International criminal tribunals and human rights law: Adherence and contextualization

Zeegers, K.J.

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CHAPTER 5 THE RIGHT TO LIBERTY AND PROVISIONAL RELEASE

1. Introduction

The protection of the right to liberty has been one of the most criticized aspects of the practice of the ICTs. In international criminal justice, most accused persons remain in detention from the moment that they are arrested until a final judgment is rendered. Given the average length of an international criminal trial, this means that most defendants spend a substantial amount of time in detention while still presumed innocent. IHRL recognizes detention for the purpose of bringing a person to trial as a permissible limitation of the right to liberty. However, there are several requirements for such limitations to be allowed within the scope of this right. This Chapter discusses the way in which the ICTs have interpreted and applied the right to liberty in its approach to provisional detention and release.

As will be seen, the ICTs’ interpretation and application of their legal frameworks governing provisional detention and release has been impacted on by IHRL. The requirements for lawful deprivations of liberty that emanate from human rights law are partly mirrored in the ICTs’ legal frameworks, and the interpretation and application of these provisions has clearly been influenced by precedents from human rights courts and supervisory bodies, the ECtHR in particular. However, that should not be taken as to imply that the ICTs’ approach fully conforms to IHRL. Quite the contrary, there are a number of significant deviations in the approach of the ad hoc Tribunals in particular, whose legal frameworks create a presumption of detention for persons awaiting their trials. At the same time, their law and practice has evolved over the years and the practice of the ICTY in particular has been brought more in line with IHRL. The ICC’s legal framework departs from the precedent of the ad hoc Tribunals and has created a de jure presumption of liberty and its practice thus far create the impression of a balanced approach to the right to liberty that is inspired by IHRL. At the same time, several problems remain.
2. IHRL Framework

The right to liberty is enshrined in the ICCPR, the ECHR, ACHR, and the ACHPR.\(^1\) At their core, the provisions in these conventions are similar. All provide for a right to personal liberty that entails a prohibition of arbitrary and unlawful deprivations of liberty. This means that the right to liberty is not absolute, but may be limited in certain circumstances and under certain conditions. The ICCPR and ECHR explicitly recognize detention for the purpose of bringing a person to trial as a permissible deprivation of liberty, while the ACHR and ACHPR set more general conditions and require deprivations of liberty to be lawful and non-arbitrary.\(^2\) Limiting the duration of provisional detention is another primary objective of this right.\(^3\)

IHRL does not recognize a right to release pending trial as such.\(^4\) However, the right to liberty does include the right to be tried within a reasonable time, or to release pending trial.\(^5\) This does not imply a choice between the two.\(^6\) Rather, it expresses the fact that IHRL favors release pending trial, although it may not strictly require it under all circumstances. This part discusses the implications that these norms have in the context of provisional detention, which covers all detention between the arrest of a suspect until a court of first instance convicts or acquits the defendant.\(^7\)

2.1. General requirements

IHRL allows for deprivations of liberty, but requires these to be lawful and non-arbitrary. On a general level, this means that national law must clearly define the conditions for deprivations of liberty and that such law must be foreseeable in its application.\(^8\) IHRL incorporates a presumption of liberty. With respect to persons awaiting trial, this has been interpreted to mean that release should be the rule, and detention the exception. This is a corollary of the presumption of innocence coupled with the right to liberty. The ICCPR explicitly provides

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\(^1\) Art 9 ICCPR; Art 5 ECHR; Art 7 ACHR; Art 6 ACHPR.
\(^2\) Art 9(3) ICCPR; Art 5(1)(c) ECHR; Arts 7(4) and 7(5) ACHR; Art 6 ACHPR.
\(^5\) Art 9(3) ICCPR: ‘everyone … shall be entitled to trial within a reasonable time or to release; Art 5(3) ECHR: ‘everyone … shall be entitled to trial within a reasonable time or to release pending trial’; Art 7(5) ACHR: ‘everyone … shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings’; the ACHPR does not provide such a right.
that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody’. The HRC has emphasized that provisional detention should be exceptional, as short as possible, and that it is for the state to explain and justify such liberty deprivations; absent such an explanation, the Committee will find a violation. Case law of the ECHR evinces a comparable presumption in favor of release. The burden to justify detention should always rest with the authorities, since detention is a limitation of the right to liberty and is permissible only in exhaustively enumerated and strictly defined cases. The IACtHR has also endorsed a presumption in favor of release. However, each case of provisional detention must be assessed according to its specific features: its lawfulness cannot be considered in abstracto.

Provisional detention is justified only if there are ‘clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty.’

9 Art 9(3) ICCPR.
11 ECHR, Judgment, Borisenko v. Ukraine (App No 25725/02), 12 January 2012, 43, 51, specifically, in para 41, the Court states with respect to the defendant that ‘[u]ntil conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable’; see also ECHR, Judgment, McKay v. United Kingdom (App No 543/03), 3 October 2006, 41; ECHR, Judgment, Smirnova v. Russia (App Nos 46133/99 and 48183/99), 24 July 2003, 58; ECHR, Judgment, Jablonski v. Poland (App No 33492/96), 21 December 2000, 83.
fence—a ‘condition sine qua non’ for such detention—there must be ‘relevant and sufficient reasons’ to justify provisionally detaining a person. This follows from the principle that liberty should be the rule and detention the exception. ‘[U]ntil conviction, [the accused] must be presumed innocent, and the purpose of [the right to liberty] is essentially to require his provisional release once his continuing detention ceases to be reasonable.’

It follows that it is always for the detaining authorities to justify provisional detention, no matter how short. In addition to proving the existence of relevant and sufficient grounds, the authorities must also consider whether alternative measures might offset the risks that are deemed to require detention. This follows from the principles of necessity, subsidiarity, and


proportionality, which are overarching principles governing provisional detention.\textsuperscript{19} Necessity and subsidiarity jointly imply that provisional detention may only be applied when it has a specific purpose that cannot be achieved through means that are less restrictive of the person’s right to liberty.\textsuperscript{20} Provisional detention must be ‘absolutely essential to attain the desired objective, and there must be no measure that is less onerous in relation to the affected right, among all those that are similarly appropriate to achieve the proposed objective.\textsuperscript{21}

Furthermore, national authorities must clearly set out the justification for provisional detention in a reasoned decision. The ECtHR frequently finds violations when provisional detention is justified using ‘stereotyped formulae’, or reasoning that it considers too limited.\textsuperscript{22} Similarly, the assessment of the necessity of detention cannot be based on considerations that are ‘general and abstract’ but must be connected to the concrete circumstances of the case.\textsuperscript{23}

The ECtHR has held that systems of mandatory provisional detention are \textit{per se} incompatible with the convention.\textsuperscript{24} This ties in with the obligation to consider alternatives to detention, and the obligation to justify detention with a reasoned decision that addresses the specific circumstances of the case at hand. Similarly, presumptions in favor of detention, for example with regard to certain categories of crimes, will still require proof of the existence of concrete facts rendering detention necessary in the circumstances.\textsuperscript{25}

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\textsuperscript{20} Ibid.
\textsuperscript{22} ECtHR, Judgment, \textit{Idalov v. Russia} (App No 5826/03), 22 May 2012, 147: ‘[t]he Court has frequently found a violation of Article 5 § 3 of the Convention where the domestic courts have extended an applicant’s detention relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures’; see further, eg: ECtHR, Judgment, \textit{Dolgova v. Russia} (App No 11886/05), 2 March 2006, 38; ECtHR, Judgment, \textit{Ricardi v. Romania} (App No 3048/04), 3 April 2012, 73; ECtHR, Judgment, \textit{Dolgova v. Russia} (App No 11886/05), 2 March 2006, 49; ECtHR, Judgment, \textit{Smirnova v. Russia} (App Nos 46133/99 and 48183/99), 24 July 2003, 70.
\textsuperscript{25} Harris, O’Boyle and Warbrick (n 6), 176.
arise in cases where release may only be granted in ‘exceptional circumstances’, in particular when this requirement imposes a burden of proof on the applicant.26

Finally, provisionally detained persons have a right to challenge their detention before a competent court.27 This right stems from the principle of habeas corpus.28 Persons deprived of their liberty must have access to a judicial remedy, and the decision on the legality of detention must be rendered ‘speedily and effectively’.29 The ECtHR has also clarified that decisions on lawfulness of detention should be subject to appeal, and that such appeal should also be decided speedily.30 The court reviewing detention must test whether the conditions set by domestic law and IHRL for lawful provisional detention are met. Such decisions must address the existence of a reasonable suspicion and whether there are grounds for detention.31 Furthermore, a detained person must be able to challenge her/his detention at reasonable intervals, because provisional detention should be of a strictly limited duration.32 Since it is for the detaining authority to justify detention, they should bear the burden of proof in proceedings regarding provisional detention.33

2.2. Reasonable suspicion

The first requirement for provisional detention in IHRL is a reasonable suspicion of having committed an offence. This is a sine qua non condition for provisional detention. The authorities bear the burden of proof to establish a reasonable suspicion.34 Such a reasonable suspicion must be based on ‘the existence of information which would satisfy an objective observer that the person concerned may have committed … an offence.’35 In addition, there must be a genuine intention to bring the person concerned to trial.36

27 Art 9(4) ICCPR; 5(4) ECHR; Art 7(5) ACHR.
29 Trechsel (n 3), 464; Harris, O’Boyle and Warbrick (n 6), 184; ECtHR, Judgment, Idalov v. Russia (App No 5826/03), 22 May 2012, 157; ECtHR, Judgment, Jablonski v. Poland (App No 33492/96), 21 December 2000, 93.
30 ECtHR, Judgment, Hutchison Reid v. United Kingdom (App No 50272/99), 20 February 2003, 78-79.
31 ECtHR, Judgment, G.K. v. Poland (App No 38816/97), 20 January 2004, 90; see also Harris, O’Boyle and Warbrick (n 6), 182.
35 See eg ECtHR, Judgment, Fox, Campbell and Hartley v. United Kingdom (App Nos 12244/86; 12245/86; 12383/86), 30 August 1990, 32; ECtHR, Judgment, K.-F. v. Germany (App No 25629/94), 21 November 1997, 57; Edwin Bleichrodt, ‘Right to Liberty and Security of Person’ in Pieter van Dijk and others (eds), Theory and
2.3. Relevant and sufficient reasons for detention

In addition to a reasonable suspicion, there must be ‘relevant and sufficient reasons’ to justify provisional detention. In IHRL, there are four acceptable reasons to justify provisional detention: flight risk; the risk that the accused would obstruct the administration of justice; the risk that the accused would commit further offences; or the risk that her/his release would cause public disorder. These justifications for provisional detention are based on risks that, if materialized, would cause harm to society or the administration of justice. The individual right to liberty may thus be limited, provided this limitation pursues a legitimate aim. The ECtHR has emphasized that even a strong suspicion of the commission of a very serious crime cannot in itself justify lengthy provisional detention, absent relevant and sufficient reasons. The Court has acknowledged that severity of the crime might be a relevant consideration, but it has consistently underlined that provisional detention cannot be based solely on the gravity of the crime charged. The ECtHR has repeatedly held that provisional detention may not be used as an anticipation of the sentence because that would conflict with the presumption of innocence, which still applies to provisionally detained persons.

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36 Harris, O’Boyle and Warbrick (n 6), 147.
2.3.1. Flight risk

The risk that the accused may abscond, if released, can justify provisional detention. However, there are a number of requirements. The decision must be well-reasoned and based on an in-depth assessment of relevant factors and evidence, such as the person’s character, morals, home, occupation, assets, family ties, as well as the links s/he has with the state that is prosecuting her/him. National authorities have often been criticized for insufficient reasoning in justifying provisional detention on this ground. Similarly, flight risk cannot be based solely on the gravity of the crimes, or the severity of the anticipated sentence. Furthermore, the principle of subsidiarity makes that the authorities must also consider alternative ways of obtaining guarantees to offset the risk of flight.

The ECtHR has accepted that a limited connection of the suspect with the country where s/he faces trial may increase the risk of flight. Similarly, international contacts have also been accepted to have such an effect. Still, these factors must be supported by concrete evidence and by other relevant circumstances impacting on the risk of flight. Furthermore, violations of the conditions of previous instances of provisional release may negatively impact future decisions on this, although, it cannot serve as a justification to deny provisional

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41 ECtHR, Judgment, Samoylov v. Russia (App No 57541/09), 24 January 2012, 107; ECtHR, Judgment, Becciev v. Moldova (App No 9190/03), 4 October 2005, 58; ECtHR, Judgment, Smirnova v. Russia (App Nos 46133/99 and 48183/99), 24 July 2003, 60; ECtHR, Judgment, W. v. Switzerland (App No 14379/88), 26 January 1993, 33; ECtHR, Judgment, Neumeister v. Austria (App No 1936/63), 27 June 1968, 10; this approach appears to have been endorsed by the IACnHR: see eg IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 29.

42 See eg ECtHR, Judgment, Muradkhanyan v. Armenia (App No 12895/06), 5 June 2012, 84; ECtHR, Judgment, K.-F. v. Germany (App No 25629/94), 21 November 1997, 64; ECtHR, Judgment, Yagci and Sargin v. Turkey (App. Nos 16419/90, 16426/90), 8 June 1995, 52; ECtHR, Judgment, Mansur v. Turkey (App No 16026/90, 8 June 1995, 55; See also ECtHR, Judgment, W. v. Switzerland (App No 14379/88), 26 January 1993, 33; see also IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 30.


44 ECtHR, Judgment, Becciev v. Moldova (App No 9190/03), 4 October 2005, 58.

45 ECtHR, Judgment, Chraidi v. Germany (App No 65655/01), 26 October 2006, 40.

2.3.2. Risk of obstruction of the investigation or the trial

A second reason to justify detention can be the risk that the accused, if released, might tamper with evidence or influence or threaten witnesses. The authorities must properly substantiate this risk, based on concrete evidence. For example, the ECtHR has explained that ‘the national authorities should have regard to pertinent factors such as the advancement of the investigation or judicial proceedings and their resumption, or any other specific indications justifying the fear that the applicant might abuse his regained liberty by carrying out acts aimed, for instance, at the falsification or destruction of evidence.’ When the accused has a history of tampering with evidence or if there are concrete indications that s/he intends to do so, this may justify detention. The complexity of a case may also increase the risk that the accused will tamper with evidence, and the risk of interference with the proceedings, particularly of witnesses being threatened, is graver in the context of organized crime.

There is one important limitation to this ground for detention. As the investigation progresses, the risk of interference decreases and it accordingly becomes more difficult to justify provisional detention on this ground. For example, the ECtHR has held that ‘[i]n the

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49 See eg ECtHR, Judgment, Neumeister v. Austria (App No 1936/63), 27 June 1968, 10; IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 28.
53 IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 33.
54 ECtHR, Judgment, Samoylov v. Russia (App No 57541/09), 24 January 2012, 110.
long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out’.56

2.3.3. Risk of reoffending

The third accepted reason for provisional detention is the risk that the accused, if released, would commit further crimes. This reason must also be established in a well-reasoned manner.57 The ECtHR has emphasized that it is ‘necessary, among other conditions, that the danger be a plausible one and the measure appropriate, in light of the circumstances of the case and in particular the past history and personality of the person concerned’.58 The IACnHR has stated that the ‘danger of a second offense must be real and it must take into account the personal history as well as the professional evaluation of the personality and character of the accused’, including a possible criminal record.59 Similarly, the ECtHR has accepted a large number of crimes alleged, previous convictions on similar charges, and the existence of a network of criminal contacts as factors increasing the risk of reoffending.60 However, the ECtHR has emphasized that the initial repetition of offences does not infinitely suffice to justify a fear of repetition of offences; instead, such danger must remain concrete.61

2.3.4. Public order

The fourth accepted reason for detention is based on the risk that the release of the accused would shock public order, which has been accepted in relation to very grave crimes, the commission of which incites a certain reaction of the public.62 However, this ground is rather

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57 ECtHR, Judgment, Samoylov v. Russia (App No 57541/09), 24 January 2012, 121: where the Court critically noted that ‘while not established in the initial detention order, this risk was mentioned without any further assessment at subsequent stages of the proceedings’.
59 IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 32.
60 ECtHR, Judgment, Assenov and others v. Bulgaria (App No 24760/94), 28 October 1998, 156: where the applicant was accused of sixteen burglaries; ECtHR, Judgment, Toth v. Austria (App No 11894/85), 12 December 1991, 70: where the accused had previously been convicted on similar charges; ECtHR, Judgment, Contrada v. Italy (App No 27143/95), 24 August 1998, 58: a case related to organized crime in Italy, where the accused was considered to have a substantial network of criminal contacts which would allow him, if not force him, to continue with the commission of crimes.
exceptional, and the ECtHR has devised a significant threshold to be met. It consistently holds that, first, national authorities must provide ‘sufficient reasons, based on relevant facts, capable of showing that the release of the accused would actually disturb public order’. Second, the Court has limited the temporal use of this factor, in stipulating that ‘detention will continue to be legitimate only if public order remains actually threatened.’ The IACnHR has endorsed this ground and the limitations set thereto by the ECtHR. The ECtHR has further consistently emphasized that provisional detention based on this ground may not have the effect of anticipating a custodial sentence. Finally, concrete evidence of the existence of this risk is required; abstract and generalized considerations do not suffice.

2.4. Conclusion

IHRL sets a number of requirements for provisional detention. On an abstract level, it provides that (provisional) release should be the rule and detention the exception. More concretely, the principles of necessity, subsidiarity and proportionality make that provisional detention must be strictly necessary to achieve a certain legitimate aim and that no alternatives are available that would achieve the same aims but impose less restrictions on a person’s right to liberty. Furthermore, it is for the authorities to justify detention, they bear the burden of proof regarding the necessity of detention, and a decision to detain someone must be thoroughly reasoned. The two substantive requirements for lawful provisional detention are the existence of a reasonable suspicion, and of relevant and sufficient reasons to justify detention, which may include risk of flight, the risk of obstruction, the risk of reoffending, and risks related to public order.

65 IACnHR, Bronstein et al v. Argentina (Case No 11.205 and others), 11 March 1997, 36.
3. Provisional Release before the ad hoc Tribunals

The ad hoc Tribunals’ approach to provisional release has been subject to criticism from the perspective of the rights of accused persons. One of the earliest decisions of the ICTY confirmed that ‘the Rules have incorporated the principle of preventive detention of accused persons’. This presumption in favor of detention has often been reiterated. The ICTR has not provisionally released a single accused person to date. The ICTY, on the other hand, has become increasingly permissive of provisionally releasing accused over the years, due to the removal of the requirement of exceptional circumstances, an increase in voluntary surrenders, and, significantly, the increased cooperation from countries to which accused persons sought release. Still, as recent as 2011, an ICTY Chamber still held that before the Tribunal, ‘detention appears to be the rule and provisional release the exception’.69

The primary legal basis for this presumption of detention is that the only requirement for the arrest of a suspect is the existence of a prima facie case against her/him.70 No further grounds are required. As such, arrest appears to serve no purpose other than to bring the accused to trial.71 The RPEs provide that ‘[u]pon being transferred to the seat of the Tribunal, the accused shall be detained’.72 The ad hoc Tribunals’ system thus presumes that accused persons are detained pending trial. However, Rule 65(B) of both Tribunals’ RPEs provides for the possibility to request provisional release. The ICTY’s version of the Rule has been subject to four amendments, the most recent one in October 2011, and now provides that provisional release may be ordered at all stages of the proceedings, subject to three requirements. The first is procedural, namely that the host-country and the state to which the accused seeks release have been granted the opportunity to be heard. The other two requirements are ‘that the accused will appear for trial —flight risk —and the accused will not pose a danger to any victim, witness or other person —risk of obstruction. Finally, the ICTY version of the Rule provides that a Chamber may consider the existence of sufficiently compelling humanitarian grounds in granting release. The ICTR Rule provides for the same three requirements for

68 ICTY, Decision Rejecting a Request for Provisional Release, Prosecutor v. Blaskić (IT-95-14-T), 25 April 1996, 4: ‘the Trial Chamber considers that it may order provisional release only in very rare cases in which the condition of the accused, notably the accused's state of health, is not compatible with any form of detention’
70 Art 19(1) ICTY Statute; Art 20(1) ICTR Statute.
72 Rule 64 ICTY RPE; Rule 64 ICTR RPE.
release, but does not specify the stage at which release may be granted, nor does it mention the relevance of humanitarian grounds.

Prior to the amendment of October 2011, the case law of the ICTY had already recognized that Rule 65(B) applies during both the pre-trial- and the trial phase. However, the ICTY has considered that the rationale behind the Tribunal’s system of provisional detention is to ensure the presence of the accused at trial. Since trials in absentia are prohibited, accused persons must be present during their trials, which means that, in principle, they cannot be granted provisional release during the trial phase. The ICTR has consistently held that release during trial would disrupt the trial proceedings. The ICTY, however, has developed a practice of granting accused release during Court recesses, subject to the satisfaction of the requirements of Rule 65(B). This accords with the strict requirement of the necessity of a justification or a purpose of detention. Pre-trial detention does not have a punitive character.

During court breaks, when there are no proceedings and in the absence of the risks enumerated in Rule 65(B), there is no reason for detention, which would militate in favor of release. However, IHRL does not recognize ensuring the presence of accused persons at trial as a reason for detention, other than in connection with their flight risk.

Rule 65 provides for a right to apply for release. There is no form of automatic review of detention. Whether or not an accused person is released thus depends as a first step on her/his own initiative. This further consolidates the presumption of detention before the ad hoc Tribunals. Finally, Rule 65(B) includes an element of discretion, as is shown by the inclusion of the phrase ‘may order’. However, the discretionary element only applies once the

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75 Unlike the ICC, the legal frameworks of the ad hoc Tribunals do not provide the possibility to ‘summon’ accused persons to their trials, as an alternative to provisionally detaining them during their trials; see also De Meester and Others (n 71), 315.
76 ICTR, Decision on the Defence Motion for the Release or Alternatively Provisional Release, Prosecutor v. Nahimana (ICTR-99-52-T), 5 September 2002, 14; confirmed by the Appeals Chamber: ICTR, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, Prosecutor v. Ndagamuhe (ICTR-96-8-A), 10 January 2003, 5; similarly, the imminent commencement of trial has been considered a reason to deny provisional release. See eg ICTR, Decision on Motion to Set a Date for Trial of the Accused or Provisional Release, Prosecutor v. Ndagamuhe (ICTR-2001-71-I), 30 June 2003, 3; ICTR, Decision on Appeal Concerning Provisional Release, Prosecutor v. Muvunyi (ICTR-2000-55A-AR65), 20 May 2009, 8.
78 De Meester and Others (n 71), 323.
procedural and substantive requirements for release are met. The Tribunals have consistently held that the discretion in Rule 65(B) is a discretion for the Chamber to deny release even if the substantive criteria are met, not a discretion to grant.79

3.1. The original requirement of ‘exceptional circumstances’ justifying release

Rule 65(B) originally provided that release could only be granted in ‘exceptional circumstances’ .80 This consolidated the impression that before the Tribunals, detention was the rule and release the exception.81 The ICTY has granted few requests for provisional release prior to the amendment of Rule 65 in 1999.82 An early decision clarified that in ascertaining exceptional circumstances, a Chamber had to consider, first, whether there was a reasonable suspi-

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82 ICTY, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Prosecutor v. Đukić (IT-96-20-T), 24 April 1996; ICTY, Decision on Provisional Release of the Accused, Prosecutor v. Simić (IT-95-9-PT), 26 March 1998; ICTY, Decision on the Motion of Defence Counsel for Drago Josipović (Request for Permission to attend a funeral), Prosecutor v. Kupreskić et al (IT-95-16-T), 6 May 1999; ICTY, Order on Motion of the Accused Mario Čerkez for Provisional Release, Prosecutor v. Kordić and Čerkez (IT-95-14/2-T), 14 September 1999; see also Trotter 2012, 357, who notes that these instances of release were granted on the basis of serious illnesses of the accused or of members of his family. See also ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Prosecutor v. Blaskić (IT-95-14-T), 3 March 1994, where the accused was granted house arrest instead of incarceration in the UNDU. Strictly speaking, this decision concerned modified conditions of detention, not provisional release, which is why it will not further be discussed. Still, it provides an interesting insight in the early intentions of the Tribunal to ensure treatment of its detainees in line with IHRL.
cion, second, the alleged role of the accused in the crimes charged, where, in principle, the
greater her/his role, the more difficult it will be to prove her/his claim to release, and third,
the length of the accused’s provisional detention, since this cannot extend beyond a reasona-
ble time.83 In subsequent practice, however, the length of detention has been examined infre-
quently, and has never been accepted as an exceptional circumstance justifying release.84

Furthermore, humanitarian reasons could constitute exceptional circumstances justifying
release. Medical conditions and the death or serious illness of a close family member
were the only circumstances found to be exceptional so as to warrant provisional release.85
Still, the threshold that such reasons needed to meet in order to qualify as exceptional circumstances
was substantial. Health problems of family members had to be sufficiently serious.86
Similarly, for the accused to be granted release for health reasons, s/he had to show that s/he
could not be effectively treated in the host country.87 In most instances, however, the ICTY,
and the ICTR in particular, simply noted the absence of exceptional circumstances and denied
provisional release.88

85 ICTY, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Prosecutor v. Dukić (IT-96-20-T), 24 April 1996, 4; ICTY, Decision on Provisional Release of the Accused, Prosecutor v. Simić (IT-95-9-PT), 26 March 1998, 4; ICTY, Decision on the Application of the Accused Mr Milan Simić to Leave His Residence for Medical Reasons, Prosecutor v. Simić (IT-95-9-PT), 17 April 1998, 2-3; ICTY, Decision on the Application of the Accused Mr Milan Simić to Leave His Residence for Medical Reasons (2), Prosecutor v. Simić (IT-95-9-PT), 8 May 1998, 2-3; see also ICTY, Order Denying a Motion for Provisional Release, Prosecutor v. Blaskić (IT-95-14-T), 20 December 1996, 4-5; ICTY, Decision on Motion for Provisional Release Filed by Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović and Dragan Papić (Joined by Marinko Katava and Vladimir Šantić), Prosecutor v. Kupreškić et al (IT-95-16-PT), 15 December 1997, 10; ICTY, Decision Denying a Request for Provisional Release, Prosecutor v. Aleksovski (IT-95-14/1-PT), 23 January 1998, 3; ICTY, Decision on the Motion of Defence Counsel for Drago Josipović (Request for Permission to attend a funeral), Prosecutor v. Kupreškić et al (IT-95-16-PT), 6 May 1999, 2; ICTY, Order on Motion of the Accused Mario Čerkez for Provisional Release, Prosecutor v. Kordić and Čerkez (IT-95-14/2-T), 14 September 1999, 2; See also ICTY, Order of the Appeals Chamber on Hazim Delić Emergency Motion to Reconsider Denial the Request for Provisional Release, Prosecutor v. Delalić et al (IT-96-21-A), 1 June 1999, 3.
88 See eg ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Kupreškić et al (IT-95-16-PT), 15 May 1998, 2; ICTY, Decision Rejecting a Motion for Provisional Release, Prosecutor v. Kvočka (IT-95-4-PT), 20 October 1998, 4; ICTY, Decision on Motion for Provisional Release of Milojica Kos, Prosecutor v.
The Tribunals’ original system of provisional release was thus one with a very strong presumption in favor of detention. Where the ICTY did grant release, it attached rather stringent conditions thereto.\(^9\) Furthermore, the ICTY once acknowledged and justified its departure from international human rights standards by relying on ‘the extreme gravity’ of the crimes charged, and ‘the unique circumstances under which the International Tribunal operates’.\(^9\) These considerations have been reiterated in a number of cases.\(^1\) Former ICTY Judge Wald has argued that the initial problems faced by the ICTY in arresting its first indictees, who at times violently resisted arrest, made that it would have been inconsistent, or it would have at least been perceived so, to grant them release.\(^2\)

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\(^9\) See eg ICTY, Decision on Provisional Release of the Accused, Prosecutor v. Simić (IT-95-9-PT), 26 March 1998, 4, where the accused was ordered to surrender his passport, remain within the confines of the municipality where he lived, meet on a daily basis with the local police authorities, agree to allow international forces to conduct bi-monthly checks of his whereabouts and to make occasional unannounced visits to the accused, and not to have any contact with any of the co-accused, nor with any possible witness.

\(^1\) ICTY, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, Prosecutor v. Delalić et al (IT-96-21-T), 25 September 1996, 19; see also Müller 2008, 596.

\(^2\) Wald and Martinez (n 81), 235. See also Megan Fairlie, ‘The Precedent of Pre-Trial Release at the ICTY: a Road Better Left Less Travelled’ (2010) 33 Fordham Int’l L J 1101, 1130, who criticizes this approach because it ‘paints all the accused with the same brush’.

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The requirement of exceptional circumstances was removed from the ICTY’s RPE at the twenty-first plenary session of the Judges of the ICTY in November 1999.93 Given the confidentiality of such sessions, the rationale of the amendment is not officially known. However, according to Judge Robin, the rule was changed because ‘it conflicted with customary international law as reflected in the main international human rights instruments’, and the intention of the amendment was ‘to bring the Rule in line with modern [IHRL] that detention shall not be the general rule’.94 Similarly, a Chamber has noted that the amendment was ‘wholly consistent with the internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect’.95

Nevertheless, the first decisions after the amendment did not evince a shift in the approach to provisional release.96 In Kupreškić et al, the Chamber merely noted the change and denied provisional release because it was not satisfied that the other two requirements were met.97 More significantly, several decisions noted that ‘the effect of the amendment is not to establish release as the norm and detention as the exception’.98 Still, the threshold for provi-

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93 ICTY, Decision on Miroslav Tadić’s Application for Provisional Release, Prosecutor v. Simić et al (IT-95-9-PT), 4 April 2000, 4 footnote 5; see: IT/32/Rev. 17 RPE 17 November 1999, the amended rule then read: ‘Release may be ordered by a Trial Chamber only after hearing the host country and only if 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.’ See also Andrew Trotter, ‘Innocence, Liberty and Provisional Release at the ICTY: A Post-Mortem of ‘Compelling Humanitarian Grounds’ in Context’ (2012) 12 Hum Rts L Rev 353, 356, who notes that the vote was unanimous.


98 ICTY, Decision on Motion for Provisional Release of Miroslav Kvočka, Prosecutor v. Kvočka et al (IT-98-30/01-PT), 2 February 2000, 4; idem in ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, Prosecutor v. Brđanin and Talić (IT-99-36-PT), 25 July 2000, 12: ‘The Trial Chamber agrees with the prosecution that the amendment to Rule 65 has not made provisional release the norm’; confirmed in: ICTY,
sional release was lowered significantly. In Ademi, it was held that the question whether detention or release should be the rule was not a very interesting one; instead, focus should be on the particular circumstances of each case. It was held that the specific context of the Tribunal might militate against release in some cases, but also that this must always be considered in light of the circumstances of particular cases.99

The ICTR removed the requirement of exceptional circumstances from its RPE in May 2003.100 The disparity between the respective RPEs of the ICTY and ICTR thus existed for about three and a half years, which incited many defence submissions challenging the validity of Rule 65(B) before the ICTR. However, it continued to hold that exceptional circumstances were a ‘sine qua non condition for provisional release’.101 The change of Rule 65 before the ICTY did not affect the ICTR, and many decisions emphasized that the ICTR and ICTY are distinct judicial bodies.102 The ICTR has also noted that the ICTY, despite the removal of the requirement of exceptional circumstances, continued to regard detention as the rule and release the exception.103 The ICTR has consistently rejected allegations of Rule 65’s inconsistency with IHRL, and has generally done so without extensively engaging with this issue.104 In response to an argument that relied on Article 9(3) ICCPR, a Chamber found that ‘that conditions surrounding the detention of accused before the Tribunal are different from those surrounding detention of accused in domestic jurisdictions’, whereupon the Chamber

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100 Amendments Adopted at the Thirteenth Plenary (26-27 May 2003), 10: Rule 65 then became identical to the ICTY Rule again.


104 See eg ICTR, Decision on Sagahutu’s Preliminary, Provisional Release, and Severance Motions, Prosecutor v. Sagahutu et al (ICTR-00-56-T), 25 September 2002, 47; ‘pursuant to Article 14 of the Statute, the Judges of the Tribunal have adopted, and are bound by, the ICTR Rules of Procedure and Evidence’; see also De Meester and Others (n 71), 327.
considered that it had to apply Rule 65 as it stood. In other decisions, the ICTR merely reiterated that Rule 65 and the entire RPE bind the Tribunal and had to be applied on that basis. It has also held that ‘abundant case law’ has denied that Rule 65 was at odds with customary international law. Finally, the Appeals Chamber has considered defence challenges to the exceptional circumstances requirement and the high burden of proof imposed on the defence as ‘specious because these issues were discussed and rejected during the adoption of the rules.’ This shows that the ICTR considered itself primarily bound by its own legal framework, regardless of possible conflicts with IHRL. Notably, the ICTR never actually considered whether the requirement of exceptional circumstances, or other aspects of Rule 65(B) actually conflicted with IHRL, it simply regarded the question as irrelevant and considered itself bound by its own legal framework.

3.2. Requirements for release

Rule 65(B) mentions two substantive requirements for provisional release: flight risk and risk of obstruction. In addition, the case law of the Tribunals on the issue has also addressed the length of detention as possible factor impacting on provisional release determinations, and the relevance of humanitarian circumstances for such determinations. Several decisions of the ICTY have also cited the principles of necessity, suitability and proportionality as overarching considerations in provisional release determinations, which was supported with references to case law of the ECtHR, and to ‘public international law’. For example, a Chamber

105 ICTR, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), Prosecutor v. Mugenzi et al (ICTR-99-50-I), 8 November 2002, 35.
108 ICTR, Decision on Leave to Appeal Against the Refusal to Grant Provisional Release, Prosecutor v. Sagahutu (ICTR-00-56-I), 26 March 2003, 5.
109 The latter requirement can also be regarded as ‘danger of collusion’: the danger that the accused will threaten witnesses or tamper with evidence thereby infringing on the normal course of justice.
has considered that mandatory pre-trial detention was no longer necessary, thanks to state guarantees and other considerations.\footnote{ICTY, Decision Granting Provisional Release to Enver Hadžihanović, Prosecutor v. Hadžihanović et al (IT-01-47-PT), 19 December 2001, 8-9; Idem: ICTY, Decision Granting Provisional Release to Mehmed Alagić, Prosecutor v. Hadžihanović et al (IT-01-47-PT), 19 December 2001, 8-9; ICTY, Decision Granting Provisional Release to Amir Kubara, Prosecutor v. Hadžihanović et al (IT-01-47-PT), 19 December 2001, 8-9.} The proportionality principle has also been regarded as a relevant principle in the determination of the reasonableness of the length of pre-trial detention.\footnote{ICTY, Decision on Motion for Provisional Release of the Accused Momir Talić, Prosecutor v. Brđanin and Talić (IT-99-36-T), 20 September 2002, 23.} Furthermore, the subsidiarity principle makes that more lenient measures must be applied if they can achieve the same purpose as detention.\footnote{ICTY, Decision Granting Provisional Release to Amir Kubara, Prosecutor v. Hadžihanović et al (IT-01-47-PT), 19 December 2001, 8-9.} However, these principles have been relied on in a limited number of decisions, in a specific string of cases before the ICTY alone. It therefore cannot be said that the Tribunals have truly adopted these principles as integral to their determinations of provisional release. Such inconsistency is troublesome in and of itself, because it limits the foreseeability of the course of action of the Tribunals and complicates the task of conducting an effective defence.

3.2.1. Risk of flight

Chambers must be satisfied that the accused will reappear for trial before they can grant provisional release. Roughly, the assessment of the Tribunals in establishing flight risk have focused on the gravity of the crimes and the anticipated severity of the possible sentence, the personal circumstances of the accused, and whether the state to which the accused sought release had provided guarantees for her/his return.

Both Tribunals have often cited the gravity of the crimes charged and the length of the anticipated sentence in provisional release decisions.\footnote{ICTY, Decision Granting Provisional Release on the Motion of the Accused Petković for Provisional Release, Prosecutor v. Petrović et al (IT-04-74-T), 31 March 2008, 7; ICTY, Decision on Request for Provisional Release of the Accused Corić, Prosecutor v. Prlić et al (IT-04-74-T), 8 April 2008, 6.} This factor has turned out to be a par-
ticularly important consideration.115 Accused persons who are charged with serious crimes are likely to face long prison sentences, which is thought to increase the risk that they will abscon: ‘the more severe the sentence, the greater the incentive to flee’.116 However, several Chambers have cautioned for too great reliance on this factor. All accused before the Tribunals are, in principle, likely to face long prison sentences. Therefore, it has also been held that ‘in itself, this argument made in abstracto cannot be used against the accused’.117 The Ap-
peals Chamber has held that, contrary to the Prosecution’s arguments, a Chamber is not obliged to consider the gravity of the charges, because Rule 65(B) does not mention this as a factor impacting on provisional release determinations. In that regard, a Chamber cautioned the Prosecution that provisional detention could not be used in anticipation of the possibly lengthy sentence that the accused might receive, because that would conflict with the presumption of innocence. Similarly, it has been held that the gravity of the charges should not be the sole reason to deny provisional release, although it is certainly important, a contention which was often substantiated by referring to case law of the ECtHR. Similarly, an accused’s flight risk has been found to grow as s/he becomes increasingly aware of the evidence against her/him, since a conviction becomes more likely.

Various personal circumstances of accused persons have been weighed in order to determine flight risk. First and foremost, numerous decisions relied on the voluntary surrender of accused persons. If an accused surrendered voluntarily into the custody of the Tribunal,

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this has been seen as a significant indicator that s/he will not attempt to evade justice during provisional release. Some accused persons have alleged that the great reliance on voluntary surrender is unfair to accused that have been arrested on sealed indictments. Being unaware of the fact that the Tribunal sought their arrest was argued to have deprived them of the opportunity to surrender voluntarily, thus limiting their chances of provisional release. In addressing this issue, one solution has been that in such cases, the absence of voluntary surrender cannot be held against the accused. This has led to apparent inconsistencies. For example, in Krajinišnik and Plavšić, the Chamber first noted it would not rely on the absence of Krajinišnik’s voluntary surrender, yet still distinguished his case from Plavšić, relying, among other things, on her voluntary surrender. Other Chambers have discussed and accepted hypothetical voluntary surrenders as militating in favor of release. In these cases, accused persons had not surrendered voluntarily, but convinced the Chamber that they would have done so. At the same time, Chambers have emphasized that voluntary surrender does not

See also De Meester and Others (n 71), 326, who notes that this was one of the most important sub-factors for granting provisional release; Clemens Müller, ‘The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals’ (2008) 8 Int’l Crim L Rev 589, 602-603.


automatically mean that the accused is entitled to provisional release, other factors must also be considered.\textsuperscript{128} Furthermore, having evaded arrest by the Tribunals has been considered a strong argument against provisional release.\textsuperscript{129}

Another relevant aspect of the personal circumstances of accused persons applying for provisional release is their behaviour subsequent to their transfer to the Tribunal. Cooperative behaviour of accused persons in detention\textsuperscript{130} and a cooperative attitude in court\textsuperscript{131} have both been seen as circumstances weighing in favour of provisional release. In addition, a cooperative attitude towards the Prosecution, as manifested mainly by a willingness to be interviewed, has been seen as a factor militating in favour of provisional release.\textsuperscript{132} At the same


time, an accused’s refusal to speak during interrogation has been weighed as a factor militating against provisional release.\textsuperscript{133} This illustrates the slippery slope that weighing cooperation in provisional release decisions may entail, which was recognized by the Appeals Chamber who corrected this approach.\textsuperscript{134} On the one hand, a cooperative attitude could indicate that an accused person is less likely to flee, but at the same time, denying release because of an uncooperative attitude during interviews may exert undue pressure on accused persons who have a right not to cooperate with the proceedings against them. Generally, Chambers have held that an accused does not have to ‘fully cooperate’ with the Prosecution; rather, a willingness to be interviewed suffices to qualify as cooperative.\textsuperscript{135}

Furthermore, the fact that an accused has previously been on provisional release and abided by the conditions and returned to the tribunal has been considered a factor militating in favour of further provisional release.\textsuperscript{136} On the other hand, a serious breach of conditions

\textsuperscript{133} ICTY, Decision on Lahi Brahimaj’s Motion for Provisional Release, \textit{Prosecutor v. Haradinaj et al} (IT-04-84-PT), 3 November 2005, 6.

\textsuperscript{134} ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the TC Decision Denying his Provisional Release, \textit{Prosecutor v. Haradinaj et al} (IT-04-84-AR65.2), 9 March 2006, 18; see also De Meester (n 81), 866, who also notes that ‘the consideration of such a factor sits uneasily with the right of the accused to remain silent and not to incriminate him or herself.’


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of provisional release has been considered a reason to deny further release.\textsuperscript{137} Interestingly, the ICTR once considered that the length of provisional detention increased the risk that the accused would abscond and therefore militated against provisional release.\textsuperscript{138} Finally, personal guarantees of the accused have sometimes been weighed as a factor militating in favour of release.\textsuperscript{139} However, reliance thereon has also been rejected, or been given limited weight only.\textsuperscript{140}

State guarantees constitute a third significant factor in Trial Chambers’ consideration of flight risk. The Tribunals will have to send accused persons to the territory of states on whose cooperation they have to rely on both for enforcing possible conditions of release and for guaranteeing the return of the accused.\textsuperscript{141} Questions surrounding the willingness and ability of states to cooperate with the Tribunal in this regard are thus of obvious relevance. This is an important difference between situations of provisional release that are addressed in IHRL and before the ICTs. The latter have no territory of their own, and therefore have to rely on state for the execution of provisional release, whereas the decisions that address provisional release issued by human rights courts and supervisory bodies relate to states who are themselves responsible for carrying out the actual provisional release of accused persons.

In the early days of the Tribunals, the conflict in the region of the former Yugoslavia was still ongoing, and the attitude of certain states towards the Tribunal was markedly negative. This made the ICTY reluctant to rely on guarantees by Croatia,\textsuperscript{142} the Republika


\textsuperscript{138} ICTR, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, \textit{Prosecutor v. Muvunyi} (ICTR-00-55-AR65), 3 April 2009, 15.


Srpска,”143 and Serbia.144 As the situation in the region evolved, so did reliance on the cooperation of states in this regard. As early as 1998, the ICTY accepted guarantees from the Republika Srpska,145 although it did not do so consistently.146 As of 1999, the Tribunal consistently relied on guarantees by Croatia.147 As of 2001, the Tribunal has also accepted assurances provided by Serbia,148 where it often noted the increased cooperation of Serbia with the Tribunal.149 Furthermore, the Tribunal has relied on guarantees provided by Montenegro,150

144 ICTY, Decision on Momčilo Krajisnik’s Notice of Motion for Provisional Release, Prosecutor v. Krajisnik and Plašišć (IT-00-39&40-T), 8 October 2001, 10.
Bosnia and Herzegovina, and the United Nations Mission in Kosovo (‘UNMIK’), after an initial period during which UNMIK considered itself unable to provide such guarantees.

The ICTY has clarified that state guarantees are not the sole factor determining release. Still, in comparison to cooperation on the individual level of the accused, the requirement of state guarantees has been qualified as of ‘far greater significance’ in order to assess the risk of flight. On the other hand, the weight to be given to this factor should still depend on the individual circumstances of an accused. For example, the ICTY has consistently held that the senior position an accused may have previously held in the country to which s/he seeks provisional release may render states less willing to return her/him to the tribunal because s/he may either possess valuable information that the state does not want to be disclosed during trial, or may still be able to rely on a network of persons that still hold senior positions in that particular state. Similarly, the relevance of state guarantees is less with respect to accused who have a history of absconding.

It appears that many of the ICTR’s denials of provisional release based on flight risk were related to concerns regarding states to which the accused sought release. Before the ICTY, the question where accused should be provisionally released has not been nearly as problematic, since the countries of origin of the accused were mostly willing to receive them. The ICTR, however, has not been able to provisionally release persons to their country of

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154 See eg ICTY, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Čermak and Markač (IT-03-73-AR65.1), 2 December 2004, 33-35.
155 ICTY, Decision on Second Application or Provisional Release, Prosecutor v. Milutinović (IT-99-37-PT), 14 April 2005, 8; Similarly ICTY, Decision on Third Defence Request for Provisional Release, Prosecutor v. Sainović (IT-99-37-PT), 14 April 2005, 12; see also Müller (n 124), 605.
156 ICTY, Decision on Second Application or Provisional Release, Prosecutor v. Michovits (IT-03-37-PT), 14 April 2005, 17.
origin, partly because of the hostile attitude of Rwanda towards accused persons before the ICTR. In addition, the ICTR has denied release to countries other than Rwanda because of insufficient guarantees from states to which accused persons sought release. Subsequent to the removal of the requirement of exceptional circumstances, insufficiency of guarantees became a prime motive for denying provisional release. For example, in Ngirumpatse, the Chamber denied release because the accused had failed to provide prima facie evidence that the countries to which he sought release would agree to receive her/him, or to take measures to ensure that he would reappear for trial.

Nevertheless, the Appeals Chamber has professed that state guarantees are not ‘a prerequisite to obtaining provisional release’. Similarly, the Tribunals have held that it should not be a threshold consideration. Still, the Appeals Chamber also held that it is ‘advisable’ that the accused does procure such guarantees, since s/he bears the burden of proof to assure the Tribunal that s/he will reappear for trial, and that state guarantees are a frequent condition for provisional release, since the Tribunal cannot itself execute arrest warrants where accused fail to reappear for trial. In a similar vein, the ICTR has denied provisional release because

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159 Andrew Trotter, ‘Pre-Conviction Detention in International Criminal Trials’ (2013) 11 J Int’l Crim Just 351, 367-368. However, it has been said to be unlikely that accused persons would seek release to Rwanda, because they would have to fear for their safety: see eg Müller (n 124), 616; De Meester (n 81), 888.

160 See eg ICTR, Decision Defence Motion for Provisional Release of the Accused, Prosecutor v. Muhimana (ICTR-95-1-B-1), 1 October 2002. 7. This is further illustrated by the fact that it has thus far proven impossible to find states willing to accept acquitted ICTR defendants onto their territory, as a result of which these acquitted persons have been living in a safe house near the Tribunal’s premises; no solution for this problem has been found to date. See eg Kevin Jon Heller, ‘What Happens to the Acquitted?’ (2008) 21 Leiden J Int’l L 663; Mandiaye Niang and Chiara Biagioni, ‘The Challenges of Relocating Persons acquitted by The ICTR’ in Chile Eboe-Osuji (ed), Protecting Humanity: Essays in International Law and Policy in Honour of Navenethem Pillay (Martinus Nijhoff 2010).

161 ICTR, Decision on the Motion by Ngirumpatse’s Defence to Find the Accused’s Detention Unlawful or, in the Alternative, to Order his Provisional Release, Prosecutor v. Ngirumpatse et al (ICTR -98-44-T), 18 August 2003, 26.


163 ICTR, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Karemera et al (ICTR-99-44-AR65), 7 April 2009, 13; See also ICTR, Decision on Defence Motion to Fix a Date for the Commencement of The trial of Father Emmanuel Rukundo or, in the Alternative to Request His Provisional Release, Prosecutor v. Rukundo (ICTR-2001-70-I), 18 August 2003, 22; ICTR, Decision on Request for Leave to File an Appeal (Provisional Release), Prosecutor v. Rukundo (ICTR-2001-75-AR65), 28 April 2004, 3; ICTY, Decision on Motion for Provisional Release, Prosecutor v. Tupajić (IT-95-5/18-R77.2), 21 December 2011, 7.

164 ICTY, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Čermak and Markač (IT-03-73-AR65.1), 2 December 2004, 30; ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, Prosecutor v. Nsengimana (ICTR-01-69-AR65), 23 August 2005, 3; see also ICTR, Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release, Prosecutor v. Ntabirinda (ICTR-2001-77-I), 13 October 2006, 14; ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza (ICTR-07-91-PT), 21 September 2008, 14, where the Chamber noted that ‘In the absence of guarantees from countries to which the accused seeks release, the Trial Chamber is not convinced he will reappear’; ICTR, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Rukundo (ICTR-01-69-AR65), 23 August 2005, 3; see also ICTR, Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release, Prosecutor v. Ntabirinda (ICTR-2001-77-I), 13 October 2006, 14; ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza (ICTR-07-91-PT), 21 September 2008, 14, where the Chamber noted that ‘In the absence of guarantees from countries to which the accused seeks release, the Trial Chamber is not convinced he will reappear’; ICTR, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Rukundo (ICTR-01-69-AR65), 23 August 2005, 3; see also ICTR, Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release, Prosecutor v. Ntabirinda (ICTR-2001-77-I), 13 October 2006, 14; ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza (ICTR-07-91-PT), 21 September 2008, 14, where the Chamber noted that ‘In the absence of guarantees from countries to which the accused seeks release, the Trial Chamber is not convinced he will reappear’; ICTR, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Rukundo (ICTR-01-69-AR65), 23 August 2005, 3; see also ICTR, Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release, Prosecutor v. Ntabirinda (ICTR-2001-77-I), 13 October 2006, 14; ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza (ICTR-07-91-PT), 21 September 2008, 14, where the Chamber noted that ‘In the absence of guarantees from countries to which the accused seeks release, the Trial Chamber is not convinced he will reappear’; ICTR, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, Prosecutor v. Rukundo (ICTR-01-69-AR65), 23 August 2005, 3; see also ICTR, Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release, Prosecutor v. Ntabirinda (ICTR-2001-77-I), 13 October 2006, 14; ICTR, Decision on Defence Motion for Provisional Release, Prosecutor v. Nshogozza (ICTR-07-91-PT), 21 September 2008, 14, where the Chamber noted that ‘In the absence of guarantees from countries to which the accused seeks release, the Trial Chamber is not convinced he will reappear’.
the guarantees provided by the accused seemed not to have truly emanated from official state channels.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.}

3.2.2. Risk of obstruction

The ICTY has often held that the fact that the accused gains knowledge of the evidence and of the identity of witnesses through trial proceedings and disclosure increases the risk s/he will pose a danger to them.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.} Essentially, this argument suggests that knowledge of the Prosecution case and the witnesses that may testify suffices to establish that the accused will pose a danger to victims or witnesses.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.} Former Judge Wald has noted the irony that the Tribunal’s liberal pre-trial discovery rules contribute to a conservative pre-trial detention regime.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.} The approach to this issue has evolved, and the Appeals Chamber has subsequently held that this argument does not suffice \textit{in abstracto}: without concrete evidence that the accused will actually interfere with victims or witnesses, the mere knowledge of their identity cannot be accepted as militating against provisional release.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.}

Furthermore, it has been considered that release of the accused might scare off witnesses to come testify before the Tribunal.\footnote{ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, \textit{Prosecutor v. Rukundo} (ICTR-2001-70-I), 15 July 2004, 17; see also ICTR, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the commencement of Trial, and for Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-I), 11 July 2005, 18; Confirmed by the Appeals Chamber: ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, \textit{Prosecutor v. Nsengimana} (ICTR-01-69-AR65), 23 August 2005, 4.} However, such logic has subsequently been
rejected as unfair to the accused.171 This must be understood in light of the requirement of concrete evidence of danger, which emanates from the case law of the ECtHR, which rejects generalized concerns that are not connected directly to the person of the accused or her/his past conduct. Conversely, the closure of the Prosecution and defence case means that the accused is no longer in a position to prejudice the case, given all witnesses have testified, which has been considered to significantly decrease the risk of danger.172

Evidence of a history of interference with witnesses has been accepted as mitigating strongly against provisional release.173 Proximity to witnesses while on provisional release has also been accepted as a negative factor;174 while release to areas that are at considerable distance from possible witnesses or victims has been accepted as mitigating possible danger the accused may pose to them.175 Furthermore, the ‘volatile’ situation in Kosovo has been accepted as increasing the risk that the accused may pose a danger to victims and witnesses.176 The Appeals Chamber has further confirmed that the Chamber must weigh the possible negative effect of an accused person’s provisional release on the ‘stability in the former Yugoslavia’.177 Similarly, the possibly negative effect of release on the victims must also be weighed, but the Prosecutor was held to bear the burden of proof in that regard.178

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171 ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, Prosecutor v. Brđanin and Talić (IT-99-36-PT), 25 July 2000, 20: ‘it would be manifestly unfair to such an applicant to keep him in detention because of a possible reaction by the prosecution’s witnesses to the mere fact that he has been granted provisional release.’


173 ICTY, Decision on the Application for Provisional Release Filed by the Accused Lahi Brahimaj, Prosecutor v. Haradinaj et al (IT-04-86bis-PT), 10 September 2010, 27; Similarly ICTY, Decision on the Accused Vojislav Šešelj’s Request for Provisional Release, Prosecutor v. Šešelj (IT-03-67-T), 23 March 2012, 12.


177 ICTY, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, Prosecutor v. Boškoski and Tarčulovski (IT-04-82-PT), 17 January 2007, 16.


Former ICTY Judge Wald considered that the particular circumstances of the tribunal exacerbate concerns over witness intimidation, since it the Tribunal must rely on states to prevent this.\(^\text{179}\) In addition, she argues that witnesses will be ‘extra traumatized’ because of the atrocities that have taken place and the prominent position of the accused in her/his home community, as well as, as stated above.\(^\text{180}\)

3.2.4. Length of provisional detention

Although absent from the Rules governing provisional release, the Tribunals have often considered the length of provisional detention in relation to provisional release. This has been justified by reference to the fact that in IHRL, the ‘right’ to provisional release is related to the right to be tried without undue delay or to be released.\(^\text{181}\) The case law of the ICTY in this regard is limited. Claims for provisional release related to the length of pre-trial detention have been more prominent before the ICTR. Still, both Tribunals’ proceedings are notoriously lengthy. The average time that a person spends in provisional detention has been four years and four months before the ICTY, and seven years and eleven months before the ICTR.\(^\text{182}\) The ICTR has not provisionally released an accused person, to date. According to a 2010 study, the ICTY has, out of the 161 defendants, granted provisional release to 35 of them during the pre-trial stage, and to 32 defendants during the trial phase in periods without courtroom activity.\(^\text{183}\) However, given the lack of knowledge as to the exact periods for which release has been granted, it is not possible to draw any definite conclusions as to the average length of provisional detention of ICTY defendants. Still, it is clear that an average defendant before the ICTY will have spent a considerable time in provisional detention, while this period for an average ICTR defendant has been almost eight years.

Such lengthy periods of provisional detention may seem \textit{prima facie} ‘unreasonable’, and may therefore constitute a factor militating in favour of the provisional release of the accused. One of the ICTY’s first decisions regarding provisional release identified the length of detention as one of the three factors impacting on a determination regarding the existence of

\(^{179}\) Wald and Martinez (n 81), 237, see also eg: ICTY, Decision on Defence Motion for Provisional Release, \textit{Prosecutor v. Šešelj} (IT-03-67-PT), 23 July 2004, 7.  
\(^{180}\) Wald and Martinez (n 81), 237.  
\(^{181}\) See eg ICTY, Decision on Vidoje Blagojević’s Application for Provisional Release, \textit{Prosecutor v. Blagojević et al} (IT-02-60-PT), 22 July 2002, 58; similarly ICTY, Decision on Darko Mrđa’s Request for Provisional Release, \textit{Prosecutor v. Mrđa} (IT-02-59-PT), 15 April 2002, 42, where the Chambers considered that an accused is entitled to be tried within a reasonable time or to release pending trial, relying on the ICCPR and the ECHR.  
\(^{182}\) See \textit{infra} Chapter 6, section 3 on the right to be tried without undue delay before the ad hoc Tribunals.  
\(^{183}\) Davidson (n 4), 36.
exceptional circumstances warranting release. However, in practice, the length of detention has not been frequently examined and has never been accepted as an exceptional circumstance justifying release in and of itself. In addition, the ICTR has consistently held that lengthy detention does not per se constitute good cause for release.

The ICTY continued to consider the length of detention as a part of its provisional release decisions. For example, in Simić et al, the Chamber considered two years of pre-trial detention to constitute a factor militating in favor of provisional release. Another Chamber has clarified that it considered that the length of detention impacts on the exercise of the Chamber’s discretion with regard to provisional release. This view has been confirmed by the Appeals Chamber, which noted that a determination of the length of detention and possibility...
ble unreasonableness thereof is an additional, discretionary consideration which has no bearing upon the assessment as to whether an accused will appear for trial if released.\textsuperscript{189} In Šešelj, the Chamber, acting \textit{proprio motu}, invited the parties to make submissions on possible provisional release of the accused, mainly because the accused had been provisionally detained for over eleven years. According to the Chamber, it was impossible to predict when the judgment would be rendered, because of the disqualification of one of the judges from the bench. The length of the accused’s provisional detention was thus considered so excessive as to require the Chamber to consider the question of provisional release \textit{proprio motu}.\textsuperscript{190}

The Tribunals have often considered the right to be tried without undue delay in this context.\textsuperscript{191} For present purposes, it is important to note that the Tribunals have never accepted considerations related to delays as decisive in provisional release considerations. In general, the Tribunals profess that length of detention is a factor. Nevertheless, all decisions on this question have rejected requests for release on this basis, and have generally held that the length of detention was not unreasonable given the complexity of the case and the gravity of the crimes alleged.\textsuperscript{192} For example, the ICTY has held that periods of pre-trial detention had not yet exceeded what the ECtHR and the HRC had found to be reasonable ‘for comparable cases of comparable weight in comparable circumstances’, and that detention was therefore still proportional.\textsuperscript{193}

\addcontentsline{toc}{section}{Notes}

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\textsuperscript{190} ICTY, Order Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused \textit{Proprio Motu}, \textit{Prosecutor v. Šešelj} (IT-03-67-T), 13 June 2014, 2-3; this process was subsequently terminated because the Chamber found the accused insufficiently cooperative: ICTY, Order Terminating the Process for Provisional Release of the Accused \textit{Proprio Motu}, \textit{Prosecutor v. Šešelj} (IT-03-67-T), 10 July 2014.

\textsuperscript{191} See infra Chapter 6.


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3.2.5. Continued relevance of humanitarian circumstances warranting release

Subsequent to the removal of the requirement of exceptional circumstances, the RPEs only required the satisfaction of the two substantive requirements discussed above for provisional release. However, even after 1999, the ICTY often considered whether there was a humanitarian reason for provisional release, such as a serious illness of the accused or the death of a close relative. In Milošević, the Chamber clarified that when considering provisional release requests during the course of a trial, a Chamber must pay specific attention to the reason for which provisional release has been sought. This suggests that there must be a reason for provisional release, as opposed to a reason for detention.

In the assessment of whether an illness poses a reason for release, the standard applied by the Tribunals is whether or not the accused can receive adequate treatment in the host-country. The illness must also be sufficiently serious so as to justify release. Several decisions granted provisional release because the health of the accused would benefit from treatment in their home country.

Still, the question lingers why humanitarian reasons would be required for release. Some Chambers have clarified that they consider this type of release to fall within the discretion of the Chamber. In Popović et al, the Appeals Chamber confirmed that ‘exceptionally compelling humanitarian reasons might offset the “extremely high” risk of flight’. Similarly, it has been found that although Rule 65(B) does not mention compassionate or humanitarian-
ian grounds for release, ‘the jurisprudence of the Tribunal has recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65 where compassionate or humanitarian concerns may permit a more limited provisional release.’200 In this reading of the Tribunal’s jurisprudence on provisional release, Chambers have discretion to grant provisional release where the two requirements of Rule 65(B) are not fully met, but when exceptionally compelling humanitarian reasons exist.

In 2008, the ICTY Appeals Chamber introduced a new requirement for provisional release: at an advanced stage of the proceedings, particularly after a 98bis decision has been rendered, an accused must show sufficiently compelling humanitarian reasons to justify release.201 This new requirement for provisional release crystallized in subsequent case law and was generally accepted and followed by the Tribunal.202 A 98bis decision entails a judgment by a Trial Chamber, subsequent to the completion of the Prosecution case, that a reasonable trier of fact could make a finding beyond reasonable doubt that the accused is guilty.203 Although such a decision should not be regarded as a pre-judgment, it does at least appear to increase the likelihood that the accused will be convicted. The rationale for requiring compelling reasons for release of an accused at that stage of trial is twofold. The perception of a person against whom a 98bis decision has been rendered being released by the Tribunal, could have a prejudicial effect on victims and witnesses.204 Second, the increased likelihood of


conviction implied by a 98bis decision may increase an accused’s risk of flight. For these reasons, sufficiently compelling humanitarian reasons became required to ‘tip the balance in favour of provisional release’. This was also confirmed by the ICTR. Several Chambers have accepted serious illness of the accused to amount to sufficiently compelling humanitarian circumstances. The standard in order to be granted provisional release is that the accused must be unable to receive the relevant treatment in the host country and the ill-

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207 See also Trotter, ‘Innocence, Liberty and Provisional Release at the ICTY’ (n 93), 357, who notes that this new requirement was seen as a reintroduction of the former requirement of ‘exceptional circumstances’. 

ness must be sufficiently serious, otherwise, release is denied. Second, ill health or the passing of close family members has also been accepted to constitute sufficiently compelling humanitarian circumstances. However, the standard regarding the latter appears to be quite strict and it has not always been accepted.

In addition to the above factors, other circumstances have also been alleged to be sufficiently compelling, but have not been accepted. For example, an accused wishing to exercise his right to vote, for which reasons he had to travel to his home country to register, and to collect his pensions was denied release because these reasons were not sufficiently compelling. In addition, accused have unsuccessfully alleged that the length of their detention constituted sufficiently compelling humanitarian circumstances. Finally, the Appeals Chamber has clarified that after a 98bis decision, the period of provisional release should be proportional to the reason for which it is granted. For example, the need to visit a seriously


\[213\] ICTY, Decision on Jadranko Prlić’s Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-T), 21 April 2011, 40, where the Chamber considered that lengthy detention is a ‘factor to be taken into account’, but does not suffice as a self-standing sufficiently compelling humanitarian circumstance; confirmed by the Appeals Chamber: ICTY, Decision on Jadranko Prlić’s Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-AR65.24), 8 June 2011, 10.
ill family member in the hospital would justify provisional release of a sufficient time to visit
the family member’.214 Various subsequent decisions have followed this approach.215

This effective invention of a new requirement for provisional release has not been fa-
vorably received by all the Judges and Chambers of the Tribunal. Several Trial Chamber de-
cisions and dissents have criticized the new approach. The Appeals Chamber itself once con-
sidered that even at the post 98bis stage, Rule 65(B) does not require a humanitarian justifica-
tion for provisional release.216 Only when the Trial Chamber cannot exclude the existence of
risks of flight or danger, do sufficiently compelling humanitarian reasons constitute a basis
for resolving uncertainty and doubt in favor of provisional release, coupled with necessary
and sufficient measures to alleviate any flight risk or risk of obstruction.217

In addition, the Popović et al Trial Chamber has twice considered that in the case of
the accused Gvero, the rendering of the 98bis decision was outweighed by the old age of the
accused and his previous compliance with his provisional release conditions and that there-
fore his risk of flight had not at all increased.218 Similarly, the Prlić et al Chamber considered
that the accused’s excellent behavior on release mitigated the possible increase in flight risk
due to the advanced stage of the proceedings.219 Admittedly, these decisions do not constitute

214 ICTY, Decision on “Prosecution’s Appeal from Decision Relative à la Démmande de Mise en Liberté Provi-
16; ICTY, Decision on Gvero’s Motion for Provisional Release, Prosecutor v. Popović et al (IT-05-88-T), 21
July 2008, 16.

215 ICTY, Decision on “Prosecution’s Appeal from Décision Relative à la Démmande de Mise en Liberté Provi-
17; ICTY, Decision on Borovčanin’s Motion for Custodial Visit, Prosecutor v. Popović et al (IT-05-88-T), 17
December 2008, 24; ICTY, Decision on Valentin Ćorić’s Request for Provisional Release, Prosecutor v. Prlić et
al (IT-04-74-T), 2 December 2008, 36; ICTY, Decision on Gvero’s Motion for Provisional Release, Prosecutor
v. Popović et al (IT-05-88-T), 17 December 2009, 10; ICTY, Decision on Ivan Čermak’s Motion for Provisional

216 ICTY, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision Relative à la Démmande de
Mise en Liberté Provisoire de l’Accusé Pušić”, Issued on 14 April 2008, Prosecutor v. Prlić et al (IT-04-74-
AR65.7), 23 April 2008, 15.

217 ICTY, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision Relative à la Démmande de
Mise en Liberté Provisoire de l’Accusé Pušić”, Issued on 14 April 2008, Prosecutor v. Prlić et al (IT-04-74-
AR65.7), 23 April 2008, 14; see also ICTY, Decision Denying Mićo Stanišić’s Request for Provisional Release
during the Break after the Close of the Prosecution Case, Prosecutor v. Stanišić and Župljanin (IT-08-91-T), 25
February 2011, 22; see further: ICTY, Decision on “Prosecution’s Appeal from Décision Relative à la Démmande
de Mise en Liberté Provisoire de l’Accusé Petković Dated 31 March 2008”, Partially Dissenting Opinion of

218 ICTY, Decision on Gvero’s Motion for Provisional Release during the Break in the Proceedings, Prosecutor
v. Popović et al (IT-05-88-T), 9 April 2008, 16; ICTY, Decision on Consolidated Appeal against Decision on
Borovčanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletic’s Motion for Provisional Re-
ICTY, Decision on Gvero’s Motion for Provisional Release, Prosecutor v. Popović et al (IT-05-88-T), 17 De-
cember 2009, 17.

219 ICTY, Decision on the Accused Ćorić’s Request for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-
T), 17 July 2008, 17; similarly ICTY, Decision on the Application for Provisional Release of the Accused Pušić,
outright rejections of the Appeals Chamber’s approach to the new requirement of humanitarian circumstances. Rather, they attempt to maneuver within its confines, in order to allow the Chamber to arrive at the result it deems most appropriate.

There has also been explicit opposition to the introduction of this requirement by Appeal Judges Güney, Liu and Robinson, and by the Prlić et al and Stanišić and Župljanin Trial Chambers. Judges Liu and Güney’s have considered the invention of the requirement ‘inconsistent with the long established jurisprudence of this Tribunal … [and] an ultra vires extension of the Rules.’ Judge Liu, who sat on the bench of the decision that was seen as having introduced the requirement, has also argued that the original decision did not intend to create a general principle or to introduce a new necessary requirement. More fundamentally, the introduction of this requirement has been considered ‘contrary to both the Rules and the presumption of innocence.’ The Prlić et al Chamber has noted that human rights law prescribes detention to be the exception, not the rule and that since these are a part of international law, the provisions of Rule 65(B) of the rules had to be ‘constructed in light of these principles’. In light of ECtHR case law, the Chamber subsequently concluded that continued provisional detention ‘may therefore be perceived as an anticipatory sentence difficult to reconcile with the principle of the presumption of innocence.’ The Stanišić and Župljanin Chamber criticized the absence of any references to IHRL, notably the ICCPR and ECHR, or

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223 ICTY, Decision on Jadranko Prlić’s Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-T), 21 April 2011, 30; ICTY, Decision on the Accused Prlić’s Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-T), 9 April 2009, 43, where the Chamber noted that if it were to follow the jurisprudence of the ECHR, its review of motions for provisional release ‘could be based on substantially different legal considerations’, but noted that it was, however, bound by the Tribunal’s legal framework, as interpreted by the Appeals Chamber.

224 ICTY, Decision on Jadranko Prlić’s Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-T), 21 April 2011, 38; however, the Chamber again considered itself constrained by the Tribunal’s legal framework and the Appeals Chamber’s consideration thereof; and felt compelled to examine whether the requirement of sufficiently compelling humanitarian circumstances had been met.
the presumption of innocence, in the Appeals Chamber’s case law on this matter, which ‘instead, emphasize policy considerations’. It therefore considered the requirement to be in violation of fundamental human rights, but still applied it, because it considered itself bound by the case law of the Appeals Chamber. Judge Güney has argued that the new requirement overrides important distinctions in burdens and liberty interests between convicted persons and persons who still enjoy the presumption of innocence. He and Judge Robinson have further contended that requiring sufficiently compelling humanitarian circumstances for release equalizes a person against whom a 98bis decision has been rendered with a person who has been convicted. Furthermore, it was held to amount to a reinstatement of the requirement of ‘exceptional circumstances’. These concerns were reiterated in a large number of dissents by Judges Güney and Liu.

225 ICTY, Decision Denying Mićo Stanišić’s Request for Provisional Release during the Break after the Close of the Prosecution Case, Prosecutor v. Stanišić and Župljanin (IT-08-91-T), 25 February 2011, 18, where the Chamber noted that ‘regrettably, the Appeals Chamber has consistently followed its approach from the 21 April 2008 Decision’, for which reasons it felt compelled to abide by it but it made clear it did so disgruntlingly; see also ICTY, Decision Denying Mićo Stanišić’s Request for Provisional Release during the Upcoming Summer Court Recess, Prosecutor v. Stanišić and Župljanin (IT-08-91-T), 29 June 2011, 18.

226 ICTY, Decision in Mićo Stanišić’s Appeal Against Decision on his Motion for Provisional Release, Dissenting Opinion of Judge Güney, Prosecutor v. Stanišić and Župljanin (IT-08-91-AR65.2), 29 August 2011, 11; similarly ICTY, Decision in Mićo Stanišić’s Appeal Against Decision on his Motion for Provisional Release, Dissenting Opinion of Judge Robinson, Prosecutor v. Stanišić and Župljanin (IT-08-91-AR65.2), 29 August 2011, 3.


and Judge Robinson. Interestingly, Judge Güney, in August 2011, noted that seven out of the fifteen permanent Judges of the Tribunal had already voiced their opposition to the requirement. Despite this criticism, the Appeals Chamber, remained unconvinced it should abandon the requirement.

However, in October 2011 an extraordinary plenary of Judges was held and Rule 65(B) was amended. The Rule now clarifies that release may be ordered ‘at any stage of the trial proceedings prior to the rendering of the final judgment’. In addition, the rule now includes the contentious requirement discussed above, but in a significantly different manner. The Rule now concludes that ‘[t]he existence of sufficiently compelling humanitarian grounds may be considered in granting such release’. As a result, what was introduced as an additional requirement for release has been downgraded to a discretionary factor that may or may not be considered. The Prlić et al Chamber subsequently granted release without mentioning possible humanitarian reasons. Instead, it recalled the principle of subsidiarity, in

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231 ICTY, Decision on Mićo Stanišić’s Appeal against Decision on his Motion for Provisional Release, Separate Opinion of Judge Robinson, Prosecutor v. Stanišić and Zapljanin (IT-08-91-AR65.2), 11 May 2011; ICTY, Decision on Mićo Stanišić’s Appeal Against Decision on his Motion for Provisional Release, Dissenting Opinion of Judge Robinson, Prosecutor v. Stanišić and Zapljanin (IT-08-91-AR65.2), 29 August 2011.

232 ICTY, Decision on Jadranko Prlić’s Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-AR65.24), 8 June 2011, 9; ICTY, Decision in Mićo Stanišić’s Appeal Against Decision on his Motion for Provisional Release, Prosecutor v. Prlić et al (IT-04-74-AR65.2), 21 April 2011, 25.


235 ICTY, Decision Granting Mićo Stanišić’s Request for Provisional Release, Prosecutor v. Stanišić and Zapljanin (IT-08-91-T), 18 November 2011, 14: ‘the recent amendment of Rule 65(B) has converted the requirement of showing compelling humanitarian grounds from a condition sine qua non when granting provisional release at advanced stages of proceedings to a discretionary consideration in granting such release’; similarly ICTY, Decision on Simatović Request for Provisional Release, Prosecutor v. Stanišić and Simatović (IT-03-69-T), 13 December 2011, 10; see also Trotter, ‘Innocence, Liberty and Provisional Release at the ICTY’ (n 93), 355.
finding that, pursuant to international principles of human rights, ‘[i]f it is sufficient to use a more lenient measure than mandatory detention, it must be applied’. It then considered that the length of the accused’s pre-trial detention militated in favor of release, and proceeded to grant it.

3.3. Burden and standard of proof

The defence bears the burden of proof regarding the two requirements for provisional release before the ad hoc Tribunals. In an early decision, the fact that it was ‘not certain’ that the accused would not tamper with evidence or pose a danger to witnesses, was seen as militating against release. This illustrates the high burden of proof that accused persons bear.

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240 ICTY, Decision Rejecting a Request for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 25 April 1996, 5; ICTY, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić et al* (IT-96-21-T), 25 September 1996, 35: the Trial Chamber said that although it was ‘not convinced
lar wording has been used to address the burden of proof with regard to flight risk. However, on an abstract level, the standard an accused has to meet to satisfy a Chamber of the requirements for provisional release has also been said to be lower than that of beyond reasonable doubt.242 It must be decided on a balance of probabilities.243 Still, it has been acknowledged that the task of convincing the Chamber of these two requirements, even at that standard, ‘may well prove to be a substantial one in light of the jurisdictional and enforcement limitations of the Tribunal’.244

Other decisions have also relied on the unique character of the Tribunal as a justification for placing the burden of proof on the accused. In an early decision, a Chamber relied on the inherent limitations of the Tribunal and the way this impacts the Tribunal’s provisional release regime.245 Similarly, ‘the absence of any power in the Tribunal to execute its own arrest warrants and its need to rely on local or international authorities to effect arrests on its behalf has the practical consequence that an applicant for provisional release must have a clear and strong case to satisfy the Trial Chamber that he will appear for trial if released.’246

However, the case law of the ICTY appears to have evolved and to have mitigated the substantial burden the defence needs to meet. One Chamber considered that ‘it would be much more satisfactory if the onus were upon the Prosecution to show that the Accused would prove a danger to any such victim or witness or other person, it is not necessarily satisfied that he would not’.247 Several factors support the conclusion that the accused would prove a danger to any such victim or witness or other person, it is not necessarily satisfied that he would not’.244

241 See also Trotter, ‘Innocence, Liberty and Provisional Release at the ICTY’ (n 93), pp 361-362, who calls it a ‘substantial’ burden.


244 ICTY, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, Prosecutor v. Delalić et al (IT-96-21-T), 25 September 1996, 18.


246 ICTY, Second Decision on Nebojša Pavković’s Provisional Release, Prosecutor v. Milatinović et al (IT-05-87-PT), 18 November 2005, 12, where the Chamber also held that ‘in the absence of any submission from the
that the burden of proof that the defence bears has been mitigated. Later case law consistently emphasizes that an examination of the risk of danger requires a Chamber to find ‘concrete evidence’ of the existence of such a risk, while abstract and generalized concerns about danger to victims and witnesses have been increasingly rejected.\textsuperscript{248} In addition, a careful reading of the language of a number of decisions suggests that the Prosecution bears a burden of proof as well. Chambers have consistently found that ‘there is nothing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice’.\textsuperscript{249} Such language suggests that there must be evidence to prove that the accused has interfered, or will interfere with the administration of justice, which is not the same as requiring evidence from the defence to prove that s/he will not.\textsuperscript{250} Similarly, a Chamber stated that ‘the Accused has been acquitted of allegations of interference with a witness and that nothing in the Prosecu-


\textsuperscript{250} See also Fairlie (n 92), 1153ff. who speaks of a ‘tacit’ prosecutorial burden.
tion's submissions raises any credible apprehension that the Accused has or will interfere with any victim or witness if released’. 251 This appears to be in line with ECtHR law, which rejects ‘inadequate reasoning that does not appear to be tailored to the individual circumstances of a case’. 252

Nevertheless, later case law of the Tribunal has also continued to emphasize that the accused bears the burden of proof. 253 Furthermore, the Appeals Chamber has repeatedly quashed grants of provisional release because it disagreed with the Trial Chambers’ approach that had effectively switched the burden to the Prosecution. 254 Similarly, it has been held that the defence must provide at least some evidence to prove absence of a risk of danger: ‘Zelenović has provided nothing in his Motion or his Reply to satisfy the Appeals Chamber that his provisional release would not be to [the victims’] detriment. 255

The ICTY’s approach to the burden of proof regarding provisional release applications thus appears to have evolved from unequivocally placing it with the defence, to a somewhat more balanced approach, where concrete evidence, adduced by the Prosecution, also appears necessary to establish dangerousness. Still, affirmations of the accused bearing the burden to establish the requisite requirements for provisional release remain numerous, as a result of which it has been noted that provisional detention remains the rule before the Tribunals. 256

252 Harris, O’Boyle and Warbrick (n 6), 177.
3.4. Comparison and the ad hoc Tribunals’ use of IHRL

3.4.1. Comparing the ad hoc Tribunals’ approach to the right to liberty to IHRL

The legal framework regarding provisional detention and release before the ad hoc Tribunals differs in a number of crucial aspects from IHRL. First, before the Tribunals, a reasonable suspicion alone suffices to arrest and detain a suspect while additional ‘relevant and sufficient’ reasons for detention are necessary in IHRL. Second, instead of requiring the detaining authorities to justify detention, and review it periodically, as required by IHRL, the legal frameworks of the ad hoc Tribunals only conceive of the possibility of provisional release if the accused requests it. Third, in the context of the ad hoc Tribunals’ assessments of requests for provisional release, the accused bears the burden to prove that, if released, s/he will not pose a flight risk or obstruct the proceedings. The approach is the opposite in IHRL: the detaining authorities must show that there are relevant and sufficient reasons to justify detention, which include flight risk and risk of obstruction, but also the risk of reoffending and of disturbance of public order. The latter two factors have not been considered in the case law of the Tribunals.

At the same time, the Tribunals’ legal frameworks governing provisional detention and release have been brought more in line with internationally recognized human rights. ‘Exceptional circumstances’, the initial requirement for provisional release, was removed from both Tribunals’ RPEs. The goal of this amendment was to bring the Tribunals’ systems more in line with IHRL, because the long periods of provisional detention could possibly violate the rights of accused persons. Second, the attempted addition of ‘sufficiently compelling humanitarian circumstances’ as a requirement for release in a late stage of the proceedings has been criticized for its impact on the rights of accused persons from within the Chambers of the ICTY itself. Several Chambers and dissenting Appeal Judges voiced their opposition to this requirement, which ultimately led the majority in the plenary of judges to

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257 Similarly Trotter, ‘Pre-Conviction Detention in International Criminal Trials’ (n 159), 355.
258 See also Fairlie (n 92), 1139, who notes that the very basis of the Tribunal’s system is at fault: ‘whereas it would normally be the responsibility of the prosecution to request remand and accordingly establish those facts necessary to sustain such a motion, the tribunals’ approach ensures that the obligation to raise the issue of detention versus release lies with the accused’.
259 See eg Harris, O’Boyle and Warbrick (n 6), 176, who note that the ECHR has consistently held that legislation which provides that accused may only be granted bail ‘if exceptional circumstances exist’, in particular where this ‘imposes a burden of proof on the applicant’, may constitute a violation of the Convention.
260 See also Caroline Davidson, ‘May it Please the Crowd? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants’ (2012) 43 Colum Hum Rts L Rev 349, on the possible extension of public order as a ground for detention before the ICTs.

261 See supra section 3.1.
downgrade this factor from a mandatory to a discretionary consideration.\textsuperscript{262} Finally, the burden of proof that the accused bears has been alleviated in the case law of the ICTY, and the Prosecution now also bears a burden of proof. The prosecutor must submit concrete evidence of the risk that the accused, if released, would endanger victims or witnesses; abstract or generalized concerns no longer suffice. At the same time, this mitigated burden of proof has not been applied consistently. The Tribunals have continued to affirm that the defence does bear the burden of proof, and have also continued to accept abstract arguments by the Prosecutor in their decisions on provisional release.\textsuperscript{263}

Several aspects of the Tribunals’ approach to detention and release warrant further discussion. For example, both the ICTY and the ICTR have often relied on the gravity of the crimes charged as a significant factor that increases the flight risk of the accused. Although such an impact of gravity, and the corresponding likeliness of a severe sentence are considered relevant to provisional detention determinations in IHRL, the ECtHR has consistently held that this cannot be the sole factor decisive with regard to the release of the accused.\textsuperscript{264} Although the Tribunals have also quoted this consideration and have assured that they do not to consider gravity of the crimes alone to be a sufficient justification for detention, the extent of their actual reliance on this factor can be questioned from the perspective of IHRL.

Furthermore, the ad hoc Tribunals have held that the identification of a state willing and able to receive the accused person is a requirement for release. Although they have found that this is not an absolute requirement, in practice it has proven impossible for accused persons to be granted provisional release without identifying a state willing to receive them.\textsuperscript{265} Presumably, the Tribunals realize that it is problematic to make the enjoyment of human rights by accused persons dependent on state cooperation.\textsuperscript{266} At the same time, the circumstances in which the Tribunals operate render such reliance unavoidable. As will be seen below, the ICC has taken a more proactive approach to this matter and has engaged in the process of securing interim release agreements with states enabling it to release accused persons

\begin{footnotesize}
\textsuperscript{262} See supra section 3.2.5.
\textsuperscript{263} See supra section 3.3.
\textsuperscript{264} See supra section 2.3.1.
\textsuperscript{265} Similarly De Meester (n 81), 857
\end{footnotesize}
provisionally. This begs the question why the ICTR in particular has not adopted a similar course of action in order to remedy its inability to grant release.

Finally, the ad hoc Tribunals have grappled with the relevance of the length of detention in the context of provisional release decisions. There are numerous examples of extremely lengthy periods of provisional detention before the ICTR in particular, but also before the ICTY. Generally, most decisions of the Tribunals have confirmed that the length of detention may impact on provisional release determinations and justify exercise of discretion in ordering release. However, in practice, such considerations have played a marginal role in the Tribunals’ case law. The limited importance of the length of provisional detention is problematic from a human rights perspective, particularly given the substantial periods that many ICTY and ICTR defendants have spent in such detention. The ECtHR has consistently found that as the length of provisional detention increases, the need for the authorities to justify detention, including its length, becomes increasingly pressing. This is arguably one of the reasons why the ECtHR attaches value to periodic reviews of the necessity of detention.

At the same time, the early practice of the ECnHR has recognized the need for flexibility when it comes to the length of detention of suspected war criminals. In *Jentzsch v. Germany*, the ECnHR held that four years of pre-trial detention was not unreasonable, given Germany’s special responsibility to prosecute suspects of war crimes and crimes against humanity, because particular care had to be taken to avoid the escape of persons accused of such crimes. Chapter 6 on the right to be tried without undue delay further discusses and questions the present-day relevance of this early practice of the ECnHR. Still, the ECHR framework seems to allow for additional discretion for state authorities when it comes to the investigation, prosecution, and—the length of—provisional detention in cases related to serious crimes such as those within the jurisdiction of the ad hoc Tribunals. In the context of the right to liberty, this might mean that there is more room for provisional detention, including for lengthy periods, for persons suspected of very serious crimes. However, the Tribunals’

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269 De Meester (n 81), 885.
271 See also Stefan Trechsel, ‘Rights in Criminal Proceedings under the ECHR and the ICTY Statute – a Precarious Comparison’ in Bert Swart, Göran Sluiter and Alexander Zahar (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (OUP 2011), 164, who argues that the ECtHR ‘would take into account the specificities of the international criminal jurisdiction and accept that under these circumstances pre-
justification of such lengthy periods of both the proceedings and provisional detention can be criticized for the blanket and unsubstantiated way in which they have relied on the gravity and complexity of the crimes charged.\textsuperscript{272} In addition, the Tribunals’ approach to this issue has been inconsistent. They have sometimes professed their commitment to ensuring that provisional detention does not exceed a reasonable period. However, when faced with allegations of unreasonably lengthy periods of detention, the Tribunals have mostly referred to the complexity of cases and rejected allegations of human rights violations. What is more, there is a substantial amount of case law denying the relevance of the length of provisional detention altogether in the context of provisional release determinations.

3.4.2. The ad hoc Tribunals’ use of IHRL on the right to liberty

In their decisions on provisional release, the ad hoc Tribunals have often referred to human rights treaties and the practice of the IACtHR, the HRC, and the ECtHR in particular. At the same time, there are significant discrepancies between the provisional detention regime of the Tribunals, and the requirements of , which invites observations on some of the ways in which the Tribunals have relied on, or departed from, internationally recognized human rights.

The Tribunals have often cited provisions of human rights treaties and the practice of human rights supervisory bodies in a perfunctory manner to justify aspects of their approach to provisional release. Such decisions often assert a commitment to abide by IHRL and invoke a variety of reasons to justify their reliance on human rights norms. For example, the ICTY has noted that the removal of the requirement of exceptional circumstances was ‘wholly consistent with the internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect’ and justified this obligation by referring to the 1993 Report of the UNSG.\textsuperscript{273} In addition it has noted that provisional release decisions must be inspired by the presumption of innocence enshrined in its Statute, which was said to reflect and refer to ‘international standards’.\textsuperscript{274} Therefore, Rule 65 had to be read in

\textsuperscript{272} See infra Chapter 6, section 3.2.2. and 3.2.6.
light of the ICCPR, ECHR, and relevant jurisprudence.\textsuperscript{275} This line of case law has consistently quoted four distinct and ostensibly unrelated justifications for the ICTY’s obligation to interpret its legal framework in accordance with IHRL. First, the decisions stated that these standards ‘form part of public international law’.\textsuperscript{276} Second, the Chambers noted that all states in the former Yugoslavia are party to the ICCPR, and a number of them are party to the ECHR, while others have a candidate status in the Council of Europe.\textsuperscript{277} Third, the Tribunal itself, as an organ of the UN, is bound by these standards.\textsuperscript{278} Fourth and finally, the Tribunal must respect these standards because ‘no distinction can be drawn between persons facing...
criminal procedures in their home country or on an international level’. These decisions disclose the doctrinal uncertainty on the part of the Tribunal regarding the legal basis of its perceived obligation to respect human rights standards. Although the decisions strongly assert this obligation, each of the ICTY’s considerations has remained limited to a specific string of cases and has not been espoused consistently.

The Tribunals’ formal commitment to adhere to IHRL can also be inferred from the judges’ plenary decisions to remove the requirement of exceptional circumstances from the RPEs and from the above cited unease of a substantial number of ICTY Judges with the introduction of the requirement of ‘sufficiently compelling humanitarian circumstances’. Both the Prlić et al, and the Stanišić and Župljanin Chambers explicitly voiced their opposition to this requirement based on human rights standards. The subsequent downgrading of this requirement to a discretionary consideration may have been a consequence of the Tribunals’ obligation to abide by human rights standards.

At the same time, a substantial amount of case law of both the ICTY and the ICTR negates the perceived superiority of human rights norms over the legal frameworks of the Tribunals. For example, despite their finding that requiring sufficiently compelling humanitarian circumstances for provisional release was at odds with IHRL, the Prlić et al and Stanišić and Župljanin Chambers still applied this criterion because they felt bound by their legal framework and the case law of the Appeals Chamber, which they apparently deemed to have priority over IHRL. Similarly, the ICTR has repeatedly refused to review the criterion of ‘exceptional circumstances’ in light of defence allegations that it conflicted with human rights law, by simply reiterating that its RPE was ‘binding’. These decisions suggest that apparent or alleged departures from IHRL are irrelevant because the Tribunals are primarily bound by their own legal framework.


280 See supra section 3.2.5.

281 See supra section 3.2.5. for a discussion of the requirement of sufficiently compelling humanitarian circumstances.

The Tribunals have justified apparent departures from IHRL by relying on the unique circumstances in which they operate. The ICTR has refused to assess the discrepancy between the requirement of exceptional circumstances and Article 9(3) ICCPR because ‘the conditions surrounding the detention of accused before the Tribunal are different from those surrounding detention of accused in domestic jurisdictions.’ Specifically, the purpose of provisional detention at the ICTR was to ensure the accused’s presence at trial. Such a justification for detention is inadmissible in IHRL, particularly for lengthy periods. Yet it was still applied by the ICTR and justified by the unique circumstances in which it operates. The ICTY has also defended its provisional release regime by relying on the specific context in which it operates. It recognized that the presumption of detention was at odds with Article 9(3) ICCPR, but held that this was justified by the ‘extreme gravity of the offences’ with which accused persons are charged, and the ‘unique circumstances in which the [ICTY] operates’. In particular, the Tribunal’s necessary reliance on states for ensuring the return of accused persons and their compliance with the terms of their release, was cited as a justification for the deviation from IHRL. Subsequent to the removal of the requirement of exceptional circumstances, the ICTY continued to justify the remaining differences between its legal framework and IHRL by the unique circumstances in which it operates. For example, although de jure mandatory pre-trial detention was considered not to be in line with international standards, the absence of coercive powers and the seriousness of the crimes of which ICTY defendants are accused was still considered de facto to make provisional detention the rule rather than the exception. Rule 65 was found to provide for the possibility of provisional release, and therefore did not ‘change’ the human rights guarantees, but instead, it formulated ‘them specifically for the purposes of an international criminal court.’ Finally,

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283 ICTR, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), Prosecutor v. Mugenzi et al (ICTR-99-50-I), 8 November 2002, 35.
285 ICTY, Decision on Motion for Provisional Release filed by the Accused Zjenil Delalić, Prosecutor v. Delalić et al (IT-96-21-T), 25 September 1996, 20: ‘The unique circumstances in which the International Tribunal must operate are also readily apparent. It is not in possession of any form of mechanism, such as a police force, that could exercise control over the accused, nor does it have any control over the area in which the accused would reside if released.’
in *Krajišnik*, the Chamber held that customary international law does not prohibit imposing the burden of proof 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.’ The Chamber thus considered that there was no customary international law that applied to the *specific context* of an ICT.

There are two main ways in which the ad hoc Tribunals have engaged with IHRL on the issue of provisional release. On the one hand, they have justified certain aspects of their approach by referring to various sources of IHRL. For example, they have held that the gravity of the crimes charged may impact on the assessment of an accused’s risk of flight and that the complexity of the proceedings may justify the length of provisional detention, referring to IHRL and respective jurisprudence in support. At the same time, these decisions have often failed to acknowledge significant departures from IHRL in the law and practice of the ICTs. The second prevailing approach to IHRL has been to acknowledge such departures, and justify them by reference to the specific context in which the Tribunals operate. The merits of the Tribunals’ justification of such contextualization of human rights norms will be further assessed in the concluding section of this Chapter and in the concluding Chapter of this dissertation overall.

4. Interim Release before the ICC

Compared to that of the ad hoc Tribunals, the legal framework of the ICC provides a more elaborate regime governing interim release, which is the term used for provisional release before the Court. In addition to a reasonable suspicion, the ICC Statute requires a ground for the arrest of a suspect. From the very beginning, detention must thus be justified by the detaining authority. Once detained at the seat of the Court, the Statute provides the right to apply for interim release. Requests for interim release must be decided on an assessment of
the continued existence of the conditions that are required for the arrest of a person, enshrined in Article 58(1) of the Statute. Chambers must consider whether (A) the reasonable suspicion against the person persists; and (B) whether his continued detention is necessary for one of three reasons: (i) to ensure (re)appearance at trial; (ii) to prevent obstruction of the investigation; and (iii) to prevent the commission of further crimes. These reasons are formulated in the alternative, so that only of them suffices to justify provisional detention. In addition, the provision leaves no room for discretion. It stipulates that the Chamber shall release the person if these requirements are no longer met, and shall continue to detain her/him, if not. Finally, the ICC Statute enshrines the right to liberty in Article 55(1)(d). However, placing this right in Article 55 may be questioned, since the right to liberty should not be limited to the pre-trial stage. The ICC’s interim release decisions thus far have not mentioned this provision.


293 De Meester and others (n 71), 317.
Pursuant to Article 60(2), the accused has the right to request interim release pending trial. In addition, Article 60(3) requires the Pre-Trial Chamber to periodically review its ruling on the detention of the accused, and to do so at any time upon the request of the accused or the Prosecution. This is an important difference between the ICC and the ad hoc Tribunals, and a marked improvement from the perspective of the protection of the right to liberty.\textsuperscript{294} Rule 118(2) clarifies that the periodic review must be carried out every 120 days. In \textit{Lubanga}, the Pre-Trial Chamber clarified that this provision does not create a general duty to review detention \textit{pro proprio motu}; rather, this duty kicks in once the defence has applied for interim release.\textsuperscript{295} The Appeals Chamber has confirmed this.\textsuperscript{296} The Single Judge in \textit{Katanga} clarified that, although such review is not mandatory, a judge, ‘as the ultimate guarantor of the rights of the Defence’, must have the power to do so whenever the circumstances require, an interpretation which she supported with references to ECtHR and IACtHR case law.\textsuperscript{297}

When conducting a review pursuant to Article 60(3), the Chamber must assess whether ‘changed circumstances’ require it to modify its previous ruling on detention. This has been interpreted as requiring an assessment of whether ‘a material change in circumstances’ warrants the release of the accused.\textsuperscript{298} Like requests for interim release pursuant to Article 60(2), this involves an assessment of the persistence of the conditions for detention from Ar-

\begin{footnotesize}
\textsuperscript{294} De Meester (n 81), 898.
\textsuperscript{295} ICC, Decision on the Application for Interim Release of Thomas Lubanga Dyilo, \textit{Prosecutor v. Lubanga} (ICC-01/04-01/06-826), 3 October 2006, 4-5.
\textsuperscript{297} ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, \textit{Prosecutor v. Katanga} (ICC-01/04-01/07-222), 21 February 2008, 6-7; See also ICC, Decision on the Powers of the Pre-Trial Chamber to Review Proprío Motu the Pretrial Detention of Germain Katanga, \textit{Prosecutor v. Katanga and Ngudjolo} (ICC-01/04-01/07-330), 18 March 2008, 8-9, in fact, the Judge held that in this regard, the ICC Statute provided for a higher standard than that required by the ECtHR and the IACtHR.
\end{footnotesize}
article 58(1), albeit less thoroughly. It has been clarified that ‘the notion of “changed circumstances” … entails either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.’

The scope of review in mandatory reviews of detention under Article 60(3) is thus more limited than with regard to interim release requests under Article 60(2). Furthermore, in practice, the defence also seems to bear the burden of proof regarding a change in circumstances. In addition, although Article 60(3) and Rule 118(2) require a review of detention to take place only once every 120 days; the defence has a right to submit an application for release at any time. Pursuant to a request under Article 60(2), the Chamber must assess, anew, whether the reasons justifying detention still exist.

The ICC Statute refers only to release pending trial. Article 60 only provides the Pre-Trial Chamber with the power to order interim release, and since the Statute prohibits trials in absentia, the presumption seems to be that accused persons’ detention will extend during trial. However, the Lubanga Trial Chamber, subsequent to the confirmation of charges, also started to undertake periodic reviews of the detention of the accused. It based its competence to do so on Article 61(11) of the Statute, which provides that a Trial Chamber may exercise any function that previously belonged to a Pre-Trial Chamber if it is ‘relevant and capable of application’. Other Trial Chambers have followed this approach. However, the periodic reviews of detention do seem to have ceased in all cases once the trial had started.

299 See eg ICC, Sixth decision on the review of Laurent Gbagbo’s detention pursuant to Article 60(3) of the Rome Statute, Prosecutor v. Gbagbo (ICC-02/11-01/11-668), 11 July 2014, 19; ICC, Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to Article 60(3) of the Statute, Prosecutor v. Bemba et al (ICC-01-05-01-13-611), 5 August 2014, 3.


301 See eg ICC, Sixth decision on the review of Laurent Gbagbo’s detention pursuant to Article 60(3) of the Rome Statute, Prosecutor v. Gbagbo (ICC-02/11-01/11-668), 12 March 2014, 33, see further infra section 4.5.


303 See eg ICC, Fifth decision on the review of Laurent Gbagbo’s detention pursuant to Article 60(3) of the Rome Statute, Prosecutor v. Gbagbo (ICC-02/11-01/11-633), 12 March 2014, 33, see further infra section 4.5.

Several Chambers have explained that in an interim release decision, the Chamber must weigh the respect for individual liberty against requirements of public interest, i.e. the need to ensure the appearance of the accused and the security of victims and witnesses.\textsuperscript{306}

Before the ICC, the principle that liberty should be the rule and detention the exception has been explicitly endorsed as fundamental to interim release decisions, as a corollary to the presumption of innocence and the duty to interpret and apply the Statute in accordance with internationally recognized human rights, enshrined in Article 21(3).\textsuperscript{307} Similarly, the Appeals Chamber has held that ‘pre-trial detention, whilst to be ordered exceptionally, does not breach internationally recognised human rights or criminal law principles such as the presumption of innocence where it is justified under Articles 58(1) and 60(2) of the Statute.’\textsuperscript{308}

However, these decisions did not refer to specific sources of IHRL, or decisions of human rights courts or supervisory bodies to substantiate this finding, nor did they engage with the concrete implications of the rule that detention should be exceptional.

\textsuperscript{306} ICC, 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, \textit{Prosecutor v. Bemba} (ICC-01/05-01-08-743), 1 April 2010, 2; ICC, Public Redacted Version of the “Decision on Applications for Provisional Release” of 27 June 2011”, \textit{Prosecutor v. Bemba} (ICC-01/05-01-08-1565-Red), 16 August 2011, 46: ‘commencement of trial does not extinguish the accused's right to request that the Chamber review its previous ruling(s) on detention.’


Finally, the Appeals Chamber has repeatedly emphasized the importance of thoroughly reasoned decisions on interim release.\(^{309}\) The standard to which such decisions are held seems relatively high. For example, the Appeals Chamber has lamented a 26 page interim release decision for its ‘relatively sparse’ reasoning.\(^{310}\) According to the Appeals Chamber ‘the Pre-Trial Chamber did not set out in much detail how it analysed the evidence presented by the Prosecutor or how it reached its factual conclusions. Rather, in stating its conclusions, the Pre-Trial Chamber simply made reference in the footnotes to the items of evidence it relied upon.’\(^{311}\) Although the majority ultimately found that the decision was not so lacking in reasoning as to constitute an error, Judge Ušacka dissented for this reason.\(^{312}\) She relied on case law of the ECtHR and human rights treaties to support an accused person’s right to a reasoned opinion, and this right’s strong implications in the context of decisions on detention.\(^{313}\) She issued a similar dissent in *Ntaganda*, which was supported by Judge Van den Wyngaert, where she also relied extensively on Article 21(3) and sources of IHRL.\(^{314}\) The Appeals Chamber itself has also reiterated the need to thoroughly justify decisions on provisional detention, which it also connected to the right to a reasoned decision.\(^{315}\) At the same time, the Appeals Chamber has held that it would accord ‘a margin of appreciation’ to a Chamber, both with respect to inferences drawn from the available evidence, and the weight it accorded to different factors militating in favor or against detention.\(^{316}\)

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\(^{310}\) id., 48.

\(^{311}\) id., 12.

\(^{312}\) ICC, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled “Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-278-Red), 26 October 2012, 47.

\(^{313}\) id., 12.


\(^{315}\) id., 12.

\(^{316}\) 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* (ICC-02/11-01/11-278-Red), 26 October 2012, 47.
4.1. Persistence of a reasonable suspicion

The first requirement to justify arrest and provisional detention is the persistence of a reasonable suspicion. The ICC has quoted ECtHR case law in support of this factor’s relevance in interim release determinations. In practice, most decisions gloss over this requirement by referring to the decision on the arrest warrant, sometimes noting the absence of evidence negating this. Similarly, once the charges are confirmed, the reasonable suspicion can be based on that decision, since it requires a higher standard of proof.

4.2. Reasons necessitating arrest and detention

4.2.1. Flight risk

Like before the ad hoc Tribunals, the ICC has often relied on the gravity of the crimes charged as a factor increasing the risk of flight. Quoting the ECtHR, a Single Judge has

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320 See eg ICC, Decision on the Application for Interim Release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga (ICC-01/04-01/06-586), 3 October 2006, 5-6; ICC, Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, Prosecutor v. Katanga and Ngudjolo (ICC-01/04-01/07-345), 27 March 2008, 7-8; ICC, Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), Prosecutor v. Lubanga (ICC-01/04-01/06-1359), 29 May 2008, 14; ICC, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Appli-
emphasized that gravity alone cannot suffice to justify lengthy periods of pre-trial detention, particularly because the accused still benefits from the presumption of innocence.\textsuperscript{321} A similar consideration can be found in another decision, which, however, at the same time emphasized that the criterion of gravity ‘cannot be underestimated here since the penalty for the charges confirmed … might be such as to encourage the accused not to appear’.\textsuperscript{322} The gravity of the crimes charged has thus been an important consideration in denials of interim release requests.

In \textit{Gbagbo}, the defence argued that all accused persons before the ICC are likely to face grave charges, and that therefore, the Pre-Trial Chamber’s reliance on this factor was
unfair because it amounted to an irrebuttable presumption against release. The Appeals Chamber dismissed this line of argumentation because ‘whether charges may be similarly serious in respect of some or all other suspects who are brought before the Court is irrelevant because even if this were the case, this does not detract from the fact that the charges against Mr Gbagbo are serious.’ Interestingly, the gravity of the charges were also relied on by the Single Judge in a case regarding offences against the administration of justice because the allegations related to ‘attempts to obstruct an ongoing case’, even though these offences are undeniably less serious than the core crimes in the Court’s jurisdiction. The Appeals Chamber has confirmed these decisions because, although these offences could not be equated with the core crimes under the Statute, the Pre-Trial Chamber had provided sufficient reasoning as to the gravity of these specific crimes, and its relation to its decision not to grant interim release. Judge Ušacka, however, dissented, relying, among other things, on the limited gravity of the offences in this case, as compared to the core crimes over which the ICC has jurisdiction. Relying on case law of the ECtHR, she argued that the case had to be distinguished from other ICC cases, because ‘cases of alleged core crimes may have less or no relevance if considered in the context of offences against the administration of justice.’

Another variety of this argument has been that the increased awareness of the charges and the evidence increases flight risk. Similarly, the confirmation of charges has been found to increase the risk that an accused will abscond, since it increases the likelihood of conviction and thereby the risk of flight, as do rejections of challenges to the admissibility of the case. Furthermore, an accused’s increased awareness of the evidence against her/him increases flight risk, while the alleged existence of exculpatory evidence has not been accepted as a factor that diminishes such risk. Finally, the imminence of the commencement of trial has been considered to weigh against interim release.

Second, factors pertaining more concretely to the personal situation of an accused person have also been cited frequently. Accused who have evaded justice in the past are considered a heightened flight risk. Ntaganda alleged his voluntary surrender lessened his flight risk, but the Pre-Trial Chamber attached more weight to the fact that he had evaded justice for around seven years prior to that, and it therefore doubted the genuineness of his surren-

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Several accused have submitted arguments concerning their intent to surrender voluntarily, but these have been dismissed as hypothetical and mostly irrelevant.336 Furthermore, like in IHRL, international contacts of accused persons are often considered an important factor increasing flight risk.337 In Mbarushimana, the existence of an international support network, theoretically able to provide financial support to the accused was considered an important factor militating against release.338 In such cases, no concrete proof is required of indications that the accused will use such a network, or that s/he has previously done so. Similarly, in Gbagbo, the Single Judge weighed the existence of an extensive support network in Ivory Coast, which was committed to the ‘liberation’ of former president Gbagbo, as increasing the risk of flight.339 Similarly, the extensive network of co-accused

Bemba has consistently been relied on in decisions denying interim release to (former) members of his defence team who were charged with offences against the administration of justice.\(^\text{340}\) Furthermore, the financial position of accused persons, if affluent, has also been considered a factor militating against release,\(^\text{341}\) as well as their possible influential or high political position.\(^\text{342}\) Personal assurances by the accused of his intention to return for trial have rather consistently been considered of limited value to interim release decisions.\(^\text{343}\)

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\(^342\) ICC, Decision on the “Demande de Mise en Liberté Provisoire de M. Jean-Pierre Bemba Gombo Afin d'Accomplir ses Devoirs Civiques en République Démocratique du Congo” of 2 September 2011, Prosecutor v. Bemba (ICC-01/05-01/08-1691), 2 September 2011, 22 ("there is no way for a Chamber to know whether a
The defence’s arguments related to the moral character and high education of the accused were rejected by the Pre-Trial Chamber in *Bemba et al.* However, the Appeals Chamber, relying on case law of the ECtHR and of the ad hoc Tribunals, has considered that ‘personal circumstances of the suspect such as the suspect’s education, professional or social status may be relevant to assessing whether or not a suspect will appear before the Court.’

Furthermore, a number of other concerns have been seen as factors militating against release. For example, release to a country in the Schengen zone was thought to significantly increase flight risk, since the absence of border control makes it easier to move between different countries. Similarly, travel intentions to a state that is not a party to the Rome Statute is telling the truth when he or she promises to return to custody if granted provisional release.’; 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* (ICC-01/05-01/08-1789-Red), 27 September 2011; ICC, Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-180-Red), 13 July 2012, 55; ICC, Decision on the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”, *Prosecutor v. Bemba Gombo et al* (ICC-01/05-01/13-259), 14 March 2014, 29; ICC, Decision on the “Requête de mise en liberté submitted by the Defence for Jean-Jacques Mangenda”, *Prosecutor v. Bemba Gombo et al* (ICC-01/05-01/13-261), 17 March 2014, 26. However, see also 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* (ICC-01/05-01/08-475), 14 August 2009, 66, where the personal guarantees were considered insufficient on their own, but a possibly relevant factor; however, the above-quoted decisions did not follow this approach.


ute have been considered to militate strongly against release, since non-parties are under no obligation to cooperate with the court.347

Another contentious issue has been the importance of state guarantees for a determination of flight risk. The absence of state guarantees has frequently been held to militate against release.348 The first ICC decision related to provisional release declined to consider the substance of the request because the defence had failed to indicate to which state the accused sought release.349 This suggests the defence must ensure that a state is able and willing to receive the accused, which finds no explicit support in the Statute and RPE.

The importance of State guarantees was reiterated in Bemba, where the Single Judge noted that none of the countries to which the accused sought release appeared ready to accept him, or to provide guarantees to ensure his reappearance before the Court, which was considered highly problematic given the absence of enforcement power with the Court, and its dependence on state cooperation in that regard.350 The Appeals Chamber subsequently held that ‘a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.’351 This latter finding was a response to the conditional granting of interim release by the Single Judge to Bemba. In her decision, the Single Judge acknowledged the reliance of the ICC on state cooperation due to its ‘operational environment and lack of enforcement mechanisms’.352 The Judge then recalled state parties’ obligation to cooperate with the Court and noted that the absence of guarantees ‘cannot weigh heavily’

347 ICC, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, Prosecutor v. Bemba (ICC-01/05-01/08-323), 16 December 2008, 55.
350 ICC, Decision on Application for Interim Release, Prosecutor v. Bemba (ICC-01/05-01/08-403), 14 April 2009, 47-49; 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 (ICC-01/05-01/08-631), 2 December 2009, 107, where the Appeals Chamber noted ‘that the International Criminal Court exercises its functions and powers on the territories of States Parties, and as such 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 Court are enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective.’
351 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 (ICC-01/05-01/08-631), 2 December 2009, 106.
352 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 (ICC-01/05-01/08-475), 14 August 2009, 85.
against release and that such guarantees are not a ‘prior indispensable requirement for granting interim release; rather they provide assurance to the Single Judge.’

Still, she conceded that state cooperation is essential to the effectiveness of the Court and that therefore, the Court had to seek state observations on issues like these, which she requested for, thus deferring the decision on possible release until after a hearing with the parties, participants, and the states concerned. This decision was quashed on appeal, essentially because the Appeals Chamber disagreed with the Single Judge’s finding of a material change in circumstances. However, the Appeals Chamber emphasized the central importance of state cooperation and held that ‘[w]ithout such cooperation, any decision of the Court granting conditional release would be ineffective’.

The centrality of state guarantees in interim release decisions has been criticized as a ‘wrong and dangerous track’, since it makes the protection of the rights of accused persons conditional upon ‘highly uncertain factors’ such as states’ willingness to receive accused persons. Similarly, it has been held that ‘a person’s liberty should not depend on practical arrangements’. On the other hand, the unique character of an ICT necessarily makes it dependent on states for practical matters such as interim release.

Several decisions focused on the question whose responsibility it is to designate a state for release. For example, a Chamber considered assurances from an undisclosed state that appeared willing to receive Bemba as insufficient to negate the flight risk. The Appeals Chamber overturned this and found that the Chamber had failed to appreciate the fact that the undisclosed state had conceded to Bemba’s request for a monitoring system while on release, and for assurances guaranteeing his return to the court. Specifically, the Appeals Chamber considered that the Chamber had erred in dismissing the state’s observations because ‘it is for the Chamber, and not for the receiving State, to impose conditions (…) Accordingly, in a situation where a Chamber has not (yet) identified specific conditions which it

353 ibid, 88.
354 ibid, 90.
356 Sluiter (n 266), 265.
considers appropriate to impose, a State willing to accept a detained person can do little more
than indicate its general willingness and ability to implement conditions.’

In a subsequent decision, the Chamber again denied that it had an obligation to con-
sult a host state, in that case the DRC, because the granting of conditional release was a mat-
ter for its own discretion. Since it was not convinced any conditions could sufficiently allevi-
ate the accused’s flight risk, it declined to use its discretionary power to grant conditional
release. The Appeals Chamber accepted this reasoning, and clarified that its previous deci-

sion had not indicated a ‘general obligation on the Trial Chamber to seek observations in the
case of doubt as to submissions by a State in relation to interim release.’ For similar rea-
sons, the Single Judge in Mbarushimana denied a defence request for an order to France to
cooperate with its request for interim release. According to the Judge, ‘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.’

It has thus far proven difficult for accused persons before the ICC to identify states
willing to receive them. In that regard, the ICC appears to take a proactive stance, and
seeks to conclude agreements on interim release with states in order to enable the transfer of
provisionally released persons to states parties. Thus far, the ICC has concluded such an
agreement with Belgium in 2014, and professes to be committed to the procurement of simi-

360 ibid, 53.
361 ICC, Decision on the “Demande de Mise en Liberté Provisoire de M. Jean-Pierre Bemba Gombo Afin d’Ac-
complir ses Devoirs Civiques en République Démocratique du Congo” of 2 September 2011, Prosecutor v.
Bemba (ICC-01/05-01/08-1691), 2 September 2011, 26.
362 ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of
2 September 2011 entitled “Decision on the Demande de Mise en Liberté de M. Jean-Pierre Bemba Gombo Afin
d’Accomplir ses Devoirs Civiques en République Démocratique du Congo”, Prosecutor v. Bemba (ICC-01/05-
01/08-1722), 9 September 2011, 38.
363 ICC, Decision on the “Defence Request for an order for State Cooperation Pursuant to Article 57(3)(b) of the
364 See eg ICC, Decision on “Narcisse Arido’s request for interim release”, Prosecutor v. Bemba et al (ICC-
01/05-01/13-586), 24 July 2014, 27, where the Single Judge noted that the countries to which the accused
sought release, France and the Netherlands, had shown no willingness to accept the accused.; similarly 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 Af-
rica”, Prosecutor v. Bemba (ICC-01/05-01/08-631), 2 December 2009, where the Appeals Chamber found that
the Pre-Trial Chamber had erred in granting conditional release without identifying a state willing and able to
accept the accused into its territory, and to enforce possible conditions; see also ICC, Judgment on the Appeal of
Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 entitled “Deci-
sion on the Demande de Mise en Liberté de M. Jean-Pierre Bemba Gombo Afin d’Accomplir ses Devoirs
Civiques en République Démocratique du Congo”, Prosecutor v. Bemba (ICC-01/05-01/08-1722), 9 September
2011, 38, where the Appeals Chamber attached much weight to the fact that in the present case, the state to
which the accused sought release had not indicated its willingness or ability to receive the said person.
lar agreements with other states. The Court has been engaged in such efforts since 2011 and a draft model agreement has been circulated amongst states parties. Additionally, the Court has approached states regarding interim release on an ‘ad hoc basis’. Unfortunately, neither the model agreement nor the agreement with Belgium is publicly available, as a result of which it is impossible to assess their content. According to an ICC Press Release, the agreement ‘regulates the procedure for the interim release of an ICC detainee and in particular formalizes the necessary consultations with the Court’s Registry with the Belgian authorities, the latter examining the Court’s requests on a case-by-case basis.’ The Single Judge in Bemba et al emphasized this case-by-case nature of interim release assessments in the context of this agreement and denied that this agreement constituted a ‘changed circumstance’ within the meaning of Article 60(3). The Judge noted that Belgium had similarly emphasized that the agreement did not modify the legal framework applicable to the Judge’s decision whether or not to grant provisional release. More importantly, the agreement did not indicate an ‘unconditional availability and willingness’ of Belgium to accept provisionally released persons on its territory, let alone an ‘obligation on their part to do so’. The agreement thus seems procedural in nature and does not necessarily increase Belgium’s willingness to accept provisionally released persons on its territory.

Thus far, the absence of state guarantees has been a prime justification for provisional detention, which warrants the conclusion that, like before the ad hoc Tribunals, state guarantees are a quasi-requirement for interim release before the ICC. An interesting recent development was the Decision of the Single Judge in Bemba et al to actively request observ-

365 ICC Website: ‘Belgium and ICC sign agreement on interim release of detainees’ (10 April 2014) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr993.aspx> accessed on 28 August 2014; see also ‘Briefing paper: The Importance of Cooperation for the Effective Functioning of the ICC and Achieving its Mandate’ (last accessed 28 August 2014) <http://scm.oas.org/pdfs/2013/CP30697-1.pdf>, 6, where it is stated that ‘it is a priority for the Court to secure interim release agreements with States willing to accept persons on interim release to preclude such an eventuation. The Registry has circulated a model exchange of letters on interim release and has entered discussions with Belgium with a view to concluding an agreement.’ An example of such exchange of letters was signed on 4 August 2014 by the ICC and the Parliament of Mercosur: Exchange of Letters between The International Criminal Court and The Parliament of MERCOSUR, 4 August 2014 (last accessed 28 August 2014) <http://www.pgaction.org/pdf/Acuerdo-CPI-eng.pdf>, 2, where one of the terms of reference includes the expression of the intent to conclude bilateral cooperation agreements with the ICC, including on provisional release.


367 ibid.


369 ICC, Decision on the first review of Jean-Jacques Mangenda Kabongo’s detention pursuant to Article 60(3) of the Statute, Prosecutor v. Bemba et al (ICC-01/05-01/13-612), 5 August 2014, 32.

370 ibid.

371 De Meester (n 81), 921.
tions from states to which the accused persons desired to be provisionally released.\footnote{ICC, Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, \textit{Prosecutor v. Bemba et al} (ICC-01/05-01/13-683), 26 September 2014.} This resulted in the only decision thus far where the ICC has granted interim release.\footnote{ICC, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, \textit{Prosecutor v. Bemba et al} (ICC-01/05-01/13-703), 21 October 2014; see further, section 4.4. below.}

\subsection*{4.2.2. Risk of obstruction and danger to victims or witnesses}

the proceedings.377 While the ICTY increasingly emphasized that generalized concerns did not suffice and that evidence of concrete danger was important, the ICC has accepted that ‘feelings of insecurity voiced by the victims’, militated against release of the accused.378 Furthermore, the volatile security situation in the DRC has been held to increase the risk of interference.379 In addition, previous instances of witness intimidation have been accepted to further exacerbate such concerns, even though there was no evidence that the accused had been involved in these matters.380 The influential and powerful position of accused persons has also been considered to increase the danger they might intimidate witnesses.381

However, the ICC has increasingly recognized that such concerns have to be concrete, rather than general. For example, in Katanga and in Ngudjolo, there was evidence of supporters of the accused being connected to the threatening of victims or witnesses.382 Later, however, a Chamber stressed that these allegations by the Prosecution of Ngudjolo’s involvement in witness intimidation and such had not been specified or established, so that it could not be held to militate against release.383 This suggests that Chambers increasingly demand concrete evidence of a connection of the accused to any possible danger of witness intimidation. In Bemba, the Single Judge ruled out allegations of witness interference because these had not

been substantiated. The submissions of the Prosecutor ought to have been based on more concrete information, relying on case law of the ECtHR and the ICTY to that effect. In a later decision, the Single Judge considered a number of actual instances of witness intimidation to militate against release, despite the fact that it had not been proven that the accused was implicated in any way. The Appeals Chamber, however, subsequently emphasized that Article 58(1)(b)(ii) requires ‘that there must be a link between the detained person and the risk of witness interference.’ Similarly, the absence of evidence of the accused having ever intimidated witnesses has been considered to diminish the risk that s/he poses any danger. However, one accused’s ‘history of violence’ was considered to increase the risk of obstruction. In Bemba et al, the accused persons were suspected of having obstructed ICC proceedings, and there was also evidence of their intention to do so again, which established a risk of further obstruction. Accordingly, the Single Judge held that ‘the very nature of the crimes at stake makes it obvious that detention is the only context allowing the effective management of these risks’, in particular because there was evidence that the accused persons had continued with the commission of these offences when they were already in the custody of the Court.

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384 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 (ICC-01/05-01/08-475), 14 August 2009, 73.
385 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 (ICC-01/05-01/08-475), 14 August 2009, 72.
4.2.3. Risk of reoffending

Since the three conditions in Article 58(1)(B) are alternative, Chambers do not have to consider all three when they decide to deny interim release: the satisfaction of one suffices. As a result, the third condition was not considered until 2009, where the stable situation in the Central African Republic was taken to indicate that there was little to no danger that the release of the accused would lead to further crimes. However, in *Mbarushimana*, this factor was employed as a reason to deny release for the first time. This related to the specific crimes to which the accused could continue to contribute ‘by organising and conducting an international campaign through media channels’. This danger, combined with the fact that his ability to have internet and telephone access could not easily be monitored created a serious risk of reoffending. In *Gbagbo*, the risk of reoffending was also cited as a reason to deny release, because the accused had an extensive support network, including his political party, which he could use to commit further crimes. In *Bemba et al*, there was a logical overlap between the risk of obstruction and of reoffending, since the offences the accused were charged with were obstruction of the proceedings. In addition, the (imminent) closing of the main case against Bemba did not lessen these risks, because the case might be reopened, and a similar risk of obstruction of the contempt proceedings existed.

4.3. Conditional release

It is unclear whether conditional release is a separate institution under the ICC’s legal framework, additional to interim release, or whether it is merely the power of a Chamber to attach
conditions to the interim release of an accused person. In *Mbarushimana*, the Chamber considered that no form of monitoring or other conditions attached to the accused’s possible release could alleviate its concerns that he would pose a danger to victims and witnesses or continue with the commission of crimes.\(^{397}\) Attaching conditions to release can be a means to compensate for the risks that contribute to the necessity of the accused’s continued detention. For example, if the accused poses a flight risk, certain conditions attached to his release, such as restriction of movement, handing in his passport, or daily reporting to a police station could alleviate such risk, thus enabling release. The Appeals Chamber confirmed this reading of the relevant provisions, stating that ‘conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under Article 58(1)(b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in Article 58(1)(b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release.’\(^{398}\)

In addition, the Appeals Chamber found that a Trial Chamber has a duty to seek further observations from a state once it has expressed its ability and general willingness to receive an accused person and enforce conditions, because of the fundamental nature of personal liberty.\(^{399}\) Subsequently, the Chamber still refused release because it considered possible conditions insufficient to mitigate the risks the accused’s release would entail.\(^{400}\) Subsequently, the Appeals Chamber clarified that the obligations its previous judgment referred to were only triggered upon the satisfaction of three cumulative conditions: first, the Chamber must already be considering conditional release, second, a state must have indicated its ability and willingness to receive an accused, and third, the Chamber must be unable to come to a decision based on the available information and hence require more observations from the


The ICC has consistently rejected applications for conditional release. For example, in \textit{Gbagbo}, conditional release was rejected because the mere possibility for the accused to communicate with members of his support network could enable him to endanger victims and witnesses, to abscond, or to commit further crimes.\footnote{ICC, Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”, \textit{Prosecutor v. Gbagbo} (ICC-02/11-01/11-180-Red), 13 July 2012, 52; ICC, Decision 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} (ICC-02/11-01/11-278-Red), 26 October 2012, 79.} Similarly, conditional release for medical reasons was found unnecessary because the accused could receive proper treatment in the detention center or at least in the host country.\footnote{ICC, Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment, \textit{Prosecutor v. Gbagbo} (ICC-02/11-01/11-180-Red), 13 July 2012, 74; confirmed on appeal: ICC, Decision 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} (ICC-02/11-01/11-278-Red), 26 October 2012, 80.} Finally, as has been stated in the above, the Single Judge, in \textit{Bemba et al}, initially considered that no conditions could alleviate the risk of further obstruction, and that detention was the only way to achieve this.\footnote{ICC, Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment, \textit{Prosecutor v. Gbagbo} (ICC-02/11-01/11-180-Red), 13 July 2012, 74; confirmed on appeal: ICC, Decision 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} (ICC-02/11-01/11-278-Red), 26 October 2012, 80.}

4.4. Review of the length of detention: Article 60(4)

Article 60(4) enshrines a separate obligation for the Pre-Trial Chamber to ensure that the overall period of pre-trial detention does not become ‘unreasonable’ due to ‘inexcusable delays by the Prosecution’. This has been held to be in line with the right to be tried within a reasonable time as an internationally recognized human right enshrined in the ICCPR, ACHR

and ECHR. Before the ICC, unreasonably lengthy detention can thus constitute a separate and additional factor warranting the release of an accused. The ICC therefore distinguishes its review pursuant to Article 60(2) or (3), which entail review of the continued existence of the necessity of detention, from its review pursuant to Article 60(4), which focuses on the reasonableness of the length of detention.

Assessments of the unreasonableness of the length of provisional detention as such are more appropriately discussed in Chapter 6 on the right to be tried without undue delay. For present purposes, it is relevant to note that unreasonable delays, if caused by the Prosecution, may constitute a reason to grant interim release. However, in reviewing the overall period of detention, the complexity of cases has mostly been considered an almost absolute justification for the length of the pre-trial proceedings. As a result, the ICC has not to date found the length of any of its proceedings to have been unreasonable. However, in Bemba et al,
the Single Judge issued the only decision thus far that granted interim release, in order to prevent the length of provisional detention from becoming unreasonable.411

Strictly speaking, Article 60(4) is concerned only with delays caused by the Prosecution. In that regard, Chambers have considered, for example, the swift behavior of various court organs as mitigating possible delays.412 Furthermore, in Lubanga, the Chamber did note delays caused by the Prosecution, but considered that additional factors beyond his control also significantly contributed to the delays.413 In Bemba et al, the defence raised allegations of delay, which were argued to be particularly pressing given the relatively limited gravity of the offences charged in that case, which did not relate to the core crimes under the Statute, but to offences against the administration of justice. The Single Judge, however, initially rejected these allegations by referring to his previous decisions regarding the necessity of detention. He did not take the additional passage of time since his previous decision into account, even though the defendants had, by then, already spent almost one fifth of their possible maximum sentence in provisional detention.414 Instead, the Judge held that even if there had been delays, these were attributable to the Dutch authorities, and not to the Prosecutor.415 Nevertheless, in a subsequent decision, the Judge invited observations from the states to which the defendants sought release, ostensibly on the sole basis that their provisional detention might exceed a reasonable time.416 This evinces a more proactive approach on the part of the Pre-Trial Chamber in preventing unduly prolonged pre-trial detention, as well as in seeking state cooperation to ensure the possibility of interim release. Interestingly, the decision did not discuss whether detention was still justified under the Statute, and based its apparent desire to allow interim release on the need to prevent undue delay, regardless of his previous findings that any delays in this case were not attributable to the Prosecutor. In a subsequent

413 ICC, Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), Prosecutor v. Lubanga (ICC-01/04-01/06-1359), 29 May 2008, 17.
416 ICC, Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, Prosecutor v. Bemba et al (ICC-01/05-01/13-683), 26 September 2014, 3.
decision, the Single Judge proceeded to grant interim release to four accused persons in order to prevent the period of their provisional detention from becoming unreasonable. The Judge held that it would be unreasonable to detain them further, because the length of their provisional detention would become disproportionate to the maximum penalty they could receive.\footnote{ICC, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, \textit{Prosecutor v. Bemba et al} (ICC-01/05-01/13-703), 21 October 2014, 4.} The fact that the delays in this case had not been attributable to the Prosecutor did not ‘relieve the Chamber of its distinct and independent obligation… to ensure that a person is not detained for an unreasonable period prior to trial under Article 60(4) of the Statute’.\footnote{ibid, 5.}

4.5. Burden and standard of proof

Before the ICC, the Prosecution bears both the initial burden of establishing that the conditions in Article 58(I) exist when it requests an arrest warrant, as well as to prove their continued existence in the context of applications for interim release and reviews of detention.\footnote{See eg ICC, Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pretrial Detention of Germain Katanga, \textit{Prosecutor v. Katanga and Ngudjolo} (ICC-01/04-01/07-330), 18 March 2008, 5-6; similarly ICC, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”\textquotedblright, \textit{Prosecutor v. Bemba Gombo et al} (ICC-01/05-01/13-558), 11 July 2014, 69.}\footnote{ICC, Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pretrial Detention of Germain Katanga, \textit{Prosecutor v. Katanga and Ngudjolo} (ICC-01/04-01/07-330), 18 March 2008, 7.} This has been found to be in line with internationally recognized human rights, specifically with case law of the HRC, IACtHR, and ECtHR.\footnote{ICC, Decision on the Application for Interim Release, \textit{Prosecutor v. Bemba} (ICC-01/05-01-08-321), 16 December 2008, 31; ICC, Decision on Application for Interim Release, \textit{Prosecutor v. Bemba} (ICC-01/01-05-08-403), 14 April 2009, 36.} In addition, this has been considered to confirm that before the ICC, detention is not the rule but the exception.\footnote{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...} The Appeals Chamber has noted that, in relation to an Article 60(3) detention review, the Prosecution bears the burden of proof to demonstrate that there has been no change in circumstances that might warrant the release of the accused. Concretely, ‘the Prosecutor must, for each periodic review of detention, make submissions as to whether there has been any change in the circumstances that previously justified detention and he must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release.’\footnote{ICC, Decision on the Application for Interim Release, \textit{Prosecutor v. Bemba} (ICC-01/05-01-08-321), 16 December 2008, 31; ICC, Decision on Application for Interim Release, \textit{Prosecutor v. Bemba} (ICC-01/01-05-08-403), 14 April 2009, 36.} Similarly, the Appeals Chamber has held that the Pre-
Trial Chamber may not limit itself to arguments raised by the defence, which similarly implies that the defence does not bear the burden of proof.\textsuperscript{423}

The review under 60(3), which focuses on the question whether circumstances have changed, has been held not to ‘require the Chamber to make a decision on detention \textit{ab initio} … Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions.’\textsuperscript{424} This illustrates the difference between requests for interim release pursuant to Article 60(2), and reviews of detention pursuant to Article 60(3). The latter’s standard of review does appear to, in practice, impose a burden on the defence as well: namely of adducing evidence that circumstances have changed. This is a consequence of the fact that the burden to prove that circumstances have not materially changed is easier to satisfy than to prove that they have. As a result, even though most decisions by the ICC profess to impose the burden of proof on the Prosecutor, it is still primarily for the defence to prove that circumstances have changed, because it is easier for the Prosecutor to assert that there is no evidence of a change in circumstances.\textsuperscript{425} This is illustrated by a 2011 decision where the Chamber repeatedly considered there was ‘no evidence of a change in circumstances’.\textsuperscript{426}

The general approach to the question of changed circumstances evinces an implicit reversal of the burden of proof. If Chambers revert to a previous decision, for example on the arrest warrant, and accordingly find that there is no evidence that circumstances have changed since, it is essentially asking the defence to prove that the accused is entitled to release, instead of asking his accusers to prove that his detention is still justified.\textsuperscript{427} It has therefore been concluded that ‘the onus of proving (substantially) changed circumstances is on the

\textsuperscript{423} ICC, Decision on the first review of Fidèle Babala Wandu’s detention pursuant to Article 60(3) of the Statute, \textit{Prosecutor v. Bemba Gombo et al} (ICC-01/05-01/13-538), 4 July 2014, 2; ICC, Sixth decision on the review of Laurent Gbagbo’s detention pursuant to Article 60(3) of the Rome Statute, \textit{Prosecutor v. Gbagbo} (ICC-02/11-01/11-668), 11 July 2014, 18; ICC, Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to Article 60(3) of the Statute, \textit{Prosecutor v. Bemba et al} (ICC-01/05-01/13-611), 5 August 2014, 2.


\textsuperscript{425} Trotter, ‘Pre-Conviction Detention in International Criminal Trials’ (n 159), 358; De Meester (n 81), 898.


\textsuperscript{427} 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”, Dissenting Opinion of Judge Gheorgios M. Pikis, \textit{Prosecutor v. Bemba} (ICC-01-05-01-08-323), 16 December 2008, notably, 27, 35-36, where Judge Pikis critically notes that ‘the Single Judge adopts the view that it is for the person to prove the need for his liberty, and not for his accusers to substantiate the necessity for his incarceration’.

defence’.

Decisions by the Court do generally profess that the Prosecutor must bear the burden of proof, and the Appeals Chamber has criticized Pre-Trial Chambers decisions for insufficiently in-depth reasoning. However, several decisions on interim release rely on the evidentiary principle of ‘he who asserts must prove’, in that the decisions focus on the evidence adduced by the accused of alleged changed circumstances; instead of assessing whether the Prosecution has succeeded in establishing that the detention is still justified.

Similarly, the ICC has been criticized for requiring a rather low standard of proof for the Prosecution to establish the necessity of detention. First of all, the consistent reliance on the concern that through disclosure, the accused gains knowledge of the identity and location of witnesses is rather abstract and does not require actual indications of concrete danger. In addition, a 2008 Appeals Chamber decision considered that the risk of absconding was ‘not imaginary’, which appears to shift the burden to the defence to disprove that the risk of flight is not imaginary. As a result, even if it is for the Prosecution to establish flight risk, under a standard as low as ‘not imaginary’, it is difficult to speak of an actual burden.

4.6. Comparison and the ICC’s use of IHRL

4.6.1. Comparing the ICC’s approach to the right to liberty to IHRL

The ICC’s legal framework with regard to provisional detention constitutes an improvement from that of the ad hoc Tribunals in that it better protects accused persons’ right to liberty. Most fundamentally, the ICC Statute requires a reason for detention additional to the exist-

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428 Golubok (n 357), 306; Trotter, ‘Pre-Conviction Detention in International Criminal Trials’ (n 159), 358; see also ICC, Decision on Application for Interim Release, Prosecutor v. Bemba (ICC-01/05-01/08-403), 14 April 2009, 40, where the Single Judge concluded that ‘the defence failed to refute the grounds on the basis of which the Single Judge made her previous determination that the requirements of Article 58(1) [of the Rome Statute] remained valid’.

429 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 (ICC-01/05-01/08-1789-Red), 27 September 2011, see notably: 22-23, where the Trial Chamber reverted to its original decision reviewing Bemba’s detention in 2010, and found that the four reasons why it denied release in that instance, had not changed, while no submissions from the prosecution seem to be considered. Instead, the Chamber considered the defence’s allegations of changed circumstances, and found that these were insufficient to warrant a change in its findings on necessity of detention. See also ICC, Public Redacted Version of the 19 December 2011 Decision on the “Requête de Mise en Liberté Provisoire de M. Jean-Pierre Bemba Gombo”, Prosecutor v. Bemba (ICC-01/05-01/08-2022-Red), 3 January 2012, which only discusses whether the evidence adduced by the defence to support its application for interim release constitutes a change in circumstances or not; without considering whether the prosecution has established that continued detention is still necessary; ICC, Public Redacted Version of the 6 January 2012 Decision on the Defence's 28 December 2011 “Requête de Mise en Liberté Provisoire de M. Jean-Pierre Bemba Gombo”, Prosecutor v. Bemba (ICC-01/05-01/08-2034-Red), 19 January 2012.

ence of a reasonable suspicion. The reasons recognized as justifications for detention in the
ICC regime correspond to those recognized in IHRL: flight risk, risk of obstruction of the
proceedings, and risk of reoffending.\footnote{Although IHRL recognizes an additional reason for detention: risk of public disorder. See \textit{supra} section 4.2.} Although it is for the accused to request interim release, the mandatory consideration of whether detention is necessary in the arrest warrant stage and the periodic reviews of detention alleviate this concern. In addition, the Prosecution bears the burden of proof regarding the reasons necessitating detention in the context of both interim release request determinations and of periodic reviews of detention. As such, the ICC’s legal framework governing provisional detention and release is in line with IHRL.\footnote{De Meester and others (n 71), 341; however, see also Gordon (n 256), 692, who argues that the ICC incorporates a presumption in favour of detention and that the legal frameworks of both the ad hoc Tribunals and the ICC deviates from human rights law.}

However, several aspects of the ICC’s provisional detention and release practice raise questions from a human rights perspective. For example, the ICC’s interpretation and application of the risk of obstruction of the proceedings did not initially correspond to the requirement in IHRL that these risks must be substantiated with concrete evidence of actual likelihood of victim intimidation or other forms of obstruction. Instead, the ICC has accepted abstract concerns, such as feelings of insecurity of the victims as substantiating such a risk.\footnote{See \textit{supra} section 4.2.2.}

Furthermore, the ICC Statute only requires the Pre-Trial Chamber to review detention periodically. Although Trial Chambers initially held that this duty applies to them as well, they have generally not performed such a review upon the commencement of trial. This could be explained by the fact that the ICC Statute prohibits \textit{in absentia} trials, and detention is considered necessary to ensure the accused’s presence at trial. However, from a human rights perspective, detention can only be justified by ‘relevant and sufficient reasons’, and IHRL recognizes an exhaustive list of reasons that are relevant and sufficient. The principle of subsidiarity applies to the assessment of the necessity of detention, as a result of which the ICC should consider other ways of ensuring the accused’s presence at trial than detention.\footnote{See eg ECtHR, Judgment, \textit{Wemhoff v. Germany} (App No 2122/64), 27 June 1968, 8-9: ‘[i]t is impossible to see why the protection against unduly long detention on remand which Article 5 (Art 5) seeks to ensure for persons suspected of offences should not continue up to delivery of judgment rather than cease at the moment the trial opens.’} The Court’s willingness to do so in certain cases is shown by its decision to make use of summons to appear, instead of arrest warrants.\footnote{On this possibility, see eg De Meester and others (n 71), 317.} In such cases, accused persons remain at liberty throughout the investigation and the trial, and will be required to travel to The Hague to attend trial hearings. However, the decision to make use of summons instead of an arrest war-
rant is made by the Prosecutor, subject to review by the Pre-Trial Chamber. There is no precedent in international criminal justice for granting release to defendants when the trial is ongoing. However, there is no reason, in principle, why an accused person could not be released during trial where the Chamber is convinced that detention is no longer necessary for one of the three reasons laid down in Article 58(1). If these risks no longer exist, alternative ways of ensuring the accused’s presence at trial should be considered. Deprivation of liberty should only be ordered if it is necessary to minimize the risks referred to in Article 58, which corresponds to IHRL, and not to ensure that the accused attends his trial. Practically, however, the Netherlands, as host state of the ICC, has refused to accommodate ICC defendants during their trial in ways other than provisional detention. In addition, interim release could be considered during periods of court inactivity, such as recess, or during the drafting of the judgment. In similar circumstances, the ICTY habitually releases suspects, particularly those who have been in detention for long periods, but the ICC has not yet followed this practice.

Furthermore, the ICC’s approach to the issue of delay in the context of lengthy provisional detention can be criticized from a human rights perspective. First, the ICC’s assessments of whether a trial or a period of provisional detention has been unduly prolonged do not correspond to the requirements for reasonable lengths of detention that apply under IHRL. For present purposes, it is relevant to note that the ICC Statute only recognizes lengthy provisional detention as a ground for release if the delays can be attributed to the Prosecutor. This fails to acknowledge the possible responsibility of other Court organs for the delay. Insufficient numbers of judges or courtrooms available and budgetary problems might also cause delays, as the precedents of the ad hoc Tribunals have shown. On top of that, the issue of delay has been given limited to no attention in the ICC’s case law thus far, despite several instances of prima facie lengthy periods of provisional detention. For example, in Bemba et al, the defence had raised the issue of delay, but the Pre-Trial Chamber initially held that even if there had been issues of delay in that case, those would have been attributable to the Dutch authorities investigating the offences. This begs the question of the ICC’s own responsibility for the length of provisional detention. Such an approach also does little justice to the fact that, although the ICC is heavily dependent on states for investigations, the responsibility to take decisions on detention is entirely its own. Furthermore, in Gbagbo, dissenting Judge Ušacka criticized the Pre-Trial Chamber for failing to consider the impact of its

436 See further infra Chapter 6.
437 De Meester and others (n 71), 343.
438 See infra Chapter 6, section 3.2.4.
decision to delay the confirmation of charges hearing on the accused’s right not to be detainted for an unreasonable period. She referred extensively to ECtHR case law and to human rights treaties to justify her conclusion that Article 21(3) creates an obligation for the Court to ensure the reasonableness of the length of provisional detention. She also noted that the obligation enshrined in Article 60(4) was too narrow, because it only pertained to delays attributable to the Prosecutor. The majority of the Appeals Chamber, however, did not consider the issue of delay at all. Furthermore, the ICC has been criticized for the lack of promptness of its appellate review of detention related decisions. Furthermore, it has rightly been noted that Article 60(4) is formulated in a discretionary way, so as to allow the Chamber to deny release even when it considers there has been an inexcusable delay. This may be at odds with IHRL, which appears to provide a stricter standard.443

Recent developments in Bemba et al suggest a turnaround in the ICC’s approach to the relevance of the length of detention in the context of interim release assessments. In that case, the Single Judge ordered the release of four of the accused persons in order to prevent the period of their detention from becoming unreasonable, regardless of the fact that these delays had not been caused by the Prosecutor. This is a welcome development from a human rights perspective. However, the case relates to persons accused of offences against the administration of justice, as a result of which its precedential value with respect to other—core crimes—cases may be limited. It thus remains to be seen whether or not the ICC will follow this approach in future cases.

Finally, the most problematic aspect of the ICC’s approach to interim release relates to the role of state guarantees in its decisions on this issue. Like the ad hoc Tribunals, the ICC has raised the presence of state guarantees to the status of an implicit requirement for release. Although the Court has stated that, in principle, it is not the responsibility of the accused to identify a state willing to receive him, in practice there can be no interim release without such

439 ICC, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to Article 60(3) of the Rome Statute”, Dissenting Opinion of Judge Anita Ušacka, Prosecutor v. Gbagbo (ICC-02/11-01/11-548-Red), 26 October 2013, 14.
440 ibid, 14: ‘in my view, Article 21 (3) of the Statute casts a broader obligation on the Pre-Trial Chamber to ensure the reasonableness of the period of pre-trial detention, including when deciding whether to adjoum the confirmation hearing or to decline to confirm the charges.’
441 See also Doran (n 96), 733.
442 Golubok (n 357), 308-309.
443 De Meester and others (n 71), 343, who argue that ‘under international human rights law, there is an unconditional entitlement to release in case there is no trial within a reasonable period of time’.
444 See supra section 4.4.
a state having been identified. This follows most clearly from the Court’s case law regarding conditional release. The Court will consider such conditional release where the risks enumerated in Article 58 are thought to exist, but could be alleviated through the imposition of conditions for an accused’s release. Conditional release can only be granted if a state willing and able to enforce these conditions has been identified. Although one Single Judge suggested that ICC States Parties’ obligation to cooperate with the Court could be interpreted as including an obligation to host defendants on interim release, the Appeals Chamber has not followed her interpretation. As a result, it seems that, in reality, decisions on accused persons’ possible interim release largely hinge on whether any state will be willing to receive them. At the same time, the ICC is in the process of securing agreements with states on interim release, and has concluded such an agreement with Belgium. The content of these agreements remains undisclosed to the public, as a result of which it is impossible to assess them. ICC case law suggests that these agreements do little to increase states’ willingness to actually receive provisionally released ICC defendants; rather, they regulate the applicable procedures for effecting interim release, once the state in question has agreed to it.

The absence of states willing and able to receive accused persons on their territory for interim release is one of the primary reason why the ICC has only provisionally released accused persons on one occasion, in a case that did not concern core crimes under the Statute. Although the legal framework before the ICC evinces a presumption in favor of release, this presumption has generally not led to a more liberal approach to release than before the ad hoc Tribunals. Where the Prosecution has requested the arrest of suspects and their continued provisional detention, Chambers have generally granted it. Although there is evidence of intent to implement a more liberal approach to detention, this has yet to lead to tangible results. As such, a de facto presumption in favor of detention seems to exist before the ICC.

The peculiarities of international criminal trials result in a situation where, if the Prosecution and the Chambers so desire, a justification for detention can always be found. Ac-

445 See supra section 4.2.1.
446 See supra section 4.3.
447 Trotter, 'Pre-Conviction Detention in International Criminal Trials’ (n 159), 368; see supra section 4.2.1.
448 See also Golubok (n 357), 308; Sluiter (n 266), 266, who argue that the Court should be more proactive in obliging states to host defendants on interim release on their territory.
449 See supra section 4.2.1.
451 With the exception of the Single Judge’s decision in Bemba et al to provisionally release four suspects accused of offences against the administration of justice: ibid.
cused persons generally face grave charges, necessarily accompanied by a real risk of a severe sentence, which can be used to justify a high risk of flight. Many defendants had influential positions in their home countries, are affluent and/or well connected, which similarly increases their flight risk. On top of that, many defendants originate from states where the security situation continues to be volatile, and many governments do not look favorably upon these defendants. This distinguishes the ICC from the ICTY, which, as the region became more stable and governments more cooperative, could count on the home states of defendants to be willing to receive them and enforce the conditions of their provisional release. Like the situation before the ICTR, most cases before the ICC do not share these characteristics. These factors genuinely increase the risk of flight of accused persons before the ICC, as a result of which the practical ‘presumption of detention’ before the ICC may be not so problematic from the perspective of IHRL. However, the provisional detention of accused persons before the ICC has been lengthy. The ICC should intensify its efforts to convince states, including the host state, that they should receive provisionally released persons. Only then will the ICC be able to avoid following in the ICTR’s footsteps.

4.6.2. The ICC’s use of IHRL on the right to liberty

Overall, the ICC’s law and practice regarding interim release indicates that the Court’s approach has been greatly impacted by IHRL. Its legal framework differs substantially from that of the Tribunals in that it requires the detaining authority to justify detention, based on reasons that correspond to IHRL. This shows the extent of legislative influence of IHRL on the legal framework of the ICC. In addition, the Court’s interpretation and application of these reasons bears a strong resemblance to the interpretation and application of these corresponding reasons by human rights courts and supervisory bodies, mainly the ECtHR. Even though the ICC does not always refer explicitly to sources of IHRL and rarely truly engages with the interpretation and application of these norms by human rights courts and supervisory bodies, its approach to interim release bears a strong imprint of IHRL.

Many ICC decisions on interim release have referred to provisions of human rights treaties and to case law of both the ECtHR and the IACtHR. However, these references have been perfunctory and generally did not impact on the Court’s interpretation and application of its legal framework governing interim release. For example, several decisions on interim re-
lease have recalled Article 21(3). However, these decisions did not further use IHRL in their reasoning. Similarly, many decisions have proclaimed that before the ICC, detention is not the legal rule but the exception and stated that this was in line with internationally recognized human rights. However, these decisions failed to refer to sources of IHRL and thus appeared to merely invoke this principle rhetorically.

Furthermore, some decisions have noted that aspects of the ICC’s legal framework governing interim release were in line with internationally recognized human rights. For example, the Appeals Chamber, citing Article 21(3), has relied on the ICCPR and the ECHR to substantiate the existence of an ‘internationally recognized human right to have the lawfulness of one’s arrest/detention judicially reviewed’, which it considered to be enshrined in Article 60 of the ICC Statute. However, the Appeals Chamber did not rely upon IHRL or interpretations thereof in the subsequent analysis and application of the statutory provisions. Furthermore, it has been noted that the gravity of the crimes charged could not be the sole reason justifying detention, which was supported by references to ECtHR case law to that effect. Similarly, a Single Judge supported her finding that the submissions of the Prosecution regarding the risk of obstruction should have been supported with more specific evidence by a reference to case law of the ECtHR. The fact that the ICC Statute imposes the burden of proof regarding the necessity of provisional detention on the Prosecution has also been held to be in line with internationally recognized human rights, based on case law of the HRC, the IACtHR, and the ECtHR. Finally, the Appeals Chamber has corrected the Pre-Trial Chamber’s refusal to assess the personal circumstances of an accused person because it


455 ibid, 72.

considered such circumstances relevant to an interim release determination, based on ECtHR case law.457

5. Conclusion

From the perspective of IHRL, the approach of the ICTs to the right to liberty in the context of provisional detention and release is a mixed bag. The ad hoc Tribunals’ practice does not conform to internationally recognized human rights, most fundamentally due to the *de jure* presumption in favor of provisional detention. At the same time, the law and practice of the ICTY in particular has been brought more in line with IHRL over the years. The requirement of exceptional circumstances for provisional release was removed, and the interpretation and application of the criteria for release have been increasingly interpreted and applied in accordance with internationally recognized human rights. However, several fundamental deviations, including the legislative presumption of detention and the fact that the defence mainly bears the burden of proof, have been maintained.

The ICC’s legal framework constitutes a major improvement from the perspective of IHRL. The detaining authorities bear the burden to justify the need for provisional detention, and there is no *de jure* presumption of detention. The legislative influence of IHRL clearly emanates from the Statute’s provisions governing provisional detention and interim release. On top of that, the ICC has often interpreted and applied its framework in a manner consistent with internationally recognized human rights, albeit often without explicitly referring to sources of IHRL. However, as has been shown above, several problems remain.

One of the main obstacles to the effective enjoyment of the right to liberty by defendants before the ICTs appears to lie in the latter’s dependence on states for the execution of all possible release they may order. Both the ad hoc Tribunals and the ICC have elevated the presence of state guarantees to an effective precondition for the granting of provisional release. This serves to explain the difference between the ICTY, which has granted provisional release to a substantial number of defendants, and the ICTR, which has not done so to date, and the ICC, which has granted release only once to four suspects of offences against the administration of justice. Although all ICTs have justified their refusal to grant provisional release by means of arguments that would arguably be admissible in IHRL, the impression persists that the practical impossibility of release, due to the unavailability of host-states, plays

an important though often implicit role in such decisions. The ICC’s efforts to procure interim release agreements is laudable in that regard, and it begs the question why the ICTR has not undertaken similar efforts in order to effectively protect the right to liberty of accused persons before it. Thus far, the ICC has concluded one such agreement, and its effects remain to be seen. In addition, the Court’s decision to conduct certain cases without detaining the accused persons, making use of summons to appear instead, is similarly laudable from the perspective of the right to liberty.

The fact that most international criminal defendants are provisionally detained can probably be justified in ways that would be admissible in IHRL. The particular context of international criminal justice makes that in many cases, there is a real risk of flight, or of obstruction of the proceedings, given the international nature of the case, the often relatively senior position of accused persons, and the severity of the anticipated sentence. As a result, the ICC’s and the ICTR’s general refusal to grant provisional release can probably be justified within the limits set by IHRL. However, the practice of the ICTY, which has become increasingly permissive towards provisional release, suggests that when the practical obstacles to release are removed, the approach to the necessity of the detention of accused persons changes accordingly. Therefore, the ICTs should ensure that their reasoning on provisional detention is truly based on the specific circumstances of each case, instead of employing a practical presumption in favor of detention that is inspired by implicit practical considerations.

This issue is particularly pressing given the length of provisional detention in numerous cases before the ICTR and now also before the ICC. For example, Kanyabashi has spent sixteen years in provisional detention before the ICTR, and his case is all but exceptional, which is illustrated by the fact that the average length of provisional detention before the ICTR is almost eight years.458 Before the ICTY, the average period of provisional detention is over four years, but there have been outliers of cases with seven years or more.459 Although the practice of the ICC thus far may be too limited to assess, it is clear that there have been and continue to be several instances of extensive periods of provisional detention.460 Alt-

458 See infra Chapter 6. In addition, some accused have spent periods of up to fourteen years in provisional detention. For example, Nyiramasuhuko and Nsabimana have spent almost 14 years in provisional detention.
459 For example, Vojislav Šešelj has been provisionally detained for eleven and a half years, until his recent provisional release, the decision on which was rendered after the official cut-off date for this thesis.
460 Lubanga and Katanga have both spent over six years in detention prior to the judgement in their case. Bemba has currently been detained for around six years as well, and, partly due to the ongoing proceedings regarding allegations of offences against the administration of justice, it is difficult to predict when the judgment will be rendered.
hough the lengths of some of these cases may not be solely attributable to the ICTs in question, such extensive periods of provisional detention are a particularity of international criminal justice that should arguably weigh heavily in favor of a more liberal regime governing provisional release, even more so because defendants are detained far away from their homes and families, which increases the hardship of such detention. Thus far, the ICTs have not recognized this. In IHRL, the length of provisional detention can constitute a ground for release, but the practice of the ICTs has not acknowledged this. Article 60(4) of the ICC Statute grants Chambers the discretion to order release if pre-trial detention is unreasonably prolonged due to inexcusable delays caused by the Prosecutor. However, this provision grants a discretionary power, and excludes delays caused by anyone other than the Prosecution. On top of that, the ICTs have rarely found their trials to have been unduly delayed, as a result of which an order on release on this ground continues to appear unlikely.