applications for provisional release, these claims are nevertheless a matter of concern. Where several interviewees referred to the domestic context and the fact that the serious nature of the alleged crimes would be an obstacle to release, such an argument must be rejected as it is not helpful in explaining discrepancies between the respective practices of the ICTY and the ICTR/SCSL (these tribunals deal with crimes of a similar gravity). Lastly, it should be noted that several defence counselors stated that they did not apply for provisional release where they had the expectation that such a request would not be granted. As evidenced by the Zigiranyirazo case, such a strategy may not always be in the defendant’s best interests. In this case, the Trial Chamber used the fact that the defendant never applied for provisional release to support the argument that the defendant may have contributed to the continued pre-trial detention himself.

§ Provisional release applications pending surrender

The procedural rules of the ad hoc tribunals do not provide the possibility of a suspect’s or accused person’s provisional release prior to his or her surrender to the tribunal. However, two instances may be noted in which accused persons remained at liberty in France, pending the ICTR Prosecutor’s request for the referral of these cases to France (Rule 11bis ICTR RPE). By not ordering their provisional detention, the French court relied on the accused}

SCSL argued that the insertion of a provision on bail in the SCSL RPE is solely to be explained on policy grounds. See Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (“What I will say about that is that that rule was put there for policy reasons. There was no way the Judges were going to grant bail to any of the accused persons”).

Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 10; Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 8 (referring to the incident where an accused was refused provisional release as well as transfer in custody to allow him to attend the funeral of his son).

Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 9; Interview with a Legal Officer of the ICTR, ICTR-36, Arusha, 4 June 2008, p. 5.

Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11 (“It appears to people that you do not need to apply for bail here because you will not get it. Many people seem to have that feeling. I do recall that in the first case that I was handling, we did discuss that with my client that we should apply for bail, but he also felt like, first of all, they will not grant it, and if they do grant it, where will they take me, will they take me to Rwanda? No, let me just stay here.”); Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 6. (“I have thought about it and I know I cannot apply it”); Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 7 (“We do not apply for release and as a practical matter, you cannot even construct a proposal because there is no place your client can be residing”).

ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, Prosecutor v. Zigiranyirazo, T. Ch. III, 18 June 2012, par. 38 (”there is no evidence that the Claimant ever applied for provisional release, pursuant to Rule 65, and in this sense he can be said to have contributed to his own continued pre-trial detention”).
persons’ “very solid guarantees of appearance in France” and their prior record of respecting their obligations during release.\textsuperscript{121}

The next section will examine the general principles underlying the procedural set-up of the pre-trial detention regime at the \textit{ad hoc} tribunals and the SCSL. They will be helpful in the further comparative analysis. These principles include the burden of proof, the standard of proof as well as the presence (or absence) of discretion.

\section*{II.2.1. Unfettered discretion to refuse release}

The wording of Rule 65 (B) (‘\textit{provisional release may be ordered}’) indicates that even where the conditions under Rule 65 (B) are fulfilled, the Trial Chamber retains the discretion to refuse provisional release.\textsuperscript{122} In general, the Judges hold an unfettered discretion to deny provisional release.\textsuperscript{123} Consequently, Rule 65 (B) does not exhaustively list the reasons why provisional release may be refused.\textsuperscript{124} In this regard, the \textit{ad hoc} tribunals (and the SCSL) adopt a \textit{bifurcated approach}.\textsuperscript{125} While the Trial Chamber will only grant provisional release where the requirements of Rule 65 (B) are satisfied, the Chamber maintains its discretion to refuse provisional release. As clarified by the case law, it is at the Chamber’s discretion to refuse the order where the conditions have been met but, it is not at their discretion to grant the order notwithstanding the non-fulfillment of one or more of the requirements.\textsuperscript{126} Since the removal of the ‘exceptional circumstances’ requirement, the \textit{ad hoc} tribunals have applied

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\textsuperscript{121} Decision on Request for Release, Re: Laurent Bucyibaruta, Case No. 2007/05293, Paris Court of Appeal, First Examining Chamber, 19 September 2007; Decision on Request for Release, Re: Wenceslas Munyenyuka, Case No. 2007/05357, Paris Court of Appeal, First Examining Chamber, 19 September 2007.

\textsuperscript{122} Overall, the negative formulation of Rule 65 (B) (provisional release cannot be ordered \textit{unless} a number of requirements are fulfilled) confirms the existence of discretion.

\textsuperscript{123} ICTY, Decision on Defence Motion for Provisional Release, \textit{Prosecutor v. Kovačević}, Case No. IT-97-24, T. Ch., 20 January 2000, par. 7.

\textsuperscript{124} See e.g. ICTY, Order on Provisional Release of Jadranko Prlić, \textit{Prosecutor v. Prlić et al.}, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 18.


\textsuperscript{126} ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, \textit{Prosecutor v. Brđanin et al.}, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 22. As Noted by DEFRANK, the wording (‘in general’) seems to leave open the door for the Trial Chamber to grant provisional release where the other requirements have not been met: M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, p. 1438. In this regard, the Trial Chamber in \textit{Brđanin} argued, in relation to the length of pre-trial detention, that “it is difficult to envisage \textit{likely} circumstances where provisional releases would be granted to an accused by reason of the likely length of his pre-trial detention where he has been unable to establish that he will appear for trial.” See \textit{ibid.}, par. 25.
their discretion to allow the denial of a provisional release request where the other requirements of Rule 65 (B) have been met.

For example, provisional release may be refused in situations where the accused showed obstructive behaviour other than absconding or interfering with witnesses (e.g. the destruction of documentary evidence, the effacement of crime traces, conspiring with co-accused who remain at large or where there are serious reasons to believe that the accused would commit further serious offences). 127

Judge Hunt argued that while the burden of proof is on the accused to prove that he or she will appear for trial and that he or she will not interfere with victims, witnesses or other persons, 128 the burden shifts once the accused has satisfied the Trial Chamber. There is no additional onus on the accused to persuade the Trial Chamber to exercise its discretion in favour of granting a provisional release. 129 The onus of proof regarding the Trial Chamber’s exercise of discretion under Rule 65 (B) is on the Prosecutor. As Hunt argued, such an approach would be in conformity with the ECtHR’s jurisprudence, preventing the reinstatement of an ‘exceptional circumstances’ requirement by requiring the accused to address all possible unidentified factors to persuade the Trial Chamber to use its discretion to grant a motion of provisional release. While this approach is followed by most jurisprudence, 130 some Trial Chambers have considered the discretionary element to be one which enables release rather than one that prohibits it. 131

127 ICTY, Order on Motion for Provisional Release, Prosecutor v. Ademi, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 22; ICTY, Order on Miodrag Jokić Motion for Provisional Release, Prosecutor v. Jokić, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 21; ICTY, Order on Provisional Release of Jadranko Prlić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 18. Consider also ICTY, Decision on Provisional Release, Prosecutor v. Šainović et al., Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 74 (noting that in light of the presumption of innocence “some care would have to be exercised to ensure that there was at least a real prospect that such conspiracy would occur, rather than a mere suspicion that it may occur”).

128 See the discussion infra, Chapter 8, II.2.2.

129 ICTY, Decision on Provisional Release, Prosecutor v. Šainović et al., Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 82.

130 ICTY, Order on Miodrag Jokić Motion for Provisional Release, Prosecutor v. Jokić, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 21 (“a Trial Chamber will still retain a discretion not to grant provisional release”).

131 See e.g. ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Mlečanić, Case No. IT-98-29/1-PT, T. Ch. II, 13 July 2005, par. 4 (“This Trial Chamber considers that even if the Accused fully discharges his burden in relation to each element, he must then satisfy the Chamber having regard to all the circumstances, that it should exercise its discretion to order provisional release.” Note that the Trial Chamber refers in this regard to the holding by the Trial Chamber in the Bralić and Čuljić Decision of 25 July 2000, which does not seem to support this reasoning); ICTY, Decision on the Motion for Provisional Release of the
Overall, there is no exhaustive list detailing what factors may lead the Trial Chamber to decline the order of provisional release where the other requirements are met. In that regard, Rule 65 (B) is “impermissibly vague”. 132 FAIRLIE notes that “the judges have truly made themselves the unrestrained masters of an accused person’s destiny by ‘failing to give direction as to how to exercise [their] discretion, so that this exercise may be controlled.’” 133

II.2.2. The burden of proof rests with the accused

The question of who carries the burden of proof is closely related to the question of whether or not detention is the exception or the rule. 134 However, the question has been raised as to whether or not a burden of proof should be allocated, where Rule 65 (B) ICTY RPE makes provisional release dependant on the Trial Chamber being satisfied that certain requirements are fulfilled, without an indication as to what party should fulfil these requirements. However, such an idea was dismissed in the case law. 135 On one occasion, an ICTY Trial Chamber hinted to the importance of allocating the burden of proof, where it stated that it could not conduct its own investigations but, rather, that it should rely on the submissions made by the

Accessed Momir Talic, Prosecutor v. Brantnik et Talic, Case No. It-99-36-T, T. Ch. II, 20 September 2002, par. 22; ICTY, Decision on Vinko Pandarevic’s Application for Provisional Release, Prosecutor v. Pandurevic and Trbic, Case No. It-05-86-PT, T. Ch. II, 18 July 2005, par. 9 (“[i]t should be noted that by the terms of Rule 65 (B) it is a discretion to order provisional release, not a discretion to refuse to order provisional release”); ICTY, Decision Concerning Motion for Provisional Release of Milan Gvero, Prosecutor v. Tomic et al., Case No. It-04-80-PT, T. Ch II, 19 July 2005, par. 8 (“However, if the Trial Chamber is satisfied regarding these two preconditions [the conditions of Rule 65 (B)], the Chamber must then determine whether it should exercise its discretion to order release. Hence, if the Chamber is not satisfied that the discretion should be exercised, there is no order for release. It is not a discretion to refuse to order release, as the Prosecution submission suggests”); ICTY, Decision Concerning Motion for Provisional Release of Radivoje Miletic, Prosecutor v. Tomic et al., Case No. It-04-80-PT, T. Ch. II, 19 July 2005, par. 8. 136 M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1171.

132 Ibid., p. 1173.

133 Ibid., p. 1173.


135 ICTY, Decision on Momcilo Krajiljk’s Notice of Motion for Provisional Release, Prosecutor v. Krajiljrk and Plavlic, Case No. It-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 14 (however, Judge Robinson rejected the idea because “[i]f at the end of the day there is a balance in the evidence, for and against bail or provisional release, the only way the issue can be settled is on the basis of an appreciation as to whether the burden is on the Prosecutor or the Defence”); M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1137 - 1138 (the author rejects the idea where she holds that “[t]he adversarial aspect inherent in the process that accompanies provisional release determinations is pervasive.” Such adversarial scheme, where the evidence is produced by the parties and witnesses are summoned by the parties on their own motions, necessitates a determination of the question of the allocation of the burden of proof).
parties. Where this argument holds true on a practical level, it is argued that Rule 98 ICTY, ICTR and SCSL RPE allows the Judges (also pre-trial) to order the parties to produce additional evidence or to summon witnesses *proprio motu*. Therefore, the argument that Rule 65 ICTY, ICTR and 65 SCSL RPE can be read as not allocating a burden of proof is not to be dismissed too lightly.

However, notwithstanding the amendment of Rule 65 (B) ICTY, ICTR and SCSL RPE, the practice reveals that the burden of proof clearly rests on the accused person. Besides, the burden is a *substantial* one, in light of the tribunal’s jurisdictional and enforcement limitations, including the need to rely on local or international authorities to monitor the movements and conduct of the accused and to effect its arrest warrants. As the Trial Chamber stated in Brđanin, “placing the burden of proof on the applicant for provisional release to prove these two matters is justified by the absence of any power in the Tribunal to execute its own arrest warrants. […] [T]he Tribunal is dependent upon local authorities and

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137 See e.g. ICTY, Decision on Mr. Perišić Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-T, T. Ch. I, 31 March 2010, par. 12; ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR65; A. Ch., 7 September 2000, p. 3; ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavčić*, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 13 (“[t]here is nothing in customary international law to prevent the placing of such a burden [on the accused] in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors add further weight to the placing of the burden of proof upon the accused”); SCSL, Fofana - Appeal against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 33 (“absent legislation to the contrary, the burden of proving a proposition in a court room rests upon the party obliged to assert it, and the language of Rule 65 (B) […] confirms that the burden lies squarely on the applicant”). Such view is also supported by the ICTY Manual on Developed practices: ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 65. As noted by FAIRLIE, the placing of such burden on the accused is consistent with the *actori incumbit probatio* principle, which entails that the party who asserts the fact, should provide proof thereof. See M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1139, referring to M. KAZAZI, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague – London – Boston, 1996, pp. 116 – 117.

international bodies to act on its behalf.”\textsuperscript{139} Thus, similar to the \textit{ad hoc} tribunals’ justifications for the ‘exceptional circumstances’ requirement, the jurisprudence refers to the unique circumstances under which the international criminal tribunals operate as allowing for a stricter approach to provisional release. Nevertheless, in Brđanin, the Trial Chamber underlined the fact that the substantial burden placed on the accused does not imply a re-introduction of the ‘exceptional circumstances’ requirement but is “simply an acceptance of the reality of the situation in which both the Tribunal and the applicants for provisional release find themselves.”\textsuperscript{140} Judge Robinson criticised this reversed burden. In his dissenting opinion to the Krajišnik case, he argued that the tribunal has given undue prominence to its lack of a police force, its inability to execute arrest warrants in states and its corresponding reliance on states for such execution.\textsuperscript{141} Judge Robinson added that “[a] judicial body cannot rely on peculiarities in its system to justify derogations from a rule of customary international law.”\textsuperscript{142}

While Judge Robinson accepted that certain modifications should be made where norms normally applied at the domestic level are transposed to the international level, he held that such modifications should be the result of \textit{norm interpretation} (in conformity with Article 31 of the VCLT).\textsuperscript{143} In most cases, modifications will result from an appropriate use of the teleological and contextual methods of interpretation.\textsuperscript{144} He concluded that there is no legal basis in international human rights treaties for a different interpretation at the municipal or the international level. Besides, there is no provision in the Statute of the ICTY for a derogation of these international human rights norms, which are customary in nature. As mentioned earlier, Judge Robinson argued that the purpose of the amendment of Rule 65 (B) ICTY RPE and the deletion of the ‘exceptional circumstances’ requirement was to bring the rule in line with international human rights law.\textsuperscript{145} Consequently, he held that “[t]he history of the amendment does not support any interpretation of the Rule as imposing a burden on the

\textsuperscript{139} ICTY, Decision on Motion by Momir Talić for Provisional Release, \textit{Prosecutor v. Brđanin et al.}, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 18.

\textsuperscript{140} ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, \textit{Prosecutor v. Brđanin et al.}, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18.

\textsuperscript{141} ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, \textit{Prosecutor v. Krajišnik and Pavičić}, Case No. IT-00-39 & 40-PT, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 11.

\textsuperscript{142} \textit{Ibid.}, par. 11.

\textsuperscript{143} \textit{Ibid.}, par. 10 (“it is the interpretative function that must yield these modifications”).

\textsuperscript{144} \textit{Ibid.}, par. 10.

\textsuperscript{145} See supra, Chapter 8, II.2.
accused to prove the matters set out therein, because that would reflect the exceptional character of provisional release, which [...] was changed in November 1999. Nevertheless, one could argue that a plain reading of the wording of the provision unveils that the burden is on the accused. Otherwise, the formulation would state that the Prosecutor must satisfy the Trial Chamber that the accused will not return for trial and that he or she will pose a danger to any victim, witness or other person.

Whether shifting the burden of proof to the accused person is permissible under international human rights norms is doubtful. In the aforementioned Ilijkov case, the ECtHR held that:

“[s]hifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is permissible in exhaustively enumerated and strictly defined cases.”

In the Bykov case, the Grand Chamber of the ECtHR held even more strongly:

“[i]n this connection, the Court reiterates that the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release.”

The presumption of innocence arguably requires that no burden be incumbent on the accused to prove that they do not pose a risk of absconding and of interfering with victims, witnesses and other persons.

146 Ibid., par. 17-18. Judge Robinson clarified that this conclusion is limited to the proper interpretation of Rule 65 (B) as amended. He did not argue that in a system where detention is not mandatory, the burden can never be put on the accused that he satisfies the criteria for bail. He underscored that there are instances where the legislation of many countries impose such a burden on the accused where he is charged with very serious offences. However, the compatibility of such legislation with the jurisprudence of the ECtHR is doubtful.


149 As confirmed in ECtHR, Bykov v. Russia, Application No. 4378/02, Judgment (Grand Chamber) of 10 March 2009, par. 64.

§ Corresponding prosecutorial burden

Although the burden of proof is on the Defence, such a burden corresponds with some sort of ‘prosecutorial burden’, at least as far as the requirement that the accused will not pose a danger to victims, witnesses and other persons is concerned.\textsuperscript{151} Indeed, as noted by one ICTY Trial Chamber, the format of Rule 65 leads to a practical problem insofar that it puts the onus on the accused person to satisfy the Trial Chamber that he or she will appear for trial and will not pose a danger to any victim, witness or other person. “In the absence of any submission from the Prosecution setting out a basis indicative of the potential of such danger, it is difficult to see that a Trial Chamber could do other than conclude that the Accused will not pose such a danger.”\textsuperscript{152} The Chamber added that, since the Trial Chamber is not in a position to conduct an investigation but reliant on the material presented by the parties in view of the general adversarial nature of provisional release hearings, it would be far more satisfactory if the onus were placed upon the Prosecutor to show that the Accused would not appear for trial and would pose a danger. “There seems no reason, consistent with the presumption of innocence, why that should not be the order of things.”\textsuperscript{153} The Appeals Chamber in \textit{Haradinaj} also referred to this problem and held that the Chamber may demand the presence of at least some evidence that the accused person poses a danger, at which point the burden is on the Defence to refute it.\textsuperscript{154} This holding confirmed the Appeals Chamber’s earlier holding in the

\textsuperscript{151} In this regard, it was noted by one commentator that “it can be noted that, in disposing of a number of more recent requests for provisional release, each ICTY trial chamber has at one point or another implicitly assigned a prosecutorial burden of proof as regards the dangerousness prong [requirement that the person will not interfere with victims, witnesses or other persons] of the provisional release rule.” See M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1153.


\textsuperscript{153} Ibid., par. 12 (referring to the dissenting opinion of Judge Robinson). This decision followed a decision of the Appeals Chamber remanding the matter to the Trial Chamber for reconsideration. Notably, in its decision, the Appeals Chamber quashed the prior decision by the Trial Chamber where it found that “the Trial Chamber appears, in effect, to have switched the burden to the Prosecution to show that the Accused would pose a danger if released. In the putative absence of such information, the Trial Chamber appears to have assumed the lack of a danger posed by the Accused’s release. If the Trial Chamber found, as it must have done so here, that the Accused upon release will pose no danger to persons, then it must provide the reasons for reaching that finding.” See ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, \textit{Prosecutor v. Milić et al.}, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 11.

\textsuperscript{154} ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, \textit{Prosecutor v. Haradinaj et al.}, Case No. IT-04-64-AR65.1, A. Ch., 10 March 2006, par. 41.
Stanlič case that “the Prosecution has failed to provide any evidence showing that the Accused would represent a concrete risk of harm to victims and witnesses upon release.”

Consequently, the burden incumbent on the accused is to ‘make the bare assertion’ that he or she will not abscond and will not pose a danger to victims, witnesses or other persons. Once such assertion has been made by the Defence, the onus shifts to the Prosecutor to rebut this assertion. This ‘prosecutorial burden’ should be seen in light of the jurisprudence which requires a concrete danger to witnesses, victims or other persons. According to the Appeals Chamber, such an obligation on the Prosecutor does not entail a reversal of the burden of proof. Rather it is “the means by which the Prosecutor may rebut the evidence adduced by the accused in satisfaction of the burden placed upon him.”

Fairness concerns have been leveled against such a prosecutorial burden, particularly where it has not been uniformly applied and where, in the absence of a legal presumption, it results in “a guessing game for the prosecution as to whether it is required in a given case to put on evidence with regard to the asserted accused-based burden.” Besides, it has been argued that such a burden does not contribute to the efficiency of the proceedings, where the accused should be given the opportunity to respond to the Prosecutor’s accusations.

155 ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Granting Provisional Release, Prosecutor v. Tolimir et al., Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 27. Also ICTY Trial Chambers have routinely accepted such prosecutorial burden. Consider e.g. ICTY, Decision on Second Application for Provisional Release, Prosecutor v. Ljubičić, Case No. IT-00-41-PT, T. Ch., 26 July 2005, par. 26 (“Considering that no suggestion has been made that the Accused has interfered with the administration of justice since the Indictment was confirmed against him, the Prosecution’s suggestion that, if released, the Accused may pose a danger to witnesses and victims is insufficiently supported by the evidence. No concrete danger has been identified”); ICTY, Decision on Second Application for Provisional Release, Prosecutor v. Milićinović, Case No. IT-99-37-PT, T. Ch. III, 14 April 2005, par. 24.


157 See infra, Chapter 8, II.2.6.2.

158 ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004, par. 28.


160 Ibid., p. 1150, 1155, 1158. It should be noted that there is no obligation for the Trial Chamber to organise an oral hearing before deciding on a request for provisional release. See ICTY, Decision on Ljube Bosković’s Interlocutory Appeal on Second Motion for Provisional Release, Prosecutor v. Bosković and Tatčulovički, Case No. IT-04-82-AR65.3, A. Ch., 28 August 2006, par. 12; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, Prosecutor v. Rasević and Todović, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, par. 29.
GAYNOR has noted that putting the onus on the Defence is ‘unusual’ in criminal proceedings, but “[i]t is even rarer to require him to prove that a future event is likely to occur or, trickier still, not to occur.” Indeed, Rule 65 (B) ICTY, ICTR and SCSL RPE requires the accused to prove a negative, to prove that he or she will not abscond and will not pose a danger to any victim, witness or other person. Nevertheless, while it has been held historically that it is more difficult to prove a negative, the idea that the burden should always be on the party making an affirmative allegation has been rejected. In that regard, FAIRLIE refers to the writing of SAUNDERS who claims that there is no inherent difficulty in proving negative statements. Rather, difficulties arise from the nature of the proposition that needs to be proven and whether they are existential or universal propositions (the former refers to some individual or entity while the latter refers to every individual or entity in the universe). To establish an existential proposition, only information related to one entity or individual should be provided, while large (unquantified) amounts of information (regarding all individuals or entities) are necessary to establish a universal proposition.

Consequently, while there is no problem with the accused having to prove a negative proposition, the same cannot be said about requiring the accused to prove that a future event will not occur. As FAIRLIE states, the accused is required to establish “that he will not likely do anything that may harm any person if released.” Corresponding to such an unquantifiable burden of proof is a prosecutorial burden requiring “the demonstration that an accused will likely do something that will endanger someone.” This latter burden only

164 Ibid., pp. 281, 288.
165 Ibid., p. 281.
It is difficult to see how the accused are to satisfy this burden, in the absence of concrete indications of concrete submissions by the Prosecution.169

II.2.3. Standard of proof

It follows from the wording of Rule 65 (B) ICTY, ICTR and SCSL that the Trial Chamber may only grant provisional release where it is satisfied that the accused will appear for trial, and if released will not pose a danger to any victim, witness or other person.170 Although the provision does not clearly set forth the standard of proof that is required, this provision has uniformly been understood as implying a ‘balance of probabilities’ standard (that more probably than not what is asserted is true).171 However, in the Šainović and Ojdanić case, the Prosecution argued that the standard should be higher and the burden of proof incumbent on the accused should be that there is no real risk that he or she will fail to appear for trial or pose any danger to victims or witnesses.172 While the issue was not addressed in the Appeals Chamber’s decision, it was addressed by Judge Hunt in his dissenting opinion attached to it. He rejected the idea of a ‘no real risk’ burden and concluded that there is no intermediate standard between ‘preponderance of probabilities’ and the ‘beyond reasonable doubt’ standard.173 Previous case law of the ICTY, including a decision in the Brđanin et al. case, referred to the substantial burden of proof that rests on the accused to satisfy the court that he

168 Ibid., p. 1143.
169 Ibid., p. 1144 (FAIRLIE notes that “[p]resumably, an accused can put forth general evidence of a good character and peaceful nature, but it’s fair to question how much weight will be given to such assertions made by an accused war criminal and those close to him”).
170 Rule 65 (B) ICTY, ICTR and SCSL RPE (emphasis added).
171 See e.g. ICTY, Decision on Mr. Perišić Motion for Provisional Release, Prosecutor v. Perišić, Case No. IT-04-81-T, T. Ch. I, 31 March 2010, par. 12; ICTY, Decision on Stojan Župljanin’s Motion for Provisional Release, Prosecutor v. Štanišić and Župljanin, Case No. IT-08-91-PT, T. Ch. III, 30 June 2009, par. 5; ICTY, Decision on Motion for Provisional Release, Prosecutor v. Halilović, Case No. IT-01-48-T, T Ch. I, Section A, 1 September 2005, p. 6; ICTY, Decision on Savo Todović’s Application for Provisional Release, Prosecutor v. Rašić and Todović, Case No. IT-97-25/1-PT, T. Ch., 22 July 2005, par. 8; ICTY, Decision on Vinko Pandurević’s Application for Provisional Release, Prosecutor v. Pandurević and Trčić, Case No. IT-05-86-PT, T. Ch. II, 18 July 2005, par. 9; ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Mladenović, Case No. IT-08-29/1-PT, T. Ch. II, 13 July 2005, par. 4; ICTY, Decision on Momčilo Perišić’s Motion for Provisional Release, Prosecutor v. Perišić, Case No. IT-04-81-PT, T. Ch., 9 June 2005, p. 2; ICTY, Order on Provisional Release of Valentin Čorić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 14. Consider also ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, Prosecutor v. Krajišnik and Pavičić, Case No. IT-00-39 & 40-PT, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 30.
172 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Ojdanić, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 27.
173 Ibid., par. 29.
or she will appear for trial. Nevertheless, according to Judge Hunt, this only refers to the difficulties that the accused will have, given the specific context in which the tribunal operates. Judge Shahabuddeen indicated in his separate opinion to the Appeals Chamber’s decision that the burden of proof should be higher than the ‘balance of probabilities’. He drew inspiration from the intermediate ‘clear and convincing evidence’ standard which is applied in the United States as an intermediate standard between the ‘preponderance of probabilities’ and the ‘beyond reasonable doubt’ standard. In his opinion, while the presumption of innocence should be taken into consideration, attention should also be given to the particular circumstances of the tribunal, including its inability to execute its own arrest warrants. He concluded that the appropriate test is to produce substantial grounds to the Trial Chamber to make it believe that the accused would in fact appear for trial and, if released, would not pose a danger to any witness, victim or other person.

While such a heightened burden was rightly rejected by the subsequent case law, there are some intriguing examples to the contrary. In one decision, the Appeals Chamber seems to have applied yet another standard of proof by requiring ‘a convincing showing’ that the accused, if released, would appear for trial and would not pose a danger to any victim, witness or other person. Such a standard closely resembles the standard proposed by Judge Shahabuddeen. Similarly, a string of decisions stemming from ICTY Trial Chamber II interprets Rule 65 (B) as requiring a ‘clear and strong case’.

174 In Brđanin, the Trial Chamber underlined that the circumstances “place a substantial burden on any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released.” Rather than such holding being a re-introduction of the requirement that exceptional circumstances be established, it is simply an acceptance of the situation the Tribunal and the applicants are in. See, ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18. Consider also ICTY, Decision on Motion by Momir Talić for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36-AR65, A. Ch., 30 October 2002, par. 18. Note that Judge Hunt was the Presiding Judge of Trial Chamber II which issued the provisional release decision in the Brđanin et al. case.

175 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Ojdanić, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 30. Note that Judge Hunt was the Presiding Judge of Trial Chamber II which issued the provisional release decision in the Brđanin et al. case.

176 Ibid., Separate Opinion of Judge Shahabuddeen, par. 17 and following.

177 Ibid., par. 41.

178 ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR651, A. Ch., 10 March 2006, par. 26.

179 ICTY, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, Prosecutor v. Limaj et al., Case No. IT-03-66-T, T. Ch. II, 26 October 2005, par. 8 and footnotes (explicitly referring to the Separate Opinion of Judge Shahabuddeen mentioned above); ICTY, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, Prosecutor v. Brđanin and Tarčulovski, Case No. IT-04-82-PT, T. Ch
different standards of proof lead to an undesirable unpredictability as to the exact standard of proof that is to be met.

It should equally be asked what the standard of proof is for the ‘corresponding prosecutorial burden’ that was established earlier. On one occasion, the Trial Chamber hinted towards the applicable standard where it held that the standard “must not be set too high; else it would never be met.” Such a vague position does not allow for a clear establishment of the required standard of proof. There is concern that such a standard is lower than the corresponding onus on the accused, thus decreasing the value of such a corresponding prosecutorial burden.

II.2.4. General principle of proportionality

A considerable string of cases examined the proportionality of continued detention in the assessment of applications for provisional release. It was concluded in Chapter 6 that a principle of proportionality applies to and delimits all coercive measures imposed, whether

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181 ICTY, Decision concerning Brahimaj’s Motion, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 3 May 2006, par. 39.


Coercive measures are proportional only when they are (1) suitable, (2) necessary and where (3) their degree and scope remain in a reasonable relationship to the envisaged target. The provisional measures should at no time be capricious or excessive. A principle of subsidiarity applies and the more lenient measure must be applied where that would be sufficient.

From that point of view, it should be noted with concern that part of the jurisprudence does not contemplate the application of such a principle. Proof of the divergent views and the hesitation regarding the scope of the principle of proportionality can be found in Judge Hunt’s dissent in the Šainović et al. case. He argued that although some ‘ingredients’ of the proportionality test are relevant considerations in the application of the tribunal’s discretion under Rule 65 (B), its general application may be problematic. He argued that it is “unwise to introduce such a concept of “proportionality” as an additional matter, beyond the express requirements of Rule 65 (B), which “must” be taken into account under Rule 65 (B).”

Judge Hunt reminds that the ad hoc tribunals have substantially departed from ECtHR jurisprudence in relation to provisional release by recognising that it operates in a very different context at the ad hoc tribunals than in domestic states. In that sense, the terms of Rule 65 (B) already provide for the required balance between the public interest and respect for the presumption of innocence and the right to individual liberty. Nevertheless, the considerations of public interest, including the right to individual liberty, are relevant considerations in the Trial Chamber’s exercise of its discretion. Again, the peculiarities of the international criminal tribunals are relied upon to justify a further deviation from international human rights norms. While it may be argued that the drafting of Rule 65 (B) ICTY, ICTR and SCSL RPE reflects, on one hand, the balance between the right to individual liberty and the presumption of innocence and public interest considerations on the other, Judge Hunt’s dissent lacks any explanation as to why the peculiarities of the international criminal tribunals entail that the principle of proportionality may be dismissed in the international criminal context.

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184 See supra, Chapter 6, I.5.
185 ICTY, Decision on provisional Release, Prosecutor v. Šainović et al., Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 76.
186 Ibid., par. 76.
Furthermore, confusion persists regarding the scope of the principle of proportionality. It has been noted in the literature that such a principle forms part of the Trial Chamber’s discretionary power pursuant to Rule 65 (B) ICTY, ICTR and SCSL RPE.\(^{187}\) It was noted that “effectively, this scheme means that the requirement of proportionality […] first comes into play when the prerequisites for bail in Rule 65 (B) are met, but is not an overall prerequisite for the deprivation of liberty.”\(^{188}\) Such a proposition should be rejected. As discussed earlier, if the Trial Chamber’s discretionary power is limited to the discretion to refuse provisional release in a given case, the application of a principle of proportionality is limited to an assessment of whether provisional release should be rejected when the conditions of Rule 65 (B) have been fulfilled. This entails a limited and negative application of proportionality as an additional mechanism to deny provisional release in cases where provisional detention is considered proportionate.

The principle of proportionality can also not be put on the same level as the other requirements of Rule 65 (B), where these are conjunctive in nature. This would entail that three conditions would have to be fulfilled including the condition that detention would be disproportionate. Therefore, it is argued that the principle of proportionality should be considered an overarching principle instead. Such an interpretation is in line with the jurisprudence of the ICTY which did not envisage limiting the principle of proportionality in such a way but, rather, considered that “when interpreting Rule 65, the general principle of proportionality must be taken into account.”\(^{189}\)

II.2.5. Interlocutory appeals against provisional release decisions

In 1997, Rule 65 ICTY RPE was amended, adding the possibility to appeal provisional release decisions upon leave from a bench of three Judges of the Appeals Chamber and upon


\(^{189}\) Consider e.g. ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, Prosecutor v. Hadžihasanović et al., Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Order on Provisional Release of Jadranko Prlić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 15.
showing ‘serious cause’.  

Before this amendment, accused tried to appeal decisions on provisional release under Rule 72 (B) (ii) ICTY RPE (which provided for interlocutory appeals against preliminary motions upon leave by a bench). Nevertheless, the Appeals Chamber refused to entertain interlocutory appeals under the said provision. Rule 72 (B) (ii) ICTY RPE included a similar requirement of ‘serious cause’ as was included in the amended Rule 65 (D) ICTY RPE, and which the Appeals Chamber had been interpreted as encompassing:

“a serious cause, […] either […] a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or [the application] raise[s] issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision of the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber.”

In November, Rule 65 (D) ICTY RPE was amended a second time and the ‘serious cause’ requirement was replaced by a ‘good cause’ requirement. According to the Appeals Chamber, ‘good cause’ requires that the party seeking leave to appeal should satisfy the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision.


191 Consider e.g. ICTY, Decision on Application for Leave to Appeal (Provisional Release), Prosecutor v. Delalić, Case No. IT-96-21, A Bench of the A. Ch., 15 October 1996, par. 11; ICTY, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, Prosecutor v. Delalić, Case No. IT-96-21, A Bench of the A. Ch., 22 November 1996, par. 12 (the Bench of the Appeals Chamber stated that the absence of a right to appeal a decision on provisional release is not a violation of Article 14 (5) ICCPR (and Article 25 ICTY Statute) which only applies to appeals following conviction and sentence (par. 20-21)).

192 Rule 65 (D) ICTY RPE as amended during the fourteenth plenary session (U.N. Doc. IT/32/Rev.12, 12 November 1997). Compare with Rule 65 (D) ICTR RPE as amended during the fifth plenary session, 1 – 8 June 1998, introducing for the first time a possibility for interlocutory appeal against provisional release decisions.

193 ICTY, Decision on Application for Leave to Appeal, Prosecutor v. Brđanin and Talić, Case No. IT-99-36-AR65, A Bench of the A. Ch., 7 September 2000, p. 3; ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, Prosecutor v. Blagojević, Case No. IT-05-AR65, A Bench of the A. Ch., 18 April 2002, par. 3; ICTY, Decision on Application by Blagojević and Obernović for Leave to Appeal, Prosecutor v. Blagojević et al., Case No. IT-02-60-AR65.3 & 02-60-AR65.4, A Bench of the A. Ch., 16 January 2003, par. 8; ICTY, Decision Refusing Milutinović Leave to Appeal, Prosecutor v. Milutinović, Case No. IT-99-37-AR65.3, A Bench of the A. Ch., 3 July 2003, par. 3; ICTY, Decision on Fatmir Limaj’s Request for Provisional Release, Prosecutor v. Limaj et al., Case No. IT-03-66-AR65, A Bench of the A. Ch., 31 October 2003, par. 6-7 (holding that “[a] Trial Chamber “may have erred” when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case”). It suffices that the party seeking leave to appeal shows that the impugned decision is inconsistent with other decisions of the tribunal on the same issues, see ICTY, Decision on
Still, in most instances, leave to appeal the decision was denied.194 Applications for appeal should be filed within seven days of the decision. In July 1998, the provision was amended once again to provide that where a decision on provisional release was rendered orally, the appeal should be filed within seven days from the oral decision.195

Later on, the RPE saw yet another amendment of Rule 65 (D), which deleted the parties’ obligation to obtain leave to appeal a decision on motion for provisional release and provided such possibility as of right.196 According to the Annual Report, such an amendment was based “on a combination of judicial economy and expedition in a way that strengthens the rights of the accused.”197 The RPE of the SCSL, however, still provide for the requirement of obtaining leave in order to appeal decisions on provisional release. Leave is to be granted by a Single Judge rather than by a bench of Judges.198

The Trial Chamber’s decision on provisional release applications is discretionary in nature. Therefore, the accused is required to prove a discernable error where the Trial Chamber either (1) misdirected itself as to the principle to be applied, (2) misdirected itself as to the law

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195 Rule 65 (D) as amended during the fifteenth plenary session (U.N. Doc. IT/32/Rev.13, 9 – 10 July 1998); An exception is provided where the party challenging the decision was not present or represented when the oral decision was announced or where the Trial Chamber announced that a written decision will follow: Rule 65 (D) (i) and (ii) ICTY RPE. Compare Article 65 (D) ICTR RPE as amended during the twelfth plenary session, 5-6 July 2002.

196 Rule 65 (D) ICTY as amended at the thirty-second plenary session on 21 July 2005 (U.N. Doc. IT/32/Rev.36, 8 August 2005). A similar amendment to Rule 65 (D) ICTR RPE was adopted during the sixteenth plenary session, 7 July 2006.


198 Rule 65 (I) SCSL RPE.
which is relevant for the exercise of discretion, (3) gave weight to extraneous or irrelevant considerations or (4) failed to give weight or sufficient weight to relevant considerations, (5) made an error as to the facts upon which it has exercised its discretion or (6) rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly. 199

II.2.6. Material conditions for release

In the subsequent paragraphs, an overview will be provided of the most important factors that the ad hoc tribunals and the SCSL take into consideration in their assessment of the fulfillment of the two material conditions provided for under Rule 65 (B). At the beginning, it should be noted that decisions on provisional release are fact-intensive. Consequently, rather than trying to outline all potentially relevant factors in the consideration of these material conditions, the emphasis will be on the most important factors which can be discerned in the tribunals’ practice. No exhaustiveness is claimed.

In general, the Trial Chamber is not obligated to indicate all possible factors a Trial Chamber can take into account in its decision as to whether it is satisfied or not the person will appear for trial and will not interfere with witnesses, victims or other persons. However, the Trial Chamber should indicate all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision. 200 The Trial Chamber should

199 See, e.g. (among many authorities) ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.2, 9 March 2006, par. 16; ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, Prosecutor v. Štabo et al., A. Ch., 30 June 2006, par. 8; ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, Prosecutor v. Milić et al., Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, pp. 2-3.

200 See e.g. ICTY, Decision on Provisional Release, Prosecutor v. Štainlů and Žďaňský, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6; ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 8; ICTY, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, Prosecutor v. Stanišić and Šmatarić, A. Ch., 26 June 2008, par. 35; ICTY, Decision on the Accused Stojić’s Motion for Provisional Release, Prosecutor v. Prlić et al., Case No. IT-00-74-T, T. Ch. III, 17 July 2008, par. 5; ICTY, Decision on Prosecution’s Appeal From Décision relative à la demande de mise en liberté provisoire de l’accusé Stojić, Dated 8 April 2008, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.8, A. Ch., 29 April 2008, par. 9; ICTY, Decision on “Prosecution’s Appeal from Décision relative à la Demande de mise en liberté provisoire de l’Accusé Petković”, Case No. IT-04-74-AR65.8, A. Ch., 21 April 2004, par. 7. FAIRLIE is critical of such appellate culture “that calls the Trial chambers to draft overly inclusive ‘kitchen-sink’ decisions and for parties to raise an inexhaustible array of arguments.” There need to be cause to include certain factors in a Trial Chamber’s decision. Nevertheless, the Appeals Chamber held that failure to raise relevant factors may give raise to the consideration that such factors have not been considered.
give reasons for its decision on these factors. What the relevant considerations are, the weight
to be given to individual factors as well as the relevance of these factors is decided on a case-
by-case basis.201 Such a requirement follows from the obligation to render a reasoned opinion,
which ultimately derives from the fair trial guarantee.202 Jurisprudence has underlined that
attention should not only be given to circumstances as they exist at the moment when the
Trial Chamber renders its decision but also to foreseeable future circumstances when the case
is due for trial and the accused is expected to return to the tribunal.203 It is for the Trial
Chamber to indicate all the factors that it relied upon and demonstrate, through a discussion of
all these relevant factors, how the accused met or failed to meet his burden of proof that he
would appear for trial and that he would not pose a danger to victims, witnesses or other
persons.204

II.2.6.1. Whether the accused, if released, will appear for trial

One issue that all international(ised) tribunals consider in their assessment of a request for
release and the necessity of continued detention of the accused is the risk of flight and the
question of whether the accused, if released, will re-appear for trial.205 Such a factor
corresponds with the “genuine requirement of public interest” recognised by the ECHR, that
if the person will not appear for trial, continued detention is permissible.206 Also, the HRC

See M. FAIRLIE, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International
Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2003, Vol. XIV, Antwerp,
201 Consider e.g. ICTY, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to
Present Additional Evidence Pursuant to Rule 115, Prosecutor v. Stanišić and Simatović, A. Ch., 26 June 2008,
par. 35.
202 As provided for in Article 21 (2) ICTY Statute; Article 20 (2) ICTR Statute and Article 17 (2) SCSL Statute.
See e.g. ICTY, Decision Refusing Milutinović Leave to Appeal, Prosecutor v. Milutinović, Case No. IT-99-37-
AR65.3, A. Ch., 3 July 2003, par. 22.
203 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Đanić, Case No. IT-99-37-AR65, A.
Ch., 30 October 2002, par. 7 and 11; ICTY, Decision on Prosecution’s Interlocutory Appeal of Mico Stanišić’s
Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 8; ICTY,
Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin
Provisional Release, Prosecutor v. Popović et al., A. Ch., 30 June 2006, par. 8; ICTY, Decision on Defence
Appeal against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, Prosecutor v.
Lukić and Lukić, Case No. IT-98-32/1-AR65.1, A. Ch., 16 April 2007, par. 7.
204 ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir
Borovčanin Provisional Release, Prosecutor v. Popović et al., A. Ch., 30 June 2006, par. 8; ICTY, Decision on
Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pasković’s Provisional Release,
Prosecutor v. Milić et al., Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 5; ICTY, Decision
on Provisional Release, Prosecutor v. Šainović and Đanić, Case No. IT-99-37-AR65, A. Ch., 30 October 2002,
par. 6.
205 See infra, Chapter 8, II.2.6.1; Chapter 8, II.3.5.1; Chapter 8, II.4.1-3.
206 See infra, Chapter 8, II.2.6.1.
accepted that pre-trial detention may be exceptionally ordered on the basis of the likelihood that the person would abscond.\textsuperscript{207} This risk of absconding increases where investigations continue and the evidence against the accused ‘gradually accumulates’.\textsuperscript{208}

Several factors have been taken into consideration by the \textit{ad hoc} tribunals and the SCSL in assessing this requirement for provisional release. Without claiming exhaustivity, a list of factors that the Trial Chamber usually takes into consideration when assessing this requirement is provided below. The factors which are only relevant with regard to provisional release during trial are not included. At the outset, it is noted that no suspect or accused provisionally released by the ICTY has absconded while on provisional release.\textsuperscript{209}

§ Circumstances of surrender

The \textit{voluntariness of the accused’s surrender} is the predominant factor when considering whether the accused will appear for trial. This implies that the accused surrendered out of free will and in the absence of compulsion.\textsuperscript{210} In almost all instances where provisional release was granted, the accused had surrendered voluntarily. That being said, this criterion alone is not sufficient for establishing that the accused will return for trial, meaning that other factors will be considered.

\begin{itemize}
\end{itemize}
The Haradinaj case, in which Prime Minister Haradinaj stepped down from office within hours of learning about an indictment against him, is a notorious example of a voluntary surrender. The Trial Chamber referred to this as “exemplary and stand[ing] out in positive contrast against the conduct of other accused of his rank in comparable circumstances.”

However, the voluntary nature of the surrender is not always clear. In the Šainović et al. case, the Appeals Chamber determined that the Trial Chamber committed an error in considering the surrender of Šainović and Ojdanić to be voluntary. According to the Appeals Chamber, the Trial Chamber should have considered statements that Šainović and Ojdanić made to the media that they would not surrender voluntarily. The Appeals Chamber also suggested that they should have considered the fact that both accused only surrendered in April 2002, after the adoption of the Law on Cooperation of the FR Yugoslavia, whereas they had been indicted in May 1999. However, the Defence argued that prior to the adoption of the law, it would not have been possible for them to surrender. In the case of Stanišić (Jovica) and Simatović, the accused were already detained prior to their surrender to the ICTY. In such cases, the Trial Chamber took other evidence into consideration on efforts to be surrendered to the tribunal. In casu, the Trial Chamber, among others, took into consideration that the accused had requested to be granted release to have the possibility to surrender to the ICTY. In Stanišić (Mićo), the Appeals Chamber found that the Trial Chamber had not erred in its determination that the accused had voluntarily surrendered because the accused’s surrender was conditional upon a governmental guarantee to support his future application for provisional release. In cases where surrender is contingent on the fulfilment of certain conditions, this does not go to the factual determination of the voluntariness of the surrender, but to the weight to be given to the surrender.

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211 ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 30-33.
212 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Ojdanić, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 10.
213 Ibid., par. 10.
216 Ibid., par. 14; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević’s Application for Provisional Release, Prosecutor v. Pandurević and Trbić, A. Ch., 3 October 2005, par. 8.
In *Brdjanin*, the Trial Chamber was confronted with the situation where the original indictment had been issued under seal. The Chamber held that it “is an unfortunate consequence of the use of sealed indictments[,]… it cannot be assumed one way or the other that, had he been given that opportunity, Brdjanin would have taken or rejected it.”

The Trial Chamber in *Krajišnik* clarified that “[t]he Trial Chamber considers this to be a neutral factor which does not lend support to the contentions of either side. It does not permit the accused to rely on it in support of his application on the fact that he has surrendered. On the other hand, it does not permit the Prosecution to claim that he was evading arrest.” Where an indictment was issued under seal, evidence may be advanced that seeks to demonstrate that the accused would have surrendered voluntarily if he knew about the indictment.

§ Absence of police force

The absence of a police force of the tribunal adds another obstacle to the Defence to satisfy the Trial Chamber that the accused person or suspect will appear. In *Brdjanin*, the Trial Chamber underlined that the absence of a police force and the need to rely on national authorities or international bodies to effectuate arrests “place a substantial burden on any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released.” Rather than re-introducing the requirement that exceptional circumstances must be established, such a holding is simply an acceptance of the situation that the tribunal and the applicants are in.

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218 ICTY, Decision on Mormočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik* and Plavšić, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 20 (emphasis added). Judge Robinson exposed himself skepticismally about the neutrality of such factor where the Trial Chamber subsequently relied on the voluntariness of Mrs. Plasvić’ arrest to distinguish her case from Krajišnik’s (see *ibid.*, Dissenting Opinion of Judge Patrick Robinson, par. 36). Consider also ICTY, Decision on Savo Todović Application for Provisional Release, *Prosecutor v. Šašović* and Šešelj, Case No. IT-97-25/1, T. Ch. II, 22 July 2005, par. 20; SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004, par. 41 (where the accused did not know of the existence of an indictment against him, the Designated Judge held that the issue of voluntary surrender is not applicable to the present case); ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 30.


§ Personal guarantees

Personal guarantees are not given much value in practice, in light of the fact that where the accused faces a substantial sentence if convicted, there is a considerable incentive to abscond. Nevertheless, they are a relevant factor that the Trial Chamber should consider. In the Boskoski and Sarčulovski case, the Appeals Chamber did not find that the Trial Chamber had erred when it did not explicitly deal with Boskoski’s claim that he wanted to return to public life after the trial proceedings were over. While the accused claimed that considerable weight was given to comparable arguments made in the Haradinaj case, the Appeals Chamber noted that it was not satisfied that this factor could outweigh other factors and that these factors should be weighed in the circumstances of each case. Similarly, guarantees offered by family or friends have been considered to be “generally unpersuasive.” No Trial Chamber has accorded these guarantees much weight.

§ Governmental (state) guarantees

In light of the absence of their own enforcement mechanism or police mechanism, the ad hoc tribunals ascribe considerable weight to guarantees provided by the government to monitor the suspect or accused and to apprehend him or her in case of lack of voluntary surrender. As will be shown, it can safely be concluded that this factor has been elevated to a condition sine qua non for any provisional release. The most important element which is taken into consideration by the tribunal in its assessment of governmental guarantees is the state’s (or entity’s) history of cooperating with the tribunal. The reliability of state guarantees should not be assessed in general. Rather, the Trial Chamber should determine what would happen if

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221 ICTY, Decision on Momočilo Krajčinik’s Notice of Motion for Provisional Release, Prosecutor v. Krajčinik and Plavšić, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 17; ICTY, Decision on Motion by Radoslav Bardin for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 16 (“[i]t is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial”).

222 See e.g. ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Ojdanić, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6.


225 Consider e.g. ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, Prosecutor v. Brđanin et al., Case No. IT-99-36-T, T. Ch. II, 20 September 2002, p. 4 (where the Court emphasised that it attaches weight to the fact that the Law of Cooperation was passed by the FRY).
the state or authority were obliged to arrest the person concerned under its guarantee. While the general level of cooperation “does have some relevance” in such an assessment, it is not itself a fact in issue. Furthermore, the ad hoc tribunals recognised that the reliability of governmental guarantees, to some extent, depends on the vagaries of politics, power alliances, international pressure or even the likelihood of a future change of government.

Importantly, the failure to obtain such governmental guarantees has been a major factor in explaining the absence of provisional releases at the ICTR. The jurisprudence uniformly held that “it is advisable for the accused to provide guarantees from the relevant governmental authorities.” Nevertheless, both ad hoc tribunals have underlined that there is no prerequisite pursuant to Rule 65 (B) to provide a governmental guarantee ascertaining the appearance at trial. However, the same jurisprudence recognised that such a guarantee, if

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226 ICTY, Decision on Appeal against Refusal to Grant Provisional Release, Prosecutor v. Mrkić, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 11.
227 Ibid., par. 11 (the Appeals Chamber underscored that it is “both unnecessary and unwise to include in the Trial Chamber’s decision a separate finding concerning the general level of cooperation – unnecessary because any such finding can only be applicable to a particular point in time, and unwise because it could easily be misunderstood by the parties in relation to subsequent applications for provisional release”);
ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Čermak and Mrkić, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 32; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decisions Granting Provisional Release, Prosecutor v. Tolimir et al., Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 14.
228 ICTY, Decision on Appeal against Refusal to Grant Provisional Release, Prosecutor v. Mrkić, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 11.
229 Consider e.g. ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, Prosecutor v. Rukundo, Case No. ICTR-2001-70-1-T, T. Ch. II, 15 July 2004, par. 17–18.
231 See in particular ICTR, Decision on Mathieu Ngirumpatse’s Appeal against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Karembeu et al., Case No. ICTR-98-44-AR65, A. Ch., 7 April 2009, par. 11-12 (the Appeals Chamber holds that the Trial Chamber erred in stating that, as the host state is the guarantor of public safety and order on its territory, the host state is the only entity that can provide guarantees that the accused will not flee, as such effectively transforms the obtaining of governmental guarantees into a prerequisite for provisional release); ICTR, Decision on Defence Motion for Review of Provisional Measures, or Alternatively, for Provisional Release, Prosecutor v. Nshogoza, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008, par. 16. At the ICTY, consider ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, Prosecutor v. Blažojačić, Case No. IT-05-AR65, A Bench of the A. Ch., 18 April 2002, par. 7 (“There is not reference in Rule 65 (B), or elsewhere in Rule 65, to an obligation upon the accused, as a prerequisite to obtaining provisional release, to provide guarantees from that state, or from anyone else, that he will appear for trial. It is nevertheless usual, and it is certainly advisable, for an applicant for provisional release to provide such a guarantee from a governmental body, in order to satisfy the Trial Chamber that he will appear for trial. That is because the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory of the Former Yugoslavia in the event that he does not appear for trial, and it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf”); ICTY, Decision on Application by Dragan Jokić for Provisional Release, Prosecutor v. Blažojačić et al., Case No. IT-02-53-AR65, A. Ch., 28 May 2002, p. 2; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional
deemed credible, may carry considerable weight in support of an application. The absence of a state guarantee weighs in heavily against release. On one occasion, ICTR Trial Chamber III went even further and stated that “[t]he Defence must provide at least prima facie evidence that the country in question agrees or would agree to accept the Accused on its territory, and that the country will guarantee the Accused’s return to the Tribunal at such times as the Chamber may order.”

The importance given to state guarantees where the tribunal lacks its own police force should not come as a surprise. As one commentator observes “an accused has yet to prevail in a motion for release in the absence of such a guarantee.” Besides, the Appeals Chamber confirmed that since the Trial Chamber holds the discretion to impose such conditions on the provisional release as it considers appropriate for ensuring the accused’s presence at trial (pursuant to Rule 65 (C) ICTR, ICTY or SCSL RPE), it may make its order of provisional release dependent on the furnishing of such guarantees.

The reliability of state guarantees depends on the particular circumstances of each case. In Krajišnik, where the Trial Chamber had to consider the guarantees offered by the Republika Srpska, the Trial Chamber noted that the government had not arrested anyone yet and that the guarantee consequently did not have the force it would have if the government had done so.

Some more recent jurisprudence has also illustrated scepticism towards guarantees offered by the Republika Srpska. Where guarantees of the government of the Republic of Bosnia and Herzegovina were offered in the Delalić and Đelić case, the Trial Chamber noted “overwhelming” problems in implementing these guarantees.

The accused’s former position may influence the reliability of governmental guarantees. Former senior (military or political) leaders may have certain valuable information about a government that could work as a disincentive for that government to enforce guarantees given by the state to which the accused seeks to be released. The Appeals Chamber held that the Trial Chamber should take this into account when considering whether the accused will appear for trial if provisionally released. The Trial Chamber should appraise the weight of

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236 Consider in that regard: ICTY, Decision on Appeal against Refusal to Grant Provisional Release, Prosecutor v. Mrkić, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 9 (the Appeals Chamber noted that “[a] Trial Chamber may accept such a guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept […] the same authority’s guarantee as reliable in relation to Accused B, without there being any inconsistency (or “double standards”) involved in those two decisions); ICTY, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Čermák and Markač, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 31.

237 ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, Prosecutor v. Krajišnik and Plače, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 18.

238 ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, Prosecutor v. Popović et al., A. Ch., 30 June 2006, par. 37 (The Appeals Chamber did not find a discernable error where the Trial Chamber questioned how the accused could avoid arrest for two and a half years while residing with family in ‘obvious places’ and where the Trial Chamber concluded that cooperation by the Republika Srpska remained insufficient due to failure to provide information that could lead to the arrest of Karadžić and Mladić). ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, Prosecutor v. Delalić, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 32; ICTY, Decision on Motion for Provisional Release Filed by the Accused Hamzin Delić, Prosecutor v. Đelalić et al., Case No. IT-96-21, T. Ch., 24 October 1996.

239 ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 17; ICTY, Decision on Appeal against Refusal to Grant Provisional Release, Prosecutor v. Mrkić, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 9 (“[…] accused B may have been a high level government official at the time he is alleged to have committed the crimes charged, and he may have since then lost political influence but yet possess very valuable information which he could disclose to the Tribunal if minded to cooperate should he be kept in custody. There would be a substantial disincentive for that authority to enforce its guarantee to arrest that particular accused if he did not comply with the conditions of his provisional release”). It should be recalled that pursuant to Article 29 (2) of the ICTY Statute, states are under the obligation to arrest and transfer an accused person to the Tribunal.
governmental guarantees provided in light of an accused’s previously held senior position. This can have an important bearing upon the state’s readiness and willingness to re-arrest the accused when he or she refuses to surrender him or herself, negatively influencing the prospects of the accused appearing at trial. It is also relevant to ask what would occur if the relevant authority were obliged, under its guarantee, to arrest the accused in light of the accused’s former position, regardless of where that position was held.

For a while, there were different views in the jurisprudence as to whether or not state guarantees could also include guarantees offered by state entities, in particular by the Republika Srpska. The Obrenović case illustrates these divergent views in that the Trial Chamber dismissed a guarantee provided by the Republika Srpska where Rule 2 ICTY RPE only refers to states. However, the Appeals Chamber held on appeal that the Trial Chamber erred by not following its earlier position in the Blagojević et al. case. The Appeals Chamber found that a guarantee by the Republika Srpska was valid because there was nothing in the ICTY Statute or the RPE that limited the body giving an undertaking to a ‘state’ under international law. The Trial Chamber did not concede, leading the Appeals Chamber to reiterate its previous holdings and to consider the matter itself.

241 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Đanić, Case No. IT-99-37-AR65, A. Ch., 31 October 2002, par. 9; ICTY, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Granting Provisional Release, Prosecutor v. Tolimir et al., Case No. IT-04-80-AR65, A. Ch., 19 October 2005, par. 20. Consider also: ICTY, Decision on Motion by Radoslav Brđanin, Prosecutor v. Brđanin, Case No. IT-99-36-PT, T. Ch. II, 28 March 2001, par. 26; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, Prosecutor v. Milićević et al., Case No. IT-05-87-AR65, A. Ch., 1 November 2005, par. 8 (the Appeals Chamber held that “a reasoned opinion should include a discussion of this factor, as it is relevant to the determination”).

242 ICTY, Decision on Provisional Release, Prosecutor v. Šainović and Đanić, Case No. IT-99-37-AR65, A. Ch., 31 October 2002, par. 9; In the Haradinaj case, the Trial Chamber held that the accused’s former position as Prime Minister meant that guarantees by UNMIK carry more weight than were they to be provided by his government, see ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 41.

243 ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65, A. Ch., 17 October 2005, par. 19 (the Chamber added that “[…] the Trial Chamber is simply to consider whether the evidence suggests that an accused, by virtue of a prior senior position, may have any information that would provide a disincentive for the State authority providing a guarantee on behalf of that accused to enforce that guarantee”).

244 ICTY, Decision on Dragon Obrenović’s Application for Provisional Release, Prosecutor v. Obrenović, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 60.

245 ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, Prosecutor v. Blagojević et al., Case No. IT-02-53-AR65, A. Ch., 28 May 2002; ICTY, Decision on Provisional Release on Vidoje Blagojević and Dragan Obrenović, Prosecutor v. Blagojević et al., Case No. IT-02-60-AR65 & IT-02-60-AR65.2, A. Ch., 3 October 2002, par. 6. Consider also the Separate Opinion of Judge Hunt, arguing that “what is important in these cases is the power of arrest, which
§ Guarantees offered by UNMIK

Guarantees have also been offered by the UNMIK transitional administration. In the Limaj case, the Trial Chamber requested UNMIK in 2003 to provide guarantees but UNMIK replied that it was unable to do so. UNMIK concluded that the flight risk would be ‘appreciable’ because of Kosovo’s borders and geography, the police resources available to UNMIK and the support resources available to the accused.247 Contrastly, in 2005, Trial Chamber II granted Haradinaj provisional release.248 An important consideration in the Trial Chamber’s decision to allow Haradinaj’s provisional release and in the assessment of the likelihood that he would appear for trial were the guarantees provided by UNMIK to detain the accused, if necessary.249 The Trial Chamber was convinced that UNMIK’s resources “were substantially enhanced in the meantime.”250

§ Influence of Rule 11bis proceedings

A pending motion for a Rule 11bis referral may “aggravate the risk” that the accused will not appear for trial.251 Logically, this holds true when such a motion has been positively decided upon. The ICTY Trial Chamber concluded in the Rasević and Todović case that, as a consequence of the reality that the trial will be conducted in Bosnia and Herzegovina, there was “a significantly increased risk that the accused will not appear for trial if granted provisional release.”252 The Appeals Chamber found this consideration to be reasonable, specifically in light of statements that the accused had made reflecting his “rather serious concerns” about being incarcerated in Bosnia and Herzegovina; concerns that he raised in the

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247 ICTY, Decision on Provisional Release of Fatmir Limaj, Prosecutor v. Limaj et al., Case No. IT-03-66-PT, T. Ch., 12 September 2003, pp. 6–7; ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 38.
248 ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005.
249 Ibid., par. 37 and following. In a written report, UNMIK stated that it has full authority and control over law enforcement in Kosovo and is in a position to provide specific guarantees regarding the accused, should the Tribunal request such, see ibid., par. 10.
250 Ibid., par. 40.
251 ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-PT, T. Ch. II, 9 March 2005, par. 25.
252 ICTY, Decision on Savo Todović’s Application for Provisional Release, Prosecutor v. Rasević and Todović, Case No. IT-97-25/1-PT, T. Ch., 22 July 2005, par. 27 (emphasis added).
course of the Rule 11bis proceedings. When an 11bis referral decision is pending or has been decided upon, governmental guarantees should not refer just to the delivery of the accused to the custody of the tribunal but also to the delivery of the accused to the state to which the case is or could be referred.

§ Seriousness of the crimes and the length of the expected sentence

Another factor which is taken into consideration is the seriousness of the crimes that the accused has been charged with and the prospect that he or she will receive a severe sentence. These factors may encourage the accused to flee. However, the case law of the tribunals holds that the seriousness of the crimes alleged cannot, by itself, justify long periods of detention on remand. For this reason, the Appeals Chamber dismissed the fact that in most national systems, accused charged with the most serious crimes may not be provisionally released. This holding has the indirect effect of bringing the provisional release scheme on par with the ECtHR’s case law. The Court found that national laws that remove judicial discretion for provisional release in the case of certain crimes and provide for an automatic

253 ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, Prosecutor v. Žeželj and Todović, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, p. 6.

254 Ibid., p. 4.

255 See e.g. ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević’s Application for Provisional Release, Prosecutor v. Pandurević and Trbić, A. Ch., 3 October 2005, par. 5; ICTY, Decision on Defence Request for Provisional Release of Stanislav Galić, Prosecutor v. Galić, Case No. IT-98-29-A, A. Ch., 23 March 2005, par. 6; ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, Prosecutor v. Popović et al., A. Ch., 30 June 2006, par. 14.

256 Consider ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, Prosecutor v. Haradinaj, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 4 (noting that “particularly in light of the presumption of innocence, […] the seriousness of the crimes an accused is charged with is not a reason on its own for not granting provisional release, but merely one of the factors to be taken into account in evaluating whether the Accused will appear for trial”). See also ICTY, Order on Provisional Release of Valentin Ćorić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 29; ICTY, Decision on Provisional Release, Prosecutor v. Stanišić, Case No. IT-03-69, T. Ch., 28 July 2004, par. 22; ICTY, Decision on Fatmir Limaj’s Request for Provisional Release, Prosecutor v. Limaj et al., Case No. IT-03-66-AR65, A Bench of the A. Ch., 31 October 2003, par. 30 (holding that such an approach is in accordance with the jurisprudence of the ECtHR); ICTY, Decision on Provisional Release, Prosecutor v. Ćalija and Đilović, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6; ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, Prosecutor v. Popović et al., A. Ch., 30 June 2006, par. 14; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decisions Granting Provisional Release, Prosecutor v. Tolimir et al., Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 25.

257 See the Prosecution’s argumentation in ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004, par. 29. (the Prosecution argued that there may be an inconsistent or double standard between the ICTY and national courts).
denial of provisional release, violate the right to a fair trial. Indeed, Article 5 (3) ECHR requires the judge that the accused appears before to have the authority to order release. It also requires that the judge consider the facts that militate for and against provisional detention.258

As previously argued, the severity of the crimes within the realm of international criminal tribunals was one of the primary justifications for the extraordinary nature of the pre-amendment provisional release scheme.259

Similarly, the expectation of a lengthy sentence cannot be held against the accused in abstracto where all accused face lengthy sentences upon conviction, because of the severity of the crimes.260 Such a factor should not be considered alone and must be assessed in light of other factors.261 This holding is in accordance with the ECtHR’s jurisprudence, which held on numerous occasions that the possibility of a severe sentence cannot, in principle, suffice to establish the danger that the accused will abscond without referring to other factors.262 Nevertheless, the severity of the sentence in the event of a conviction may legitimately be regarded as a factor encouraging the accused to abscond.263

259 See supra, Chapter 8, II.1.
261 ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Ćerić and Markač, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 27 (“the Appeals Chamber considers that the Trial Chamber regarded the possible severity of the sentence as determinative, thus giving it undue weight for justifying the Appellant’s detention”); ICTY, Decision on Drago Nikolić’s Request for Provisional Release, Prosecutor v. Popović et al., Case No. IT-05-88-PT, T. Ch. II, 9 November 2005, par. 18; ICTY, Decision on Defence Request for Provisional Release of Stanislav Galić, Prosecutor v. Galić, Case No. IT-98-29-A, A. Ch., 23 March 2005, par. 6.
263 Ibid., par. 154. See in that regard: ICTY, Order on Miodrag Jokić Motion for Provisional Release, Prosecutor v. Jokić, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 24 (the Trial Chamber notes that where the Tribunal’s jurisdiction is limited to serious offences this implies that the accused may expect to receive, if convicted, a sentence that may be of considerable length. This fact could mean that an accused is more likely to abscond or to obstruct the course of justice in other ways).
Remarkably in the *Jentzsch* case, which concerned the prosecution of war crimes and crimes against humanity, the ECommHR’s conclusion seemed to imply that the danger of the accused’s flight due to the severity of the crimes alleged and the severity of the sentence that could be expected in case of a conviction (life sentence) sufficed to justify continued detention. The Commission stressed the special responsibility of the authorities in preventing the escape of persons accused of committing such crimes. Consequently, one is left wondering in how far the seriousness of the crimes within the ambit of the international criminal tribunals and the sentences likely to be imposed in case of conviction would be a sufficient underpinning for a Trial Chamber to find that there is a risk of absconding.

FAIRLIE has noted that such a factor is of limited value given that the subject matter jurisdiction of the *ad hoc* tribunals is limited to the most serious crimes. Consequently, this factor will “likely admit of an answer before the question is even posed.”

§ Cooperation with the Prosecutor

An accused person’s willingness to cooperate weighs in their favour “insofar as it shows their general attitude of cooperation towards the International Tribunal.” Such a cooperative attitude may be expressed, for example, by the fact that an accused provisionally accepted to be interviewed by the Prosecutor. This does not imply, however, that an accused person should be penalised for refusing to cooperate. The non-cooperation of the accused should not play a role when considering his or her request for provisional release. Therefore, the non-cooperation should be considered as a neutral factor.

The consideration of such a factor sits uneasily with the right of the accused to remain silent and not incriminate him or herself. Nevertheless, where the Appeals Chamber held that cooperation with the Prosecutor may be taken into consideration as a relevant factor for assessing if the accused will appear for trial, it equally emphasised that the accused is not required to assist the Prosecution in proving its case against him, and that the accused “is not at the disposal of the Prosecution.” Similarly, provisional release should not be refused as a matter of discretion until an accused could be interrogated by the Prosecution. Provisional release is not dependent on the accused’s agreement to be interviewed. It follows from the above mentioned right to remain silent and the privilege against self-incrimination that the usefulness of the information provided to the Prosecutor is irrelevant.

In this context, reference should be made to the aforementioned ć case, in which the Appeals Chamber held that a statement made by the Prosecution in the course of the investigation that cooperation could have a positive effect on the accused’s application for provisional release was distinct from a promise of provisional release. Therefore, while the Appeals Chamber considered this to be an inducement, in the sense of an incentive, it did not render the accused’s participation in an interrogation involuntary.

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269 ICTY, Decision on Prosecution’s Appeal against Decision on Provisional Release, Prosecutor v. Šimrhović, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004, par. 9.
271 Ibid., par. 8. In light of the right to remain silent, Judge Hunt argued that such argument made by the Prosecutor is offensive of the right to remain silent and “should be publically repudiated by the OTP.” See ICTY, Decision on Provisional Release, Prosecutor v. Šainović et al., Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 85.
272 ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.2, 9 March 2006, par. 16.
273 ICTY, Decision Refusing Milićnović Leave to Appeal, Prosecutor v. Milićnović, Case No. IT-99-37-AR65.3, A. Ch., 3 July 2003, par. 12 (noting that “there is no indication that the Trial Chamber considered that the account given by an accused must be regarded as “full and honest” by the Prosecution to be relevant to the Chamber’s decision to release him provisionally”); ICTY, Decision on Prosecution’s Appeal against Decision on Provisional Release, Prosecutor v. Šimrhović, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004, par. 9; ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.2, 9 March 2006, par. 16.
274 This decision was previously discussed, see supra, Chapter 4, IV.2.1; ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38.
It follows that by waiving his or her rights, the accused may increase his or her chances of being granted provisional release. It has been argued that this presents the accused with a choice that “seems incompatible with the right to remain silent.”

§ Other factors

Again, the list of factors is by no means exhaustive. Other factors considered in the jurisprudence include the fact that the accused or suspect did not try to abscond or go into hiding,276 previous compliance with all conditions and guarantees imposed during a previous period of provisional release,277 the age of the accused278 or character references.279 Notably, in Šainović and Ojdanić, the Appeals Chamber provided a list of relevant factors that a reasonable Trial Chamber should consider in the case at hand.280 Later case law confirmed that while such a list was not exhaustive, it offered ‘guidance’ as to the relevant factors that should be considered by the Trial Chamber.281

II.2.6.2. Interference with victims, witnesses or other persons

The accused person seeking provisional release should equally satisfy the Trial Chamber that he or she will not interfere with victims, witnesses or other persons. The link between the risk

275 Z. DEEN-RACSMÁNY and E. KOK, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004, Vol. XX, Antwerp, Intersentia, 2009, p. 73 (the authors argue that while the cooperation with the tribunal is a relevant factor to be considered in the assessment whether the accused will appear for trial, the Prosecution should be excluded from the definition of ‘tribunal’).

276 Consider e.g. ICTY, Order on Provisional Release of Valentin Ćorić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 30; ICTY, Order on Provisional Release of Jadranko Prlić, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 30 (the Trial Chamber noted that the accused did not try to abscond prior to his arrest and did not go into hiding despite receiving indications that he was considered a suspect).

277 See, e.g. ICTY, Decision on the Accused Stojić’s Motion for Provisional Release, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 17 July 2008, par. 16; ICTY, Decision on Prosecution’s Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.5, A. Ch., 11 March 2008, par. 19.


279 See e.g. ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 34 (including reference letters from late President Rugova, and the Special Representative of the Secretary-General in Kosovo).


281 ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, Prosecutor v. Rasnović and Todović, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, p. 2.
underlying such a requirement and the existence of witness protection programmes should be mentioned at the outset. Logically, these protection programmes aim at reducing the exact same concerns that underlie the present requirement. Consequently, the existence thereof is a relevant factor that the Trial Chamber should consider in its assessment of this requirement.282

In general, the assessment of whether or not the accused will pose a danger to victims, witnesses or other persons cannot be made in the abstract but, rather, requires the identification of a concrete danger.283 The mere expression of general concerns or witness fears does not suffice.284

§ Possibility to contact prosecution witnesses

As the jurisprudence of the ad hoc tribunals has consistently reiterated, the heightened ability to interfere with victims and witnesses, by itself, does not suggest that the accused will pose a danger to them.285 The mere ability for the accused to contact witnesses directly or indirectly, does not constitute ‘danger’ within the meaning of Rule 65 (B) and therefore does not constitute a sufficient basis for refusing provisional release, so long as the Chamber is otherwise satisfied that the accused will not pose a risk.286 If the accused knowing the names of victims suffices to determine that the accused will pose a risk to them, then the Prosecutor’s simple compliance with his or her disclosure obligations pursuant to Rule 66 ICTY RPE would effectively prevent the provisional release of the accused person.287

282 In this regard, REARICK notes that the blanket witness protection offered at the ICTR to prosecution witnesses to some extent alleviates the concerns of interference and substantially reduces the threats to witnesses or victims. See D.J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journals», Vol. 44, 2003, p. 582.
283 See, e.g., ICTY, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, T. Ch. I, 20 July 2007, par. 17; ICTY, Decision on Lahi Brahimaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. 04-84-bis-PT, T. Ch. II, 10 September 2010, par. 30.
284 ICTY, Further Decision on Brahimaj’s Motion, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 3 May 2006, par. 39.
285 See e.g. ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 19; ICTY, Decision on Prosecution’s Interlocutory Appeal of Milo Stanišić’s Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 28.
286 Ibid., par. 20.
287 Ibid., par. 19; ICTY, Decision on Motion by Momir Talić for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 33-39. Compare with ICTY, Decision Rejecting a Request for Provisional Release, Prosecutor v. Blaškić, Case No. IT-95-14, T. Ch., 25 April 1996, p. 5 (holding that “the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a
Chamber confirmed such a view and dismissed the argument that knowledge of the names of potential prosecution witnesses obtained by the accused was any indication that he would pose a threat to them. The mere fact that the accused has been informed of potential witnesses does not provide support for the argument that the accused has the intent to threaten these witnesses.

§ Public perception of witness safety

Arguments based on the assumption that the perpetrators of previous incidents will also have an interest in interfering in this particular case and that provisional release would negatively impact on the public perception of the witnesses’ safety are not sufficient to deny provisional release, in the absence of a concrete danger posed by the accused to anyone. Subjective witness fears are not sufficient and are not a reason to refuse provisional release per se. In the past, however, the tribunal took into consideration the negative impact that provisional release could have on a person’s willingness to testify, particularly where the accused requested provisional release shortly before the intended commencement of the trial proceedings.

§ Former position and threat posed to victims, witnesses or other persons

Similarly, the fact that an accused may still hold considerable powers to influence victims or witnesses or the ability to destroy and suppress evidence is no indication that the accused will exercise such influence unlawfully. Danger cannot be considered in abstracto and,
therefore, a concrete danger must be identified. Similarly, in cases where the accused previously held a senior position (e.g. as Republica Srpska’s Minister of the Interior), the Prosecution should provide evidence showing that the accused would present a concrete risk of harm to victims and witnesses if released.293 The Appeals Chamber dismissed the argument that “because the Accused was once the Minister of Interior of the Republica Srpska, specific information as to his contacts and connections is not required as his position manifestly resulted in extensive and highly-placed contacts.”294 Information should be provided as to connections or contacts retained by the accused or evidence that he or she has, in fact, ever sought to contact or intimidate victims or witnesses or intends to do so.295 The Appeals Chamber clarified in Prlić et al. that this does not amount to putting the burden on the Prosecution. It only suggests that if the accused has satisfied the Trial Chamber that he or she will not interfere with witnesses, victims or other persons upon release, the Prosecution should produce evidence to rebut that fact.296

§ Concrete indications of intimidation

In contrast, where the Prosecutor is able to formulate concrete allegations that the accused has been involved in witness intimidations, the Trial Chamber should address the validity of such allegations. If not, the Trial Chamber puts the burden to prove that the accused will not pose a danger to any person on the Prosecutor.297 In the Milić case, where the Trial Chamber did not respond to the Prosecutor’s allegations, the Appeals Chamber stated that “the Trial Chamber appears, in effect, to have switched the burden to the Prosecution to show that the Accused would pose a danger if released. In the putative absence of such information, the Trial Chamber appears to have assumed the lack of a danger posed by the Accused’s release.”298

293 ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 27.
294 Ibid., par. 25 (the Prosecution argued that specific information is only required for low-level accused).
295 Ibid., par. 27; ICTY, Decision on Mićo Stanišić Motion for Provisional Release, Prosecutor v. Stanišić, Case No. IT-04-79-PT, T. Ch. II, 19 July 2005, par. 18.
296 ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A. Ch., 8 September 2004, par. 26.
297 ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Neboja Pavković’s Provisional Release, Prosecutor v. Milić et al., Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 10-11.
298 Ibid., par. 10-11; ICTY, Second Decision on Nebojsa Pavković Provisional Release, Prosecutor v. Milić et al., Case No. IT-05-87-PT, T. Ch. III, 18 November 2005, par. 9. In casu, the Prosecution had
In this regard, the Appeals Chamber has underlined that a reasonable Trial Chamber should also have regard for governmental guarantees to monitor the accused and protect victims, witnesses and other persons, or to the accused’s prior behaviour. Regard may also be given to protective measures issued in the course of the pre-trial stage. Other factors that should be considered include the length that the accused was aware of the investigation without having posed any such treat or the geographical area that the accused seeks to be released to.

II.2.6.3. Hearing of the host state and the state to which the accused seeks to be released

This condition for provisional release has not caused a great deal of controversy. In the Todović case, the Appeals Chamber found no error where the host state had not been heard. The host state should only be consulted when the Trial Chamber grants provisional release. Similarly, the requirement that the host state should be given the opportunity to be heard has not proven to be problematic. The Netherlands, for example, never tried to prevent provisional release. That being said, it is important to understand that the consideration of the host state’s interests is a factor that sets the provisional release/detention regime of international criminal tribunals apart from their domestic counterparts.

alleged that the accused had been involved in the attempted killing of the minister of foreign affairs of Serbia and Montenegro and had publicly threatened every person who would surrender him to the Tribunal.

ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, 23 July 2004, par. 8.

Consider e.g. ICTY, Decision on the Motion for Provisional Release of the Accused Ćorić, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 11 June 2007, p. 4.

ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 49.

ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, Prosecutor v. Prlić et al., Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A. Ch., 8 September 2004, par. 26.

ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, Prosecutor v. Ragović and Todović, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005.

Consider e.g. ICTY, Correspondence from Host Country Re: Request for Provisional Release, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, 16 December 2008 (“I have the honour to inform you that the Netherlands, as host country and limiting itself to the practical consequences relating to such a provisional release, does not have any objections. It is the understanding of the Netherlands that, upon his provisional release, Mr. Milan Milutinović will leave Dutch territory”).

II.2.7. Provisional release on humanitarian/compassionate grounds or on medical grounds

While Rule 65 (B) ICTY, ICTR and SCSL RPE does not refer to compassionate or humanitarian grounds for provisional release, some case law states that motions based on these grounds “are governed by a distinct set of rules.” The ICTY’s jurisprudence confirmed that where the requirements of Rule 65 (B) have not been met, provisional release can be granted on compassionate or humanitarian grounds. However, other decisions declined to release a person on compassionate grounds, where the conditions of Rule 65 (B) had not been fulfilled. For example, in the Meakić et al. case, the Trial Chamber considered humanitarian considerations to be “substantially favouring the grant of provisional release for a limited period”. However, it consequently required that the conditions that the accused will appear for trial and not pose a danger to victims, witnesses or other persons were met. In Talić, the Trial Chamber found that, since the accused was suffering from terminal cancer, his medical condition had become incompatible with any detention on remand for a long period. Temporary release may also be ordered in cases where a relative has a grave illness or to attend a relative’s funeral. In contrast, the ICTR never allowed temporary provisional release on compassionate grounds, nor did it allow for a transfer in custody as an alternative to provisional release.

306 ICTY, Decision on Šainović Motion for Temporary Provisional Release, Prosecutor v. Milić et al., Case No. IT-05-87-T, T. Ch., 7 June 2007, par. 7.
307 Ibid., par. 7, par. 11; ICTY, Decision on Ojdanić Motion for Temporary Provisional Release, Prosecutor v. Milić et al., Case No. IT-05-87-T, T. Ch., 4 July 2007, par. 8.
308 ICTY, Decision on Defendant Dušan Fustar’s Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Father’s Death, Prosecutor v. Meakić et al., Case No. IT-02-65-PT, T. Ch., 11 July 2003, p. 3; consider also ICTR, Decision on Augustin Ndingiyimana’s Emergency Motion for Temporary Provisional Release, Prosecutor v. Ndingiyimana et al., Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003, par. 18 (“After having reviewed the Motion, the Chamber finds that it does not fulfill the conditions set under Rule 65 for it to grant provisional release of the Accused, for example the hearing of the host country”).
310 See e.g. ICTY, Decision Pursuant to Rule 65 Granting Amir Kabura Authorization to Attend his Mother’s Funeral, Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Duty Judge, 12 March 2004; ICTY, Decision on Defendant Dušan Fustar’s Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Father’s Death, Prosecutor v. Meakić et al., Case No. IT-02-65-PT, T. Ch. III, 11 July 2003.
311 Notably, in the Ndingiyimana et al. case, Ndingiyimana requested for provisional release to visit his son, who was gravely ill, in a Belgian hospital or to be allowed, in the event of his son’s death, to attend the funeral. In the alternative, he requested his ‘transfer in custody’. The request was denied because, among others, the ‘host state’ had not been heard. The Trial Chamber did not respond to the alternative request for a transfer in custody. See ICTR, Decision on Augustin Ndingiyimana’s Emergency Motion for Temporary Provisional Release, Prosecutor v. Ndingiyimana et al., Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003, par. 1, 17-18.
In that regard, the ICTY noted that, in the absence of its own police force, transfer in custody (in the sense of an escorted release whereby an accused can be taken to an external event while remaining in custody under escort) is not possible. Therefore, although the ICTY allowed the defendant to be released pre-trial for short periods of time, “a condition of such release has been that the national authorities of the State to which the accused is to be released provide round the clock surveillance and supervision of the accused.”

As previously noted with regard to pre-amendment Rule 65 (B), medical grounds may also justify release in order for the accused to receive medical treatment. The conditions of Rule 65 have to be fulfilled and it should be demonstrated that the accused cannot receive the treatment in the host state.

II.2.8. Conditions imposed pursuant to Rule 65 (C)

An obligation is incumbent on the Trial Chamber to ensure that the accused will comply with the requirements to appear for trial and not to interfere with victims, witnesses or other persons. The power that the Trial Chamber holds, pursuant to Rule 65 (C) ICTY, ICTR and SCSL RPE, to impose such conditions upon the accused as it deems appropriate, should be seen in that perspective. In practice, granting provisional release is made dependent on the imposition of certain conditions. The Trial Chamber will only be satisfied that the conditions under Rule 65 (B) are fulfilled if it appears that the accused person will comply with the conditions imposed. Conditions imposed typically include geographic limitations to where the accused should reside, or the requirement to not contact witnesses, victims or co-accused persons.

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314 ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 3-4.
The Trial Chamber holds the power to vary the conditions for provisional release. Where the conditions imposed on the provisional release of a suspect or accused should be tied back to the requirements of Rule 65 (B), the same holds true where the Trial Chamber exercises its discretion to vary the conditions. The major ruling in this regard is the Haradinaj ‘Re-assessment Decision’. It was the first decision where the Trial Chamber expressly contemplated a possible modification of its own decision. On 6 June 2005, ICTY Trial Chamber II had granted Haradinaj provisional release. While the disposition of this decision prohibited Haradinaj from holding any governmental position at any level in Kosovo or from getting involved in any way in any public political activity, the Trial Chamber left the door open for a reconsideration of this condition after a period of ninety days.

On 15 August 2005, the Defence requested that the decision be reconsidered in order to lift the constraints on Haradinaj’s ability to appear publicly and on his involvement in public activities as well as for him to be permitted to travel throughout Kosovo. The Trial Chamber subsequently decided, by majority, to allow Haradinaj to appear in public and to

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315 Reconsiderations of the conditions of provisional release have occurred in several cases, often on humanitarian grounds, see e.g. ICTY, Decision on Bajrush Morina’s Request to Vary Conditions of Provisional Release, Prosecutor v. Harajija and Morina, Case No. IT-08-84-R77.4, T. Ch. I, 14 October 2008; ICTY, Decision on Sainovic Motion for Variation of Conditions of Temporary Provisional Release, Prosecutor v. Muhitinovic et al., Case No. IT-05-87-T, T. Ch., 1 October 2008.
316 See supra, Chapter 8, II.1.
318 However, consider the dissenting opinion of Judge Shahabuddeen and Judge Schomburg to the decision on appeal, noting that despite this holding, “the Trial Chamber engaged in no apparent consideration of the Rule 65 (B) criteria in making its Re-Assessment Decision.” See ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 3-4. Consider also the argumentation elsewhere: K. DE MEESTER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 29 February 2005 – 16 November 2005, Vol. XXXVII, Antwerp, Intersentia, 2011, pp. 143 – 149.
319 ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 24. Noteworthy, while the Appeals Chamber observed that this is the first case where a Trial Chamber expressly contemplated modifying its decision, the Appeals Chamber added in a footnote that this is an observation, and not a criticism of the Trial Chamber: “[t]he Trial Chamber is supposed to remain apprised of the behaviour of the accused when on provisional release, and to be prepared to modify conditions if necessary.”
320 With the exception of exercising his position of President of the Alliance for the Future of Kosovo.
321 Ibid., par. 53.6.
322 ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, Prosecutor v. Haradinaj, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 2.
engage in public political activities upon approval by UNMIK.\footnote{Ibid., p. 5.} In arriving at its decision, the Trial Chamber took into consideration “the very special circumstances of this case, especially UNMIK’s assessment of the anticipated positive effects of the Accused’s involvement in public political activities and in the upcoming negotiations on the final status of Kosovo.”\footnote{Ibid., p. 4.} Such considerations are at least remarkable insofar that they seem alien to the requirements of Rule 65 (B) ICTY RPE.

§ Delegation of monitoring to a non-judicial body

The Re-assessment Decision involved the United Nations Interim Administration in Kosovo (‘UNMIK’) in an unprecedented way in the accused’s provisional release regime. This raises the question as to which delegations of the Trial Chamber’s functions are acceptable under Rule 65 of the ICTY RPE. The Trial Chamber granted UNMIK the ability to approve or deny any request made by Haradinaj to appear in public or to engage in political activity. Only one yard-stick was provided for, to know that UNMIK considers that, in the concrete situation, “it would contribute to a positive development of the political and security situation in Kosovo.”\footnote{Ibid., p. 4.} Again, such a criterion is alien to the requirements of Rule 65 (B) ICTY RPE.\footnote{Ibid., p. 4.} No guarantee was provided that UNMIK would consider the requirements of Rule 65 (B) in its assessment of Haradinaj’s requests. The Trial Chamber retained some control through UNMIK’s bi-weekly reports to the Trial Chamber.\footnote{ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, Prosecutor v. Haradinaj, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 4.}

The underlying question is this: to what extent can a Trial Chamber ‘delegate’ its power according to Rule 65 (C) to impose conditions on the provisional release of an accused as it deems appropriate in light of the objectives of Rule 65 (C) ICTY RPE?\footnote{ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 19.} Put another way, what forms of delegation to UNMIK of these powers and responsibilities are acceptable? The
Prosecutor appealed this decision on the ground that it constituted an impermissible abdication of the Trial Chamber’s role.  The Appeals Chamber found that some form of delegation is indispensable for the proper functioning of the tribunal.  Specifically, the tribunal has to rely on national authorities or other actors to control the conditions and terms of provisional release. While the Appeals Chamber emphasised that not every form of delegation would be permissible, it concluded that several factors rendered the delegation permissible in concreto.

Firstly, the decision-making entrusted to UNMIK was not central to the judicial process, insofar that the decisions at stake did not have a bearing on the accused’s innocence or guilt.  Secondly, UNMIK was not granted absolute discretion.  Thirdly, the Trial Chamber retained “quite real and effective” supervisory authority by means UNMIK’s bi-weekly reports and the fact that the Prosecution would also be watching. UNMIK’s power was constrained given that the Trial Chamber could change the conditions at any time. Lastly, there are significant advantages in allowing UNMIK to take responsibility for day-to-day decisions; a function which, if left to the the Trial Chamber, would be impractical.

Thus, the Appeals Chamber amended the Trial Chamber’s decision only insofar that it did not allow the Prosecution to make submissions to UNMIK when the accused formulated a request to UNMIK. In the scenario of delegating certain functions to UNMIK, the equality of arms and the audi alteram partem principles have some applicability outside the tribunal.
§ Limitations to the conditions that can be imposed

The vague criterion that UNMIK had to use to decide on Haradinaj’s requests raises other legitimate concerns. Such delegation may be in violation of the right to freedom of expression, as human rights law requires that restrictions to such a right be provided for by law. 336 Curtailing the right to engage in political speech should equally fulfill this requirement. Consequently, limitations put on this freedom based on other considerations than the ones mentioned in Rule 65 (B) ICTY RPE should be treated with distrust. It was argued above that the criterion on which basis UNMIK decided on Haradinaj’s applications, and which it could use to curtail Haradinaj’s right to political speech, was linked to neither of these criteria.

Nevertheless, the Appeals Chamber reasoned that human rights law departs from the position that all expression is allowed unless other circumstances are present. The starting point in the Haradinaj Re-assessment Decision was that all expression (at least, all political) is prohibited. 337 The Chamber continued that human rights norms have nothing to say about the correct criteria to apply in this case. 338 Such an argument, however, should be rejected. While it is true that the Trial Chamber’s first decision denied the right to political speech, a condition that can be imposed by the Trial Chamber pursuant to Rule 65 (C), the starting point when an accused is provisionally released is that this person continues to be entitled to that right. When the Trial Chamber decides to impose conditions that restrict such right, these restrictions, under human rights law, should be provided for by law. 339 Under the tribunal’s security criterion”, does not longer guarantee the Trial Chamber’s ability to supervise and control the provisional release regime. See ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 15 and the discussion thereof in K. DE MEESTER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 29 February 2005 – 16 November 2005, Vol. XXVII, (forthcoming).


337 In its first decision, the Trial Chamber had prohibited all political speech by Haradinaj. Consequently, in the wording of the Appeals Chamber, the question at stake is “how much expression will UNMIK allow the Accused?” 338 ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 84 (emphasis added).

339 Article 19 ICCPR; Article 10 ECHR; Article 13 ACHR; Article 9 ACHPR.
procedural framework, this implies that they should be necessary to ensure the accused’s appearance at trial or for the protection of victims, witnesses or other persons.

In a similar vein, the standard condition imposed by the ICTY, that the accused cannot discuss the case with anyone but counsel and that he or she should refrain from holding public office, may be problematic from a human rights perspective and may be disproportionate, even where such a condition is justified by the need to prevent absconding and to promote the administration of justice. Moreover, it has been argued that such a restriction lacks a proper legal basis because Rule 65 (C) is vague and broad. However, as argued before, Rule 65 (C) and (B) should be read together in that conditions imposed pursuant to Rule 65 (C) should be necessary to safeguard the presence of the accused for trial or to prevent any danger to victims, witnesses or other persons. In that way, Rule 65 (B) ICTY, ICTR and SCSL RPE should be understood as limiting Rule 65 (C) where it explains the nature of the threat that would arise from the individual’s exercise of his or her freedom of expression.

II.2.9. Requests for modification of the conditions of detention

A rather unexplored alternative route to the stringent conditions of Rule 65, which prevented any provisional release from being granted at the ICTR and the SCSL, is Rule 64 ICTY, ICTR and SCSL RPE. This rule allows the accused to apply to the President to request a modification of the conditions of detention. On this basis, in Blaškić, the then-President Cassese placed the accused under house arrest in a residence designated by the authorities of The Netherlands outside the tribunal’s Detention Unit. While the President noted that the possibility of house arrest is neither provided for under the Statute nor under the RPE of the ICTY, he argued that there is also nothing preventing or prohibiting house arrest as an alternative to pre-trial detention, calling it the “middle-of-the-road measure” between the

340 Z. DEEN-RACSMÁNY and E. KOK, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004, Vol. XX, Antwerp, Intersentia, 2009, pp. 74-75 (arguing that it is difficult to see why a blanket ban on discussing the case with anyone but counsel is necessary to attain these aims, also in light of other conditions imposed).

341 Ibid., p. 75.

342 ICTY, Decision on the Motion of the Defence filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Prosecutor v. Blaškić, Case No. IT-95-14-PT, President, 3 April 1996, par. 24 (in casu, defence counsel sought “some sort of restricted liberty” under Rule 64 (reference is made to the measure of compulsory residence (assignation à la residence), which is a precautionary measure taken against persons who (i) have allegedly committed offences which do not automatically entail remand in custody and (ii) are not likely to engage in behavior (such as interference with investigations, repetition of crime, danger to the public order) requiring that a custodial measure be taken (par. 12)).
norm (detention on remand) and the exception (provisional release). In his assessment, the President considered such factors as the risk of absconding, danger posed to witnesses, tampering with evidence or danger to the public order and peace.\footnote{Ibid., par. 21.} Also, the ICTR considered that in some situations, including situations where security concerns or medical reasons are present, detention at a location other than the tribunal’s detention facility may be preferable.\footnote{Consider ICTR, Decision on Matthieu Ngirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Ngirumpatse, Case No. ICTR-98-44-T, President, 24 June 2010, par. 2.} On this basis, Ngirumpatse was detained at a safe house in Arusha in order to receive medical treatment.\footnote{Consider ICTR, Decision on Matthieu Ngirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Ngirumpatse, Case No. ICTR-98-44-T, President, 24 June 2010.}

II.2.10. Length of the pre-trial detention

The average period of time that accused persons spend in pre-trial detention is a matter of grave concern. The accused are usually detained several years before the start of their trial. In some cases, the period of time spent in pre-trial detention is simply appalling.\footnote{Consider F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 198 (referring to the length of pre-trial detention as “one of the most worrying features of international criminal proceedings”).} For example, Karemera spent over seven years in pre-trial detention at the behest of the ICTR prior to the commencement of his trial. This is not an exception. Ngirumpatse and Nzirorera each spent approximately six-and-a-half years in pre-trial detention, while Bagosora and Hategekimana were both detained six years prior to the commencement of their trial.\footnote{ICTR, Status of Detainees on 5 September 2013 (available at: http://www.unictr.org/cases/tabid/202/Default.aspx, last visited 18 January 2014).} In contrast to the ICC and other internationalised criminal tribunals, the procedural framework of the ICTY/ICTR and the SCSL does not envisage a formal review mechanism to control the necessity and reasonableness of continued pre-trial detention.\footnote{ICTY, Order on Motion for Provisional Release, Prosecutor v. Ademi, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 26 (the Trial Chamber emphasises that in the absence of a formal, periodic review mechanism, the issue of the length of the pre-trial detention may need to be given particular attention. It was noted by WALD and MARTINEZ that suggestions to change the original Rule 65 (B) to adopt a presumption of release and an automatic review of detention every 90 days have been made but were rejected. See P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., Essays on ICTY Procedure and Evidence, Kluwer Law International, The Hague, 2001, p. 233. Compare with the periodic review mechanism provided for under Article 60 (3) ICC Statute, which will be discussed, infra, Chapter 8, II.3.3.}
As previously discussed, under pre-amendment Rule 65 (B), the length of the pre-trial detention was assessed in provisional release applications as part of the ‘exceptional circumstances’ requirement. Nevertheless, the ICTR Appeals Chamber held in Kanyabashi that “although the long pre-trial detention the Applicant has served may, if attributable to the Tribunal, entail the need for a reparation for a violation of fundamental human rights, it does not per se constitute good cause for release.” Consequently, the length of pre-trial detention alone would not necessarily be sufficient for release but only a factor to be taken into consideration when assessing the existence of ‘exceptional circumstances’. This ‘exceptional circumstances’ requirement was, in turn, the threshold for considering the other requirements for provisional release under pre-amendment Rule 65 (B). Therefore, even where the Trial Chamber would find the pre-trial detention to be unreasonable, this would not necessarily entail that the person should be released. It was noted with concern that a period of pre-trial detention of over six-and-a-half years was not considered to constitute ‘exceptional circumstances’ in the sense of pre-amendment Rule 65 (B) ICTR RPE.

Likewise, following the amendment of Rule 65 (B), the length of detention is only a factor considered in the Trial Chamber’s exercise of its discretion to deny provisional release if the substantial conditions of Rule 65 (B) are fulfilled (the period of detention being is a factor favouring release). It was stressed in Krajišnik that the length of the pre-trial detention is “an important factor in the exercise of discretion in determining an application for provisional release.” Similarly, the Appeals Chamber held in Haradinaj that the excessive length of pre-trial detention has no bearing on the assessment of the substantial requirements of Rule 65 (B) ICTY RPE but is “an additional discretionary consideration.” This factor includes both the actual or likely period of detention.

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349 As discussed, supra, Chapter 8, II.1.
351 Cf. ICTR, Decision on Defence Motion for Release, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22.
352 See supra, Chapter 8, II.1.
354 ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, Prosecutor v. Haradinaj et al., Case No. IT-04-84-AR65.2, A. Ch., 9 March 2006, par. 23. Consider also, e.g. ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, Prosecutor v. Mladić, Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, par. 8; ICTY, Decision on the
It follows from international human rights norms that pre-trial detention should be limited in
time and that the person has a right to be tried within a reasonable time or to be
(conditionally) released (délai raisonnable). Both the HRC and the ECtHR considered that
what constitutes ‘reasonable time’ must be assessed on a case-by-case basis. The ECtHR
explained that the ‘reasonableness of time’ criterion cannot be translated into a fixed number
of days, weeks, months or years, or into various periods depending on the seriousness of the
alleged crime. Article 5 (3) ECHR does not include a maximum length of pre-trial
detention.

While Article 5 (3) ECHR is formulated as a disjunction (“trial within a reasonable time or
release”), it requires the ordering of the release as soon as the detention ceases to be
reasonable. Release may be conditioned by guarantees to appear for trial. TRECHSEL
noted that the assessment of the reasonableness of the length of detention, entailing the
weighing of the interests of the person against the interests of the prosecution of crime, is
particularly difficult where offences such as crimes against humanity are concerned. The
aforementioned Jentzsch v. Germany case is illustrative in that regard. It concerned
proceedings in Germany involving allegations of war crimes and crimes against humanity for
Jentzsch’s alleged involvement as a member of the SS in ‘death bath’ operations at the Gusen
concentration camp. The ECommHR found a pre-trial detention of over six years (while
‘regrettably long’) not to be unreasonable. In its assessment, the ECommHR referred to the
fact that (1) the crimes happened a long time ago, (2) that numerous victims were involved
and that there was a need “to clarify the whole historical complex” in order to make a proper

Accused Praljak’s Motion for Provisional Release, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 17
July 2008, par. 27.

ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, Prosecutor v. Mladić et al., Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, par. 8.

Article 9 (3) ICCPR; Article 5 (3) ECHR; Article 7 (5) ACHR.


Article 5 (3) ECHR.


assessment of the individuals involved and their degree of participation and guilt, (3) the number of witnesses and suspects and (4) the fact that the crime scene was outside Germany. Similar difficulties are encountered by international criminal tribunals when conducting their investigations. It follows that the specific nature of the crimes within the ambit of the jurisdiction of the international criminal tribunals influences the interpretation of human rights provisions and allows for extended pre-trial detention.

An additional factor in explaining the length of pre-trial detention in the *Jentzsch v. Germany* case was the fact that proceedings had been transferred several times, which was not the case in *W.R. v. The Federal Republic of Germany*. In this case, the applicant had been convicted to penal servitude for life for the murder of some 148 persons while he served as a subordinate police commander and member of the SS in German occupied Poland. The EcommHR did not find the length of detention on remand of six years and eleven months to be unreasonable. The Commission held that “the prosecuting authorities, in investigating the case against the applicant, were faced with such exceptional difficulties as do not arise in normal criminal cases.” These include the fact that the crimes were committed a long time ago, the fact that the crimes were committed against numerous victims as part of “a large scale scheme calculated to exterminate the Jews as an entire”, the fact that witnesses had been scattered, the fact that it was necessary to establish the exact role of the accused in the alleged crimes, the necessity to first obtain a general picture of the situation and the fact that some 500 witnesses were examined in Germany and abroad. To be clear, it is not the nature (gravity) of the crime but the complexity of the crime that justifies longer periods of pre-trial detention. It should be noted that there is no automatic correlation between the gravity of the crime and the complexity of the case. Thus, a case by case consideration is warranted.

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364 See supra, Chapter 2, VII.3.
366 *Ibid*.
367 *Ibid*.
368 *Ibid*.
369 Consider, e.g., RYNGAERT, speaking on the more general right to a fair trial: “Indeed, serious concerns may be raised over the use of the gravity of the crime as a free-standing criterion – that is, as unconnected from the genuine complexity of the proceedings – in terms of the presumption of innocence.” See 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. 731.
Whether the time spent in detention before judgment has, at some stage, exceeded the acceptable limit—and has, therefore, imposed a greater sacrifice than could be expected from a person presumed to be innocent—must be taken into consideration. The ‘reasonable time’ requirement under Article 5 (3) ECHR implies a two-pronged test. As previously noted, the persistence of a reasonable suspicion is a condition sine qua non for the lawfulness of the continued detention. However, as the ECtHR’s jurisprudence confirms, after a certain amount of time, the persistence of a reasonable suspicion is no longer sufficient. Other grounds should justify continued detention. These grounds should be ‘relevant’ and ‘sufficient’. Where such grounds are lacking, even short periods of pre-trial detention may be found to be in violation of Article 5 (3) ECHR. It was noted that these justifying grounds are lacking in the procedural framework of the ad hoc tribunals and the SCSL. Besides, the Court must ascertain whether the national authorities displayed ‘special diligence’ in conducting the proceedings. The aim of such a test is to detect any unjustified delays or periods of inactivity. When a defendant is provisionally detained, there is a special duty of diligence on the authorities to bring detention to an end without further delay.

On several occasions, the ICTY held that the length of pre-trial detention should be considered “in light of all the circumstances of a case, such as the complexity of the case, the speed of handling, the conduct of the accused, the conduct of authorities, the absence of unjustified inertia and the presence of budgetary appropriations for the administration of criminal justice.” In considering the length of pre-trial detention, the ad hoc tribunals highlighted the fact that they are working in a different context than national criminal justice systems. Circumstances that have been considered in the jurisprudence to explain the length

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371 Consider e.g. ECtHR, Toth v. Austria, Application No. 11894/85, Series A, No. 224, Judgment of 12 December 1991, par. 76; ECtHR, Vaccaro v. Italy, Application No. 41852/98, Judgment of 16 November 2000, par. 42 (the Court found a violation where no explanation had been given for an investigation lasting one year, five months and twenty-four days, where after it took the district court ten months and a half to declare that the case was outside its jurisdiction).


373 ICTY, Decision on Darko Mrđa’s Request for Provisional Release, Prosecutor v. Mrđa, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 42; ICTY, Decision on Vidoje Blagojević’s Application of Provisional Release, Prosecutor v. Blagojević et al., Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 29.

374 Consider in this regard the argumentation by MINTYRE that “[t]he Tribunal must […] take account of unique circumstances in which it operates.” See G. MINTYRE, Defining Human Rights, in G. BOAS and
of the pre-trial detention include (1) the general complexity of the proceedings,\textsuperscript{376} (2) the number of motions filed by the parties\textsuperscript{377} and (3) the further complexity caused by the joinder of trials,\textsuperscript{378} (4) the gravity of the crimes charged and/or the severity of the corresponding penalty,\textsuperscript{379} (5) the factual and legal complexity of the charges and\textsuperscript{380} (6) the necessity to deliberate and render decisions on pre-trial motions filed by the parties.\textsuperscript{381}

More worrisome are references to institutional constraints and limited resources in the case law of the ad hoc tribunals. For example, in Bagosora, the Trial Chamber referred to the overbooked trial docket and the ‘limited human and physical resources’ at the tribunal’s disposal.\textsuperscript{382} However, the HRC confirmed that institutional shortcomings are not a relevant circumstance in the assessment of the ‘reasonable time’ requirement.\textsuperscript{383}


\textsuperscript{381} Ibid., par. 19.

\textsuperscript{382} ICTR, Decision on Defence Motion for Release, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 25. Consider also: ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 28 (stating that “[i]t is unfortunate that the limited resources possessed by the Tribunal do not permit an earlier trial for those in detention, and that a delay of even this length is necessary, but the likely period of pre-trial detention for Brđanin has not been demonstrated to be unreasonable”).

Overall, considerations relating to the length of the pre-trial detention only play a marginal role in the assessment of provisional release applications.\textsuperscript{384} Even in cases where the accused has been detained for a considerable amount of time in pre-trial detention, the fact that the ECtHR’s case law has accepted delays of four years or more has been used to justify refusals of provisional release.\textsuperscript{385}

Since the length of detention is assessed by the Trial Chamber as part of its discretionary power, it is evident that Rule 65 (B) does not leave room for the length of pre-trial detention to itself lead to release. This is not in conformity with international human rights law, where the proper remedy in case pre-trial detention is found to be unreasonably lengthy is release. Therefore, it may be asked whether a habeas corpus-like request for release may be made on the sole ground of the unreasonable length of detention.\textsuperscript{386} However, in Barayagwiza, where the Defence submitted that the length of pre-trial detention was unreasonable and the accused should be released, the Trial Chamber urged the Defence to address the requirements of Rule 65 in its application.\textsuperscript{387}

Another alternative route to address the length of pre-trial detention is through a claim that the right to be tried without undue delay has been violated.\textsuperscript{388} Nevertheless, the right to be tried within a reasonable time or release and the right to be tried without undue delay, while related, are distinct rights. Where delays in the trial are found to be justified, the right to be tried within a reasonable time or to release may still imply that the person should be released.


\textsuperscript{385} 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. 233. See e.g. ICTY, Decision on Momcilo Krajišnik’s Notice of Motion for Provisional Release, Prosecutor v. Krajišnik atd Pļavči, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 15 (“the relevant international treaties express the proposition that provisional release should be granted where the accused cannot be brought to trial within a reasonable period of time”). Nevertheless, the Trial chamber consequently refers to the ECtHR which held that extensive periods of pre-trial detention may be reasonable, for example in ECtHR, W. v. Switzerland, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993.

\textsuperscript{386} As suggested by H. FRIMAN, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for Rwanda 2001 – 2002, Vol. X, Antwerp, Intersentia, 2007, p. 122. As discussed earlier, the ad hoc tribunals and the SCSL determined that they have the power to hear habeas corpus motions. See supra, Chapter 7, V-A.1.

\textsuperscript{387} ICTR, Decision on the Defence’s Motion for Provisional Release of Jean-bosco Barayagwiza, Prosecutor v. Barayagwiza, Case No. ICTR-99-52-T, T. Ch. I, 3 September 2002, par. 3 (the Trial Chamber refers to an earlier (similar) motion that was orally decided and where the Presiding Judge stated: “If you are relying on Rule 65, you [should] make an appropriate motion and satisfy the criteria set out in Rule 65 for a decision to be taken by the Chamber in respect of provisional release. Such a course is still open to you”).

\textsuperscript{388} Article 21 (4) (c) ICTY Statute; Article 20 (4) (C) ICTR Statute and 17 (4) (c) SCSL Statute.
II.2.11. Agreements on the acceptance of provisionally released persons

It may be asked how far a duty is incumbent on the tribunal to identify a country willing to accept an accused who meets the criteria for provisional release.389 One could argue that the Registry should undertake efforts to conclude agreements with states willing to accept persons who meet the standards for release on their territory.390 To some extent, guidance may be found in the enforcement of sentences agreements that have been concluded between the ad hoc tribunals and states that have expressed a willingness to enforce sentences. However, regarding the enforcement of sentences, provision is made for states to express this willingness under the ad hoc tribunals’ respective Statutes.391 In turn, the ad hoc tribunals’ Statutes do not provide any procedure for states to express their willingness to accept persons whose provisional release has been ordered by the tribunal. Coupled with the aforementioned absence of any statutory provision on provisional release, such a gap creates the impression that the possibility of provisional release was only an afterthought.

Nevertheless, such an oversight may not lead to a refusal to order provisional release if there is no longer a justification for pre-trial detention. Where the ECtHR considered the length of pre-trial detention pursuant to Article 9 (3) ICCPR, it held that the state cannot rely on institutional constraints to justify continued pre-trial detention.392 Consequently, the tribunal cannot rely on deficits in its own procedural regime to justify continued detention. International human rights norms dictate that the authority reviewing the lawfulness of

389 In such argument, it is presumed, as the ad hoc tribunals have emphasised themselves, that obtaining state guarantees is not a prerequisite for provisional release. See supra, Chapter 8, II.2.6.1.
390 Consider e.g. C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Reviews», Vol. 60, 2010, pp. 69 – 70 (advocating that the tribunals actively seek to make arrangement with states and holding that “the ICC and other emerging tribunals, like the Special Panel for Lebanon, would be well advised to consider in advance the arrangements to be made for the release of a defendant for whom no valid grounds for detention exist”).
391 Article 27 ICTY Statute and Article 26 ICTR Statute, Rule 103 ICTY and ICTR RPE. Consider also ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (Rev.1), 1 September 2009 and ICTR, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment, 23 September 2008. In that regard, it was noted by some authors that “[i]t is an open question as to what should happen if no such designation can be made, meaning that no state would be prepared to enforce sentences of the Tribunals.” See C. KRESS and G. SLUITTER, Imprisonment, 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. 1772.
392 As discussed, supra, Chapter 8, II, 2.10.
detention should always have the authority to order release.  

The ECtHR held that such authority to order release should be ‘effective’.

It follows that once there is no longer a justification for continued pre-trial detention, a duty is incumbent on the tribunal to identify a country willing to accept provisionally released accused persons. Whether it would actually be possible for the tribunal to identify states willing to conclude an agreement to accept provisionally released persons on their territory remains an open question. According to one legal officer of the ICTR, imposing such a burden on the tribunal “is like asking the impossible”.

In connection to the question above, it is important to ask how far an obligation is incumbent on states to accept persons who have been provisionally released by the tribunal. It could be argued that a broad interpretation of the unconditional requirement to ‘cooperate with the tribunal in the investigation and/or prosecution of persons accused of committing serious violations of international humanitarian law’ encompasses a duty to receive persons who have been provisionally released by the tribunal on their territory. As one author puts it, the duty of states to cooperate with the ad hoc tribunals is “all-embracing.” It includes “any situation in which the ICTY or ICTR need assistance.” Such an obligation is only limited where statutory provisions would limit such obligations (as the Statutes of the ad hoc tribunals arguably do with regard to the enforcement of sentences).

In casu, where provisional release is ordered, the tribunal needs assistance by states to effectively implement its decision.

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393 See supra, Chapter 7, V.3.1 (right to be promptly brought before a judge or ‘officer’) and Chapter 7, V.4.1 (right to challenge the legality of detention).

394 ECtHR, Feldman v. Ukraine, Application Nos. 76556/01 and 38779/04, Judgment of 8 April 2010, par. 90 (where the national court ordered release of the person, the person was immediately re-arrested. The ECtHR held that the review of the lawfulness of detention was thus ineffective in that there was no adequate judicial response to the applicant's complaints). See S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 308.

395 One legal officer, when asked about the existence of a duty incumbent on the tribunal to identify a state willing to accept the accused person provisionally released, replied the following: “[F]rom an administrative point of view, I would say that it is probably undesirable to impose additional responsibility on the Tribunal, because it is like asking the impossible.” See Interview with a Legal Officer of the ICTR, ICTR-29, Arusha 5 June 2008, p. 5.

396 Article 29 ICTY Statute and Article 28 ICTR Statute.


399 Ibid., p. 1592.
to release a person provisionally. Therefore, the state requested should comply with such request.

Nevertheless, when interviewees were asked about the existence of such an obligation, some revealed themselves to be rather sceptical. First of all, such decisions involve important financial consequences.\textsuperscript{400} Secondly, and more importantly, it may be asked whether there could be an obligation on states to accept persons who are accused of grave crimes on their territory.\textsuperscript{401} One interviewee called it “a step too far”.\textsuperscript{402} In that regard, it was noted that there is no obligation to grant them refugee status.\textsuperscript{403} Indeed, Article 1 (F) (a) of the 1951 Refugee Convention excludes persons from the protection of refugee status in case there are ‘serious reasons for considering’ that the person has committed a crime against peace, a war crime or a crime against humanity. Besides, states may argue that their immigration laws may prevent them from accepting the person onto their territory.\textsuperscript{404}

II.3. The ICC: Provisional release as the rule, detention as the exception

The ICC provides for a regime of pre-trial detention and release that is substantially different from the provisional release scheme provided for by the \textit{ad hoc} tribunals and the SCSL. Several (guiding) principles underlying the Court’s pre-trial detention and provisional release scheme distinguish it from the other international criminal tribunals and deserve our close consideration. The next subsection will address issues such as the allocation of the burden of proof, the absence of discretion to order pre-trial release and, most notably, the existence of a periodic review mechanism. The sum of these elements will lead us to conclude that the procedural scheme of the ICC provides for provisional release as a rule and detention as an exception. The ICC’s record on provisional release provides us with two examples where

\begin{itemize}
  \item \textsuperscript{400} Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 7.
  \item \textsuperscript{401} Consider e.g. Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 8 (“I am just not so certain how easy it would be for the Tribunal to make arrangements with states and sort of coerce them into accepting a detained person if they are unwilling to do so”).
  \item \textsuperscript{402} Interview with a Legal Officer of the ICTR, ICTR-17, 3 June 2008, p. 7 (“I think that is a step too far. I think it is too far to order a state to accept someone who is accused of mass murder on their territory. I do not think any state would really want to do that. I think it should remain voluntary”).
  \item \textsuperscript{403} Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 8.
  \item \textsuperscript{404} Nevertheless, some accused persons already had official refugee status in the countries were they were arrested. Therefore they should not have any problems in moving back to these countries. See: Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 14.
\end{itemize}
temporary interim release was granted on humanitarian grounds. Both concerned the temporary release of Bemba during a period not exceeding 24 hours to attend a funeral.405

§ Exceptional character of detention

ICC case law has continuously emphasised the exceptional character of pre-trial detention, thereby deviating from the mainstream opinion upheld in the case law of the ad hoc tribunals and the SCSL that detention is neither the rule nor the exception.406 Indeed, in stark contrast to the system of automatic pre-trial detention at the ad hoc tribunals and the SCSL, the ICC Statute makes the issuance of a warrant of arrest by the Pre-Trial Chamber dependent not only upon the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court but also on the existence of a legitimate purpose for the detention. More precisely, detention should appear to be necessary (i) to ensure the person’s appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings or (iii) to prevent the person from continuing with the investigation.

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405 See ICC, Decision on the Defence’s Urgent Request Concerning Mr. Jean-Pierre Bemba’s Attendance of his Father’s Funeral, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-437-Conf, PTC II, 8 July 2009 as referred to in ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 36; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 36; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-403, PTC II, 14 August 2009, par. 36; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 36 (indicating it as one of “the guiding principles upon which the present review is based”).
commission of the crime or a related crime which is within the jurisdiction of the court and arises out of the same circumstances. The importance of this different starting point lies in its accordance with international human rights norms and practices. It was previously emphasised how international human rights norms require that detention be the exception and not the rule. Besides, the existence of a statutory provision dealing with pre-trial detention and release (Article 60 ICC Statute) should be noted, in contrast to the absence of such a provision in the Statutes of the ad hoc tribunals and the SCSL.

However, it has been argued that, with the exception of instances where a person appears before the Court following a summons to appear, pre-trial detention is the rule. This conclusion is derived from the structure of the relevant provisions and the requirement that the suspect request or apply for interim release.

§ Applications for provisional release pursuant to Article 60 (2) ICC Statute

Pursuant to Article 60 (2) ICC Statute, the suspect or accused may apply for provisional release during the period of pre-trial detention. The suspect should be informed about this right to apply for interim release at his or her first court appearance. Such a request can be made at the first appearance or afterwards. The Pre-Trial Chamber should be satisfied that the conditions for detention under Article 58 (1) ICC Statute are met. In that regard, written observations should be sought from the Prosecutor and the detained person. Besides, the Pre-Trial Chamber should seek the observations of the host state and of the state to which the person seeks to be released. Consequently, in line with the case-law of the ad hoc tribunals,

407 See supra, Chapter 7, II.1.
408 See supra, Chapter 8, I.
410 Article 60 (1) ICC Statute.
411 Rule 118 (1) ICC Statute.
412 As noted by Judge Pikis, the principal distinction between Article 60 (2) ICC Statute and Article 58 (1) is the different time perspective. See ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Decision 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, Separate Opinion of Judge Georgios M. Pikis, par. 10.
413 Rule 118 (3) ICC RPE; ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 Entitled “Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's judgment of 19 August 2011”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-1937-Red2 (OA 9), A. Ch., 15 December 2011, par. 64.
414 Regulation 51 of the ICC Regulations of the Court.
the suspect or accused applying for interim release should indicate the state to which he or she seeks to be released.\textsuperscript{415}

As jurisprudence clarifies, a decision pursuant to Article 60 (2) ICC Statute requires that the justification for detention be examined anew (\textit{de novo}) and that such a review be based on evidence placed before the Chamber and not on evidence placed before another Chamber.\textsuperscript{416}

The requirement to assess anew the facts justifying detention implies that the power of the Pre-Trial Chamber is not conditioned by a previous ruling on the application for an arrest warrant.\textsuperscript{417} However, this does not prevent the Chamber from referring, in its decision on interim release, to the decision on the warrant of arrest, where the factors that were relied upon in the latter decision may be the same.\textsuperscript{418} There is no requirement for presenting ‘changed circumstances’.\textsuperscript{419} This requirement should be understood in light of the \textit{ex parte} nature of the application for a warrant of arrest. The Court hears the submissions from the


\textsuperscript{416} 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, \textit{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. 12. Consider also the dissent of Judge Pikis, who is critical of the reasoning of the Single Judge, who relied on the decision on the issuance of an arrest warrant as the basis for the determination of an application for interim release pursuant to Article 60 (2) ICC Statute without satisfying himself that the conditions of Article 58 (1) ICC Statute were met and leaving it to the suspect to rebut the findings of the Pre-Trial Chamber in the decision on the confirmation of the arrest warrant. See 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”, \textit{Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-323 (OA), A. Ch.}, 16 December 2008, Dissenting Opinion Judge Georgios M. Pikis, par. 26-27. See further ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, \textit{Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01/11-180-Red, PTC I}, 13 July 2012, par. 47.


\textsuperscript{418} \textit{Ibid.}, par. 27.

\textsuperscript{419} \textit{Ibid.}, par. 25. The Appeals Chamber determines that the Pre-Trial Chamber misstated the applicable standard where the requirement of ‘changed circumstances’ only applies to decisions under article 60 (3) on the periodic review of decisions on provisional detention. Nevertheless, the majority concluded that the Pre-Trial Chamber applied the correct legal standard in the factual analysis (\textit{ibid.}, par. 25). Judge Ušacka disagrees on this point and convincingly shows how the many references in the decision to the arrest warrant decision create the opposite impression. See \textit{ibid.}, Dissenting Opinion of Judge Anita Ušacka, par. 20 et seq.
Defence for the first time. The assessment pursuant to Article 58 (1) ICC Statute includes both limbs (the presence of reasonable grounds and necessity of the detention).

§ Provisional release applications pending surrender (Article 59 (3) ICC Statute)

As hinted before, the ICC Statute equally provides for a second regime which applies to provisional release applications in the custodial state (‘interim release pending surrender’). While being detained in the custodial state and pending surrender to the ICC, the suspect has a right to apply for interim release before the competent authority. Such a right is an improvement in comparison with the ad hoc tribunals’ procedural system, where no provision was made for interim release in the custodial state and where the issue of provisional release was left in its entirety with the Trial Chamber. Such right betrays the more horizontal nature of the ICC. In the absence of further specifications regarding the applicable procedure, the relevant municipal laws will apply to these applications for provisional release. Worrisome at first is the requirement that the competent authority of the custodial state considers, ‘given

420 ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 23 (in contrast, a decision pursuant to Article 60 (3) is a review of an earlier decision on detention/release).

421 While the jurisprudence of the ICC has uniformly held that the assessment pursuant to Article 60 (2) ICC Statute should include both limbs, it has been argued that a challenge to the ‘reasonable grounds’ requirement is not really an application for interim release and that the result of a successful challenge should not be interim release but dismissal of the charges. See W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, pp. 724 -725. Nevertheless, the re-assessment of the existence of reasonable grounds provides a safeguard to the suspect or accused where it ensures that reasonable grounds, which are a necessary requirement for the issuance of the warrant of arrest, persist. The successful challenge of the ‘reasonable grounds’ criterion does not invalidate the original warrant of arrest where it encompasses a consideration anew whether the reasonable grounds criterion continues to be fulfilled. Therefore, the time element may explain different outcomes where the Pre-Trial Chamber assesses the existence of ‘reasonable grounds’.

422 Article 59 (3) – (7) ICC Statute and Rule 117 ICC RPE.

423 Article 59 (3) ICC Statute. The jurisprudence of the ICC reveals that at least two suspects have relied on this right: Bemba Gombo and Mbarushima, and applied for interim before the competent authority in Belgium and France respectively.


425 Such design should be considered in light of concerns that were raised during the drafting process of the Rome statute (ad hoc committee of the GA) that municipal law might be at tension with the obligations of the State towards the Court. This led to the position of the PrepCom that proceedings for arrest were to lay essentially within the framework of the domestic authorities: see W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 717.
the gravity of the alleged crimes’, whether there are ‘urgent and exceptional circumstances’ to justify interim release and whether the necessary safeguards exist to ensure that the custodial state can fulfil its duty to surrender a suspect to the ICC. This provision reinstalls the original, pre-amendment Rule 65 (B) ICTY RPE requirement. Notably, where the pre-amendment criterion of ‘exceptional circumstances’ was justified by (1) the extreme gravity of the offences concerned and (2) the unique circumstances under which the tribunal operates, including the absence of a police force and the absence of any control over the areas in which the accused would reside, only the first one is relevant here where applications for interim release in the custodial state are concerned. Nevertheless, it should be noted that the criteria for interim release in the custodial state “reflect current practice in the field of extradition.”

At that stage a warrant of arrest has already been issued pursuant to Article 58 ICC Statute, which presupposes the fulfilment of the relevant standard of proof and a determination that detention is necessary. Therefore, the comparison with the pre-amendment provisional release regime at the ad hoc tribunals and the SCSL is flawed. More worrisome then is the prohibition for the custodial state to consider whether the warrant of arrest was lawfully issued. This contrasts with the jurisprudence of the ad hoc tribunals and is in tension with international human rights norms. However, Rule 117 (3) ICC RPE inserts a possibility to challenge the legality of the warrant of arrest by direct application to the ICC Pre-Trial Chamber. Furthermore, as noted by SLUITER, nothing seems to prevent the executive branch to raise issues relating to the legality of the warrant of arrest as an obstacle.

426 Consider e.g. C.A. MÜLLER, The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals, in «International Criminal Law Reviews», Vol. 8, 2008, p. 620 (arguing, among others, that such requirement is inconsistent with the ICCPR and the jurisprudence of the ECtHR and is contrary to the principle of complementarity as well as Article 21 (3) ICC Statute).

427 See the discussion of this requirement, supra, Chapter 8, II.1.

428 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. 1254 (the author adds that “[t]he critical consideration in deciding whether or not to grant interim release must surely be whether or not the risk that a person will abscond after having been released can be minimized”).

429 For a similar view, 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. 469 (arguing that the inclusion of such criterion is “fully justified”).

430 Article 58 (4) ICC Statute, see supra, Chapter 7, V.3.2.

431 See supra, Chapter 7, V.4.1.

432 Notably, such limitation may be at tension with the right to challenge the lawfulness of the arrest and detention, as discussed in detail, supra, Chapter 7, V.3.2.

433 See supra, Chapter 7, II.4.2 and Chapter 7, V.3.2. and V.4.2. Besides, whereas Article 59 (4) ICC Statute prevents the competent authority in the custodial state from assessing the legality of the arrest warrant, nothing prevents the competent authority from reviewing the legality of the request for the arrest and surrender of the person. As noted by one author, this may even allow the competent authority to review the legality of the sufficiency of the evidence supporting the request, pursuant to Article 91 (2) (C) 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, pp. 469 – 470.
to cooperation.\textsuperscript{434} Further requirements incumbent on the custodial state include the obligation of notification, the obligation to ‘give full consideration’ to recommendations by the Pre-Trial Chamber before rendering a decision, to provide periodic reports upon request by the Pre-Trial Chamber and to deliver the suspect to the ICC as soon as possible when ordered to do so.\textsuperscript{435} While the practice is limited, Article 59 (3) ICC Statute was put to the test in the \textit{Bemba} case when Bemba requested to be provisionally released by the custodial state (Belgium). The request was denied.\textsuperscript{436}

\textbf{§ Disclosure}

There is no provision in the statutory documents of the ICC for disclosure in relation to applications for interim release, leaving an important lacuna.\textsuperscript{437} Nevertheless, the Appeals Chamber clarified that the suspect or the accused must be granted access to the largest extent possible to documents that are essential for him or her to challenge the legality of detention. Such requirement follows from the right of every individual to be informed of the grounds and reasons for which the deprivation of liberty is sought.\textsuperscript{438} The Prosecutor should have this in mind when applying for a warrant of arrest pursuant to Article 58 ICC Statute and alert the Pre-Trial Chamber as soon as possible, preferably at that time, of any necessary redactions.\textsuperscript{439}

Such redactions may be necessary to protect victims and witnesses or to safeguard the on-


\textsuperscript{435} Article 59 (5) – (7) ICC Statute. Consider e.g. ICC, Recommendations adressées à la Chambre d’instruction de la Cour d’Appel de Paris en vertu de l’article 59 du Statut de Rome, \textit{Le Procureur c. Mbarushimana, Situation en RDC}, Affaire No. ICC-01/04-01/10-15, Ch. P. 1, 18 octobre 2010 (in which the Pre-Trial Chamber limited itself to confirming that the justifications for the detention set out in its decision on the Prosecutor’s application for an arrest warrant remain valid).

\textsuperscript{436} Cass, P.08.0896.F, 18 June 2008, which can be found in the Oxford Reports on International Law in Domestic Courts, http://idel.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-idel-1115be08&recno=3&module=idel&category=Belgium, last checked 21 December 2010. According to Article 16 (1) of the Law of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, the suspect can file a request for release awaiting surrender with the \textit{Chambre des mises en accusation} (Kamer van Inbeschuldigingstelling). The \textit{Cour de Cassation} (Hof van Cassatie) held that a suspect can request provisional release pursuant to Article 59 (3) ICC Statute and Article 16 (1) of the Law on cooperation with the ICC while the \textit{Chambre des mises en accusation} had no yet taken a decision on his appeal against his provisional detention, because these are two separate procedures).


\textsuperscript{438} Article 9 (2) and (4) ICCPR; Article 5 (2) and (4) ECHR; Art. 7 (4) and (5) ACHR; see the discussion of this right, supra, Chapter 7, V.2.2.

\textsuperscript{439} Ibid., par. 32-33.
going investigation. Where the suspect or accused applies for interim release in the absence of full disclosure, he or she can again apply for interim release when full disclosure has been obtained.

II.3.1. Absence of discretion to refuse provisional release

An important difference in the ICC’s provisional detention and release scheme is the absence of any discretion of the Pre-Trial Chamber. It follows from the language of Article 60 (2) ICC Statute that where the conditions for detention under Article 58 (1) ICC Statute cease to be met, the person shall be released.

Importantly, since decisions on an application for provisional release pursuant to Article 60 (2) juncto Article 58 (1) ICC Statute are not discretionary in nature, the principle of proportionality and necessity should not be an independent consideration in a decision regarding continued detention. Indeed, it is the discretion of the Trial Chamber of the ad hoc tribunals and the SCSL to either refuse or grant applications for provisional release which necessitates the reading of a distinct requirement of proportionality (including a notion of necessity) into Rule 65 (B) ICTY, ICTR and SCSL RPE.

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440 Ibid., par. 33. Consider in this regard the critical remarks of SCHABAS regarding the scope of application for interim release as being limited to the requirements of Article 58 (1) (b) and not including Article 58 (1) (a) ICC Statute, supra, Chapter 8, II.3, fn. 421.


442 See the wording of Article 60 (2) ICC Statute: ‘shall’ (not ‘may’) as confirmed in 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. 134; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 41; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 59.

443 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. 140.
II.3.2. Burden of proof rests with the Prosecutor

According to the relevant case law, the burden of proof pursuant to Article 60 (2) ICC Statute rests on the Prosecution. It was argued by Single Judge Kuenyehia in the Katanga and Ngudjolo Chui case that this follows not only from the ordinary meaning of the words of Article 60 (2) ICC Statute, but is also in accordance with the object and purpose of Article 60 (2) ICC Statute. The provision aims at ensuring that pre-trial detention is limited to the period of time when the conditions of Article 58 (1) continue to be met.  

However, the close scrutiny of the reasoning by the Single Judge or the Pre-Trial Chamber in the assessment of applications for provisional release unveils inconsistencies in the Court’s case law. For example, in the Bemba case, the Single Judge effectively put the burden on the suspect. When assessing the risk of obstruction or endangerment of the investigation or prosecution, the Single Judge referred to the findings and conclusions of the Pre-Trial Chamber in its decision on the application for an arrest warrant, “in the absence of any relevant argument on the part of the defence to the contrary.” Similarly, in its assessment of the ‘reasonable grounds’ requirement of Article 58 (1) (a) ICC Statute, the Single Judge argued that these grounds are exhaustively explained in the decision on the application for a warrant of arrest and that “the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand.” The Appeals Chamber determined


445 Ibid., par. 52.

446 Ibid., par. 52.
that while it would have been preferable for the Pre-Trial Chamber to explain in more detail how it reached its conclusion, the Single Judge did not err. 447

Such conclusion is regrettable. By confirming that the yardstick for determining an application for interim release pursuant to Article 60 (2) ICC Statute is the warrant of arrest and the decision on the Prosecutor’s application for a warrant of arrest (a decision taken in the absence of the suspect or accused) the burden of proof is effectively put on the suspect or accused. 448 It is up to the suspect or accused to rebut the findings in this decision. 449 As argued by Judge Pikis in his dissent to the Appeals Chamber’s judgment, the burden of proof pursuant to Article 60 (2) ICC Statute should be on the Prosecutor, who seeks to limit the liberty of the individual. The Prosecution should satisfy the Pre-Trial Chamber that the requirements of Article 58 (1) ICC Statute are met. Where, as previously explained, an Article 60 (2) ICC Statute application requires the Pre-Trial Chamber to revisit the conditions under Article 58 (1) anew; the assessment should not be limited to a determination whether the suspect or accused person has rebutted these conditions. 450

It was previously held that putting such burden on the detained person is in violation of international human rights norms. 451 Additionally, placing the burden of proof on the suspect or accused is contrary to Article 67 (1) (i) ICC Statute, which prohibits any reversal of the burden of proof or placing of the onus of rebuttal on the accused person.

This minority view notwithstanding, the majority of the case law seems to put the burden, under Rule 60 (2) ICC Statute, on the Prosecutor. However, it was noted by SCHABAS that it is not clear what the implications of placing such burden on the Prosecutor are where the Prosecutor “may simply rely upon earlier submissions, coupled with the claim that


449 Consequently, the Prosecutor should not adduce any evidence or material other than the decision on the application for an arrest warrant.

450 Ibid., par. 26, referring to 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, A. Ch., Case No, ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 12.

451 See supra, Chapter 8, II.2.2.
This implies that the burden to produce new evidence that challenges the earlier decision by the Pre-Trial Chamber rests with the accused. Where it holds true that the burden on the Prosecutor may not be too high where the Pre-Trial Chamber has previously been satisfied that ‘reasonable grounds’ exist and that detention is necessary, the previous finding does not predict the outcome of the re-consideration anew of the justification of detention. More puzzling is the argumentation that “[i]f the Prosecutor produces no evidence of changed circumstances, there must be a presumption in favour of a status quo. In other words, the burden falls to the detained person to produce new evidence challenging the earlier ruling.” The existence of any presumption (for a status quo) is at tension with the requirement pursuant to Article 60 (2) ICC Statute to consider the justification for detention anew and, therefore, should be rejected.

II.3.3. Periodic review of ruling on release or detention

Doubtless, the most important dissimilarity between the ICC’s and the ad hoc tribunals’ provisional release scheme is the periodic review mechanism which is provided for under Article 60 (3) ICC Statute and Rule 118 (2) ICC RPE. It provides the detained person with a procedural safeguard against the undue prolongation of detention. The purpose of this procedural safeguard is “to ensure that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances.” Therefore, the passing of time is of central importance to the understanding of this review mechanism.

453 Ibid., p. 724.
454 Ibid., p. 724.
455 See the discussion supra, Chapter 8, II.3.
457 Ibid., par. 49. It has been argued that the “changed circumstances” requirement seeks to prevent one Chamber (single Judge) to revise the decision by a differently composed Chamber (single Judge) and from acting, in effect, as an appellate court. See K.A.A. KHAN, Article 60, 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. 1165 (who considers such condition to be “a proper and appropriate safeguard to avoid frivolous or repeated applications on this issue by either side”.

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Pursuant to Article 60 (3) ICC Statute, a ‘ruling on detention’ should regularly be reviewed by the Pre-Trial Chamber or by the Single Judge.\(^{458}\) Whereas Article 60 only speaks of the review of detention by the Pre-Trial Chamber, the Trial Chamber can exercise its functions in relation to interim release on the basis of Article 61 (11) ICC Statute.\(^{459}\) Such review should take place at least every 120 days or at any time at the request of the person or the Prosecutor.\(^{460}\) No time restriction applies if one of the parties requests a review of a ruling on provisional release. They should not wait 120 days.\(^{461}\) Nevertheless, the jurisprudence clarified that the statutory provisions also provide the Single Judge with a margin of discretion to decide whether such new application should be admitted for the sake of conducting a review on interim release.\(^{462}\) There seems to be no basis for reading such discretion into Article 60 (3) ICC Statute. The ‘changed circumstances’ criterion already limits the right of the parties to request a review of the pre-trial detention and safeguards against repetitious or frivolous requests.

The Pre-Trial Chamber may decide, at the request of one of the parties or \emph{proprio motu}, to convene a hearing. It is under the obligation to have at least an annual hearing on the issue pre-trial detention.\(^{463}\) It was held by PTC I that observations by the parties are not a precondition for the periodic review.\(^{464}\) Importantly, the obligation of a periodic review pursuant to Article 60 (3) ICC Statute only applies where there has been a \textit{ruling on a

\(^{458}\) Article 39 (2) (b) (iii) ICC Statute and Rule 7 ICC RPE allow for a single Judge to exercise the functions of the Pre-Trial Chamber.


\(^{460}\) Rule 118 (2) ICC RPE.


\(^{462}\) \textit{Ibid.}, par. 32-33 (\textit{in casu}, the Pre-Trial Chamber considered that the suspect had received full disclosure between the time of his previous and present interim release application, which warranted a reconsideration of the matter. Besides, the Pre-Trial Chamber noted that the deadline for the periodic review was approaching. Therefore, expediency considerations further favoured the review).

\(^{463}\) Rule 118 (3) ICC RPE. For an example, see ICC, Transcript of Hearing, \textit{Prosecutor v. Bemba Gombo, Situation in the DRC}, Case No. ICC-01/05-01/08-T, PTC II, 29 June 2009.

previous application for provisional release. Where Article 60 (3) ICC Statute speaks of a ‘ruling on the release or detention of a person’, the Appeals Chamber rejected the assertion in Lubanga that the periodic review is not only triggered by a decision on interim release but also as a consequence of “any different action of the Pre-Trial Chamber which had the result of keeping Thomas Lubanga in detention.” Consequently, it is not the warrant of arrest that triggers the periodic review mechanism of Article 60 (3) ICC Statute. In Bemba, the Appeals Chamber clarified that the ‘ruling’ referred to in Article 60 (3) ICC Statute is either the initial decision made under Article 60 (2) ICC Statute or ‘any potential subsequent modifications made to that decision under Article 60 (3) of the Statute’.

It has been held by Single Judge Steiner that in the absence of a previous request for interim release, the Single Judge or Pre-Trial Chamber is not precluded from conducting a proprio motu review of the pre-trial detention, where such would be warranted. Such proprio motu power ultimately derives from the function of the Pre-Trial Chamber as the ‘ultimate guarantor of the rights of the Defence’, and equally follows from a contextual reading of Article 60.

465 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. 94. Nevertheless, Pre-Trial Chamber I apparently disregarded the holding by the Appeals Chamber, where the Single Judge (Judge Steiner) reasoned that pre-trial detention should be reviewed at least every 120 days pursuant to Rule 118 ICC RPE, and where in casu no previous application for interim release had been filed by the defendant. See ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, Prosecutor v. Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 24 January 2008, p. 3. A later decision by Single Judge Steiner followed the reasoning of the Appeals Chamber. See ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, Prosecutor v. Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6.

466 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. 96 – 99. Judge Pikis, in his separate opinion, clarified that ‘review’ refers to a ‘revisitation’ of a subject previously visited. That subject revisited concerns the interim release of the suspect which can only arise where the suspect is being detained. Besides, a ‘ruling’ refers to “the outcome of a court’s decision either on some point of law or on the case as a whole.” See ibid., Separate Opinion of Judge Georghios M. Pikis, par. 15.


468 ICC, Decision Concerning Pre-Trial Detention of German Katanga, Prosecutor v. Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6; ICC, Decision on the Powers of the Pre-Trial Chamber to Review proprio motu the Pre-Trial Detention of Germain Katanga, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-330, PTC I, 18 March 2008, pp. 8-10, 12.

469 Ibid., p. 8.
(3) ICC Statute from its object and purpose and is in compliance with international human rights norms. Nevertheless, such a reading is obviously at tension with the ordinary meaning of the wording of Article 60 (3) which speaks of a ‘review of its ruling on release or detention of the person’. While the Appeals Chamber has not yet considered the issue of a proprio motu review pursuant to Rule 60 (3) ICC Statute, it was indicated above that according to the Appeals Chamber, such a ruling refers to the initial decision taken on a request for interim release or any modifications thereto. It remains unclear what the starting point is in a case of a proprio motu review in the absence of previous ruling on provisional release and detention.

When the Pre-Trial Chamber periodically reviews the detention on remand, it should address the justification for the detention anew and satisfy itself whether the conditions under Article 58 (1) ICC Statute continue to be met. The Pre-Trial Chamber should ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention. According to Article 60 (3) ICC Statute, the Pre-Trial Chamber may only modify its ruling ‘if it is satisfied that changed circumstances so require’.

More precisely, from the reading of Article 60 (3) ICC Statute and Rule 118 ICC RPE in light of Articles 55, 57 and 67 ICC Statute, including the right for the suspect or accused “not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.”

Article 60 (3) ICC Statute and Rule 118 ICC RPE aim, according to the Pre-Trial Chamber, (i) at ensuring that a person is only detained on remand where the conditions for detention of Article 58 (1) are met, and (ii) only for the period of time these conditions continue to be met and that, if no such proprio motu power were read in Article 60 (3), “a person could remain in pre-trial detention indefinitely without any review whether the conditions continue to be met.”

See supra, Chapter 8, II, 3.3, fn. 465-467 and accompanying text.


Ibid., par. 60. In another decision, Single Judge Steiner followed the reasoning of the Appeals Chamber. See also ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the Democratic Republic of the Congo, Case No. ICC-01/05-01/08-234, PTC II, 16 December 2008, par. 32 (holding that the ‘changed circumstances’ criterion necessitates revisiting the conditions on the basis of which it was decided in the previous decision on provisional release that the suspect should continue to be detained); ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 37; ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, Prosecutor v. Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6.

Where no material change in circumstances since the last review of the detention has been identified by the Trial Chamber, the Chamber will not consider the preparedness of states to accept a person that is provisionally released: Consider ICC, Transcript of Hearing, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-234, T. Ch. III, 2 December 2008, p. 28; ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 32.
changed circumstances, according to the Appeals Chamber, either encompass a change in some or all of the facts that are underlying a previous decision on detention or the presence of a new fact which satisfies the Pre-Trial Chamber that a modification of the previous decision is necessary. Trial Chamber III held, in line with the holding of the Appeals Chamber, that what is required is a ‘material (or substantive) change’ of circumstances. However, the Trial Chamber further narrowed the concept of changed circumstances by holding that ‘incremental changes’ (which for example follow from the passage of time) do not necessarily reach the threshold to constitute a ‘material change’. Such limited interpretation of the concept of ‘material changes’ sits uneasy with the emphasis put on the passage of time by the jurisprudence of the ECtHR. The jurisprudence of the ECtHR uniformly underscored the importance that the court reviewing the detention takes the passage of time into consideration and demonstrates that the reasons for detention which existed at the beginning of the detention continue to exist until the point at which the applicant was released or convicted. By introducing the concept of ‘incremental changes’, the Court denies the importance of the element of time with regard to the justification for continued detention.

Regarding methodology, where the Pre-Trial Chamber carries out a periodic review, it must revert to the ‘ruling on the release or detention of a person’ and determine whether or not


477 Consider also S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 306 (arguing that “time is a very relevant circumstance, and it is always changing, by definition”).

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there has been a change in circumstances bearing on the requirements of Article 58 (1) ICC Statute. It should look at the circumstances already decided on in the ‘ruling’ and determine whether these circumstances continue to exist. There is no need to enter findings on the circumstances already decided upon in the original ruling. Importantly, this implies that the Chamber cannot limit itself to the consideration of the arguments raised by the Defence. Evenly important, the Chamber is required to set out its reasoning. This is in line with the jurisprudence of the ECtHR which repeatedly emphasised that where identical or stereotyped language is used in the orders confirming detention, this raises doubts about the justification for continued detention. Nevertheless, at the same time the ECtHR has stressed that the lack of detailed reasoning will not in itself lead to a violation of Article 5 (3) ECHR.

In this respect, the Appeals Chamber proffered necessary guidance to the Pre-Trial Chambers in how to conduct periodic reviews. Earlier practice revealed rather divergent views on the scope of the review decisions. For example, in Lubanga, Trial Chamber I discussed the relevant conditions for detention under Rule 58 (1) ICC Statute in the context of a periodic review, without having due regard the presence of ‘changed circumstances’. In the Katanga and Ngudjolo case, Pre-Trial Chamber I adopted yet another approach to the matter where it, upon the conclusion that the circumstances had not changed since the previous ruling,

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481 Ibid., par. 52.

482 Ibid., par. 52.


484 Consider e.g. ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007, par. 6 – 10.
appraised the submissions made by the parties in the context of that original request for interim release.485

§ Burden of proof

Similar to what was said earlier regarding applications for provisional release; divergent views existed concerning the burden of proof. A review of the relevant jurisprudence reveals that in some instances, the burden was put on the suspect or accused to show that events which occurred since the previous reconsideration implied a substantial change in the circumstances.486 The suspect or the accused was effectively required to refute the grounds on the basis of which the Pre-Trial Chamber or Single Judge made the previous determination as to the validity of the requirements of Article 58 (1) ICC Statute.

In its decision in the Bemba case, the Appeals Chamber clarified this issue. According to the Appeals Chamber, when the Pre-Trial Chamber decides to issue a warrant of arrest pursuant to Article 58 ICC Statute on the basis of evidence and other information submitted by the Prosecutor, this indicates that the Prosecutor must also submit information satisfying the Pre-Trial Chamber that continued detention is necessary.487 Consequently, the burden clearly rests on the Prosecutor. However, this burden is limited to ‘changed circumstances’. The Prosecutor is required to make submissions on the question of whether or not there has been any change in the conditions that previously justified detention. Connected to this is the obligation incumbent on the Prosecutor to bring any other relevant information of which he or

486 ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 40 (“The Defence thus failed to refute the grounds on the basis of which the Single Judge made her previous determination that the requirements of Article 58 (1) remained valid”); ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 33 (“the Chamber is unpersuaded that any of these matters demonstrate a change of circumstances since the last review of the accused’s detention, either viewed separately or together. Further, they do not undermine the critical conclusion that detention remains necessary to ensure the accused’s appearance at this trial”); ICC, Decision on the Review of the Detention of Mr. Jean-Pierre Bemba pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-843, T. Ch. III, 28 July 2010, par. 38 (“In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime”).
she is aware that relates to the question of detention or release to the attention of the Chamber. 488

§ Prosecutorial review of detention

Whereas Article 60 (3) ICC encompasses the duty incumbent on the Pre-Trial Chamber to periodically review the pre-trial detention, it should be noted that the Regulations of the OTP include a parallel obligation on the OTP to keep the necessity of the provisional detention of a person under review. 489

II.3.4. Interlocutory appeal against decisions on detention or release

In line with the ad hoc tribunals and the SCSL, decisions granting or denying interim release may be appealed by either party. 490 Obviously, such right to appeal equally applies to instances of conditional release. The scope of the appeal is limited. The appraisal of the evidence which is relevant to the continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on the basis of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or the taking into account of facts extraneous to the sub judice issues. 491 As far as factual errors are concerned, the Pre-Trial Chamber enjoys a margin of appreciation with regard to the inferences drawn from the available evidence and to the weight accorded to different factors. 492 Parties may request to

488 Ibid., par. 2, 51.
489 Regulation 57 (2) of the OTP Regulations.
490 Article 82 (1) (b) ICC Statute.
491 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, A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 25; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-031 (OA2), A. Ch., 2 December 2009, par. 61.
grant suspensive effect of the appeal. The time limitation for appeals of decisions on interim release is five days.\(^{493}\) Victims may participate on appeal under specific circumstances.\(^{494}\) Where they participated in the proceedings before the Pre-Trial Chamber (or Trial Chamber), they are not automatically allowed to participate in the interlocutory appeal. They should file an application to that extent, where an interlocutory appeal is a “separate and distinct stage of the proceedings”, and the Appeals Chamber will assess whether the victim’s personal rights have been affected as well as the appropriateness of the victims’ participation.\(^{495}\)

Concerns have been raised about the slow pace of the appellate review of detention-related decisions. For example, where the Defence in \textit{Bemba} appealed the review decision of Trial Chamber III of 28 July 2010, the Appeals Chamber rendered its decision on appeal on 19 November 2010, more than three-and-a-half months later. Similarly, in \textit{Gbagbo}, the Appeals Chamber rendered its decision on the decision of Pre-Trial Chamber I of 13 July 2012 on provisional release only on 26 October 2012, almost three-and-a-half months later. GOLUBOK noted that while no strict time limitations are provided for the consideration of these decisions on appeal, “[i]t is hardly possible for the delays of this magnitude to be compatible with the requirement of speedy review of the lawfulness of detention.”\(^{496}\) Indeed, where international human rights law requires that arrested persons and detained persons have the right to judicial supervision of the lawfulness of the detention, such lawfulness should be determined \textit{speedily}.\(^{497}\) Pending trial, there is a special need for a swift decision “because the defendant should benefit fully from the principle of the presumption of innocence.”\(^{498}\) Such time element includes the appellate proceedings, if provided for.\(^{499}\) As previously noted, 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.\(^{500}\) A delay of three months between the filing of a

\(^{493}\) Rule 154 (1) ICC RPE.

\(^{494}\) 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. 35 – 45.

\(^{495}\) Ibid., par. 35 – 45.

\(^{496}\) S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 309.

\(^{497}\) As discussed at length, supra, Chapter 7, V.4.1.

\(^{498}\) Consider \textit{e.g.} ECtHR, Shannon v. Latvia, Application No. 32214/03, Judgment of 24 November 2009, par. 67.

\(^{499}\) Consider \textit{e.g.} ibid., par. 67; ECtHR, Toth v. Austria, Application No. 11894/85, Series A, No. 224, Judgment of 12 December 1991, par. 84; ECtHR, Navarra v. France, Application No. 13190/87, Judgment of 23 November 1993, par. 28.

\(^{500}\) ECtHR, Rehbock v. Slovenia, Application No. 29462/95, Judgment of 28 November 2000, par. 85-86. See supra, Chapter 7, V.4.1.
challenge and the decision was found to be too lengthy ‘in principle’ by the HRC.\footnote{HRC, Torres v. Finland, Communication No. 291/1988, U.N. Doc. CCPR/C/38/D/191/1988, 5 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.} Consequently, the delays of the Appeals Chamber in ordering their review decisions may not be compatible with international human rights norms.

II.3.5. Grounds justifying pre-trial detention

II.3.5.1. General

In contrast with the statutory documents of the ad hoc tribunals and the SCSL, Article 58 ICC Statute imposes certain material conditions for pre-trial detention. Firstly, Article 58 (1) (b) ICC Statute sets a threshold for the issuance of a warrant of arrest and makes pre-trial detention dependent on the existence of ‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’. This requirement was already addressed elsewhere.\footnote{See supra, Chapter 7, II.2.} Secondly, detention should be necessary on the basis of one of the alternative grounds justifying detention in Rule 58 (1) (b) ICC Statute. These grounds will be discussed here.

The requirement of a legitimate ground upon which pre-trial detention is based, brings the pre-trial detention regime in line with human rights norms. As previously noted, the ECtHR requires the existence of a “genuine requirement of public interest”, which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty.\footnote{See 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. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84.} The ECtHR discerned four permissible grounds for the refusal of interim release, to know (1) the risk that the accused will not appear for trial; (2) the risk that the accused would prejudice the administration of justice; (3) the risk that the accused would commit further offences and (4) the risk that the accused would cause public disorder.\footnote{Consider, e.g. ECtHR, Smirnova v. Russia, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 59.} It is easily understood how some of these legitimate grounds, such as the risk of flight or prejudice to the administration of justice
(or even the risk of public disorder), are particularly valid with regard to these international jurisdictions.\textsuperscript{505}

The close scrutiny of the decisions on interim release issued by the Pre-Trial Chambers, in general, only reveals a cursory discussion of the conditions set forth in Article 58 (1) ICC Statute. In several cases, the Appeals Chamber criticised the scarce reasoning of the respective Pre-Trial Chambers. In Lubanga, the Appeals Chamber noted that it would have been preferable for the Pre-Trial Chamber to explain in more detail why it reached its conclusion that the Appellant may abscond.\textsuperscript{506} Nevertheless, the Appeals Chamber immediately added “that it could not discern any error on the part of the Pre-Trial Chamber.”\textsuperscript{507} Similarly, it considered the reasoning as to the potential endangerment of witnesses (the other factor which, according to the Pre-Trial Chamber, necessitated continued detention) to be scarce, but added that the reasons for detention are in the alternative and therefore the question whether the detention is necessary to prevent the obstruction or endangerment of the investigations or court proceedings is not decisive.\textsuperscript{508} As a result, subsequent review decisions issued by Judge Steiner of Pre-Trial Chamber I underlined that the Appeals Chamber did not discern any error on the part of the Chamber and reiterated the wording of the Appeals Chamber that any determination by a Pre-Trial Chamber whether or not a suspect is likely to abscond necessarily involves an element of prediction.\textsuperscript{509} No further explanation is given why the PTC reached the conclusion that the accused may abscond or may interfere with the administration of justice.\textsuperscript{510} In a similar vein, periodic reviews

\textsuperscript{506} 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. 01/04-0106 (OA 7), A. Ch., 13 February 2007, par. 136-137.
\textsuperscript{507} Ibid., par. 136.
\textsuperscript{508} Ibid., par. 139.
\textsuperscript{510} Notwithstanding the additional argumentation by the Single Judge that the danger of absconding had increased after the confirmation of charges, that the identities of many witnesses were disclosed during the confirmation hearing and that, considering the ever volatile situation in the DRC, the risk of endangerment of victims and witnesses remained, the reasoning does not further clarify why these two factors were found to be present in the first place. See ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01-06-826, PTC I, 14 February 2007, p. 6; ICC, Second Review of the “Decision on the Application for Interim Release of
undertaken by Trial Chamber I, only included a scarce consideration of the conditions of Article 58 (1) (b) (i) ICC Statute.\textsuperscript{511} Likewise, in the \textit{Bemba} case, the Appeals Chamber on the one hand criticised the Pre-Trial Chamber and emphasised that it would have been preferable to discuss in more detail why the conditions of Article 58 (1) (b) (i) continue to be fulfilled, but on the other hand emphasised that:

"[i]t is nevertheless satisfied that the Pre-Trial Chamber’s omission to provide more detailed reasoning did not detract from the correctness and adequacy of its finding on this point."	extsuperscript{512}

Subsequent decisions on interim release suffer from similar poor reasoning. Finally, similar criticisms were vented towards Pre-Trial Chamber I in the \textit{Gbagbo} case, and the Appeals Chamber emphasised “the importance of the reasoning in decisions on interim release.”\textsuperscript{513} “The reasoning should indicate with sufficient clarity the basis of the decision.”\textsuperscript{514} While the Appeals Chamber noted that the reasoning of the Pre-Trial Chamber “was relatively sparse”, and emphasised “to provide fuller reasoning in future decisions on the review of detention”, it did not find the decision to be so lacking in reasoning for it to conclude to an error of law.\textsuperscript{515}

Therefore, while the Appeals Chamber repeatedly emphasised the importance of a detailed reasoning explaining why continued detention remains necessary, such consideration seems to have fallen on deaf ears. Such scarcely reasoned decisions are problematic from a human

\footnotesize{Thomas Lubanga Dyilo”, \textit{Prosecutor v. Lubanga Dyilo}, \textit{Situation in the DRC}, Case No. ICC-01/04-01/06-926, PTC I, 11 June 2007, p. 5.  
\textsuperscript{511} ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, \textit{Prosecutor v. Lubanga Dyilo}, \textit{Situation in the DRC}, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007, par. 10.  
\textsuperscript{512} 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”, \textit{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. 53. Similarly, the Appeals Chamber exposed itself critical of the scarce reasoning on Article 58 (1) (b) (ii) ICC Statute, again without finding an identifiable error of law (\textit{ibid.}, par. 66-67).  
\textsuperscript{513} ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, \textit{Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire}, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 47.  
\textsuperscript{514} \textit{Ibid.}, par. 47.  
\textsuperscript{515} \textit{Ibid.}, par. 47, 49, 64. Consider the Dissenting Opinion of Judge Ušacka, who disagrees with the majority and holds in this regard that “the majority has to correct errors, clarify findings, and interpret the findings in the Impugned Decision regarding the application of article 60 (2) of the Statute. With all due respect for the majority, I find that the reasoning provided by the Pre-Trial Chamber does not conform to the standards required of a reasoned decision pursuant to article 60 (2) of the Statute.” See \textit{ibid.}, Dissenting Opinion of Judge Anita Ušacka, par. 14.}
rights perspective where, as previously emphasised, the ECtHR repeatedly held that while the lack of a detailed reasoning will not in itself lead to a violation of Article 5 (3) ECHR, the use of identical or stereotyped language in orders confirming detention may give rise to doubts about the justification for the continued detention.\footnote{516} Reasons which are given to justify continued detention should be ‘relevant and sufficient’.\footnote{517}

Further, the decision on interim release should be based on the facts pertinent to the case. In the Ngudjolo case, the Appeals Chamber reasoned that the Single Judge had erred in her assessment of the possibility of obstructing or endangering the investigations or court proceedings, where she referred to the analysis of the security situation by Judge Steiner in the Katanga case. The Chamber underlined that the Single Judge is duty-bound to appraise facts bearing on sub judice matters, to determine their cogency and weight and come to certain findings. It is for the Single Judge to assess the facts pertinent to the decision.\footnote{518}

II.3.5.1. To ensure the presence of the suspect or accused at trial

The need to ensure the presence of the suspect or accused at trial seems to be the most important ground necessitating provisional detention. In the case law of the ICC (including decisions on applications for warrants of arrest, decisions on interim release, as well as decisions on the review of continued detention) several factors can be identified which are considered in the assessment of the necessity of a person’s arrest and detention to ensure his or her presence during the trial proceedings. Firstly, it may be expected that voluntary surrender is an important factor in the assessment of any risk of flight, in line with the case law of the ad hoc tribunals and the SCSL. In that regard, the ICC Pre-Trial Chamber rejected claims made by the suspect on his willingness to present himself before the Court because of


\footnote{517} Consider e.g. ECtHR, Wemhoff v. Austria, Application No. 2212/64, Series A, No. 7, Judgment of 27 June 1968, par. 12; ECtHR, Yagiç and Sargin v. Turkey, Series A, No. 319-A, Judgment of 8 June 1995, par. 52; ECtHR, Khodorkovsky v. Russia, Application No. 5829/04, Judgment of 31 May 2011, par. 182.

the hypothetical nature of such statement and the absence of any concrete evidence.\textsuperscript{519} Problematic is the finding of Pre-Trial Chamber I where prior detention, which prevented voluntary appearance, was the only factor to conclude that arrest was necessary to ensure appearance at trial.\textsuperscript{520} In this way, the fact that a person is detained prior to his surrender to the ICC is used as justification for his subsequent detention. Such reasoning contrasts with the practice of the \textit{ad hoc} tribunals. The \textit{ad hoc} tribunals hold that where the accused is prevented from voluntary surrendering him or herself, the absence of voluntary surrender is to be considered a neutral factor.\textsuperscript{521}

Secondly, the jurisprudence of the ICC uniformly holds that the fact that the charges have been confirmed increases the risk that a person may abscond.\textsuperscript{522} In a similar vein, the dismissal of an admissibility challenge by the Defence and the approaching start of the trial may increase the risk of absconding.\textsuperscript{523} Thirdly, the gravity of the crimes and the possibility of facing a long prison sentence are often referred to as a relevant factor in the consideration of the risk of absconding in the sense of Article 58 (1) (b) (i) ICC Statute.\textsuperscript{524}

\textsuperscript{519} Consider e.g. ICC, Decision on Application for Interim Release, \textit{Prosecutor v. Bemba Gombo, Situation in the Central African Republic}, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, \textit{Prosecutor v. Bemba, Situation in the Central African Republic}, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 58. In a later decision, the Single Judge held that while she cannot build her argument solely on hypothetical arguments, she was of the view that this factor, together with all other relevant factors constituted ‘changed circumstances’. “In the absence of any explanation for this change of its stance”, the Appeals Chamber found that the Pre-Trial Chamber erred in its appreciation of the weight to be attached to these hypothetical claims. See ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, \textit{Prosecutor v. Bemba Gombo, Situation in the Central African Republic}, Case No. ICC-01/05-01/08-80, PTC II, 14 August 2009, par. 61; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, \textit{Prosecutor v. Bemba Gombo, Situation in the DRC}, Case No. ICC-01/05-01/08-631 OA2, A. Ch., 2 December 2009, par. 75.

\textsuperscript{520} ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, \textit{Prosecutor v. Katanga, Situation in the DRC}, Case No. ICC-01/04-01/07; PTC I, 6 July 2007, par. 62.

\textsuperscript{521} See supra, Chapter 8, II, 2.6.1.


\textsuperscript{524} Consider e.g. ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté...
Appeals Chamber has emphasised, in line with the practice of the ad hoc tribunals and with international human rights law, that such factors cannot be considered in isolation.\textsuperscript{525} Fourthly, where the suspect or accused has a network of international contacts, such factor may, according to the Appeals Chamber, be relevant in the assessment as to whether the person will appear for trial.\textsuperscript{526} For example, in Bemba, the Single Judge found the reference to the “past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources” by the Pre-Trial Chamber in its decision on the application for an arrest warrant to be relevant and determined that this consideration was still valid.\textsuperscript{527} The relevance of these circumstances in

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\textsuperscript{527} ICC, Decision on the Prosecutor’s Application for an Arrest Warrant to be Relevant and Determined that this Consideration was Still Valid.
the assessment of the necessity of detention in view of the risk of flight has been confirmed by the jurisprudence of the ECtHR.\textsuperscript{528}

Further in line with the jurisprudence of the \textit{ad hoc} tribunals and the SCSL, the Courts seems to attach little weight to personal guarantees provided by the accused.\textsuperscript{529} In turn, much weight is attached to state guarantees offered. It will be illustrated how the Appeals Chamber has turned the provision of state guarantees into a quasi-requirement for every provisional release.\textsuperscript{530}

Other factors assessed included the “risk that the suspect may abscond from the jurisdiction of the Court if granted provisional release”,\textsuperscript{531} a previous record in absconding in relation to national criminal proceedings for war crimes\textsuperscript{532} and the position of the suspect where connections attach to this position which may be at the person’s disposal.\textsuperscript{533}
II.3.5.2. Obstruction or endangerment of the investigation or of the court proceedings

It should be noted that the ICC has adopted a considerably more flexible approach than the jurisprudence of the ad hoc tribunals and the SCSL in relation to the requirement that the accused person would not interfere with victims, witnesses or other persons. The ICC does not require the presence of concrete evidence indicating the possible interference of the suspect or accused with victims or witnesses. Indeed, the nascent jurisprudence of the ICC, for example, accepted general references to the volatile situation in the DRC and/or the disclosure of the identity of victims and witnesses. In other instances, reference was made to concrete instances of prior interference or obstruction. However, the Appeals Chamber has reminded (obiter) that it follows from Article 58 (1) (b) (ii) ICC Statute that detention must be necessary ‘to ensure that the person does not obstruct or endanger the investigation or the court proceedings’. Hence, “there must be a link between the detained person and the risk of witness interference.”

Remarkably, and in stark contrast with the jurisprudence of the ad hoc tribunals and the SCSL, the Trial Chambers take subjective feelings of insecurity voiced by victims into consideration. Such departure from the ad hoc tribunals’ jurisprudence may perhaps be

535 ICC, Public Redacted Version of the 26 September 2011 Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-1789-Red, T. Ch. III, 27 September 2011, par. 29 – 33 (“Several incidents have been reported since July 2011 in which threats have allegedly been made against prosecution witnesses and their families in connection with their testimony at the Court.” […] “The Chamber is not in a position at this stage to reach conclusions on who is responsible for the alleged incidents of witness interference. It is a reasonable inference, however, that some may have originated from individuals who support the accused.”); ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, Prosecutor v. Ngudjolo Chui, Situation in the DRC, Case No. ICC-01-04-02/07, PTC I, 6 July 2007, par. 67 (referring to threats uttered by men under the suspect’s command); ibid., par. 63 (referring to obstruction of the investigation conducted by MONUC on the crimes allegedly committed).
537 ICC, Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (Rule 118 (2) of the Rules of Procedure and Evidence), Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01-04-01-07-750, T. Ch. II, 19 November 2008, par. 15 (“in view of the feeling of insecurity voiced by the victims, the use of general terms, equally striking in the Prosecutor’s submissions, does not reasonably eliminate the risk of real interference should Mathieu Ngudjolo Chui be released and return to the DRC”). Compare, supra, Chapter 8, II.2.6.2.
traced back to the important role victims play as participants in the trial proceedings. Additionally, in ICC investigations, the crimes are often ongoing with suspects still holding senior positions while victims and witnesses remain in the region. As a consequence, risks of interference are obviously higher.

Indeed, the ICC seems to attach much weight to the factor that in a given case, the identities of many witnesses have been disclosed to the suspect or accused and that he or she may thus exert pressure on victims and witnesses to obstruct or endanger the court’s proceedings. The Trial Chamber noted in Bemba that the suspect could easily locate them, placing them at a particular risk. As president of the Movement for the Liberation of the Congo, Bemba continued to exercise de facto and de jure authority over this movement and could rely on the movements’ network and on his former soldiers to influence witnesses, with past behaviour indicating that he would do so. In Mbarushimana, the Pre-Trial Chamber noted that the suspect maintained his position of leader of the FDLR and through his contacts with FDLR members in the field could have access to (potential) witnesses. Consequently, the position of a suspect or accused person is a factor that should be considered. In this regard the Court

538 ICC, Public Redacted Version of the “Decision on Applications for Provisional Release” of 27 June 2011, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-1565-Red, T. Ch. III, 16 August 2011, par. 63 – 65 (noting that the fact that the accused has been informed of the identities of all prosecution witnesses, together with his position, his influence and the financial means he can muster create a “possibility” of witness interference); ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 6 (considering that this factor in combination with the volatile situation in the DRC may lead to the endangerment of victims and witnesses); ICC, Review of the “Decision on the Application for Interim Release of Matthieu Ngudjolo Chui”, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, p. 10 (noting that the disclosure of the identities of many witnesses for the purpose of the confirmation hearing together with the security situation in the DRC increases the risk of endangerment of victims and witnesses); See ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 41; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo””, Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 65 (“Disclosure enhances the detainee’s knowledge of the Prosecutor’s investigations. Therefore under article 58 (1) (b) (ii) of the Statute, it may be a relevant factor”).


540 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01-04-01/10, PTC I, 28 September 2010, par. 48.
may also refer to the fact that a suspect or accused person has a “large and well-organised network of potential supporters.”

II.3.5.3. Continuous contribution to the commission of the alleged (or related) crime(s)

Pre-trial detention may be necessary to prevent a person from continuing with the commission of the alleged crime or a related crime within the jurisdiction of the Court and which arises out of the same circumstances. For example, this ground was relied upon by the Prosecutor in his application for a warrant of arrest for Mbarushimana. The Pre-Trial Chamber concluded that it was satisfied that the risk of continuing contribution to the commission of the alleged crimes was ‘sufficiently high’ to justify the issuance of a warrant of arrest. In a similar vein in Gbagbo, the Single Judge concluded that the activities of his political party were aimed at restoring him in power. Since Mr. Gbagbo could use its network of supporters to commit crimes within the jurisdiction of the Court, continued detention was warranted. This legitimate ground for provisional detention concerns “future crimes”, “which by their nature cannot be specified in detail.”

II.3.6. Length of pre-trial detention

It follows from Article 60 (4) ICC Statute that the Pre-Trial Chamber should ensure that individuals are not detained for an unreasonable period of time prior to trial due to ‘inexcusable delay’ by the Prosecutor. The provision adds that where the Pre-Trial Chamber finds a delay to be inexcusable, it “shall consider releasing the person, if
circumstances so require." Consequently, there is no obligation on the Pre-Trial Chamber to set a person free upon the finding of an ‘inexcusable delay’. The Appeals Chamber has emphasised that Article 60 (4) is independent from Article 60 (2) and 60 (3) ICC Statute, and constitutes a distinct protective mechanism.546 Nevertheless, it has been argued that, in practice, the distinction between Article 60 (3) and 60 (4) has become blurred, where the latter review is undertaken at the occasion of the Article 60 (3) review.547 In this sense, it was noted by Judge Pikis that Article 60 (3) ICC Statute “adds an additional safeguard to the armoury of the law for the protection of a right of a person not to be exposed to unjustified prolongation of his/her detention.”548

The unreasonableness of any period of detention prior to trial cannot be considered in the abstract, but has to be determined on the basis of the circumstances of each case and should take the specific features of that case into consideration.549 In its assessment, the Trial Chamber must determine whether the requirement of public interest outweighs the rule of respect for individual liberty.550

The assessment of Article 60 (4) ICC Statute consists, on its turn, of two prongs. First, the reasonableness of the overall period of detention should be assessed. Only when the period of detention is found to be unreasonable, is there a need to consider the second prong, to know whether the unreasonable delay was caused by an ‘inexcusable delay’ that can be attributed to

546 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. 120; ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 29.


548 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, Separate Opinion of Judge Georgios M. Pikis, par. 17.

549 See e.g. 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. 122-123; ICC, Decision on Application for Interim Release, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 46.

the Prosecutor. Delays that are not attributable to the Prosecutor, e.g. the financial constraints of the Court, are not included in Article 60 (4) ICC statute.

‘Inexcusable delay’ has been interpreted by the Appeals Chamber as a “failure to take timely steps to move the judicial process forward, as the ends of justice may demand.” Issues regarding prior detention are relevant where they are part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.” Where prior detention is not part of that process, it should not be taken into consideration in the assessment under Article 60 (4) ICC Statute. Consequently, the period a person is detained for in the national jurisdiction before being transferred to the ICC is not relevant where the crimes, for which he or she was being detained in the custodial state, are separate and distinct from the crimes that led to the issuance of a warrant of arrest by the ICC.

In this sense, the jurisprudence of the ICC surpasses what is required under human rights law. According to the ECHR, where a person has already been deprived of liberty in another jurisdiction, pending extradition, that time period does not fall under Article 5 (3) ECHR.

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552 K.A.A. KHAN, Article 60, 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. 1167 (criticising the exclusion of delays not attributable to the Prosecutor from the scope of Article 60 (4)). It was previously noted that institutional constraints are irrelevant to the assessment of the reasonableness of the period of pre-trial detention pursuant to Article 9 (3) ICCPR. See supra, Chapter 8, II.2.10.
553 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, A. Ch., Case No, ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 14. The organs of the Court should act swiftly and should not have been dormant at any time in the course of the proceedings. See ICC, Decision on the Application for the Interim Release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-586, PTC I, 18 October 2006, p. 7.
554 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. 121, referring to ICC, Judgment on the Appeal of Mr. 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. 01/04-01/06-772, A. Ch., 14 December 2006, par. 42; consider also ICC, Decision on the Powers of the Pre-Trial Chamber to Review proprio motu the Pre-Trial Detention of Germain Katanga, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, PTC I, Case No. ICC-01/04-01/07-330, 18 March 2008, p. 11.
555 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. 121. The Appeals Chamber notes that Article 78 (2) ICC Statute only allows to deduct, in imposing the sentence, any time spent in detention in connection with conduct underlying the crime (emphasis added).
which provision does not apply to detention with a view to extradition pursuant to Article 5 (1) (f) and which detention is within the jurisdiction of another state.556

II.3.7. Conditional release

When the (Pre-) Trial Chamber or the Single Judge determines that a person should be released, conditional release may be ordered and conditions may (and in practice, will) be imposed.557 This implies a two-tiered approach whereby the Pre-Trial Chamber firsts determines whether a person should be released and secondly as to whether and what conditions should be imposed.558 Such conditions help mitigate or negate the risks described in Article 58 (1) (b) ICC Statute. However, the Appeals Chamber holds that it may also “in appropriate circumstances, impose conditions that do not, per se, mitigate [such] risks.”559 The result of this two-tiered examination should be a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions.560 Whereas it follows from the case law that the Pre-Trial Chamber holds discretion to consider conditional release, such power should be exercised “judiciously and with full cognizance of the fact that the person’s personal liberty is at stake.”561 Nevertheless, it is argued here that it is preferable that the consideration of conditional release is fully guided by the principle of subsidiarity. Hence, where conditions imposed upon release would satisfy the needs for provisional detention, no discretion should be left with the Chamber to order provisional detention.

557 Rule 119 (1) ICC RPE states that “[t]he Pre-Trial Chamber may set one or more conditions restricting liberty.”
558 ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 43. The strict separation of these two steps is to a certain extent artificial. What if the Pre-Trial Chamber would only be satisfied that the conditions of Article 58 (1) ICC Statute are not met where certain conditions are applied? Through the consideration of governmental guarantees, a consideration of the conditions to be applied already occurs during the first step.
559 ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 105.
560 Ibid., par. 105.
561 ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, Prosecutor v. Gbagbo, Situation in the Republic of Côte d'ivoire, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 79.
Before the conditional release is granted, the views of the relevant state should be heard. If the Chamber is considering conditional release and a state generally indicated its willingness and ability to receive a detained person without it being clear what specific conditions the state is willing or able to impose, the Chamber should indicate the conditions it considers and seek the observations of the state in that regard. In addition, the Pre-Trial Chamber should seek the views of the victims that have communicated in the case and may be at risk because of the release or the conditions imposed. Conditions restricting liberty that can be imposed include travel limitations, limitations regarding contacts, restrictions regarding professional activities, deposition of a bond, providing real or personal security or surety, prohibition to contact witnesses or victims directly or indirectly, or the handing over of identity papers. Where Rule 119 (1) ICC RPE provides a list of conditions that may be imposed, this list is by no means exhaustive. It follows from the presumption of innocence and the principle of subsidiarity that the conditions imposed should be the least stringent conditions which are required to safeguard the interests of Article 58 (1) ICC Statute.

Cooperation of states is vital for the execution of all decisions granting conditional release. In that regard, Single Judge Trendafilova referred to the general cooperation obligation of States Parties embodied in Articles 86 and 88 ICC Statute, which also applies to Part 5 of the ICC Statute concerning interim release. The Single Judge held the view that governmental

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562 Rule 119 (3) ICC RPE; Regulation 51 ICC Regulations of the Court.
564 Rule 119 (3) ICC RPE.
565 Rule 119 (1) ICC Statute.
567 ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 84.
568 Ibid., par. 85-86.
guarantees are no prerequisite for interim release and that the absence of such guarantees cannot weigh heavily against the suspect or accused.569

Nevertheless, the Appeals Chamber determined that the Single Judge had erred where she ordered conditional release without first identifying the conditions that would render the release feasible, without identifying the state to which Bemba would be released and without determining whether the state concerned would be able to impose the Court's conditions.570
Where, as stated above, Rule 119 (3) ICC RPE obliges the Court to seek the views of the relevant states before the imposition or the amendment of any conditions restricting liberty, it follows that prior to ordering the provisional release of a suspect or accused, "a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release." 571 The Appeals Chamber did not further clarify the meaning of "a State willing and able".572

This interpretation, which is in line with the practice of the ad hoc tribunals and the SCSL, confirms the existence of a quasi-requirement of providing governmental guarantees before a provisional release can be granted. As emphasised by the Appeals Chamber, any decision of the Court granting provisional release would be ineffective without the cooperation of the relevant state party. In the end, the ICC is dependent on state cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the ICC are enforced. Regrettably, the question as to what obligations are incumbent on States Parties to accept suspects or accused persons who have been released conditionally and to offer the necessary guarantees, is left unaddressed. Rather, the Appeals Chamber limited itself to repeating the mantra of dependence on state cooperation. SLUITER observes that this quasi-requirement makes the compliance of the Court’s provisional

569 Ibid., par. 88.
570 ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-631 OA2, A. Ch., 2 December 2009, par. 109.
571 Ibid., par. 106.
detention regime with international human rights norms dependent on the question of whether or not a state is ‘willing and able’ to receive a person who is eligible for provisional release.573

In a subsequent step to obtain conditional release, Bemba’s Defence formulated a request to the Trial Chamber (pursuant to Article 57 (3) (b) ICC Statute) for assistance by the Registry to obtain the necessary state guarantees of appearance. The request was rightly dismissed in the context of the Article 60 (3) review where such a request did not constitute a ‘changed circumstance’ and was only relevant to future applications for provisional release.574 Nevertheless, such a request in itself may offer an interesting avenue. The request was based on Rule 20 ICC RPE which deals with the responsibilities of the Registry vis-à-vis the Defence and provides a list of responsibilities which, according to the Defence, is non-exhaustive in nature. The Defence drew a parallel with the enforcement agreements that have been signed with certain states and argued that “similar agreements could be signed with States Parties, whereby they could offer a guarantee that [he] would appear at trial if he were to be released to their territories.”575

A parallel could also be drawn with Rule 185 ICC RPE which deals with release of the detained person, other than on a provisional basis. It obliges the Court to make, as soon as possible, such arrangements as it considers appropriate for the transfer of the person. Persons should be transferred ‘to a state which is obliged to receive him or her, to another state which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State’.

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573 Ibid., p. 265 (the author adds that “[t]he respect of fundamental human rights norms cannot be made conditional upon such highly uncertain factors”).

574 ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 69. Consider in this regard also ICC, Decision on the ‘Defence Request for an Order for State Cooperation Pursuant to Article 57(3)(b) of the Rome Statute’, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01/04-01/10-85, PTC I, 24 March 2011 (where the accused requested an order for state cooperation on the basis of Article 57 (3) (b) ICC Statute and Rule 119 (3) ICC RPE and Regulation 51 ICC Regulations of the Court (obligation for the Pre-Trial Chamber, in the context of a decision on interim release, to seek the observations of the State to which the person seeks to be released) such request was rejected where “it is for the Chamber to request observations from the State concerned, only if and when an application for interim release is made, and that it is not required that such observations should be obtained by the person applying for interim release and included in that person’s application”).

Consequently, it may be argued that a corresponding obligation exists for States Parties to receive persons provisionally released. In line with the argumentation provided by Single Judge Steiner, one may reason that an obligation to accept detainees that are provisionally released and to offer necessary guarantees for their appearance at trial follows from the general obligations incumbent on States Parties to fully cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. This presupposes an understanding of the obligations of States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’ as to also cover detention on remand. There seems to be no reason why the States Parties’ cooperation obligations would not extend to the provisional detention/release regime.

Moreover, it may be argued that Article 88 ICC Statute obliges States Parties to have the necessary procedures in place to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons. This view is in line with international human rights law. It was argued by Judge ROBINSON in his dissent to the Krajisnik case, that “[a] judicial body cannot rely on peculiarities in its system to justify derogations from the rule of respect for individual liberty.” He opined that any authority reviewing detention should be able to effectively order release if there are no reasons for the continuation of detention and this order should be able to be effectively implemented. GOLUBOK has proposed; in line with the suggestion that was made earlier with regard to the ad hoc tribunals, that “the Assembly of States Parties [is] to ascertain that standing arrangements are in place to ensure the State cooperation in the matters related to the conditional release at the investigation/trial stage of the proceedings before the ICC, having in mind the States Parties’ general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction.”

576 Article 86 ICC Statute.
577 G. SLUITER, Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, p. 266 (the author holds that the assistance of states in respect of interim release should be governed by Article 93 (1) (I) of the ICC Statute (residual clause)).
Unfortunately, this view is not currently held by the States Parties. They reason that the cooperation obligations under Article 86 do not necessarily include cooperation with the Defence.\textsuperscript{580} In this regard, reference is made to Article 57 (3) (b) ICC Statute, which limits the Pre-Trial Chamber’s power to assist with defence requests for cooperation to ‘such cooperation […] as may be necessary to assist the person in the preparation of his or her defence’.\textsuperscript{581} It follows that States Parties consider the assistance with regard to provisional or conditional release to be a voluntary form of cooperation.\textsuperscript{582} Therefore, an ad hoc framework agreement would be necessary between the Court and States Parties willing to receive persons eligible for conditional or provisional release. In this regard, the ICC Registry drafted and circulated an ‘Interim Release Framework Agreement’.\textsuperscript{583}

Finally, with regard to the Bemba case, it is noted that although the Defence was eventually able to provide the Court with state guarantees, provisional release was refused by Trial Chamber III when it concluded that these guarantees “do little to allay the Chamber’s concerns regarding the possibility of the accused absconding.”\textsuperscript{584} On appeal, the Appeals Chamber concluded that the Trial Chamber erred where it did not assess these state guarantees in light of the letter of Bemba addressed to that state. From the combined reading of these documents, it emerged that the state concerned could impose the conditions indicated in the letter of Bemba or other conditions under Rule 119 (1) ICC RPE.\textsuperscript{585} Once a state indicated its general willingness and ability to accept a detained person and enforce conditions, it is for the Court to specify the necessary conditions for release and to seek observations from the state in that regard.\textsuperscript{586} After the matter was remanded for reconsideration, the Trial Chamber concluded, based on additional information submitted, that the conditions proposed by the state “do not mitigate the risk of flight to an acceptable

\textsuperscript{580} International Bar Association, Fairness at the International Criminal Court, August 2011, p. 37.
\textsuperscript{581} Ibid., p. 37.
\textsuperscript{582} Ibid., pp. 37 – 38. The report discusses several key points of the framework agreement, which has not been made public at the time of writing.
\textsuperscript{586} Ibid., par. 54 – 56.
degree” and “would meaningfully increase the accused's ability to interfere with witnesses or to cause others to do so.” 587

II.3.8. Impact of medical reasons on provisional detention

According to the Appeals Chamber, medical reasons may impact provisional detention in at least two ways. Firstly, health reasons may have an effect on the legitimate grounds upon which provisional detention is based. Secondly, the poor health may be considered by the Pre-Trial Chamber where it exercises its discretion to order conditional release. 588 Recall that the ad hoc tribunals may order provisional release on medical grounds even when the conditions for provisional release have not been met. 589

II.4. Internationalised criminal tribunals: confirming pre-trial detention as the exception

II.4.1. The Extraordinary Chambers in the Courts of Cambodia

II.4.1.1. General

The pre-trial detention regime is similar to that of the ICC since it also proclaims, at least in theory, that liberty is the rule and deprivation of liberty is the exception. 590 In line with the ICC, the Co-Investigating Judges emphasised the exceptional nature of provisional detention;


588 ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 87; ICC, Decision on the Request for the Conditional Release of Laurent Gbagbo and on his Medical Treatment, Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-01/11-362-Red, PTC I, 18 January 2013, par. 24. In the Gbagbo case, the Single Judge decided that the medical condition of Gbagbo did not have a bearing on the legitimate grounds for detention under Article 58 (1) (b) and did not consider it necessary to exercise her discretion to grant conditional release on medical grounds. See ibid., par. 38; ICC, Decision on the Review of Laurent Gbagbo's Detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-01/11-291, PTC I, 12 November 2012.

589 See supra, Chapter 8, 2.8.

590 Consider e.g. Rule 82 (1) ECCC IR (‘The Accused shall remain at liberty whilst appearing before the Chamber unless Provisional Detention has been ordered in accordance with these IRs’); Rule 72 (4) (d) ECCC IR (‘where the disagreement concerns provisional detention, there shall be a presumption of freedom’); ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 46 – 47 (referring to the presumption of liberty).
liberty during the pre-trial phase is therefore the general rule.\footnote{Consider e.g. ECCC, Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 8; ECCC, Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 9. Consider also Article 203 of the Cambodian Code of Criminal Procedure.} In a similar vein, the ECCC Trial Chamber confirmed that liberty is the norm.\footnote{ECCC, Decision on Ieng Thirith’s Fitness to Stand Trial, NUON Chea et al., Case No. 002/19-09-2007, T. Ch., 17 November 2011, par. 80 (“As, pursuant to the presumption of innocence, liberty is considered the norm, detention is an extraordinary measure which must only be imposed in accordance with procedures established by law.”).} The exceptional nature of any deprivation of liberty is reflected in the strict time limitation of any order on provisional detention. Pursuant to Rule 63 (6) of the Internal Rules (‘IR’), provisional detention may be ordered for crimes against humanity, war crimes and genocide for a period not exceeding one year, which can be extended per one additional year. For other crimes within the jurisdiction of the Extraordinary Chambers, detention may be ordered for periods not exceeding six months, renewable by further six-month periods. The period of pre-trial detention may only be extended twice by the Co-Investigating Judges. Consequently, the maximum period of provisional detention (between the opening and closing of the judicial investigation)\footnote{ECCC, Closing Order, NUON Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ, 15 September 2010, par. 1619.} is three years and one and a half years respectively.\footnote{According to Internal Rule 68, the issuance of the closing order normally puts an end to the provisional detention or bail order. However, by a ‘specific, reasoned decision’, the Co-Investigating Judges may decide to maintain the provisional detention, where they consider that the conditions for ordering provisional detention or bail continue to be met. Such order ceases to have effect after four months, unless the charged person is brought before the Trial Chamber before that time (Rule 68 (3) IR).} It was previously discussed that provisional detention of a charged person may be ordered at any time during the judicial investigation, after an adversarial hearing.\footnote{Rule 63 (1) (a) ECCC IR. See supra, Chapter 7, II.1.}

Further proof of the exceptional character of provisional detention may be found in Rule 64 (1) ECCC IR, according to which, at any time during the detention of the charged person, the Co-Investigating Judges ‘shall’ \textit{pro proprio motu} or at the request of the Co-Prosecutors order release, where the conditions for detention are no longer fulfilled. The use of the verb ‘shall’ instead of ‘may’ bears witness of the fact that the Co-Investigating Judges do not possess any \textit{discretion} in deciding whether or not to detain a charged person.
Rule 64 (2) ECCC IR provides for the right for a charged person to submit an application for provisional release at any time during the detention.\footnote{Such application will be forwarded to the Co-Prosecutors, who will reply within five days. The Co-Investigating Judges will decide within five days from receipt of the Co-Prosecutors’ submission.} In line with the ICC’s procedural regime, ‘changed circumstances’ are required for a new application for provisional release.\footnote{Rule 64 (3) ECCC IR.} Different from the ICC, the Internal Rules further specify that a new application can be filed at least three months after the final determination on the previous application.\footnote{ECCC, Order of Provisional Detention, KAING Guék Éav “Duch”, Case No. 001/18-07-2007-ECCC-OCIJ, OCIJ, 31 July 2007.}

Even though pre-trial release is the rule, the practice of the ECCC reveals a different picture. All charged persons have so far been detained ahead of the trial proceedings. Duch was arrested in July 2007.\footnote{ECCC, Provisional Detention Order, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007; ECCC, Provisional Detention Order, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007; ECCC, Order of Provisional Detention, NUON Chea, Case No. 002/14-08-2006, OCIJ, 19 September 2007; ECCC, Provisional Detention Order, KHIEU Samphan, Case No. 002/14-08-2006, OCIJ, 19 November 2007.} The other charged persons were all arrested in November 2007.\footnote{ECCC, Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, IENG Thirith, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012.} In practice, pre-trial detention thus seems firmly established as the rule. Only Ieng Thirith has been released from detention in September 2012 after she was found unfit to stand trial.\footnote{KHIEU Samphan requested to be provisionally released, given his medical conditions. However, the Co-Investigating Judges decided that it would be ‘premature’ to affirm that the charged person’s condition is incompatible with detention where additional medical examinations were necessary. See ECCC, Order Refusing the Request for Release, KHIEU Samphan, Case No. 002/14-08-2006, OCIJ, 23 June 2008, par. 5.} In turn, the possibility of provisional or conditional release remains a theoretical possibility where any practice is lacking.\footnote{KHIEU Samphan requested to be provisionally released, given his medical conditions. However, the Co-Investigating Judges decided that it would be ‘premature’ to affirm that the charged person’s condition is incompatible with detention where additional medical examinations were necessary. See ECCC, Order Refusing the Request for Release, KHIEU Samphan, Case No. 002/14-08-2006, OCIJ, 23 June 2008, par. 5.} It will further be explained what factors have been advanced to explain the necessity of pre-trial detention.

§ Adversarial hearing

Important, the procedural regime of the Extraordinary Chambers does not encompass a regime of automatic pre-trial detention, characteristic of the ad hoc tribunals and the SCSL. It rather provides for the feature of an adversarial hearing, prior to the ordering of provisional detention. Such a concept, unknown to the procedural regimes of the international criminal tribunals, is aimed at providing the charged person with the opportunity to respond to the
submissions of the Co-Prosecutors. A more detailed discussion of this peculiar concept is therefore warranted. The charged person should at this occasion be informed of the right to assistance of counsel. According to the Pre-Trial Chamber, it can be inferred from Rule 63 (1) ECCC IR that the right to assistance of counsel can be waived. Nevertheless, the formal requirements for such waiver pursuant to Rule 58 (2) ECCC IR do not apply. On the question of what requirements do apply in such circumstances, the Pre-Trial Chamber held, based on its analysis of the relevant jurisprudence of the ad hoc tribunals, that the waiver should be unequivocal and voluntary, the latter term meaning that the waiver should be informed, knowing and intelligent. This presupposes that the charged person is given the opportunity to make a rational appreciation of the effects of proceeding without a lawyer. Normally, there is no need to inform the charged person about his or her right to remain silent before the start of the adversarial hearing, as the charged person is not being questioned.

In NUON Chea, the Pre-Trial Chamber concluded that the charged person’s waiver was unequivocal and voluntary. However, this conclusion can be doubted. In particular, it seems that the waiver was not unequivocal. Moreover, the waiver can hardly be deemed informed, given the various contradictory statements made by the Co-Investigating Judges about the nature and purpose of the adversarial hearing. For reasons of clarity, it is necessary here to reproduce some excerpts of the initial hearing and the adversarial hearing (which immediately followed the initial hearing).

ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 18. As previously discussed, the Pre-Trial Chamber held that, given the distinct purpose served by interviews and adversarial hearings, the right to waive the assistance of counsel included in Rule 58 (interview of the charged person) of the Internal Rules cannot readily be applied in such context. While it may be read to apply to any form of questioning of the charged person, the Pre-Trial Chamber concluded that it does not apply where the charged person is not questioned in the course of the adversarial hearing. See ibid., par. 16 – 17 and the discussion thereof, supra, Chapter 4, IV.1.3.
During the initial hearing the following exchange took place:

International Co-Investigating Judge (‘ICIJ’): “Because your lawyer is not here today, would you like to make a statement in regard to the charges against you or the facts against you?

Nuon Chea (‘NC’): “I would like to make some statement against these charges”

National Co-Investigating Judge (‘NCIJ’): “I think probably there will be some kind of misunderstanding, I may like to clarify. Just now I informed you about your rights. During the Initial Appearance and after this I will announce, notify about the information or the possibility of Provisional Detention, because in this Initial Appearance and you haven’t got the lawyer, the continued proceedings whether you will be detained or not. What would you like to comment on if you don’t have your lawyer with you.

ICIJ: “So because we conduct the Adversarial Hearing, would you like to make a statement?”

NC: “Now?”

[The French-English interpreter takes over]

ICIJ: “If you would like to make a statement, this would be the time to do it. We are going to record them.”

[the Khmer-English interpreter proceeds]

NC: “I would like to make a statement now.”

NCIJ: “So after your statement, the judges will have to discuss, will have an adversarial hearing to decide or rule on the possibility of provisional detention. In this regard, do you think you will wait until these kind of hearing can take place or do you think that the hearing can be conducted soon, or in a few more minutes.”

NC: “To continue on what matter?”

NCIJ: “Just now you said you have a lawyer, but the lawyer is not here. So the next proceeding, after the initial hearing, when you have been notified about your rights and charges against you, next we will discuss about the conditions or possibility of the conditions of detention and with the participation of the Co-Prosecutors as requested. You can respond to them. If you don’t have a lawyer you can also do so, or if you have a lawyer you can still respond. In that situation, the judges will make a decision of the possibility of Provisional Detention. So do you want to wait until you have your lawyer here or do you want to proceed these proceedings?”

NC: “Of course I want to continue these proceedings on my own.”

ICIJ: “So to put it more clearly, you have to be informed about your rights. Because there will be the adversarial hearing where there will be the participation from the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia and you should
also know that you have the right to have a lawyer and with the lawyer, he will be able to defend you.”

NC: “You mean the lawyer be… the hearing will be conducted in 24 hours or just in the next few minutes.”

ICIJ: “Since your lawyer cannot participate in these proceedings now, he can only be here tomorrow, so if you wait until your lawyer comes to the hearing, the hearing can only be conducted from tomorrow.”

NC: “I don’t have any problem or any secrets to hide.”

NCIJ: “So are you sure, because in order not to misunderstand, in order to not say that the court failed to tell you about your rights, I would like to clarify again the Judges already raised that we will conduct an Adversarial Hearing with the participation of the Co-Prosecutors and you can respond to them with your own statements and if you have a lawyer, the lawyer can assist you in this response also. If you think we can conduct a hearing now without a lawyer, it is your own right. And if you need a lawyer, so it has to be adjourned and then tomorrow, when the lawyer comes, then the court can continue. So I would like to finally clarify that whether the hearing can be conducted now, or can we wait until your lawyer come, because you haven’t got your lawyer here. Adversarial hearing can continue now.”

NC: “I think we can have it conducted now. But now I can go ahead on my own. Although my lawyer is not available today, I still want the debate to be held today.”

The transcript reveals that the explanation given by the Co-Investigating Judges on the purpose and scope of the adversarial hearing was confusing and at times contradictory. Given this confusion, it may rightly be doubted whether the charged person understood the effect of the waiver of this right. At the start of the adversarial hearing, the Co-Prosecutors made the following statement, which further evidences the confusion:

National Co-Prosecutor (‘NCOP’): “Point number two, we request that the Judges should inform this Adversarial Hearing clearly to the Charged Person. Because in the record he says that he needs his lawyer. As the name already listed in this record. When he already understands that this Adversarial Hearing proceeding, he does not need a lawyer. So make sure he understands this Adversarial Hearing matter, because it is the matter of consideration of the possibility of Provisional Detention of the Charged Person. So that

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610 ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 15.
he can envisage whether he would prefer having a lawyer here or not, now. So this is the
suggestion of the Co-Prosecutors. I would like to make sure that he is well informed
about the matter of the Adversarial Hearing and his right of having a lawyer. Because
judges will issue a decision." 611

When the national Co-Investigating Judge subsequently asks NUON Chea whether he had
stated that he did not need a lawyer, he responded:

NC: “I don’t need a lawyer now, but tomorrow my lawyer come. In general, I need a
lawyer, but now my lawyer is not here.”
NCOJ: “Because this relates to the possibility of Provisional Detention, though Judge
Lemonde already clarified this and I also explained to you do you understand that? So I
would like to explain again to you, after the Initial appearance, would you like to have a
lawyer. Because, in the Adversarial Hearing that to be conducted will be considered the
possibility of Provisional Detention.”
NC: “I need a lawyer, I already proposed the name. For a foreign lawyer, I don’t know
his name yet. I only know that Mr. Son Arun the national lawyer.”
ICOJ: “I like to explain to you that everyone here understands that you can wait, because
it is your interest, you can wait until your lawyer comes, so that the Adversarial Hearing
can be conducted, because in that hearing it is about the possibility of Provisional
Detention but if you can defend yourself here in this process without a lawyer, then we
can continue.”
NC “I would like to clarify that I can defend my own now, but from tomorrow onwards,
when the lawyer comes, I will need his assistance. For the International Co-Lawyer I will
seek advice from my national lawyer.” 612

What is required for a waiver to be made voluntary, is that the waiver is informed, knowingly
and intelligent. The person should be able to make a rational appreciation of the effects of
proceeding without a lawyer. 613 Importantly, where there are indications that the person is
confused, steps must be undertaken to ensure that the suspect does actually understand the
nature of his or her rights. 614 While the Co-Investigating Judges explained the nature and

611 Ibid., par. 15.
612 Ibid., par. 15.
613 See supra, Chapter 4, IV.1.1.
614 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora,
Case No. ICTR-98-41-T, T. Ch. I., 14 October 2004, par. 17; See supra, Chapter 4, IV.1.1.
scope of the adversarial hearing several times during the initial appearance, the transcript shows that during the adversarial hearing, the confusion remained. In that context, the voluntariness may be doubted. Where the charged person made different statements on whether he wants his lawyer to be present at the adversarial hearing, the waiver seems ambiguous and therefore not unequivocal in nature.

The Co-Prosecutors, defence counsel and charged persons should be heard at the occasion of the adversarial hearing. The charged person can request additional time to prepare his or her defence; in that case, a reasoned order may be issued by the Co-Investigating Judges for the immediate detention of the person for a period up to seven days. During that period, the charged person will again be brought before the Co-Investigating Judges who will proceed with the adversarial hearing, whether or not in the presence of the defence counsel. Once the charged person is detained, he or she should be brought before the Co-Investigating Judges at least every four months.

§ Requirements for provisional detention

According to Rule 63 (2) ECCC IR, the detention order should contain the initial maximum detention period, the factual and legal grounds upon which the detention is based and a statement of rights. According to the Pre-Trial Chamber, this does not imply that the Co-Investigating Judges should indicate a view on all factors, but only requires the Co-Investigating Judges to set out the legal grounds and facts taken into account in their decision.

Detention may be ordered by the Co-Investigating Judges where there are ‘well founded reasons to believe’ that the charged person has committed the crimes described in the introductory or supplementary submission. What is required is that facts or information

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615 Rule 63 (1) (b) IR as inserted following the amendment of Rule 63 (1) ECCC IR, adopted during the second revision of the Internal Rules on 1 February 2008. Prior to this amendment, police custody orders were issued placing the charged persons in police custody for a maximum of 48 hours. See e.g. ECCC, Police Custody Decision, IENG Sary, Case No. 002/14-08-2006, OCIJ, 12 November 2007; ECCC, Police Custody Decision, IENG Thrith, Case No. 002/14-08-2006, OCIJ, 12 November 2007.

616 Rule 68 (3) ECCC IR.

617 ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 66.

618 Rule 63 (3) ECCC IR.
exist which would satisfy an objective observer that the person may have committed the
offences. Consequently, the ‘well-founded reasons to believe’ can be equated with the
‘reasonable grounds to believe’ criterion found in Article 58 ICC Statute as interpreted by the
jurisprudence.

Different from the *ad hoc* tribunals and the SCSL, the existence of a strong suspicion alone
will not suffice to order provisional detention. A second condition needs to be fulfilled. In line
with the ICC’s provisional detention scheme, detention should serve a legitimate purpose and
should thus be considered to be necessary. According to the Co-Investigating Judges, the
principle of necessity implies that “if these objectives could be achieved by some other
reasonable means, then they must be considered”, and as such understood the principle of
necessity as encompassing a principle of subsidiarity. Detention may be ordered for
different reasons, (1) to prevent the charged person from exercising pressure on witnesses or
victims and prevent collusion between the charged person and accomplices from crimes
within the jurisdiction of the ECCC; (2) to preserve evidence or to prevent its destruction; (3)
to ensure the presence of the charged person during the proceedings; (4) to protect the security
of the person or (5) to preserve public order. These justifications are formulated in the
alternative, where one of the grounds is met; this suffices to justify the provisional detention
of the charged person. The requirement is disjunctive and there is no need to examine all
criteria where the Judges deem that they have sufficiently demonstrated the need for
provisional detention in reference to one or more of the criteria of Rule 63 (3) (b) of the

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619 The Pre-Trial Chamber reasoned that the term ‘well-founded reason’ corresponds with the requirement of ‘raisons plausibles’ in the French version of the Internal rules which, on its turn, corresponds with the wording of the French version of Article 5 (1) (c) of the ECHR. Consequently, what is required is the ‘reasonable suspicion’ standard of Article 5 (1) (c) of the ECHR. This implies that the term is similar to the requirement of ‘reasonable grounds to believe’ under Article 58 (1) ICC Statute, according to which ‘facts or information should exist which could satisfy an objective observer that the person concerned may have committed the offence’ are required (ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 43-46; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 11; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 24).

620 See supra, Chapter 7, II.2.

621 Ibid., par. 18.

622 See e.g. ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 83.
Internal Rules. Remarkable is the inclusion of the preservation of public order and the protection of the security of the person as justifying grounds, where none of the international criminal tribunals provides for such legitimate objectives.\footnote{However, it should be noted that the ad hoc tribunals and the SCSL occasionally referred to ‘public order concerns’ in exercising its discretion to refuse provisional release. Consider e.g. SCSL, Fofana - Decision on Application for Bail Pursuant to Rule 65, Prosecutor v. Norman et al., T. Ch., 5 August 2004, par. 82 – 84. ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 91. With regard to detention during the trial, consider e.g. ECCC, Decision on Khieu Samphan’s Application for Immediate Release, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 26 April 2013, par. 15 (“When detention is continued at trial, jurisprudence requires the Court to ensure that detention remains proportionate to the circumstances of that case including its complexity and the prospective sentence”). See also ECCC, Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, IENG Thirith, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 22. \textsuperscript{627} See supra, Chapter 8, II.2.4.}

In line with the international criminal tribunals, an overarching principle of proportionality applies to any decision not to release a person and should be considered when the Co-Investigating Judges are considering the possibility of granting bail (other forms of detention).\footnote{ECCC, Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 10. \textsuperscript{625} See e.g. ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 61.} A decision not to release a person results from a balancing exercise between the competing public interest requirements (as laid down in Rule 63 (3) (b) ECCC IR) on the one hand and the presumption of innocence on the other hand (Article 35 new ECCC Law and Rule 21 (1) (d) ECCC IR). The Pre-Trial Chamber relied on the case law of the ICTY in holding that this balancing exercise should at all times be proportionate, in so far as it should be (1) suitable (2) necessary and (3) its degree and scope remain in a reasonable relationship to the envisaged target.\footnote{See supra, Chapter 8, II.2.4.} The provisional measures should at no time capricious or excessive. A principle of subsidiarity applies where the more lenient measure must be applied where that would be sufficient.

§ Extension of provisional detention

An extension is only possible where the conditions for detention continue to be met “notwithstanding the passage of time and taking into consideration the results of the judicial investigation.”\footnote{ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 22. \textsuperscript{627} See supra, Chapter 8, II.2.4.} The power to extend detention is \textit{discretionary} in nature.\footnote{ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 22. \textsuperscript{627} See supra, Chapter 8, II.2.4.} Any decision on the extension of provisional detention should be in writing and set out the reasons for such
extension (Rule 63 (7) ECCC IR).629 Therefore, the simple statement that conditions continue to be met, referring to the reasons given by the Pre-Trial Chamber in its decision on the appeal against the detention order does not seem sufficient.630

When the Pre-Trial Chamber on appeal considered the extension of the provisional detention, it distinguished between (1) the assessment of the requirement of ‘well-founded reasons to believe’ under Rule 63 (3) (a) ECCC IR and (2) the grounds necessitating detention (Rule 63 (3) (b) of the ECCC IR).631 As far as the ‘well-founded reasons to believe’ are concerned (1), the Pre-Trial Chamber found that the Co-Investigating Judges correctly fulfilled their obligation when they restated the existing reasons for detention in the previous Pre-Trial Chamber appeal decision, adding some references to new pieces of incriminatory evidence, and when the Defence did not raise any exculpatory evidence when this was requested by the Co-Investigating Judges.632 Once the existence of ‘well-founded reasons to believe’ is established, this suffices throughout the pre-trial stage of the proceedings, unless exculpatory evidence is identified which undermines these ‘well founded reasons’.633 Consequently, the Co-Investigating Judges can limit their review to all exculpatory or inculpatory evidence that has been put on the case file since the last review.634 The Co-Investigating Judges and Pre-Trial Chamber will look at the evidence afresh, taking into account the new evidence (either

629 Rule 63 (7) ECCC IR. Consider also ECCC, Decision on Appeal against Order on Extension of Provisional Detention, NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 21 (arguing that it is an international standard that all decisions of judicial bodies are required to be reasoned).
630 See in that regard the reasoning by the Co-Investigating Judges in the Order on the Extension of Provisional Detention of Nuon Chea: ECCC, Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/10-09-2007-ECCC-OCIJ, OCIJ, 16 September 2008, p. 2 (the Co-Investigating Judges added a list of some new inculpatory evidence).
631 ECCC, Decision on Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009. It should be noted that the decision is not entirely clear. While paragraph 22 of the decision refers to Rule 63 (a) ECCC IR, Rule 63 [(3)] (a) is actually meant, a view which is supported by the heading of the sub-section: “VII. The standard used by the Co-Investigating Judges on the well-founded reasons” (emphasis added).
632 Ibid., par. 23. Where the Co-Investigating Judges only referred to new incriminatory evidence, the Pre-Trial Chamber concluded that this implies that the Investigating Judges did not find exculpatory evidence sufficient to mention in their order.
633 ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 21.
634 Consider e.g. ECCC, Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 14 (“due to the relatively recent nature of the Pre-Trial Chamber’s analysis of the case file, the Co-Investigating Judges do not consider it necessary to further elaborate on the key evidence, considering it sufficient to note that they endorse the above analysis as an accurate summary of the case against Ieng Sary”); ECCC, Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 11; ECCC, Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 13.
of incriminatory or exculpatory nature) that has been put on the case file.\textsuperscript{635} The simple statement by the Co-Investigating Judges that they re-assessed the totality of the evidence afresh, was considered sufficient by the Pre-Trial Chamber to conclude that ‘well-founded reasons to believe’ still existed. However, the Pre-Trial Chamber noted that “it would have been preferable for the Co-Investigating Judges to give more details about the evidence they have gathered which supports their conclusion that there continue to be well-founded reasons to believe that the charged person may have committed the crimes with which she has been charged.”\textsuperscript{636}

In the consideration of the grounds necessitating the provisional detention (2), the Co-Investigating Judges cannot just state that the charged person did not present new facts or circumstances showing ‘changed circumstances’. The Pre-Trial Chamber held that the Co-Investigating Judges should consider whether or not the risks that substantiated the initial detention still exist.\textsuperscript{637} The passage of time is a relevant consideration in determining the legitimacy of extending the provisional detention of the charged person.\textsuperscript{638}

In \textit{IENG Thirith}, the Defence had not made any submissions on the fulfilment of the conditions of Rule 63 (3) (b). Notwithstanding the careful consideration of these conditions by the Pre-Trial Chamber in its decision on the appeal against the detention order, the Co-Investigating Judges considered whether these conditions are currently satisfied \textit{in light of the findings of the Pre-Trial Chamber and all the circumstances at the time of expiry of the initial}

\begin{itemize}
\item \textsuperscript{635} ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 30; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, \textit{KHIEU Samphan}, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 25; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, \textit{IENG Thirith}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010, par. 27.
\item \textsuperscript{637} ECCC, Decision on Appeal against Order on Extension of Provisional Detention, \textit{NUON Chea et al.}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 30 (the Pre-Trial Chamber holds that the extension order by the Co-Investigating Judges “lacks sufficient reasoning”).
\end{itemize}
order. Where there has not been a change in circumstances, the Co-Investigating Judges concluded that detention is still necessary. Such standard for review has been endorsed by the Pre-Trial Chamber.

The above standard is reminiscent of the ‘changed circumstances’ requirement of the Article 60 (3) ICC Statute’s periodic review mechanism. Further drawing the parallel with the ICC’s periodic review system, it may be argued that references to the fact that the Defence did not put forward anything indicating that detention is no longer necessary, should be avoided. It gives rise to an impression that the burden is on the Defence to adduce new facts or circumstances as to why the charged person should be released and it is irrelevant to the standard of review under Article 63 (7) ECCC IR. On some occasions, the Co-Investigating Judges and the Pre-Trial Chamber seem to have effectively put the burden on the Defence to adduce new facts or circumstances as to why detention would no longer be necessary.

§ Interlocutory appeal against decisions on detention or release

Pursuant to Rule 63 (4) and (7) of the ECCC IR, the order for provisional detention as well as decisions on the extension of detention can be appealed before the Pre-Trial Chamber.

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640 Consider e.g. ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC32), PTC, 30 April 2010, par. 28 – 29 and par. 33 -34.

641 Notably, in the case against IENG Sary, the Pre-Trial Chamber noted with approval the order on the extension of provisional detention where “the Co-Lawyers for the Charged Person, apart from observing the advanced age and the fact that his wife is also here in detention, did not present new facts or circumstances that show that conditions under Rule 63 (3) (b) have changed in order to convince the Co-Investigating Judges or this Chamber that detention is not warranted at present.” See ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 25. The Co-Investigating Judges had argued in their decision that they would be ‘guided’ by the findings of the Pre-Trial Chamber in its previous judgment, but “if new evidence has been placed before the Co-Investigating Judges which was not available to the Pre-Trial Chamber and which suggests a change in circumstances, then this approach would have to be revised. However, this is presently not the case.” Such formulation of the standard of review may be read as requiring the Defence to adduce facts or circumstances to prove ‘changed circumstances’. Consider e.g. ECCC, Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 24 (“The Co-Investigating Judges have not found any change in the circumstances […]. In addition, the Co-Investigating Judges note that the Defence in its observations do not make any submission addressing the risk of the Charged Person failing to attend…”).
Likewise, orders on provisional release under Rule 64 (1) and (2) of the ECCC IR can be appealed before the Pre-Trial Chamber. Lastly, decisions ordering release on bail can be appealed before the Pre-Trial Chamber.642

Remarkably, the scope of such appeal is much broader than provided for under the comparable appeal mechanisms at the international criminal tribunals. Firstly, and reflecting the inquisitorial style of proceedings, the Pre-Trial Chamber controls the regularity of all procedural steps undertaken by the Co-Investigating Judges prior to the issuance of the detention order. Secondly, the Pre-Trial Chamber should examine the exercise of discretion by the Co-Investigating Judges, by undertaking its own analysis thereby applying the standard for provisional detention as set out in Internal Rule 63 (3) ECCC IR and should check whether the facts justify the provisional detention. Thirdly, the Pre-Trial Chamber should assess whether the circumstances referred to in the order still exist. Lastly, the Pre-Trial Chamber should consider additional issues not dealt with which are the subject of specific grounds of appeal.643 Victims that have been admitted as civil parties in the proceedings can participate in provisional detention appeals.644

More problematic are the delays in the issuance of decisions by the Pre-Trial Chamber. For example, in Case 002, the provisional detention order for IENG Thirith was issued on 14 November 2007, whereas the appeal decision by the Pre-Trial Chamber was not issued until 9 July 2008, almost eight months later. Similarly, where IENG Sary appealed the detention order issued by the Co-Investigating Judges, he had to wait 11 months before a decision was issued. These long delays even led Khieu Samphan to withdraw his appeal against the detention order, 10 months after it was filed.645 As previously noted with regard to the ICC, where a possibility is foreseen to appeal decisions on the lawfulness of detention, human

642 Rule 65 (1) ECCC IR.
643 ECCC, Decision on Appeal against Provisional Detention Order of Kaing GuEk Eav alias “Duch”, KAING GUEK EAV alias “Duch”, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 8; ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 9.
644 ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008. TURNER points out that dangers are involved in allowing civil parties to participate in detention appeals. Where the presumption of innocence is arguably stronger before charges have been confirmed, the “unfiltered stories [of victims] may interfere with this presumption.” See J.I. TURNER, Commentary: Decision on Civil Party Participation in Provision Provisional Detention appeals, in «American Journal of International Law», Vol. 103, 2009, pp. 121-122.
rights law requires that such appeal is decided upon speedily. A delay of almost eight months is extremely worrisome and clearly incompatible with international human rights norms.646

II.4.1.2. Grounds justifying pre-trial detention

When compared to the justifications for arrest and detention as enlisted in Article 58 (1) (b) ICC Statute; it appears that justifications (1) (to prevent the charged person from exercising pressure on witnesses or victims and prevent any collusion between the charged person and accomplices from crimes within the jurisdiction of the ECCC) and (2) (to preserve evidence or to prevent its destruction), cover the ‘obstruction or endangerment of the investigation or prosecution’ justification, which can be found in Article 58 (1) (b) (ii) ICC Statute. They are normally discussed together by the Pre-Trial Chamber as they are supported by similar arguments.647 Also the justification of ensuring the presence of the charged person at trial corresponds with the justifications provided for under the ICC’s provisional detention scheme. Unknown then to the ICC are grounds (4) (to protect the security of the person) and (5) (to preserve public order). These latter grounds especially deserve our close consideration.

§ Preventing interference with witnesses and victims, collusion and preservation of evidence

Access to elements of the dossier, including the written records of the witness interviews has been an important factor which has been taken into consideration by the Co-Investigating Judges, even in the absence of the indication of a concrete risk of interference with victims or witnesses.648 The inquisitorial style of proceedings implies that witness statements that have

646 See the discussion, supra, Chapter 8, II.3.4.
647 See e.g. ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 59; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 95; ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 40.
648 ECCC, Provisional Detention Order, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 17. The Co-Investigating Judges reasoned that “henceforth, IENG Sary will have access to all of the elements in the case file of the judicial investigation” […] Whereas the nature of the alleged crimes makes it difficult for a suspect to identify and influence the very large number of potential witnesses before the judicial investigations begins, the same is not true once the charged person has knowledge of the identity of the inculpatory witnesses and victims involved in the proceedings. The Co-Investigating Judges consequently acknowledge that these fears would particularly be justified where the charged person would have uncontrolled communications with these people, given that IENG Sary has numerous family members and former subordinates in the regions concerned. Some of them hold influential positions, sometimes even having armed guards. Consider also: ECCC, Provisional Detention Order, IENG Thirith, Case No. 002/19-09-2007-
been taken by the Co-Investigating Judges (or the Co-Prosecutors) are put on the case file, to which the parties have access. Taking this factor into consideration, absent a concrete risk of interference with witnesses (based on the past behaviour or acts of the charged person), deviates from the practice of the international criminal tribunals and should be rejected.

The relevant jurisprudence of the Pre-Trial Chamber diminished the importance of this factor when it rightly emphasised that evidence should exist, of any past actions and/or behaviour of the charged person which in itself would display a concrete risk that he may use that to interfere with victims and witnesses. This comports with the jurisprudence of the Trial Chamber.

Several arguments have been put forward by the Co-Investigating Judges to underline the importance of this particular factor. The Co-Investigating Judges have argued that “whereas the nature of the alleged crimes makes it difficult for a suspect to identify or influence the very large number of potential witnesses before the judicial investigation begins, the same is not true once the charged person has knowledge of the identity of the inculpatory witnesses.”

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649 See supra, Chapter 3, IV.1.3.

650 See supra Chapter 8, II.2.6.2; Chapter 8, II.3.5.2.

651 Compare the appeal of IENG Thirith against provisional detention, where the Pre-Trial Chamber found that “the Charged Person’s past actions and behaviour in themselves display a concrete risk that she could use her influence to interfere with witnesses and victims” and the appeal of her husband IENG Sary against his pre-trial detention, where the Pre-Trial Chamber concluded, in the absence of a concrete risk, that “detention is not a necessary measure to prevent the Charged Person from exerting pressure on witnesses and victims and destroying evidence.” See ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 51 and ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 99 -100. Also in other instances, the Pre-Trial concluded that provisional detention is necessary because of a concrete risk that the charged person may exert pressure on victims and witnesses. Consider e.g. ECCC, Decision on Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 31 (“This probability is based upon the past behaviour of the Charged Person. […] [T]here is fresh evidence in the case file upon which the Pre-Trial Chamber finds that the Charged Person exerted pressure on [redacted] by threatening him in order to withdraw confessions that implicated members of the upper echelon. Other evidence found in the case file shows that the fear of witnesses from intimidation remains a reality.” (footnotes omitted)); ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 42 (referring to threats ousted during the hearing before the Pre-Trial Chamber).

652 ECCC, Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, IENG Thirith, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 20.
and victims involved in the proceedings.”653 Where the witnesses have already been heard and their statements have been added to the dossier, a chance still exists that they are heard again during the investigation or during the trial hearings.654 In addition to this, witnesses may have given leads in their statements and named other potential witnesses who have not yet been interviewed.655 A concern that was levelled by the Pre-Trial Chamber is the limited number of remaining witnesses that can still testify as to the charged person’s involvement in the alleged crimes.656 However, if there is no evidence to support a concrete risk of interference, such arguments should be rejected. This also applies to the general references by the Pre-Trial Chamber to the fact that “the mere presence of the Charged Person in society can exert pressure on witnesses and prevent them from testifying.”657

In line with other tribunals, the former hierarchical position or the political involvement of the charged person is taken into account in the assessment whether the charged person may attempt and be in a position to pressurise victims and witnesses (for example where the witnesses or victims were the charged person’s subordinates).658 According to the Pre-Trial

653 ECCC, Order on Extension of Provisional Release, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26 (The Co-Investigating Judges add that the risk is corroborated by the charged person’s behaviour and public statements. Reference is made to statements made by the charged person in the press). 654 Ibid., par. 26; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 41. 655 ECCC, Order on Extension of Provisional Release, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 41. 656 ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO3), PTC, 17 October 2008, par. 96. Nevertheless, the Pre-Trial Chamber consequently concluded that detention is not a necessary measure to prevent the charged person from exerting pressure on witnesses and victims or to destroy evidence where the Chamber could not find “evidence of any past actions and/or behaviour of the Charged Person which in themselves would display a concrete risk that he might use that influence to interfere with witnesses and victims.” See ibid., par. 99 -100. 657 Consider e.g. ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, KAING Guek Eav alias “Duch”, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 32. 658 ECCC, Order of Provisional Detention, NUON Chea, Case No. 002/14-08-2006, OCIJ, 19 September 2007, par. 5 (referring to his hierarchical position as “Brother No. 2”); ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO2), PTC, 9 July 2008, par. 45 (the Pre-Trial Chamber finds that a degree of influence was necessarily involved in her senior position (Minister of Social Affairs) and involvement in political movements); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO3), PTC, 17 October 2008, par. 97 (The Pre-Trial Chamber underlines that IENG Sary was Minister of Foreign Affairs, and a member of the Standing Committee of the Communist Party of Kampuchea, and remained politically active after 1979); ECCC, Order on Extension of Provisional Release, IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO2), PTC, 9 July 2008, par. 45; ECCC, Order Refusing Request for Release, KHIEU Samphan, Case No. 002/19-09-
Chamber, since a degree of influence necessarily attaches to such senior positions or political involvement, such influence does not stop when one does not longer occupy the position. Consequently, it may allow the charged person to organise others and put pressure on victims and witnesses.

Again, a concrete risk should be identified. When the Co-Investigating Judges in the Order Refusing the Request for Release of KHIEU Samphan agreed that a “genuine risk of retaliation” against victims or witnesses existed and was corroborated by public statements made by the charged person, the Pre-Trial Chamber disagreed and found that the statement (one newspaper article) was not sufficient to indicate a concrete risk of the charged person pressurizing victims or witnesses. The Pre-Trial Chamber determined that it had not found evidence on past actions or behaviour which, in themselves, would indicate a concrete risk that the charged person may use his influence to pressurise witnesses.

Occasionally, the risk of destruction of evidence was also referred to. The Pre-Trial Chamber held that NUON Chea may destroy evidence, and based such finding on an interview with the charged person Duch, where he stated that he was reprimanded by NUON Chea for not destroying ‘evidence’, as he had done.

Generally, subjective fears expressed by victims and witnesses are taken into consideration in the assessment of the risk of interfering with witnesses and victims. The argument is that

2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 16, referring to the fact that some witnesses stated that they were the charged person’s subordinates. A fact which was rejected by the Pre-Trial Chamber on appeal, see ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 44.


ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 61.

An extreme example of the importance attached to these witness fears can be found in a reference made by the Pre-Trial Chamber in its decision on the appeal by NUON Chea against the Detention Order. The Chamber referred to a comment made by Dutch while he was interviewed as a charged person. In that interview, Dutch stated that he was reprimanded by Nuon Chea for not destroying ‘evidence’, as he himself had done. The Pre-Trial Chamber subsequently argues that in light of the fear already expressed by witnesses of testifying before the Court, although this incident happened 25 years ago, if victims knew about this incident (which apparently was a private conversation between Nuon Chea and Dutch), it could negatively affect their willingness to testify.
when the charged person would be released, witnesses might refuse to participate in future proceedings.\textsuperscript{664} On this particular point, the jurisprudence of the ECCC deviates from the jurisprudence of the \textit{ad hoc} tribunals which clarified that subjective witness fears are not sufficient to deny provisional release.\textsuperscript{665}

Other factors which were considered include the public support of the charged person in certain regions, in particular insofar as it allows the charged person to organise others to put pressure on victims and witnesses.\textsuperscript{666} Further, the display of public hostility towards supporters of the prosecution of the senior leaders of the Democratic Kampuchea may, according to the Pre-Trial Chamber, be an indication of a concrete risk that the charged person would use his or her influence to interfere with witnesses and victims and may thus increase the witnesses’ fears.\textsuperscript{667}

\textbf{§ To ensure the presence of the charged person during the proceedings}

In the assessment of the risk of absconding, the national and international connections of the charged person are an important consideration.\textsuperscript{668} Attention is further paid to the charged person’s former political position, which may imply that the person has allies in foreign countries,\textsuperscript{669} the fact that the charged person used to travel abroad frequently\textsuperscript{670} and the

\footnotesize{See ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, \textit{NUON Chea et al.}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 63.\textsuperscript{664} ECCC, Order Refusing Request for Release, \textit{KHIEU Samphan}, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 16.\textsuperscript{665} See supra, Chapter 8, II.2.6.2.\textsuperscript{666} ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, \textit{IENG Thirith}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 46–47.\textsuperscript{667} \textit{Ibid.}, par. 51.\textsuperscript{668} \textit{Ibid.}, par. 54 (The Pre-Trial Chamber refers to the connections of the charged person with people in the area close to the Thai border, where she used to live, which may help the charged person to flee across the Thai border); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 102 (also referring to the fact that the charged person used to live in Pailin, near the Thai border and that the governor and his deputy may assist the charged person in obtaining a V.I.P card to cross the border); ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, \textit{NUON Chea et al.}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 68; see further ECCC, Order on Extension of Provisional Release, \textit{IENG Thirith}, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 28.\textsuperscript{669} ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 104; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, \textit{IENG Thirith}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 55.\textsuperscript{670} ECCC, Provisional Detention Order, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 18; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, \textit{IENG Thirith}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 55; ECCC, Decision on Appeal against}
availability of financial means that could facilitate an escape. The fact “that it is more likely than not that the charged person is known in the region, at both sides of the border”, has also been relied upon as contributing to the risk of flight. When the charged person indicated that he could have attempted to flee before, since he knew that efforts were being undertaken to prosecute, at a minimum, the high ranking leaders of the Khmer Rouge, the Pre-Trial Chamber rejected such argument. It simply noted that “the situation is not longer the same now that he is under investigation before the ECCC.”

The gravity of the crimes and the length of the sentence to be expected if the charged person would be convicted are equally considered. In line with the analysis of the international criminal tribunals, the Pre-Trial Chamber and the Supreme Court Chamber clarified that the risk of flight cannot solely be based on the gravity of the crimes and the possible sentence. This factor may also be relevant regarding the risk of public disorder since, considering the

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ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 66; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 32; ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 40 – 41 (“The expectation of a lengthy sentence cannot be held against the accused in abstracto as the sole factor determining the outcome of an application for release, because all the accused persons before the ECCC, if convicted, are likely to face heavy sentences. Therefore, the Supreme Court Chamber finds that even though the Trial Chamber invoked a valid statutory condition for detention, it regarded the potential severity of the sentence as determinative, thus giving undue weight for justifying the Accused’s detention”). In this regard, the Supreme Court Chamber held that the Trial Chamber erred in only relying on this factor in ordering the Accused’s detention pursuant to Rule 63 (3) (b) (iii) ECCC IR. Compare ECCC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 16 February 2011, par. 39, 40.
gravity of the alleged crimes, the release of the charged person could provoke protests and indignation which, on its turn, could lead to acts of violence.\textsuperscript{676}

Further factors taken into consideration include public statements ousted\textsuperscript{677} or the possession of a false passport.\textsuperscript{678} It is more problematic that the Pre-Trial Chamber considered the fact that the charged person exercised his right to remain silent to be a relevant factor. The Chamber found “the assertion [by the Defence] that the Charged Person has publicly and consistently stated his willingness to participate in these proceedings […] not persuasive since the Charged person has, until now, exercised his right to remain silent.”\textsuperscript{679} Most disturbingly, the Supreme Court Chamber referred to the “enormous organizational and logistical undertaking involving four accused, most of whom have health problems, and numerous civil parties and multi-person legal teams” as the only factor to establish the risk of flight.\textsuperscript{680} In turn, the risk of flight was the only legal basis for the accused person’s detention. It added that “[e]ven a single instance of an accused failing to appear before the court may undermine the prospect of arriving at a judgment in a reasonable time.”\textsuperscript{681} Consequently, in the absence of any concrete evidence on the risk of absconding, the Supreme Court Chamber relied on the right to speedy proceedings (of the accused and of the co-accused persons) to justify further detention. Clearly, this reasoning bears on the consequences of the charged person not showing up at trial but is irrelevant as to the risk of flight. Therefore, such reasoning is to be rejected.

When the Defence referred to the distinct characteristics of the ECCC \textit{vis-à-vis} international criminal tribunals (the Court is not dependent on state cooperation, may issue arrest warrants, and has a judicial police at its disposal, which increases the possibilities for the ECCC to monitor the charged person and re-arrest him or her in case of flight) as diminishing the risk

\textsuperscript{677} ECCC, Provisional Detention Order, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OClJ, OCIJ, 14 November 2007, par. 18 (IENG Sary made numerous public statements indicating that he refuses to appear before the Extraordinary Chambers).
\textsuperscript{678} ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OClJ (PTC03), PTC, 17 October 2008, par. 104.
\textsuperscript{679} ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, \textit{NUON Chea et al.}, Case No. 002/19-09-2007-ECCC/OClJ (PTC01), PTC, 20 March 2008, par. 69.
\textsuperscript{680} ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, \textit{KHIEU Samphan}, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 54.
\textsuperscript{681} \textit{Ibid.}, par. 54.
of flight, the Pre-Trial Chamber rejected such argument.\textsuperscript{682} According to the Pre-trial Chamber, the existence of a judicial police and the authority to issue arrest warrants “does nothing to reassure this Court that the risk of flight is non-existent.”\textsuperscript{683} The Pre-Trial Chamber added that “when the risk of flight is being discussed the issue is not to give the benefit of the doubt to the charged person and check the possibilities to ensure his presence in case he will flee and not appear in court.”\textsuperscript{684} However, the Pre-Trial Chamber seemed to forget that such analysis is ultimately about weighing probabilities. The question as to what would happen if the judicial police were obliged to re-arrest the person concerned, is a relevant consideration in that regard.\textsuperscript{685}

§ Preservation of the public order

The preservation of public order as justification for the deprivation of liberty has been accepted in the jurisprudence of the ECtHR as a legitimate public interest, on condition that domestic law provides for it. According to the Court, certain offences may, by reason of their particular gravity and the public reaction to them, give rise to a social disturbance capable of justifying pre-trial detention, at least for a certain time.\textsuperscript{686} Such justification is limited to ‘exceptional circumstances’.\textsuperscript{687} In conformity with the case law of the ECtHR, the Pre-Trial Chamber held that in order to conclude that detention is necessary to preserve public order, facts capable of showing that the accused’s release would actually disturb public order must exist.\textsuperscript{688} In addition, detention on such grounds remains legitimate only if the public order

\begin{footnotesize}
\textsuperscript{682} As argued by the Defence in: ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 35.
\textsuperscript{683} Ibid., par. 39.
\textsuperscript{684} Ibid., par. 39.
\textsuperscript{685} See supra, Chapter II.2.6.1.
\end{footnotesize}
remains threatened. The Pre-Trial Chamber repeatedly determined that a threat to the public order existed. It based such finding on reports that the prosecutions may encompass a fresh risk to the Cambodian society and “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them” on resolutions made by the UN General assembly that the crimes committed during the Democratic Kampuchea are still a matter for concern for the Cambodian society; the interest of the Cambodian population in the proceedings before the ECCC (demonstrating that the trials are still a matter of great concern for the Cambodian population and the international community), or the everyday disturbances and violent crimes, which, according to the Pre-Trial Chamber, are a fact of common knowledge. The Pre-Trial Chamber noted that notwithstanding the presumption of innocence, the way the charged persons are perceived is changed since ‘reasonable suspicion’ was established.

In this context, the Pre-Trial Chamber highlighted that even where specific evidence is required to support such a risk, the assessment necessarily involves a measure of prediction, specifically considering the crimes within the jurisdiction of the international(ised) criminal
It is surprising that this ground for the deprivation of liberty has not been foreseen by the procedural framework of the ICC, where legitimate fears of public disturbances upon the release of the suspect or accused may likewise exist. However, the jurisprudence illustrates how the vagueness may lead to abuse. DAVIDSON observes that “[t]he ECCC public order ground has thus become something of a blank check for detention. Every ECCC bail decision has denied bail and cited, amongst other grounds, public order as a basis for detention.” While at present this picture has somewhat changed, the importance of the public order ground in the jurisprudence of the ECCC cannot be neglected. What is apparent in the jurisprudence of the ECCC is that a threat to public order should not necessarily stem from the person’s own conduct but can be based on the type of crimes concerned. That said, such interpretation is not necessarily in breach of international human rights norms where the ECtHR in Letellier did not hold that the court should necessarily have

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695 ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 65 (the Pre-Trial Chamber refers to the fact that the crimes committed are still a matter of concern for the society, of which it finds proof in the great interest the Cambodian population takes in the hearings of the Pre-Trial Chamber (par. 68)); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 112.


697 Consider C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, pp. 349 – 413. The author submits that “although, in theory, using public confidence or public order factors to decide whether to detain international criminal defendants can be consistent with human rights norms, as courts typically use these factors, they prove vague, logically inconsistent, and run the risk of allowing public opinion to override the fundamental human rights of criminal defendants” (ibid., p. 353). With regard to the ECCC, the author notes that “[t]he ECCC public order experience indicates that public order may be a tempting and easily abused ground, but the ECCC statute and rules provided judges with no guidance on the meaning of public order. Criteria are needed to constrain judges” (ibid., p. 408). Therefore the author suggests that a ‘strong showing of the threat to public order or public safety’ as well as a ‘strong preliminary showing of the defendant’s guilt’ should be required.


699 Consider e.g. ECCC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, NUON Chea et al., Case No. 002/19-09-2007/ECCC/TC, T. Ch., 16 February 2011 (rejecting the public order submissions because of lack of substantiation).

700 C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, p. 375. The author notes that only in one case, the Pre-Trial Chamber referred to the actual conduct of the charged person. See ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 71 (the Pre-Trial Chamber notes that the charged person “has publicly shown her hostility toward those who suggested that the senior leaders of the Democratic Kampuchea regime should be put on trial and to those deemed to have spoken about her alleged role in this regime.” “It is possible to envisage that the Charged person will issue further statements that, in the context of the today’s Cambodian society, have the potential to affect public order, notably if they were issued after the Charged Person’s release from provisional detention”).
regard to the attitude and conduct of the accused when released but may also focus on “certain offences”.\(^1\) It is to be noted that the report of the EUCOMHR in *Letellier* had previously held that the attitude or conduct of the accused when released should be considered.\(^2\) Admittedly, as has been confirmed by the case law of the ECCC, the ECHR in *Letellier* did require “facts capable of showing that the accused’s release would actually disturb public” and that detention on such grounds remains legitimate only if the “public order remains actually threatened.”\(^3\)


\(^{702}\) See ECommHR, *Letellier v. France*, Application No. 12369/86, Report of 15 March 1990, par. 52. “Pour la Commission le trouble à l’opinion publique dérivant de la mise en liberté d'une personne repute innocente ne saurait résider seulement dans la gravité du crime qui lui est reproché ou des soupçons qui pèsent contre elle. Elle constate que les juges ne se sont pas fondés sur d'autres circonstances comme l'attitude et la conduite qui pourraient être celles de l'accusée une fois remise en liberté pour étayer l'existence d'un danger de trouble à l'ordre public”).


\(^{704}\) FAIRLIE notes that “such cases need to be carefully evaluated, as instances in which it is asserted that detention is for the ‘protection’ of the accused are often the most objectionable.” See M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left Less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1131, fn. 156.


\(^{706}\) For an exception, see ECCC, Decision on Appeal against Provisional Detention Order of *IENG Thirth*, *IENG Thirth*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 60 - 63.


§ Safety of the charged person

Evidently, the justification for pre-trial detention based on the safety of the charged person is open to abuse.\(^4\) On a number of occasions, the Co-Investigating Judges cited safety considerations in ordering provisional detention.\(^5\) Where the Defence argued that most of the charged persons lived openly and at liberty during the thirty years before their arrest and detention, often without threats, the Co-Investigating Judges and the Pre-Trial Chamber usually rejected these arguments.\(^6\) The Pre-Trial Chamber reasoned that “such non-interference could be placed in the context of the impunity that reigned for almost thirty years” or the fact that the charged person’s home was guarded.\(^7\)

\(^{704}\) Ibid., par. 51.

\(^{705}\) For an exception, see ECCC, Decision on Appeal against Provisional Detention Order of *IENG Thirth*, *IENG Thirth*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 60 - 63.
from one or more victims cannot be ruled out. Relying on threats uttered during the first public hearing of the Pre-Trial Chamber in the Duch case, the Pre-Trial Chamber reasoned in several instances that where the alleged crimes are related to the charges of which the defendant in that case was charged, “this aggression could be vented towards this charged person.”

II.4.1.3. Length of pre-trial detention

According to Rule 21 (4) of the Internal Rules, ‘proceedings’ should be concluded within a reasonable time. Such proceedings include judicial investigations. Furthermore, the ECCC’s procedural detention scheme sets strict limitations to the length a person can spend in provisional detention by determining that the period of provisional detention can only be extended two times. Notwithstanding these safeguards as to the length of the deprivation of liberty, the Co-Investigating Judges also consider the length of the pre-trial detention, when deciding on the extension of the provisional detention or release. Indeed, the nexus between the time a charged person spent in detention and the diligence displayed in the conduct of the investigations is a relevant factor in the consideration of the continuation of detention or release. The assessment consists of two factors: the ‘reasonableness of the length of the detention’ and the ‘diligence of the Co-Investigating Judges in conducting their investigation’.

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708 ECCC, Order Refusing Request for Release, KHIEU Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 20. On appeal, the Pre-Trial Chamber referred to various incidents that occurred in the course of the proceedings encompassing emotional and angry reactions from victims. See ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 53 – 58.


710 ECCC, Decision on Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 45.

711 Rule 63 (7) ECCC IR.


713 See e.g. ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 59; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, KHIEU Samphan, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 44; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of
The Co-Investigating Judges have underlined the importance of the passage of time in determining the legitimacy of the continued provisional detention of a charged person. Where the Co-Investigating Judges refer to the case law of the ECtHR regarding the right to be tried within a reasonable time (Article 6 (1) ECHR), they disregard the right to trial within reasonable time or release as provided for under Article 5 (3) ECHR or Article 9 (3) ICCPR. While some overlap between these provisions certainly exists, the latter provisions require special diligence if the person is detained and demand for greater diligence on the part of the prosecuting authorities.

On its part, the Pre-Trial Chamber referred to the right to trial within reasonable time or release as provided for in Article 9 (3) ICCPR or Article 5 (3) ECHR. In line with the jurisprudence of other international criminal tribunals, the Pre-Trial Chamber held that the right to be tried within a reasonable time requires the judicial authorities to ensure that the detention is reasonable in light of the particular circumstances of the case. Further in line with the ad hoc tribunals, the Pre-Trial Chamber identified five factors which are relevant in considering the reasonableness of the length of the provisional detention: to know (1) the effective length of the detention; (2) the length of the detention in relation to the nature of the crime; (3) the physical and psychological consequences of the detention on the detainee; (4) the complexity of the case and the investigations; and (5) the conduct of the entire procedure. An important factor taken into consideration by the Pre-Trial Chamber in its

Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010, par. 48.


715 See e.g. ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 56.

716 Ibid., par. 57.

717 Consider e.g. ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 69; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, IENG Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 58. See supra, Chapter 8, II.2.10.
assessment is the large-scale investigative actions required by the gravity and nature of the alleged crimes.718

The Co-Investigating Judges noted that while the right to remain silent and not to cooperate actively with the judicial authorities during the judicial investigations are undisputed, “this attitude is not conducive to speedy proceedings.”719 Where the Defence objected that such statement infringes upon the right of the charged person to remain silent, the Pre-Trial Chamber held that it cannot be concluded that any adverse inference was drawn against the charged person. The statement was a mere comment about the fact that exercising this right is not conducive to assist the Judges in discovering exculpatory evidence.720

II.4.1.4. Bail orders and conditional release

At any time, the Co-Investigating Judges may decide, *proprio motu* or at the request of the Co-Prosecutors, that the charged person should be released on bail. The principle of subsidiarity dictates that bail should be ordered where it would be sufficient to satisfy the needs served by the deprivation of liberty. Conditions may be imposed, including to ensure the presence of the charged person at trial and to ensure the protection of others. The bail order may be terminated, changed, suspended or conditions may be added by the Co-Investigating Judges at any time *proprio motu* or upon request by the Co-Prosecutors.721 The charged person may file an application to change or suspend the conditions of a bail order or to suspend it.722 However, no release on bail has so far been ordered. Any conditions for release of the charged person are outweighed by the necessity of provisional detention.723 In denying requests for alternative measures, the Co-Investigating Judges referred to the

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721 Rule 65 (4) ECCC IR.

722 Rule 65 (5) ECCC IR.

‘particular gravity of the crimes’ and the fact that no bail would be rigorous enough to ensure that the abovementioned requirements are sufficiently satisfied.\textsuperscript{724}

II.4.1.5. Alternative forms of detention

While the Defence has repeatedly requested the Co-Investigating Judges and the Pre-Trial Chamber to consider alternative forms of detention, so far no such requests have been honoured. In the absence of any explicit provision in the Internal Rules for alternative forms of detention, the Pre-Trial Chamber considers this to be an alternative request for release by bail order, under the condition of hospitalisation or house arrest.\textsuperscript{725} A balancing exercise is subsequently undertaken between the grounds necessitating the detention of the charged person and the conditions proposed by the charged person.\textsuperscript{726} In all cases so far, it was decided that the conditions proposed by the charged person were outweighed by the necessity of the provisional detention.\textsuperscript{727}

II.4.1.6. Provisional release on humanitarian grounds

Since the statutory documents, the Internal Rules and Cambodian law are silent on the possibility to release a charged person on health considerations, the Pre-Trial Chamber sought guidance in procedural principles established at the international level and applied the case law of the ICTY. It thus held that a person may exceptionally be released where his or her conditions are incompatible with detention.\textsuperscript{728} This finding was further supported by the presence of a provision providing for release of a suspect from police custody in case health conditions make him or her unsuitable for custody.\textsuperscript{729} Old age is not in itself an obstacle to


\textsuperscript{725} ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 119-120.

\textsuperscript{726} \textit{Ibid.}, par. 121.

\textsuperscript{727} Consider \textit{e.g.} ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, \textit{IENG Sary}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 64; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, \textit{KHIEU Samphan}, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 49.

\textsuperscript{728} ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, \textit{KHIEU Samphan}, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 80.

\textsuperscript{729} Rule 51 (6) IR.
The compatibility of the state of health of the accused person with detention is decided on a case-by-case basis in light of the overall circumstances of the case.731

II.4.2. The Special Panels for Serious Crimes
II.4.2.1. General

Similar to the ECCC, the SPSC have consistently emphasised that pre-trial detention is the exception, and pre-trial liberty the rule.732 It will be illustrated how various aspects of the SPSC’s provisional detention regime confirm such a pronouncement. The procedural framework envisaged limitations to the period suspects or accused persons could be detained, specific justifications were required for pre-trial detention and a periodic review mechanism was provided for. All these elements further reveal the exceptional nature of pre-trial deprivation of liberty. However, the practice did not confirm this picture. Illegal detention was a widespread problem at the SPSC.733 Furthermore, several commentators refer to the “excessive use of pre-trial detention” at the SPSC.734

As previously discussed, under the TRCP, upon arrest, the person had to be brought before the Investigating Judge and a review hearing was organised.735 At the occasion of this review hearing, the Investigating Judge could confirm the arrest and order detention, release the

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732 SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, Prosecutor v. Franca da Silva alias Jhoni Francia et al., Case No. 04/2001, SPSC, 27 April 2002, par. 48 (“It shall not be a general rule that persons waiting trial be detained in custody, but release shall be subject to a guarantee to appear for trial”); SPSC, Judgment, Prosecutor v. Carlos Ena, Case No. 5/2002, COA, 24 September 2003, p. 3; SPSC, Decision to the Application for Release of the Accused Lino de Carvalho, Prosecutor v. Lino Carvalho, Case No. 10/2001, SPSC, 28 October 2002, par. 17; SPSC, Decision to the Application for Release of the Accused Carlos Ena, Prosecutor v. Carlos Ena, Case No. 5/2002, SPSC, 12 June 2003, par. 20; SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, Prosecutor v. Sisto Barros et al., Case No. 01/2004, SPSC, 17 March 2004, par. 44; SPSC, Judgement of the Court of Appeal of East Timor, Prosecutor v. Júlio Fernandes et al., Case of Appeal No. 2000/1, COA, 14 February 2001 (“it is a measure of constraint of exceptional nature (as are all measures of constraint) which should only be taken or extended when the imposition or extension is really essential to guarantee other superior values; and when all assumptions established by law are met”).
734 C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, 2006, p. 25 (in this regard, REIGER and WIERDA refer to the fact that the TRCP offered little guidance on the function of the Investigating Judge, an office that was non-existent under the Indonesian criminal justice system).
735 See supra, Chapter 7, V.2.3 and V.3.3.
suspect or order substitute restrictive measures. This order was appealable. Victims had the right to be heard at the review hearing.

It followed from Section 20.7 TRCP that detention could only be ordered in case (1) there were ‘reasonable grounds to believe’ that a crime had been committed, (2) there was ‘sufficient evidence’ to support the ‘reasonable belief’ that the suspect was the perpetrator and (3) there were ‘reasonable grounds to believe’ that detention was necessary. It followed from Section 20.8 TRCP that these ‘reasonable grounds to believe that detention is necessary’ included (1) reasonable grounds to believe that the suspect will flee to avoid criminal proceedings, (2) the risk that evidence would be tainted, lost, destroyed or falsified, (3) reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered, or (4) reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security. Where the ordering of pre-trial detention was made dependent on the fulfilment of the conditions outlined above, there was no discretion for the Investigating Judge to order detention absent their fulfilment. Consequently, the Investigating Judge had to order the release if he found that there were insufficient grounds to continue the detention or if the Public Prosecutor dismissed the case. The burden of proof was on the Prosecution. Absent was the legitimate ground of protecting the safety of the accused person (cf. ECCC). Commentators have argued that the Investigating Judges often only made generic reference to the legitimate grounds for detention under Section 20.8 TRCP. As indicated above, it follows from the case law of the ECtHR that such use of

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736 Section 20.6 TRCP.
737 Section 23.1 TRCP.
738 Section 12.3 TRCP.
739 In one case, the Court of Appeal seems to have applied a different (incorrect) threshold where it seemingly required “a strong belief that the defendant will be convicted for having committed a given crime.” Critical of such threshold, see C. CORACINI, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes 2003 – 2005, Vol. XIII, Antwerp, Intersentia, 2009, p. 200 (arguing that such threshold could contravene the right to be presumed innocent until guilt is proven).
740 Section 20.8 (a) - (d) TRCP.
741 Consider the wording of Section 20.7 TRCP (“The Investigating Judge may confirm the arrest and order the detention of the suspect when...” (emphasis added)).
742 Consider e.g. SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, Prosecutor v. Franca da Silva alias Jhoni Franca et al., Case No. 04/2001, SPSC, 27 April 2002, par. 29 (highlighting the difference with the ICTY provision on provisional release). However, occasionally, the burden seems to have effectively been put on the suspect.
identical or stereotyped language raises doubts about the justification for the continued detention. 745

§ Periodic review of detention - Limitation in time

The detention of a suspect had to be reviewed by the Investigating Judge every 30 days. 746 The Court of Appeal held that the suspect was not entitled to a hearing at this occasion. 747 This interpretation is at tension with international human rights law, which requires that the Judge “must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified.” 748 Such periodic review allows the Judge to take changed circumstances into consideration. Normally, the maximum duration of the pre-trial detention was six months from the moment of arrest. 749 Where a crime was punishable with a sentence of imprisonment of more than five years, the maximum period


746 Section 20.9 TRCP. There is no express requirement that a hearing is organised at such occasion. Nevertheless, the default to organise a hearing is considered an irregularity: see SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romero Tilman and Joao Sarmento, Prosecutor v. Sarmento et al., Case No. 18/2001, SPSC, 22 March 2002, par. 34 – 36 (referring to a decision of the Court of Appeal of 14 February 2001, which is binding on the SPSC pursuant to Section 2.3 UNTAET Regulation 2000/11).

747 SPSC, Judgement of the Court of Appeal of East Timor, Prosecutor v. Júlio Fernandes et al., Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende, JA, p. 8 (According to the Judge, such right followed from Section 2.1. TRCP, which includes the entitlement for every person to a fair and public hearing before a competent court, which right includes the right “to be heard before a decision, especially an adverse decision, is made in the course of proceedings for which he has been arraigned before the court.” However, the majority decision took another view and held that “it is not obligatory to hold a public hearing to review the pre-trial detention as pursuant to Section 20.9, nor to decide about the extension of the pre-trial detention as stated in Sections 20.11 and 20.12 TRCP. Therefore, this act cannot be considered, as the appellants wish it could, a nullity which cannot be remedied.” See SPSC, Judgement of the Court of Appeal of East Timor, Prosecutor v. Júlio Fernandes et al., Case of Appeal No. 2000/1, COA, 14 February 2001, p. 3. For an convincing view that an obligation to hear the person existed, see S. LINTON, Prosecuting Atrocities at the District Court of Dili, in «Melbourne Journal of International Law», Vol. 2, 2001, pp. 428 – 429 (the author underlines, among others, that such approach “reveals an appreciation of the object and purpose of Regulation 1999/1”, which includes both the requirement that “all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards” as well as the requirement that the laws of East-Timor should not conflict with international standards. LINTON adds that the SPSC’s “failure to ensure a hearing in the presence of the accused and receive any submissions was not ‘a mere irregularity’ (in the words of the majority), but a fundamental issue going to the heart of fair trial guarantees in international law”). For a similar view, see S. LINTON, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in «Criminal Law Forum», Vol. 12, 2001, p. 227. Notably, in the Sarmento et al. case, the SPSC, in referring to this holding by the Court of Appeal, distinguished between the right to be heard and the right to a hearing. See infra, fn. 753.


749 Section 20.10 TRCP.
could be extended by three months by the Investigating Judge or the Judge to whom the matter had been referred following the filing of the indictment, upon the request of the Public Prosecutor. The interests of justice had to require such extension and there had to be compelling reasons to order so. For particularly complex cases which carried an imprisonment of ten years or more, the Investigating Judge or the Judge to whom the matter had been referred, could extend the detention as long as was reasonable in the circumstances, at the request of the Prosecutor, provided that the interests of justice required so and having regard to the international standards of fair trial. These two instances where the maximum period of pre-trial detention could be extended allowed for the consideration of ‘the prevailing circumstances in East Timor’. Arguably, in these situations, the Defence had to be given the opportunity to be heard. However, no clear provision was made for holding a hearing.

In Prosecutor v. Carlos Ena, the Court of Appeal determined that since the indictment was only composed of six pages and there were only ten prosecution witnesses and 6 defence witnesses, the proceedings were of a normal complexity and the ‘complexity’ requirement was not satisfied.

While obvious, the Court of Appeals had to emphasise that the pre-trial detention could not be extended with retroactive effects. From the moment the warrant of arrest expires, the basis for the deprivation of liberty disappears and the detention becomes illegal. In the Fernandes case, when detention orders against a number of persons had expired or were about to expire, the SPSC took the mind-blowing step of issuing new arrest warrants to ‘fix’ this problem. The same practice was applied in the Los Palos case. The Court of Appeals

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750 Section 20.11 TRCP. The decision can be appealed to the Court of Appeal (Section 23 TRCP).
751 Section 20.12 UNTAET Regulation 2000/30. The decision can be appealed to the Court of Appeal (Section 23 UNTAET Regulation 2000/30).
752 Section 20.11 and 20.12 TRCP.
753 SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, Prosecutor v. Sarmento et al., Case No. 18/2001, SPSC, 22 March 2002, par. 38-39: the SPSC derives such obligation from the right to a fair trial (Section 2 UNTAET Regulation 2000/30 and Article 9 (3) ICCPR). Consider also SPSC, Judgement of the Court of Appeal of East Timor, Prosecutor v. Júlio Fernandes et al., Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende, JA, p. 8 (arguing that there should be a hearing in the presence of the accused and his legal representative, if any). Consider also the discussion supra, fn. 747.
756 Ibid., p. 7.
757 See the discussion of this case, supra, Chapter 7, II.1.
758 See JSMP Trial Report, The General Prosecutor v. Joni Marques and nine others (The Los Palos Case), March 2002, p. 14 (“In mid-January 2001, the prosecutors again realised that several detention orders had
overruled this decision of the SPSC.\textsuperscript{759} Also other problems related to the length of the pre-trial detention plagued the SPSC. Among others, the issue arose that the period of detention had already expired at the time a case was transferred to the SPSC.\textsuperscript{760} Another infamous case is Victor Alves. His lawyers challenged his detention, holding, among others, that the maximum period of pre-trial detention had expired.\textsuperscript{761} At the relevant time, it followed from the then applicable Indonesian code of criminal procedure that the person needed to be released if no proceedings were initiated within 110 days following the deprivation of liberty. However, UNTAET adopted Regulation 2000/14, with immediate effect, which replaced the time limitations of pre-trial detention provided under the Indonesian code of criminal procedure and automatically validated all previous arrests and detentions made before 10 May 2000.\textsuperscript{762} However, the Judge decided to set aside Regulation 2000/14 where he found that its provisions violated international human rights standards and concluded that the detention of Victor Alves was unlawful.\textsuperscript{763}

§ Standard of proof

It followed from Sections 20.7 and 20.8 TRCP that the Court must be satisfied that there are ‘reasons to believe’ that detention is necessary for one of the legitimate grounds under Section 20.8 of TRCP.\textsuperscript{764} Occasionally, the SPSC seems to have applied an erroneous standard of proof. For example, the SPSC in its reasoning in Sarmento not only reversed the burden of proof but also imposed an unattainable threshold when it reasoned that “there is not evidence that the accused Joao Sarmento could not have financial resources or no contact in West

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\textsuperscript{759} Ibid., p. 15.

\textsuperscript{760} Ibid., p. 15.


\textsuperscript{762} Ibid., p. 141.


\textsuperscript{764} While Section 20.8 (a), (c) and (d) TRCP explicitly state that ‘reasons to believe’ are required, Section 20.8 (b) TRCP requires a different standard, namely the existence of "a risk that evidence may be tainted, lost, destroyed or falsified" (emphasis added).
Timor or Indonesia. The fact that his relatives are in East Timor is not in itself a guarantee.\footnote{SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, Prosecutor v. Sarmento et al., Case No. 18/2001, SPSC, 22 March 2002, par. 60 (emphasis added).} Indeed, an abstract risk of absconding always exists: what is needed to be shown are ‘reasons to believe’ that the person will flee, which arguably requires more than a mere abstraction. In the same case, the SPSC insisted that there is ‘no certainty’ that the accused will not flee. Again, the SPSC not only reversed the burden but also set a much higher standard of proof than the ‘reasons to believe’ threshold under Section 20.8 of the TRCP.

When the SPSC considered the risk of interference with victims and witnesses (Section 20.8 (c) TRCP), the SPSC relied on Rule 65 (B) ICTY RPE and concluded that it was not satisfied that the accused will not pose a danger to victims or witnesses, apparently accepting the ‘balance of probabilities’ threshold as elaborated in the jurisprudence of the \textit{ad hoc} tribunals.\footnote{SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, Prosecutor v. Franca da Silva alias Jhoni Franca et al., Case No. 04/2001, SPSC, 27 April 2002, par. 37; (renumbered by author); SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, Prosecutor v. Sarmento, Case No. 18/2001, SPSC, 7 February 2003, par. 33 (where the Court refers to case law of the ICTY, it adds that: “the Court takes into account that in the ICTY the rule places the burden of proof of showing the absence of the grounds for detention on the defense while in UNTAET Regulation 2000/30 the burden of proof of such factors is on the prosecution”).} Also when the SPSC considered the risk of flight, the SPSC occasionally concluded that it was not satisfied that the person would not flee.\footnote{Ibid., par. 49. Other decisions applied the correct standard. Consider e.g. 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. 46 (concluding that “[t]here are reasons to believe that Aprecio may flee the jurisdiction of the court once released”).} Such borrowing from the \textit{ad hoc} tribunals’ provisional release scheme should be rejected where a different standard of proof is provided for under the TRCP and where it effectively reverses the burden of proof, putting it on the Defence.

§ Requests for review of detention

The suspect or accused person held the right, upon request, to have their detention reviewed \textit{at regular intervals} by a competent Judge or a panel of Judges.\footnote{Section 6.3 (k) TRCP.} When detention was reviewed, the burden of proof rested on the Prosecution.\footnote{SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, Prosecutor v. Franca da Silva alias Jhoni Franca et al., Case No. 04/2001, SPSC, 27 April 2002, par. 29.} This right was limited by the jurisprudence...
to situations where ‘new grounds’ or a ‘change in circumstances’ existed.\textsuperscript{770} The right arose when (1) the previous period of detention expired and (2) when there were changes affecting any of the grounds upon which the accused person’s detention is based.\textsuperscript{771} However, the SPSC accepted that the additional time spent in detention since the last order of detention constituted “a change in the circumstances of the case.”\textsuperscript{772} There was no concrete time limit, exceeding which it could be automatically considered that such new grounds appeared. It was a matter for the Court to be considered on a case-by-case basis and in light of several factors that may account for the length of detention.\textsuperscript{773} At the occasion of this review, there was no need for the Court to revisit the grounds that have already been taken into consideration in previous decisions on pre-trial detention or release.\textsuperscript{774}

II.4.2.2. Grounds justifying pre-trial detention

Decisions on continued detention mostly considered the risk of flight and only seldomly focussed on the preservation of evidence or the endangerment of public safety.\textsuperscript{775} As stated above, often only a generic reference was made to the grounds justifying detention. In the case of Júlio Fernandes et al., the Court of Appeals lashed out at the decision of the SPSC, which simply stated that “there are reasons to believe that the accused will try to escape to

\textsuperscript{770} Ibid., par. 15 (“The right of the accused to have his detention reviewed at regular intervals[s] does not mean that a party can bring before the Court the same reasons upon which the Court initially decided. Only new grounds have to be submitted”); SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, Prosecutor v. Lino Carvalho, Case No. 10/2001, SPSC, 28 October 2002, par. 13; SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, Prosecutor v. Sarmento, Case No. 18/2001, SPSC, 7 February 2003, par. 15.


avoid criminal proceedings” and that “there are reasons to believe that the witnesses and/or victims can be put under pressure, manipulated or their safety endangered.” The Appeals Chamber repeated that “[t]he Court should mention the facts that led to the decision and has to mention the evidence (even if it has not been proven true) based on which it can state that those facts exist.”

§ Risk of flight

The gravity of the alleged crime and the sentence that could be expected upon conviction were factors taken into consideration in the assessment of the risk of flight. Also the alleged role the accused played in the crimes charged was considered. In the aforementioned Sarmento case, the SPSC seemed to have based its conclusion in the first place on the gravity of the crimes and the sentence that could be imposed. However, some reference was also made to other factors, including financial resources or international contacts. As it was argued before, it follows from human rights law that the gravity of the crime and the length of the expected sentence cannot be the only ground upon which detention is based.

Other factors that were considered in the assessment of the risk of flight included the voluntariness of surrender (following a previous release or escape) or the fact that relatives or the accused live(d) in West Timor. The importance of the latter factor can be explained by the lack of cooperation by Indonesia.

776 SPSC, Judgement of the Court of Appeal of East Timor, Prosecutor v. Júlio Fernandes et al., Case No. 2000/1, COA, 14 February 2001, pp. 8 – 9. (the Court of Appeals added that “the judicial decision has to include all evidence facts, all factual elements and legal elements which are necessary to convince, at least rationally, the receiver of the decision and the public in general that in view of those evidence elements one has to conclude that certain facts have been proven; and that, in view of the facts which have been proven and the applicable law, the decision made was the only possible one. The prestige of a Court lies, to a great extent, in the ability to be based on legal premises, make others rationally accept the Court’s decisions”).


778 Ibid., par. 28 (“As a general principle, the greater the accused’s role in an alleged crime, the more difficult it will be for the Court to release him”).


The risk of interference with victims or witnesses was accepted as a ground for detention *in the absence of any concrete indication* of attempted interference or manipulation. For example, where the accused was detained and therefore did not have the possibility to interfere, this factor was taken into consideration. Together with the factor that releasing the accused at that stage may have had a negative impact on the willingness of the victims and/or witnesses to participate in the trial proceedings, this factor was considered sufficient to establish ‘reasons to believe’. It was added that where the evidence has already been gathered, risks of interference may still exist as many witnesses are expected to appear before the Court to testify. Similarly abstract and general in nature was the reasoning of the SPSC in *Sarmento* where it held that “the fact that they did not do it in the past [tried to pressurise, manipulate or endanger the safety of witnesses] is not a guarantee they will not do it in the future. No one can predict the future.” Such reasoning falls short of the requirement to establish ‘reasons to believe’ and should be rejected as it puts an unattainable burden on the Defence.

A different approach, in line with the holdings of the *ad hoc* tribunals, was taken by the SPSC in the *Sisto Barros* case, where the Court (Judge Rapoza) held that “[t]he fact that victims or witnesses may apprehend a risk to themselves because they have provided information to the Public Prosecutor may be considered on the question of the defendant’s detention only to the

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781 A MOU was concluded between the Republic of Indonesia and the UN Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters (done at Jakarta on 5 April 2000 and at Dili at 6 April 2000 (http://www.unmit.org/legal/Other-Docs/mou-id-untaet.htm, last visited 1 December 2010). Consider in particular Section 2 (c) on the enforcement of warrants for arrest ad Sections 9 and 10 on the transfer of persons for the purpose of criminal prosecution.

782 *SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 36 (p. 9); such ‘negative impact’ was also considered in *SPSC, Decision on the Application for Release of the Accused Benjamin Sarmanto, Prosecutor v. Sarmanto*, Case No. 18/2001, SPSC, 7 February 2003, par. 35.

783 Ibid., par. 38.

784 *SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romero Tilman and Joao Sarmento, Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 58. It can be argued that the reasoning of the SPSC should be understood as implying that the gravity of the crimes and the length of the possible sentence led the SPSC to conclude that there was a risk of interference: proof of such understanding can be found in the decision by the SPSC (Judge Maria Natercia Gusmao Pereira) on a subsequent application for release: see *SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 30.
extent that such apprehension is based on the conduct of the defendant.”785 Consequently, mere subjective witness fears will not in themselves suffice to order detention for risk of interference. Similarly, the fact that the accused persons have been living in the proximity of the residences of the victims and witnesses for a long time, was not accepted as a factor for increasing the risk of interference with victims or witnesses since no incidents had occurred.786

II.4.2.3. Length of the pre-trial detention

The case for release gets stronger when the period of detention lengthens.787 The length of pre-trial detention was an exceptional ground on which to release the suspect or accused.788 The SPSC held that not the delay in itself provoked release but the length of detention going beyond what was reasonable.789 There was no concrete time limitation, behind which pre-trial detention became unreasonable. The reasonableness of the pre-trial detention was assured by Section 20.10 – 20.12 TRCP, encompassing strict time limitations for pre-trial detention. It also provided for the possibility to extend pre-trial detention for particularly complex cases which carried an imprisonment of ten years or more as long as the length of the pre-trial detention was reasonable in the circumstances, and having due regard to international fair trial standards. In addition, Section 6.3 (f) TRCP guaranteed the suspect or accused a trial without undue delay. The consideration of reasonableness of the length of the detention and of the right to be tried without undue delay had to be done on a case-by-case basis and various elements had to be considered. Different from other international criminal tribunals, the SPSC held that the reasonable length of the detention should be assessed on the basis of the time that has already been spent in detention, “not over the hypothetical future period that a

785 SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, Prosecutor v. Sisto Barros et al., Case No. 01/2004, SPSC, 17 March 2004, par. 50 (emphasis added).
786 Ibid., par. 50.
postponement of the case could add. However, the Court added that the perspective of this future time can be taken into account by the Court as an additional element to be considered. In that regard, the imminent opening of the trial is an element which was taken into consideration in the assessment of the reasonableness of the length of the detention.

II.4.2.4. Conditional release

The principle of subsidiarity in provisional detention situations entailed that whenever substitute restrictive measures were sufficient and adequate to satisfy the ends of detention, detention had to be stopped and substitute restrictive measures had to be imposed. The jurisprudence of the SPSC reveals that substitute restrictive measures were occasionally imposed. Substitute restrictive measures could be ordered by the Investigating Judge in cases where there was a risk of interference with witnesses, victims or other persons participating in the proceedings or in cases where there was a risk of destruction of evidence. Furthermore, the Investigating Judge could order that bail or another surety was posted, in addition to restrictive measures, to ensure the appearance of the suspect or accused at trial. Where this provision thus seemed to limit the application of these measures to instances where such was necessary to protect evidence, it has been argued that such measures could also be imposed where there could be a risk of flight or of public security and safety. The measures provided for in the TRCP included house arrest, geographic limitations of the

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790 Ibid., par. 18.
791 SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correira, Prosecutor v. Abilio Mendez Correira, Case No. 19/2001, SPSC, 10 June 2003, par. 14-15 (in casu, where the court could not assure that the trial would commence within one month, the proximity of the trial could not be considered to be reason to keep the accused person under detention); SPSC, Decision to the Application for Release of the Accused Carlos Ena, Prosecutor v. Carlos Ena, Case No. 5/2002, SPSC, 12 June 2003, par. 21.
792 See e.g. SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, Prosecutor v. Lino Carvalho, Case No. 10/2001, SPSC, 28 October 2002, par. 17.
794 Section 21 (1) TRCP.
795 Section 21 (2) and (3) TRCP.
796 S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes, Vol. XIII, Antwerp, Intersentia, 2008, p. 100. According to ZAPPALÀ, where Section 21 (1) only refers to one of the conditions for detention, substitute measures can also be imposed where there exists a risk of flight or a danger to public security and safety. Limiting such measures to instances where there exists a risk of interference with evidence is “only a mistaken impression based on a mere textual reading of the provisions.” It is this author’s opinion that the reading together of Section 21 (1) and (2) clarifies that substitute restrictive measures can equally be imposed where detention is grounded on a risk of flight.
freedom of movement, periodic checks on the suspect, or the prohibition to visit certain places or to speak to named individuals. In Carvalho, the SPSC held that the (procedural) principle of legality limited the substitute restrictive measures that could be imposed to those restrictive measures enunciated in Section 21 (1) UNTAET Regulation 2000/30. However, the SPSC seemed to leave the door open for the imposition of other measures where the Court believed they were necessary “to ensure the integrity of evidence related to the alleged crime or the safety and security of the victims, witnesses” and provided that these measures were “necessary and lawful.”

The conditions imposed included the prohibition to interfere, harass or endanger victims or witnesses. Such a restrictive measure was limited to the protection of victims and witnesses in the case concerned and it was no general measure of security. These measures served different objectives, to know the guarantee the implementation of the penalty or the broader administration of justice (including the preservation of the investigation and preventing the further commission of offences).

In ordering conditional release (the imposition of alternative measures), personal assurances and assurances of the community to which the suspect or accused sought to be released were important.

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797 Section 21 (1) TRCP.
798 SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, Prosecutor v. Lino Carvalho, Case No. 10/2001, SPSC, 28 October 2002, par. 21. According to ZAPPALÀ, the procedural principle of legality requires that procedural provisions clarify the circumstances and the conditions in which detention can be imposed. However, he doubts whether more lenient measures must be set out in the same detailed manner: see S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes, Vol. XIII, Antwerp, Intersentia, 2008, p. 99. Reference is made to the decision in Blaškić where the ICTY President allowed for house arrest in the absence of any explicit provision for it. The reasoning was that where pre-trial detention is allowed for, every more lenient restriction of the right to liberty should be allowed for. This may formally be at tension with the procedural principle of legality but respects the presumption of innocence. See the discussion of this decision, supra, Chapter 8, II.2.9. Consider also SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correira, Prosecutor v. Abilio Mendez Correira, Case No. 19/2001, SPSC, 10 June 2003, par. 19.
II.4.3. Special Tribunal for Lebanon

Similar to the ICC, the STL provides for an alternative to pre-trial detention and for a suspect or an accused “not to be arrested and not to be held in custody in The Hague during pre-trial proceedings.” Indeed, as previously explained, the procedural set-up of the STL provides for the possibility for the suspect or accused to appear before the tribunal following a summons to appear, without being detained, or following the issuance of a safe conduct.

Leaving these alternative routes aside, the statutory framework of the STL clearly confirms pre-trial release as the rule and detention as the exception. This exceptional nature of provisional detention was confirmed by the Pre-Trial Judge. In some of the first orders issued so far by the STL, he held that detention is only warranted where it proves strictly necessary. Caution is necessary and given the lack of sufficient practice, it remains to be seen whether a practice of pre-trial release will emerge.

However, different additional elements of the procedural set-up of the pre-trial detention and release regime confirm the exceptional character of pre-trial detention. They include (1) the limitation of provisional detention to certain categories of persons; (2) the putting of the burden on the Prosecutor in release applications; (3) the installment of a periodic detention review mechanism and (4) the obligation incumbent on the Pre-Trial Judge or Chamber to ensure that the person is not detained for an unreasonable period of time due to inexcusable delay by the Prosecutor.

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802 See e.g. STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal’s President, 25 November 2010, par. 25.
803 Rule 78 and Rule 79 STL RPE respectively. See supra, Chapter 7, IV.
804 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. 22; 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. 7. It may also be noted that at the occasion of the last amendment of the STL RPE, all references to “provisional release” were replaced by “release”. Such amendment was made “as to clarify that detention, and not release, is exceptional.”
805 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. 50.
806 It is noted that the first case before the STL proceeds in absentia.
§ Detention on remand

Rather than providing for automatic pre-trial detention following transfer, Rule 101 STL RPE provides for detention on remand for specific categories of persons. These categories include (i) detained persons transferred to the tribunal (which category includes persons that are detained in Lebanon in the case of the attack against Prime Minister Rafiq Hariri and others and whose transfer is sought by the tribunal\textsuperscript{806} as well as other persons detained by the Lebanese authorities whose transfer to the tribunal is sought\textsuperscript{807}), (ii) the detention of suspects or accused arrested by Lebanon or another state following a warrant of arrest and who are transferred to the tribunal (Rule 83 STL RPE), and (iii) the detention of accused persons arrested following their voluntary appearance at the tribunal.\textsuperscript{808} Additionally, it should be reiterated that the issuance of a warrant of arrest does not only require the confirmation of the indictment but (in line with the ICC) also presupposes the existence of a legitimate ground for detention, to know (1) to ensure the appearance of a person ‘as appropriate’, (2) to prevent the 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{809} The preservation of the public order is not included as a legitimate ground. Similarly, the transfer and provisionally detention of a suspect does not only presuppose that the person qualifies as a suspect, but requires that detention is necessary (1) to prevent the escape of the suspect, (2) to ensure that the person does not obstruct or endanger the investigation or the court proceedings (for instance by posing a danger to, or intimidating, any victim or witness), or (3) to prevent criminal conduct of a kind of which he is suspected.\textsuperscript{810}

\textsuperscript{806} Consider in particular Article 4 (2) STL Statute and 17 (A) and (B) STL RPE. As noted by the STL Pre-Trial Judge, Article 4 (2) STL Statute should not be understood as implying that all persons detained in Lebanon in connection with the Hariri case should be transferred to the tribunal, including persons the Pre-Trial Judge considers to release, at the request of the Prosecutor. See 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, par. 12 – 15.

\textsuperscript{807} The transfer of other persons detained by the Lebanese authorities to the custody of the tribunal pursuant to Rule 17 (G) STL RPE and Rule 80 STL RPE (temporary surrender of detained person).

\textsuperscript{808} Rule 101 (A) STL RPE. It has been proposed to limit detention on remand following transfer to seven days, during which period the Prosecutor would have to request the provisional detention of the suspect or accused. This proposed amendment was rejected. 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. 49.

\textsuperscript{809} Rule 79 (A) STL RPE. See the discussion on warrants of arrest, supra, Chapter 7, II.1.

\textsuperscript{810} Rule 63 (B) (ii) and (iii) STL RPE. See the discussion on the arrest and provisional detention of suspects, supra, Chapter 7, III.3.
A right for the accused to apply for release is provided for under Rule 101 (B) STL RPE. According to Rule 102 (A) STL RPE, release may only be refused if (i) detention is necessary to ensure appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, (for instance by posing a danger to, or intimidating, any victim or witness), or (iii) to prevent criminal conduct of a kind of which he is suspected. It is clear from the wording of the provision that the burden is on the Prosecutor to show that provisional detention is necessary.\(^{811}\) The Pre-Trial Judge rightly argued that implicit in Rule 101 (A) STL RPE is the requirement, in line with international human rights standards, that the person is suspected or accused of a crime within the jurisdiction of the tribunal.\(^{812}\) He added that “[i]f that condition is not met, reviewing the other conditions for provisional detention set out in Rule 102 becomes superfluous.”\(^{813}\) As shown before, the case law of the ECtHR clarified that the persistence of a reasonable suspicion is a \textit{sine qua non} for the validity of the continued detention.\(^{814}\)

Similarly, a right of the suspect provisionally detained at the seat of the tribunal and the Prosecutor to apply for release is provided for.\(^{815}\) Following the amendment of Rule 101 (B) STL RPE, the test of Rule 63 STL RPE is to be applied to such applications.\(^{816}\) As previously mentioned, it requires that the Pre-Trial Judge should consider continued detention to be a necessary measure (a) to prevent the escape of the suspect, (b) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, including by posing a danger to, or intimidating, any victim or witness, or (c) to prevent criminal conduct of a kind of which he is suspected.\(^{817}\) In line with other tribunals, both the host state and the state to which the person seeks to be released should be heard prior to release.\(^{818}\)


\(812\) 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. 30.

\(813\) Ibid., par. 30.

\(814\) See supra, Chapter 7, V.4.1; Chapter 8, 2.10.

\(815\) Rule 63 (G) STL RPE. It follows from 63 (H) STL RPE that Rules 101 and 102 STL RPE regarding detention on remand of accused persons apply \textit{mutatis mutandis} to the detention of suspects.

\(816\) Rule 101 (B) STL RPE as amended at the occasion of the Third Plenary of Judges, 10 November and corrected on 29 November 2010 (STL/BD/2009/01/Rev. 3).

\(817\) Rule 63 (B) (iii) STL RPE.

\(818\) Rule 101 (C) STL RPE.
§ Periodic review of the ruling on release or detention

Further proof of the exceptional character of pre-trial detention can be found in the requirement incumbent on the Pre-Trial Judge or Chamber to review its ruling on detention or release at least every six months (periodic review), or at any time at the Prosecutor’s or detained person’s request. At such occasion, the Pre-Trial Judge or Chamber may review its decision, if ‘changed circumstances’ require so. While no strict time limitations for the length of detention are provided for, Rule 101 (E) STL RPE stipulates that the tribunal should ensure that the person is not detained for an unreasonable period due to an inexcusable delay by the Prosecutor. If such delay occurs, the Pre-Trial Judge or Chamber may order release, with or without conditions.

§ Conditional release

Conditional release may be ordered, including a bail bond. Conditions that may be imposed should be necessary to ensure the presence of the accused at trial or for the protection of others.

Lastly, decisions in relation to release are appealable. When the Prosecutor appeals this decision, the appeal should be filed within one day and when the detained person appeals, the appeal should be filed within seven days. The Prosecutor may request a stay of the decision on release pending the appeal.

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819 Rule 101 (D) STL RPE. Previously, Rule 101 (D) only referred to a ‘periodic review’. During the 3rd revision of the RPE, the provision was amended to clarify that the ‘periodic review’ implies that the decision should be reviewed at least every six months. See the STL RPE as amended on 10 November 2010 at the occasion of the third plenary of Judges and corrected on 29 November 2010 (STL/BD/2009/01/Rev.3 (Incorporating STL/BD/2009/01/Rev.3/Corr. 1)). Compare with the periodic review mechanism provided for in Article 60 (3) ICC Statute and Rule 118 (2) ICC RPE, which was previously discussed, supra, Chapter 8, II.3.3.
820 Rule 101 (D) STL RPE.
821 Emphasis added. It should be reiterated that the period a suspect can be detained on remand (detention prior to the confirmation of the indictment) is limited. Consider Rule 63 (D) STL RPE (‘in the event the indictment has not been confirmed and an arrest warrant signed by the Tribunal, the suspect shall be released or, if appropriate, delivered to the authorities of the requested State’ (emphasis added)).
822 Rule 102 (B) STL RPE.
823 Rule 102 (C) STL RPE.
824 Rule 102 (D) STL RPE.
PRELIMINARY FINDINGS

In this chapter, the provisional detention and release regimes of the different international(ised) criminal courts and tribunals under review were analysed in depth. On the basis of this analysis, a number of conclusions can now be drawn. It was found that whereas most tribunals scrutinised proclaim that pre-trial release is the rule and detention the exception, the ad hoc tribunals and the SCSL hold that detention is neither the rule nor the exception and that the particular circumstances of each case should be considered. This approach was critically evaluated in light of international human rights norms, which clearly require that release is the norm and detention the exception.

The other institutions under review proclaim that pre-trial liberty is the rule and pre-trial detention the exception. That said, the practice does not always confirm this picture. Therefore, rather than taking such pronouncements for granted, a number of ‘features’ were discussed above which can be reflective of a system where pre-trial release is the rule. These factors include: (i) the absence of discretion for the Judges in decisions on provisional detention/interim release, (ii) the requirement that one or more legitimate grounds are present for the ordering of provisional detention, (iii) the fact that the burden of proof in decisions on provisional detention/interim release is on the Prosecutor, (iv) the presence or not of a periodic review mechanism regarding pre-trial detention, (v) strict time limitations for provisional detention and (vi) the possibility for the Judges to order conditional release.

With regard to the first of these ‘features’, a distinction can be drawn. The practice of the ad hoc tribunals and the SCSL leaves discretion to the Judges to deny provisional release where all conditions have been fulfilled. Other tribunals under review reject the idea of such judicial discretion in decisions on provisional detention/interim release. The removal of judicial discretion is a remarkable improvement where the analysis of international human rights norms clearly depicts that the accused should be released where no ‘genuine requirement of public interest’ is present, which outweighs the person’s right to personal liberty. Furthermore, the absence of discretion enhances transparency. Since not only the ICC, but also the internationalised criminal courts and tribunals discussed do not leave any discretion.

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with the Judges in provisional detention/release cases, it may be concluded that there is a tendency to remove judicial discretion in provisional release/detention matters. Where judicial discretion is provided for, it is important that proportionality constitutes an independent consideration with regard to a decision on provisional detention/interim release.

The ICC as well as the internationalised criminal tribunals discussed require that pre-trial detention is necessary for one or more legitimate purpose(s). In contrast, the ad hoc tribunals and the SCSL provide for a regime of automatic pre-trial detention, absent any showing of the necessity thereof. The requirement of a legitimate purpose brings the provisional detention/interim release regime in line with international human rights norms. As indicated above, it follows from the jurisprudence of the ECtHR that the persistence of a reasonable suspicion is a condition sine qua non for the lawfulness of the continued detention. However, after a certain amount of time, the persistence of a reasonable suspicion can no longer suffice. A ‘genuine requirement of public interest’ should exist for continued detention, which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty.

With regard to the burden of proof, it emerges from the analysis above that the ad hoc tribunals and the SCSL clearly put the burden of proof on the accused. In contrast, the other international(ised) criminal tribunals scrutinised put the burden of proof on the Prosecutor. It was concluded that such an approach stands to be preferred where the former approach violates human rights law. Putting the burden on the Prosecutor is characteristic of a system which considers pre-trial detention to be the exception and release to be the rule. However, it was noted with concern that even in those systems which purport that the burden of proof is on the Prosecutor, in practice this burden was often shifted to the accused. Notably, on many occasions, Pre-Trial Chambers of the ICC effectively shifted the burden to the accused when they took the ex parte decision on the warrant of arrest as their point of departure for the consideration of a request for provisional release.

Most tribunals scrutinised above make allowance for a periodic review mechanism of pre-trial detention, or a review at the occasion of the extension of the pre-trial detention (ICC, SPSC, STL and ECCC). It was concluded that such a review mechanism provides the detained person with an effective safeguard against the undue prolongation of the detention. It follows from international human rights norms that pre-trial detention should be limited in time and
that the person has a right to be tried within a reasonable time or to be (conditionally) released. Furthermore, this mechanism allows the taking into consideration of any changed circumstances.

Furthermore, it was found that none of the international criminal tribunals and only some internationalised criminal tribunals (ECCC, SPSC) provide for strict time limitations of any provisional detention. The international criminal tribunals in particular would benefit from such time limitations where accused persons usually spend a very long time in pre-trial detention. However, as a general rule, all tribunals acknowledge that persons should not be detained for an unreasonable period in pre-trial detention.

Finally, all tribunals scrutinised provide for the possibility of conditional release. It was argued that conditions imposed should serve to negate or mitigate the risks which allow for pre-trial detention. This ensures that substitute restrictive measures are ordered in accordance with the principle of subsidiarity. It was argued that, unlike at the ICC, the ordering of conditional release should not be discretionary. In order to fully comply with the principle of subsidiarity, conditional release should be ordered where the conditions imposed suffice to safeguard the legitimate grounds for provisional detention under Article 58 (1) (b) ICC Statute.

In general, it is difficult to identify shared rules and/or practices with regard to provisional detention/interim release. Nevertheless, some further commonalities can be identified. First, while not strictly required under human rights law, all international(ised) criminal tribunals seem to allow for interlocutory appeals against provisional detention/release decisions. It was noted with concern that at several tribunals scrutinised (ICC, ECCC) substantive delays exist before a decision on appeal is rendered.

All tribunals reviewed recognise the interference with victims, witnesses or other persons as a ground legitimising pre-trial detention or, alternatively, require the absence of any risk of such interference as a pre-condition for provisional release. It was noted with concern that not all tribunals require the identification of a concrete danger of interference. Therefore, it was argued that the identification of a concrete danger should be required and that general witness fears should not be considered sufficient. The mere compliance of the Prosecutor with disclosure obligations should not prevent the provisional release of accused persons. In a
similar vein, all tribunals recognise the risk of flight as a public interest requirement justifying pre-trial detention or require the absence of any risk of flight as a precondition for the ordering of provisional release. A gamut of factors was identified which are usually considered by the tribunals in the assessment of such risk. The single most important factor is probably the voluntary surrender of the suspect or accused. In addition, the gravity of the crimes as well as the possibility of a lengthy prison sentence are factors which are often considered. Human rights law requires that these factors are not considered in isolation.

Other grounds justifying the pre-trial detention are not commonly shared. They include the contribution to the further commission of the crimes, the prevention of collusion, the more general protection of evidence, the protection of the security of the person or the preservation of the public order. It was noted that these public interest requirements are compatible with international human rights law. Notably, at least some of the concerns underlying these justifying grounds are also considered by the ad hoc tribunals and the SCSL where they exercise their discretion to refuse provisional release.

Further, it emerges that a major obstacle to provisional release lays in the de facto requirement that the host state agrees to allow the accused on its soil and guarantees that the person will appear for trial and will not interfere with witnesses, victims or other persons. Tellingly, the ICC Appeals Chamber refused the conditional release of Bemba, where no state had been identified that was able to impose the conditions. It was argued that States Parties are under an obligation to receive persons provisionally released. Arrangements should be made to ensure the state cooperation with regard to conditional release.

Finally, several international(ised) criminal courts and tribunals have allowed for the release of the person detained prior to the commencement of the trial on humanitarian/compassionate grounds. These releases are usually determined on a case-by-case basis, taking into consideration all circumstances. Therefore, no general rules could be discerned.