The shared protection of human rights at the International Criminal Court

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CHAPTER 3: Suspects and Accused

3.1. Introduction

The commencement of an ICC trial is not the beginning of international criminal proceedings, but the middle. Before a trial can start, the Court must conduct an investigation in which suspects are identified. During this process, interviews and interrogations will take place. This is followed by the issuance of arrest warrants, leading to the arrest and surrender of these suspects to the ICC. The time between surrender and the start of the trial can be lengthy, meaning that the possibility of release pending trial must be considered.

From this narrative, three distinct stages of proceedings can be discerned: investigation, arrest and surrender, and interim release. Each of these is shared in nature because they require the involvement of both the ICC and States. For an investigation to be effective in gathering evidence, identifying suspects, and acquiring information from suspects and witnesses, the ICC must work with the State in which the investigation is taking place. For suspects at large to be arrested and surrendered to the ICC for trial, the Court must ask States to carry out the arrests on its behalf. For those individuals who are in custody to be granted interim release where appropriate, the ICC must secure the cooperation of a State willing to host the accused for the duration of their release. These are all functions that the Court must carry out, and they all require the involvement of a State.

The actions undertaken by the ICC and States during the three stages of proceedings discussed all touch on the human rights of suspect. The interrogation of a suspect on the territory of a State engages the right to a fair trial. If fair trial is not respected at this early stage, it can cause irreparable harm to the fairness of the proceedings as a whole. For the other two factual stages (arrest and surrender and interim release), the right to liberty is central. In any situation where an individual is being deprived of his or her liberty, the proper processes and procedures must be followed to ensure that the detention is not arbitrary. Failures at this stage, as well as being problematic in and of themselves, will also impact on the fairness of the trial in general. Given that the ICC requires the assistance of States to carry out its functions and tasks at these stages of proceedings, it

also requires the assistance of States to ensure that the rights affected by these functions and tasks are properly protected.

The remaining sections of this Chapter examine each of the three stages in turn, setting out the obligations of the actors involved to protect these rights. Following this discussion of obligations, each factual stage will look at the potential implementation and structural problems that sharedness can give rise to, in order to ascertain whether the rights are adequately protected.

3.2. Interrogation of Suspects on the Territory of States

3.2.1. Introduction

Every criminal trial begins with an investigation. It is the time when ICC investigating teams are sent out to collect information, identify potential suspects, and gather evidence. An ICC investigation into a particular situation can be opened following a State or UN Security Council referral, or through the *propio motu* powers of the Prosecutor.[1] At the time of writing, 10 situations are under investigation at the ICC.

Conducting investigations is a crucial function of the ICC, and yet a great many investigative activities cannot be carried out by the ICC acting alone. If the ICC requires a search warrant, official documents, or needs to interrogate a suspect, it must seek the assistance of the State Party where the investigation is taking place (hereafter the 'investigation State'). All these activities are intrusive and have the potential to compromise the human rights of the suspect. At this stage in proceedings, the most pressing human rights concern for many accused is the right to a fair trial. Measures taken during this time can jeopardise the fairness of a possible future trial: 'the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation'.[2] This is particularly true of the interrogation element of the investigation phase, when the suspect is particularly vulnerable[3] and a lack of safeguards can lead to self-incrimination. For this reason, and because the investigation stage in general would be worthy of an entire study in and of itself,[4] the focus of this section will be on the interrogation part of the investigative phase.

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[1] Article 13 Rome Statute.

[2] International Law Commission, 'Report of the Commission to the General Assembly on the work of its forty-fifth session' (1993) Volume II Part Two Yearbook of the International Law Commission, 113.

[3] Application no. 1377/04 *Case of Pakshayev v Russia* (Judgment) 13 March 2014 §28.

[4] And indeed has been, although the focus was not on the shared aspects of investigations: Karel de Meester, *The Investigation Phase in International Criminal Procedure: In Search of Common Principles* (Academisch Proefscrift, 2014).

An important preliminary matter that must be addressed is whether fair trial protections apply to interrogations conducted during the investigation phase, at a time when a formal charge has not yet been brought. The issue is not without contention. Article 14(2) and (3) ICCPR list many of the substantive protections that make up the right to a fair trial (such as the right not be to compelled to testify against oneself, the right to an interpreter, etc.). These two paragraphs are prefaced with 'everyone charged with a criminal offence' and 'in the determination of any criminal charge' respectively, which points to the protections only being applicable once a charge has been brought. This is also true for the wording of Article 6 ECHR. However, the practice of the ECtHR does not endorse such an interpretation.

The ECtHR largely asserts the view that a lack of protection in the pre-trial phase renders trial protections meaningless.[5] It does acknowledge that not all of Article 6 ECHR can be relevant to the pre-trial phase, by which it is surely referring to rights very much linked to a charge, such as time and facilities for the preparation of a defence. With this caveat, the ECtHR jurisprudence supports an interpretation of Article 6 that makes it applicable to interrogations in the investigation phase if the fairness of the trial would otherwise be greatly prejudiced.[6] Building on this in the ICC context, De Meester uses the ECtHR case law to convincingly argue that Article 6(1) applies from the moment a person is considered a suspect by the ICC Prosecutor.[7] It is submitted that this is the correct stance; while not all fair trial protections can apply prior to a charge being brought, there are many that must apply. To find otherwise would contradict the often-pronounced notion that human rights should be practical and effective, and not merely theoretical or illusory.[8]

Having determined that fair trial protections apply to the interrogation phase, it is now possible to proceed to a discussion of the relevant obligations to protect this right. The two actors involved in this shared stage of ICC proceedings are the ICC and the investigation State. As the suspect is still on the territory of the investigation State (generally speaking), this is the only State involved. Following this discussion, the author will look at the obligations as a whole in order to determine whether there are any problems with human rights protection.

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[5] 'Guide on Article 6: Right to a Fair Trial (Criminal Limb)' European Court of Human Rights (2014) <http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> visited 3 June 2016.

[6] Application no. 13972/88 *Case of Imbrioscia v Switzerland* (Judgment) 24 November 1993 §36.

[7] De Meester (*supra* note 4), 369.

[8] This is often said by the ECtHR. See for example Application no. 6289/73 *Airey v Ireland* (Judgment) 9 October 1979, §24.

3.2.2. Obligations of the ICC

The Rome Statute constituted an innovation in detailing the rights of persons under investigation; Article 55 is entirely dedicated to this.[9] While the Statute of the Special Tribunal for Lebanon (STL) (enacted eight years after the Rome Statute) also has detailed investigation stage rights, the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) do not. Provision at these tribunals for rights at this stage was made in the Rules of Procedure and Evidence, and they were not as comprehensive as the Rome Statute.[10]

Article 55 is not phrased in terms of obligations, but rather in terms of rights for the individual suspect. The provision was designed to provide seamless protection for the suspect at all stages of the investigation.[11] It is structured in a pyramidal way:[12] paragraph (1) grants rights to all persons involved in an investigation, and paragraph (2) grants additional rights to suspects being interrogated. Together they cover all elements of fair trial that are relevant to this stage: right to counsel, right to an interpreter, right against self-incrimination, and the presumption of innocence. The latter right is protected in Article 55 through the right to remain silent. The obligations created by this article are the duties that correlate to the listed rights. For instance, the duty correlating to the right to counsel is the obligation to ensure that the suspect has counsel present during an interrogation if they so choose.

In contrast to the *rights* based phrasing of Article 55, the Rome Statute protection framework also contains provisions that are worded as *obligations* for the ICC. In connection with the right to legal assistance in Article 55(2)(c), Rule 21(2) of the RPE requires that the Registry keep a list of counsel from which the suspect can choose, and Rule 128 of the Regulations of the Registry requires that the Registry assist any person to whom Article 55(2) applies and who is in need of legal assistance. Furthermore, Article 69(7) requires the ICC to deem inadmissible evidence collected in an interrogation that did not comply with Article 55, if the violation casts doubt on the reliability of the

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[9] "Article 55" in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010), 684

[10] ICTY RPE Rule 42; ICTR RPE Rule 42; SCSL RPE Rule 42; STL Statute Article 15.

[11] Schabas (*supra* note 9), 685. Article 55 grants more than just the traditional fair trial rights. Article 55(1)(b) also prohibits the use of coercion, duress or threats during the investigation, including any form of torture, cruel, inhuman or degrading treatment. Also covered in Article 55(1)(d) is a prohibition on arbitrary detention or arrest. These additional protections, designed to enhance fair trial, are not replicated in the other international criminal tribunal Statutes.

[12] Salvatore Zappalà, 'International Criminal Proceedings, Investigation' in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002), 1200.

evidence, or if to admit the evidence would damage the integrity of the proceedings.[13] Such exclusionary measures have been taken at the ICTY, where an interview with Zdravko Mucić conducted by Austrian authorities was excluded because Austrian law did not allow for the assistance of counsel at the investigation stage.[14]

In some instances, the ICC will conduct the interrogation of a suspect[15] alone, in which case the only assistance that the ICC requires from the investigation State is a grant of permission to operate on its territory.[16] In these circumstances, the obligations of the Court are clear: it must be the one to ensure that the suspect is provided with all the necessary fair trial guarantees. However, when both the ICC and the investigation State have a role to play in an interrogation, the conduct required from the ICC is less clear. To show why this is the case, it is necessary to discuss the investigation State's obligations.

3.2.3. Obligations of the Investigation State

As mentioned, sometimes the extent of the assistance required from the investigation State is the granting of permission to operate independently on its territory. At other times, the State is more involved, either because it carries it out an interrogation on the ICC's behalf, or because it conducts the interrogation alongside ICC staff members.

From the phrasing of Article 55(2), it is clear that a State can carry out an interrogation independently on the ICC's behalf, and that when it does so, it must provide the Article 55(2) protections:

> Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned *either by the Prosecutor, or by national authorities* pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned (emphasis added)

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[13] Article 69(7) Rome Statute.

[14] Schabas (*supra* note 9), 689.

[15] At the *ad hoc* tribunals there was some disagreement on whether the test for labeling an individual as a suspect was objective or subjective (De Meester (*supra* note 4), 364). If subjective, the determination would fall entirely to the discretion of the Prosecutor. The Rome Statute side-stepped this debate with the unambiguously objective wording of Article 55(2): a person is a suspect where 'there are grounds to believe that a person has committed a crime within the jurisdiction of the Court'. This provides higher degree of protection for the individual because it is harder for the Prosecution to argue that the person was not a suspect at the time of the interrogation (Mihail Vatsov, 'Security Council Referrals to the ICC and EU Fundamental Rights: a Test for ECJ's Stance in Kadi I' (2012) 25 Hague Yearbook of International Law 79, 87).

[16] An example of such an arrangement can be found in a Cooperation Agreement between the DRC and the ICC Office of the Prosecutor (Part 4, §19 of the Judicial Cooperation Agreement Between the Democratic Republic of the Congo and the Office of the Prosecutor of the International Criminal Court).

The question that remains in such situations is whether the investigation State is obliged to provide the protections in Article 55(1) as well as 55(2). Article 55(1) contains important rights, such as the right to an interpreter and the right not to be compelled to self-incriminate. However, Article 55(1) does not begin the same was as Article 55(2), in that it does not specifically mention the 'national authorities'. Instead it simply states 'In respect of an investigation under this Statute, a person', and lists the rights. This could mean that there is a deliberate difference between the two sets of rights, and that the Article 55(1) rights are always the responsibility of the ICC regardless of who carries out the interrogation. Alternatively, the difference could be attributed to the pyramidal structure of the Article 55, and the fact that the first set of rights is of a more general nature that are always applicable, and the second set are specific to interrogations. There is little guidance on this question in the drafting history, practice, or academic commentary. In line with Article 21(3), where multiple interpretations are possible, the one that best protects human rights should be favoured. In this case that means interpreting Article 55, in its entirety, as imposing obligations on the investigating State to protect the listed rights whenever it conducts an ICC interrogation.

Turning to a different case scenario, one can imagine a situation where an ICC suspect is being interrogated, and both ICC and investigation State representatives are involved. For example, it could be that an ICC staff member is asking the questions, but an investigation State judge is present in the room. Or the investigator might be from the investigation State, but a member of the ICC prosecution is present during the interrogation. The sharedness we see in such situations is quite intense, as both actors are actively involved. The important question therefore, is which actor must provide the Article 55 protections?

The wording of Article 55(2) suggests that which actor carries out the interrogation will be an 'either/or' situation: the suspect will be questions 'either by the Prosecutor, or by the national authorities'. The 'either/or' phrasing suggests that one actor should be responsible at a time, and that it was not envisaged that both actors would have protection obligations simultaneously. One interpretation could be that the actor in charge of the interrogation - the one leading it - must provide the Article 55 protections. This has a certain common sense appeal: in charge of the interrogation, in charge of the protection. Militating against such an interpretation is the existence of Rules 21 RPE and Rule 128 Rules of the Registry, which suggest that the ICC is always responsible when it comes to providing legal assistance. However, it is submitted that these rules should not be read too strictly, as it would also mean that the ICC should be solely responsible for legal assistance even when the investigation State is carrying out the interrogation autonomously. Scholarly opinion supports the idea that States can carry out ICC interrogations independently, as de Meester concludes that while the investigation State

must comply with Article 55, the modalities of the interrogation are left to the State.[17] Article 21(3) does not provide any guidance as to which interpretation should be preferred, as in each of the alternatives the rights are protected one way or another. The author therefore proposes that obligations should concentrate in the actor leading the interrogation. Which actor this is will be determined on a case by case basis.

Moving to a different issue, where a State Party is carrying out an investigation entirely on its own behalf, and not as part of an ICC situation, Article 55 creates no obligations for that State. The wording indicates this, and it has been confirmed in ICC practice. As Pre-Trial Chamber I held in the *Gbagbo* case, Article 55:

> must be understood to encompass any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest. Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under article 55 of the Statute. [18]

Furthermore, in the *Katanga* case, Trial Chamber II held that it is not the purpose of Article 55 to create an obligation on States Parties to carry out their domestic criminal proceedings according to certain procedural standards, but rather to provide rights that might not be guaranteed under domestic law.[19]

It is possible that the national authorities interrogated a person before the ICC considers them a suspect. This interrogation might not have been carried out with Article 55 guarantees, as the obligations in the article are not applicable to the domestic authorities at that time. Can evidence acquired during such interrogations be used in subsequent ICC proceedings? This potential loophole in fair trial protection is dealt with in Article 69(7), which declares evidence obtained in violation of internationally recognised human rights as inadmissible. Such was the situation in the *Katanga* case. Evidence had been obtained during an interrogation in which there had been a violation by national authorities of the suspect's right to remain silent. Even though this interrogation was unrelated to ICC proceedings, the violation contravened international human rights norms and the evidence was therefore inadmissible before the Trial Chamber.[20]

Thus far the discussion has centred on the obligations of the investigation State under the Rome Statute protection framework. The State is also bound to observe international

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[17] De Meester (*supra* note 4), 376.

[18] ICC-02/11-01/11-212 *The Prosecutor v Laurent Gbagbo* (Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC- 02/11-01/11-129)") 15 August 2012 (Pre-Trial Chamber I) §96.

[19] ICC-01/04-01/07-2635 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Prosecutor's Bar Table Motions) 17 December 2010 (Trial Chamber II) §59.

[20] *Ibid* at §§60-65.

human rights law when interrogating a suspect, whether at the ICC's behest or not. Article 55 is comprehensive in the safeguards it provides, and so fair trial protections under human rights law do not add substantially to the quality of protection of suspect during an interrogation. However, they may provide an additional incentive to the State to uphold the right to fair trial.

3.2.4. Problems in Human Rights Protection

The way that Article 55 is set up means that the obligation to provide human rights protection during an interrogation always falls to one actor, and one actor only. This is an appealing conclusion, as the fact that there is no overlap in the actors' obligations means that problems such as buck passing should, for the most part, be avoided.

That being said, this stage of proceedings is not without difficulties. Even though the author has proposed that the actor leading the interrogation should be the one to provide the Article 55(2) guarantees, there is a lack of guidance in the law as to how the interrogation leader is to be identified. This means that, in the situation where both the ICC and the investigation State are involved in the interrogation, there is the potential for implementation problems to arise. If the actors are not clear between themselves as to who is in charge, then it will not be clear who is responsible for, for example, providing an interpreter, informing the suspect of the grounds to believe that they have committed a crime, informing the suspect of the right to remain silent, etc. On a more sceptical note, this ambiguity leaves space for the actors to deliberately obscure which one of them is in charge. Either way, this state of affairs leaves the suspect vulnerable to violations of the right to a fair trial, and therefore the adequacy of human rights protection during interrogations is compromised.

3.2.5. Concluding Observations

To successfully investigate crimes within its jurisdiction, the ICC requires the assistance and cooperation of the State within whose borders it seeks to collect evidence. When it comes to interrogating suspects, the degree of assistance required can differ. On the one hand, it could be that the ICC requires only the permission of the investigation State to conduct interrogations on its territory; with that granted, the ICC conducts the interrogation. On the other hand, the ICC may request more intensive assistance from the investigation State, asking the national authorities to carry out the interrogation on its behalf. There is also a middle way between these two, where both actors are involved in an interrogation.

The right to fair trial is protected at this stage of ICC proceedings by Article 55. This provision navigates the shared nature of the situation by ensuring that regardless of which

actor is interrogating a suspect, certain fair trial safeguards are provided. These protections represent a comprehensive protection of the right to a fair trial at the investigation stage. The actor that must provide these protections is the one that leads, or is in charge of, the interrogation. Implementation issues may arise where the circumstances make it unclear who is in charge. If both actors assume that the other is in charge, then it is possible that neither actor will provide the necessary fair trial protection to the suspect.

Investigations and interrogations will lead the Prosecutor to a handful of suspects, those suspected of the greatest involvement and/or responsibility for the crimes. Where there are reasonable grounds to believe that an individual has committed a crime within the jurisdiction of the Court,[21] an arrest warrant may be issued, followed by a request to States to arrest and surrender the individual to the ICC.

3.3. Arrest and Surrender Proceedings in the Arresting State

3.3.1. Introduction

The arrest of an accused is a pre-requisite for any ICC trial to take place, however it cannot be accomplished without the assistance of States. The Court lacks both the legal and factual capacity to arrest suspects itself; it does not have the power, either legal from the provisions of the Rome Statute, or factual in terms of manpower, to send representatives into a State to carry out an arrest, and to do so would be a violation of State sovereignty. The ICC therefore relies on States to physically apprehend the subjects of ICC arrest warrants and surrender them to the Court. All State Parties of the ICC are under an obligation to comply with requests for arrest and surrender.

Being involved in the arrest of suspects means that States are also involved in the protection of the rights affected by that arrest. Arrest signals the beginning of an individual's deprivation of liberty, making the right to liberty an important concern at this factual stage in proceedings. This right embodies the principle that a person should not be detained unless absolutely necessary and after the proper procedures. The particular gravity of the crimes of which ICC suspects are accused does not justify any form of arrest or detention that does not respect international human rights law. The proper guarantees must at all times be afforded: suspects must be lawfully detained, informed of the reasons for the detention, brought promptly before a judge, be able to challenge their detention, and be afforded compensation where the deprivation of liberty was unlawful.[22]

[21] Article 58(1)(a) Rome Statute.
[22] Article 9 ICCPR.

While the Rome Statute may contain comprehensive provision for these guarantees, the reliance by the ICC on States means that how the arrest is actually conducted can be out of the Court's hands. However, it is not true that the Rome Statute leaves the arresting State unrestrained. It is then a question of whether the two sets of obligations, one on the ICC and the other on the State, come together to provide full protection for the right. To ascertain whether this is the case, the discussion of obligations below deals with the two types of arrest that can be requested by the Court: normal arrest and provisional arrest.

With the exception of this one, all the stages of proceedings analysed in this study begin with a discussion of the obligations of the ICC, followed by the obligations of States. For the arrest and surrender stage, it is helpful to invert this order. The arresting State is the principal actor here, carrying out the greater part of the relevant conduct. The obligations of the ICC are designed to complement the obligations of the State. As such, the obligations of the State will be considered first.

3.3.2. Obligations of the Arresting State: Normal Arrest

Obligations relating to arrest and surrender are scattered in provisions throughout the Rome Statute protection framework.[23] Part 9 contains the articles that oblige State Parties to comply with an ICC request for arrest and surrender.[24] These cooperation obligations are of great importance; as the wording of Article 89(1) makes it clear, States are obliged to assist the ICC in carrying out an arrest: 'State Parties *shall*, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender' (emphasis added).[25] Such requests also fall under the general duty to cooperate in Article 86.[26] ICC decisions are evidence of the compulsory nature of compliance, with formal findings of non-compliance being issued against Chad, Malawi, and Kenya for their failure to arrest Omar Al-Bashir.[27]

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[23] Bert Swart, 'Arrest and Surrender' in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002), 1688.

[24] For detail on the content of the duty to arrest and surrender, see Swart (*supra* note 23), 1680 onwards.

[25] On this point, see Christopher Hall and Cedric Ryngaert, 'Article 59: Arrest Proceedings in the Custodial State' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: a commentary* (C.H. Beck 2016), 1462.

[26] Hall and Ryngart (*supra* note 25), 1462.

[27] For an overview of decisions up until December 2014, see Annex I of 'Report of the Bureau on non-cooperation' Assembly of States Parties (New York, 8-17 December 2014) Thirteenth session ICC-ASP/13/40. Some have resulted in legal findings of non-compliance, where the ICC held that the State was in violation of Article 89 and 97 of the Rome Statute. On this see the Chad, DRC, and Malawi decisions: ICC-02/05-01/09-139 *The Prosecutor v Oman Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) 12 December 2011 (Pre-Trial Chamber I); ICC-02/05-01/09-151 *The*

It is not required that the compliance obligations of State Parties be considered in more detail than this. Instead, the focus will return to the human rights obligations of an arresting State towards the arrested individual. For this it is necessary to turn to Articles 55 and 59(2). Article 55 has been considered in detail above in relation to interrogations, but also contains important right to liberty protections. Article 55(1)(d) states that an individual under investigation shall not be arbitrarily arrested or detained, imposing a corresponding obligation on States to refrain from doing so. While the title of Article 55 is 'Rights of persons during an investigation', it should be interpreted as continuing to apply during arrest proceedings. A person does not cease to be under investigation just because they are under arrest, and it is possible that more interrogations will be conducted. Scholarship supports this interpretation, which allows Articles 55 and Article 67 (rights of an accused during trial) to provide seamless protection at all stages of proceedings.[28] This is also in line with Article 21(3).

Article 59(2) regulates the manner in which the State is to carry out the arrest. The provision is crucial because it organises the relationship between the ICC and domestic authorities in arrest proceedings, and establishes the division of labour between the Court and the arresting State for protecting the right to liberty.[29] While the article imposes obligations on both the arresting State and the ICC, the hands-on task of protecting the individual's rights is aimed at the arresting State given that this is where the arrest takes place. Article 59(2) states as follows:

> A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
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> (a) The warrant applies to that person;
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> (b) The person has been arrested in accordance with the proper process; and
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> (c) The person's rights have been respected.

Prosecutor v Oman Hassan Ahmad Al Bashir (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) 26 March 2013 (Pre Trial Chamber II); ICC-02/05-01/09-195 *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court) 9 April 2014 (Pre-Trial Chamber II).

[28] Schabas (*supra* note 9), 685. See also Karim Khan, 'Article 60: Initial Proceedings Before the Court' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: a commentary* (C.H. Beck 2016), 1474.

[29] Mohamed M. El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute' (2006) 4 3 Journal of International Criminal Justice 448.

In the first line there is already an important right to liberty protection: to be brought promptly before a judge. This creates a corresponding obligation for the arresting State to ensure that this takes place. After this basic protection, Article 59(2) sets out three elements that the judicial authority of the State must check. While the first of these, establishing that the person arrested is indeed the correct person, is self-evident and straightforward, the other elements to Article 59(2) are less clear. As the content of the custodial State's obligations to protect the right to liberty depends on how the component elements of Article 59(2) are understood, the ambiguities in the provision will be explored in turn, with some proposals for their resolution.

First is the reference to 'in accordance with the law of' the custodial State. One could describe this as the *chapeau* of Article 59(2). The meaning of this phrase will affect the content of the rest of Article 59(2), in particular the meaning of 'person's rights' and 'proper process'. The wording of the provision does not indicate whether these terms are to be given an entirely domestic meaning, or whether they will include international law protections. To arrive at an understanding of the arresting State's obligations, it is therefore necessary to look at other factors to inform the interpretation of Article 59(2).

The Appeals Chamber of the ICC made some ambiguous statements on this subject in the *Lubanga* case. The statements were made in the context of Lubanga's claim that the right to liberty violations he suffered in the DRC rendered any proceedings at the ICC an abuse of process. The defence's argument was that the ICC should review the arrest proceedings in the arresting State. To reach a decision on whether this was a proper role for the ICC to play, the Appeals Chamber examined its own role in Article 59(2). While this is principally relevant to the following section on the obligations of the ICC, the decision is relevant to the extent that, at first glance, it appears to support the position that only national law is relevant in interpreting Article 59(2):

> The enforcement of a warrant of arrest is designed to ensure, as article 59 (2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have been respected. The Court does not sit in the process, as the Prosecutor rightly observes, on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that the rights of the arrestee were properly respected. Article 99 (1) of the Statute lays down that the enforcement of the warrant must follow the process laid down by the law of the requested state. In this case, the Pre-Trial Chamber determined that the process followed accorded with Congolese law.[30]

[30] ICC-01/04-01/06-772 *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court

The Appeals Chamber seems to limit the ICC's role in reviewing the execution of the arrest warrant. It appears to hold that domestic law is the only relevant law when applying Article 59(2), and that domestic law is the exclusive realm of the State. This reading was adopted in a subsequent decision of Pre-Trial Chamber I in the *Gbagbo* case, where the Chamber held that the role of the Chamber 'with respect to proceedings under article 59 of the Statute is limited to verifying that the basic safeguards envisaged by national law have been made available to the arrested person'.[31]

The author submits that the Pre-Trial Chamber's reading of the Appeals Chamber decision was incorrect. Despite first appearances, the author proposes that the Appeals Chamber did not rule out the relevance of international law for Article 59(2). In the excerpt above, the Appeals Chamber tied the *process* of the arrest to national law, but it also tasked the ICC with seeing that the 'rights of the arrestee were properly respected', and no domestic law link was made for the *rights* of the arrested person. It is therefore proposed that the Appeals Chamber intended the rights of the arrested person to have a meaning independent from domestic law. This would tie in with Sluiter's argument that a proper interpretation of Article 59(2) would be one in which the procedural aspects of an arrest are governed by national law, but the substantive protections for the arrested persons should have an international meaning.[32] In other words, process not substance.

The distinction between procedure and substantive rights is reinforced by the distinction in Article 59(2) itself, which lists 'proper process' and 'person's rights' as two separate elements that a domestic court must examine. If the proposed interpretation of Article 59(2)'s *chapeau* is accepted, then this also resolves the remaining ambiguities in Article 59(2): the meaning of 'proper process' (Article 59(2)(b)) and 'person's rights' (Article 59(2)(c)). The custodial State has an obligation to ensure that it follows its own procedures under national law when arresting an ICC suspect (proper process), and an obligation to respect the substantive rights of the suspect under international human rights law (person's rights).[33]

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pursuant to Article 19(2)(a) of the Statute of 3 October 2006) 14 December 2006 (Appeals Chamber) §41.

[31] *Gbagbo* 15 August 2012 (*supra* note 18) §104.

[32] Göran Sluiter, 'Human Rights Protection in the Pre-Trial Phase' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 459, 474.

[33] There is much academic support for the idea that an individual's rights during an arrest are to be given an international meaning. See Bert Swart, 'Arresting Proceedings in the Custodial State' in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002), 1253; Hall and Ryngaert (*supra* note 25), 1465.

An additional argument can be made, which gives even the notion of 'proper process' an internationalised meaning. It can be argued that references to the national law of a State should include its international human rights law obligations, as States are obliged to apply these standards in their domestic proceedings.[34] As such, the procedures are dictated by domestic law, but the content of the domestic law should be seen as informed by human rights. Article 59(2) is not the only provision in the Rome Statute protection framework that makes reference to the domestic law of the State. For example, Article 106 on the conditions of detention of sentenced persons refers expressly to domestic law; Article 107, concerning the transfer of convicted persons by an enforcement State once their sentence is complete, subjects this transfer to the law of the enforcement State. In both instances the author argues that the human rights law obligations of States should be included in any understanding of domestic law. There is no reason for a different outcome in Article 59(2).

The author argues that the proposed interpretation of Article 59(2) is the only one that complies with the Article 21(3) test, as only this approach ensures that the Rome Statute protection framework is applied consistently with human rights. As one commentator points out, if the provision is confined strictly to domestic law, Article 59(2) would lose much of its protective force. This would leave significant differences in the treatment of ICC suspects in different arresting States.[35]

The question that logically follows from this discussion is also perhaps the most difficult in terms of establishing the obligations of the custodial State. The domestic court must review the arrest in line with the requirements in Article 59(2), but what should the court order if it finds that Article 59(2) has not been complied with? Must the custodial State still surrender the suspect if proper process has not been followed or if his or her rights have been violated? Article 59(2) is silent on this question, however, other provisions in the Rome Statute protection framework indicate that the individual must be surrendered regardless. Article 89, detailing the obligations of States to carry out a request for arrest and surrender, makes no mention of refusing surrender because Article 59(2) has not been complied with. At most, Article 97 requires that the States communicate with the ICC about its concerns. Academic commentary agrees with this position. The opinion of one commentator is that, just as it is not open to the arresting State to review the validity of an ICC arrest warrant, it cannot be open to that State to release a person and so impede their surrender to the Court.[36] In the words of another commentator, 'neither the determination

[34] Article 2 ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[35] Sluiter (*supra* note 32).

[36] Göran Sluiter, 'Surrender of War Criminals to the International Criminal Court, The' (2002-2003) 25 Loyola of Los Angeles International & Comparative Law Review 605, 625.

by the national judicial authority that the suspect's rights were violated nor the remedies it adopted could prevent surrender to the Court'.[37] As long as problems in the arrest are addressed by the ICC in its own process, there is no reason why this interpretation of Article 59(2) should not comply with the Article 21(3) test.

It is at this juncture that the existence of obligations beyond the Rome Statute protection framework becomes important. Above it is proposed that international human rights norms inform the standard of treatment to be afforded to arrested persons under Article 59(2); as such, by applying Article 59(2) properly, the State will be complying with its obligations under human rights law. However, obligations beyond the Rome Statute protection framework relate not only to the arrest proceedings themselves, but also to how a State must act when it determines that human rights have been violated. When a violation has occurred, the State must choose between its Rome Statute obligation to surrender the individual to the Court, and its human rights law obligation to release the individual. This tension was noted by the ICTR Appeals Chamber in *Kajelijeli*, when it observed that an arresting State must 'strike a balance between two different obligations under international law': on the one hand there are the obligations to comply with requests for arrest and surrender, and on the other hand there are the obligations under human rights law that the State has pursuant to its international commitments.[38]

Different States have handled this balance differently, and as a result there is a discrepancy in how arresting States handle the issue.[39] In New Zealand, a person is not eligible for surrender if proper process has not been followed or the person's rights have been violated.[40] In such a case, the person must be discharged unless they remain detained pending an appeal.[41] While Australia shares New Zealand's approach,[42] the powers of British courts are much more limited. In the UK, the arrested person must be surrendered to the ICC as long as the arrest warrant is delivered in good order.[43] While a British court is permitted to inquire into whether the arrest was lawful and the person's rights respected, where it finds a violation to have occurred, it can only make a declaration to that effect. A UK court is specifically prohibited from granting any other form of relief.[44] Ultimately the authorities of the arresting State, either through legislation or through a

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[37] Hall and Ryngaert (*supra* note 25), 1465.

[38] Case No. ICTR-98-44A *Juvénal Kajelijelo v The Prosecutor* (Judgment) 23 May 2005 (Appeals Chamber) §220.

[39] Al-Zeidy (*supra* note 29), 455-457.

[40] Section 43, International Crimes and International Criminal Court Act 2000, Public Act 2000 No 26, 6 September 2000, New Zealand.

[41] *Ibid*, Section 46(4).

[42] Section 23(3), International Criminal Court Act 2002, Act No. 41 of 2002, Australia.

[43] Section 5(2), International Criminal Court Act 2001, 2001 Chapter 17, 1 September 2001, Great Britain.

[44] *Ibid*, Section 5(8).

judicial decision, will have to decide which international obligation takes precedence over the other.

Finally, and returning to the Rome Statute protection framework, it is important to establish when Article 59 applies. This is especially relevant because in the early cases before the ICC, namely the *Lubanga* and *Katanga* cases, the individuals were already in detention in the DRC when they became ICC suspects. They were originally arrested for crimes under domestic criminal law, and only later did the ICC arrest warrants arrive. Technically therefore, they were not arrested pursuant to an ICC arrest warrant. The question was then whether the domestic court still had to review the arrest for compatibility with Article 59(2).

The phrasing of Article 59(2) does not answer this question, but there is practice on the point. The Pre-Trial Chamber in the *Lubanga* case held that Article 59(2) does not apply to arrest and detention pre-dating the involvement of the ICC. 14 March 2006 is the date when the request for the arrest and surrender of Thomas Lubanga was transmitted to the DRC, and so only events occurring after that date were relevant for Article 59 considerations.[45] What this essentially means is that when the arrest predates the ICC arrest warrant, the manner in which the arrest was carried out will be outside the scope of Article 59 review. This approach is consistent with the inapplicability of Article 55 to interrogations that occur before the ICC's involvement.

Does this interpretation of Article 59 comply with Article 21(3)? It is proposed that it does, on one condition: that once the arrest warrant is transmitted, the detained individual is given the benefit of all of Article 59(2)'s protections. While this condition was not expressly set out in the *Lubanga* decision discussed above, the Pre-Trial Chamber judges did in fact examine the events that took place following the 14th March 2006, and concluded that there was no breach of Article 59(2).

3.3.3. Obligations of the ICC: Normal Arrest

The State might be the actor that carries out the arrest, but since this is done pursuant to an ICC arrest warrant, the Court is inextricably involved. The question therefore is: what obligations does the ICC have to protect the right to liberty of a suspect arrested in a State Party? The answer to this is not entirely clear. The author proposes that Article 59(2) obliges the ICC to monitor the compliance of arresting States with their own obligations and act to address violations of the rights protected in Article 59(2).

[45] ICC-01/04-01/06-512 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute) 3 October 2006 (Pre-Trial Chamber I), 6.

Article 59(2) does not mention the ICC, nor is it explicitly directed at the Court. Despite this, support for the idea that the ICC must monitor compliance with Article 59(2) can be derived from other provisions of the Rome Statute protection framework, practice, and scholarly opinion.

The relevant other provisions in the Rome Statute protection framework are of a general nature and a more specific nature. The general provision is Article 64(2), which imposes an overarching obligation on the ICC to ensure that a trial is fair. Monitoring the arrest process, which can have an important impact on the fairness of a subsequent trial, therefore seems indicated. In terms of more specific provisions, there is Rule 117 RPE and Article 85 Rome Statute. They support a monitoring role for the Court because, without such a role, the provisions would be rendered ineffective. Rule 117(1) RPE, titled 'Detention in the custodial State', stipulates that the Court 'shall ensure' that the arrested person is provided with a copy of the arrest warrant in a language they understand. This covers an important element of the right to liberty, namely to be informed of the charge for which one is detained.[46] The language of the Rule is compulsory. However, this does not mean that the ICC is obliged to send an ICC staff member into the presence of the accused person in the State's custody and read them the charges. Instead it means that the ICC must monitor whether the accused has been given a copy of the arrest warrant by the arresting State. Turning to Article 85(1) Rome Statute, this provision grants individuals the right to compensation if they have been the victim of unlawful arrest or detention. As arrests are exclusively carried out by States, it must be necessary for the ICC to examine how they are carried out, as otherwise it could not be determined whether or not the arrest was lawful. Rule 117(1) and Article 85(1) may deal with specific situations, but they are indicative of a broader monitoring role for the Court.

One academic commentator takes it as 'self-evident' that the ICC has a supervisory role when it comes to compliance with Article 59(2). The role is said to derive from the fact that the Court is the only actor able to ensure the fairness of the criminal proceedings as a whole, including the arrest.[47] Another commentator sets out further arguments in favour of the ICC's monitoring role. One of these stems from the implied powers rule, and rests on the notion that the ICC must be able to rule on a violation by a State of its treaty obligation, especially when this was essential to the performance of the ICC's functions.[48] A different argument is based on the idea that jurisdiction and primacy over the arrest has passed to the ICC, such that the arresting State is acting on behalf of the ICC. It follows that simply because Article 59(2) leaves arrest proceedings to the national authorities, it does not mean that the ICC lacks competence.[49]

[46] Article 9(2) and (4) respectively, ICCPR.
[47] Sluiter (*supra* note 32), 470.
[48] Al-Zeidy (*supra* note 29), 458.
[49] Al-Zeidy (*supra* note 29), 458.

Support for the ICC's monitoring role can also be found in the decision discussed in detail above from the Appeals Chamber in the *Lubanga* case.[50] The Chamber stated that the ICC has a role in ensuring that the domestic court has followed its own criminal law procedure, and that the individual's rights have been respected. In line with the procedure/substance distinction, Sluiter proposes that the Chamber must use two margins of review: a marginal one for reviewing compliance with domestic law, but a stronger one for reviewing compliance with international human rights law.[51] In both types of review, monitoring of the arresting State's actions is necessary.

The broader context surrounding Article 59(2), the decision of the Appeals Chamber, and scholarly opinion, all support the notion that the ICC must supervise the arresting State's compliance with Article 59(2). But such supervision is of little use if the ICC cannot act where it observes non-compliance. The next question must therefore be what the ICC is obliged to do where it notes that the arresting State is not complying or has not complied with Article 59(2).[52] There are two points in time that are relevant: while the accused is still in the custody of the arresting State, and after the accused has been surrendered to the ICC.

During the arrest, and for the time between the arrest and the surrender to the Court, the author proposes that the ICC is obliged to enter into a dialogue with the arresting State where it notes non-compliance with Article 59(2). The object of this is to prevent a violation from occurring, or to stop a violation from continuing. As Judge Lal Chand Vohrah stated in the *Semanza* case before the ICTR,

> If an accused is arrested or detained by a state at the request or under the authorities of the Tribunal, even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.[53]

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[50] *Supra* note 30.

[51] Sluiter (*supra* note 32).

[52] Al-Zeidy (*supra* note 29) argues, and the author agrees, that this is not a situation in which a declaration of non-compliance under Article 87 would be appropriate: 'One should not confuse the question of non-compliance with the rights of the arrested person per Art. 59(2) with the question of non-compliance to cooperate with an ICC request per Arts. 87(7) and 112(2) (f), which provide the Court with the discretionary power to 'make a finding to that effect and refer the matter to the Assembly of States Parties'. Article 87(7) deals with a broader question, that is, a failure to cooperate that results in 'preventing the Court from exercising its functions and powers under the Statute'. As to non-compliance with the prerequisites of Art. 59(2), it is not that the state fails to comply with the Court's request to cooperate, rather that the state in an effort to comply with the request of surrender violates the person's rights before the domestic courts. Accordingly, Arts 87(7) and 112(2)(f) do not seem to be applicable in this context', footnote 40.

[53] Declaration of Judge Lal Chand Vohrah in Case No. ICTR-97-20-A *Laurent Semanza v The Prosecutor* (Decision) 31 May 2000 (Appeals Chamber) §6.

Article 59 has established a delicate balance in the division of labour between the domestic authorities and the ICC in arrest and surrender matters,[54] and only a limited form of intervention such as this would be appropriate while the individual is still on the territory of the arresting State.

Once the arrested person is transferred to the ICC, it is a different matter. At that point, it is no longer a question of preventing a violation of the rights embodied in Article 59(2), but of remedying any prejudice done to the accused's rights by a violation that has already taken place. As on many other issues, Article 59(2) is silent on what the ICC should do if domestic authorities fail to provide the protections it lists, or indeed, on what to do if a domestic court declares that there has been a violation. As the suspect must be surrendered regardless, the author proposes that it falls to the ICC to provide a remedy. The type of remedy will depend on the seriousness of the breach, and could include a reduction of sentence if found guilty,[55] financial compensation,[56] or in case of a very egregious breach, a stay of proceedings.[57]

The one remaining issue to consider on the ICC's monitoring obligations under Article 59(2) is whether the proposed interpretation satisfies the Article 21(3) test. The author proposes that it does. The ICC is able to monitor compliance with human rights in the arrest and surrender process, and can remedy violations if they take place.

While Article 59(2) is an important provision, the ICC has some additional obligations that must be noted. Two other provisions of the Rome Statute protection framework are relevant to the protection of arrested persons, namely in Rule 117 RPE and Article 55 Rome Statute. Rule 117(2) and (3) RPE are concerned with ensuring that the accused can challenge the basis of his/her detention, an important safeguard for the right to liberty. Such a challenge can be brought by an individual who is still detained in the arresting

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[54] Al-Zeidy (*supra* note 29), 450.

[55] This remedy is not explicitly provided for in the Rome Statute protection framework but has been used at the ICTR. In the *Barayagwiza* case, in response to violations of the right to liberty of the accused while in pre-trial detention in Cameroon, the Appeals Chamber decided that if the accused were convicted, time would be taken off the sentence to reflect this prejudice to the accused's rights. If acquitted, the response was to be financial compensation - ICTR-97-19-AR72 *Jean Bosco Barayagwiza v The Prosecutor* (Decision (Prosecutor's Request for Review or Reconsideration)) 31 March 2000 (Appeals Chamber) §75.

[56] Article 85 Rome Statute.

[57] The availability of this remedy in cases of pre-trial violations of rights was confirmed in the *Lubanga* case. The Defence alleged that Lubanga had been subjected to a number of human rights abuses while detained in the DRC. Pre-Trial Chamber I and the Appeals Chamber confirmed that a stay of proceedings can be ordered where there has been an abuse of process. On the facts, it was not proved that an abuse of process had taken place. Pre-Trial Chamber: *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute* (ICC-01/04-01/06-512) 3 October 2006 (Pre-Trial Chamber I) Appeals Chamber: *Lubanga* 14 December 2006 (*supra* note 30).

State, but since Article 59(4) Rome Statute explicitly prohibits national courts from deciding on the validity of an ICC arrest warrant, the challenge is heard before the ICC. Where a suspect challenges an arrest warrant on the ground that it was not properly issued in accordance with Article 58(1)(a) and (b), Rule 117(3) obliges the Pre-Trial Chamber to make a determination, and requires that this be done 'without delay'. The right to challenge the grounds for detention is bolstered by Rule 117(2), whereby the arrested person can apply to the Pre-Trial Chamber for legal assistance in proceedings before that Chamber.

The final ICC obligation discussed in this section is found in Article 55(1)(d), which contains a broad obligation on the ICC to not violate the right to liberty through arbitrary arrest or detention. As stated in the previous section, the obligations correlating to the rights enumerated in Article 55 continue to apply during arrest proceedings. It is clear that this provision would apply if the ICC were detaining an individual for an extended period at the seat of the Court, but it must also be read so as to prohibit the ICC from engaging in such conduct through cooperation with another actor. For example, the ICC would also violate this provision by, for example, requesting that the arresting State keep a suspect in custody on an ICC arrest warrant for an unreasonably long period of time before he/she is surrendered to the Court. Such an interpretation is necessary if the Article 21(3) test is to be satisfied, and is also supported by practice at the ICTR in *Barayagwiza*.

In the *Barayagwiza*[58] case, the suspect was arrested in Cameroon because of extradition requests from Belgium and Rwanda. These requests were refused, but before he was released the ICTR requested that the Cameroonian authorities continue to detain him and that he be transferred to the ICTR detention unit. Nine months elapsed before he was actually transferred to the Tribunal, during which time the suspect remained detained in Cameroon. The ICTR Appeals Chamber determined that for the 9-month period the suspect had been held by Cameroon in the constructive custody of the ICTR. The ICTR was the actor with personal jurisdiction over the suspect, as he would not have been

[58] Trial Chamber decision: ICTR-97-19-AR72 *Prosecutor vs Jean-Bosco Barayagwiza* (Decision) 3 November 2011 (Appeal Chamber); Appeals Chamber decision: *Barayagwiza* 31 March 2000 (*supra* note 55). For background on this case, see William A. Schabas, 'Barayagwiza v. Prosecutor (Decision, and Decision (Prosecutor's Request for Review or Reconsideration)) Case No. ICTR-97-19-AR72' (2000) 94 3 The American Journal of International Law 563 and Bert Swart, 'Commentary on ICTR Decision Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999' (2001) 2 Annotated Leading Cases 197.

detained but for the ICTR order.[59] The 9-month period was deemed to be a serious violation of the accused's rights, and the Appeals Chamber ordered that he be released.[60]

The constructive custody argument was used by the defence in the *Katanga* case to try and bring violations of the right to liberty that took place before the issuance of an ICC arrest warrant within the scope of the ICC's obligations. The defence team argued that proceedings against the accused should be stayed because the period of detention before the arrest warrant was issued was so lengthy that it amounted to serious mistreatment.[61] Katanga had already been detained in the DRC on other charges for approximately two years before an ICC arrest warrant was issued for him. In light of this, the Defence argued that as soon as the arrest warrant and the request for arrest and surrender were communicated to the DRC, Katanga fell under the constructive custody of the ICC. The ICC therefore shared responsibility for the ongoing violation.[62] In this way, the Defence sought to engage the ICC's obligation to remedy violations of the right to liberty with respect to the period of detention prior to the arrest warrant. If the ICC had agreed with these arguments, the Court would have had to remedy a violation that had been ongoing for an extended period of time, and the remedy requested by the Defence was a stay of proceedings. Given the important points raised, it is regrettable that the Trial Chamber dismissed the motion on procedural grounds, but in all likelihood it would have been rejected.[63]

3.3.4. Obligations of the ICC and the Arresting State: Provisional Arrest

Putting together a full request for arrest and surrender takes time. In normal arrest proceedings, the Court must complete two steps in requesting the arrest and surrender of a suspect. First, the Pre-Trial Chamber must issue an arrest warrant, and second a formal

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[59] This reasoning was derived by analogy from the 'detainer' process, whereby a person already in the custody of one State is kept there at the request of another State, so that the latter State can take custody once the former States' reasons for custody are ended. The suspect in the detainer process is in the constructive custody of the requesting State, with the detaining State acting as agent – *Barayagwiza* 31 March 2000 (*supra* note 55) §§56 and 61.

[60] This order was overturned on appeal. The Appeals Chamber decided in *Barayagwiza* 31 March 2000 (*supra* note 55) that the Prosecutor was less to blame for the extended detention that previously thought, and that remedies short of terminating proceedings would be more appropriate.

[61] ICC-01/04-01/07-1666-Red-tENG *The Prosecutor v Germain Katanga* (Public Redacted version of the "decision on the motion of the defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp)) 3 December 2009 (Trial Chamber II) §19.

[62] ICC-01/04-01/07-1263 *The Prosecutor v Katanga and Ngudjolo* (Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/07-01/04-1258-Conf-Exp)) 2 July 2009 (Trial Chamber II) §§101-106.

[63] *Katanga* 3 December 2009 (*supra* note 61), §§65-66.

request for arrest and surrender, containing numerous documents,[64] must be put together and transmitted. Such a lengthy procedure can be problematic when time is of the essence. In the lead up to the issuance of an arrest warrant for Jean-Pierre Bemba Gombo, the Prosecution received information that he intended to travel within a few days' time, possibly to the DRC where he would be able to avoid capture.[65] In response, on the same day as the arrest warrant was issued, a request for provisional arrest was transmitted to Belgium where Bemba was located.[66]

Provisional arrest, provided for in Article 92, allows the ICC to request the arrest of a suspect before having completed and transmitted the full arrest and surrender request. At the ICTY and ICTR, provisional arrest was possible even when no arrest warrant had been issued, [67] but this is not the case at the ICC.[68] The expedited nature of provisional release does not mean that the protections discussed in the previous section arising from Article 59(2) do not apply; those safeguards must be followed whether it is a provisional arrest or a normal one. But in provisional arrest situations there is an additional requirement. When a request for provisional arrest and detention is transmitted to a State in accordance with Article 92, the formal request, as required by Article 89, must follow within 60 days of the arrest. The time limit of 60 days is important. Rule 188 ICC RPE sets the limit, and Article 92(3) provides for the release of the arrested person if the request for surrender is not received within that time limit. Should the time limit pass without a request being made, the suspect is no longer lawfully detained. These provisions are significant in safeguarding elements of the right to liberty, in particular the right to be brought promptly before a judge and the right to trial within a reasonable time.[69] The time limit requirement prevents a person from remaining stuck in limbo, unable to be released on the one hand, but unable to go ahead with the trial on the other.

The ICC's obligation in cases of provisional arrest and detention are fairly straightforward. The Court has an obligation to transmit the formal request for arrest and surrender within the time limit of 60 days, or otherwise arrange for the release of the suspect. The obligations on the arresting State are also straightforward. Before the expiry of the 60-day time limit, the arresting State is detaining the arrested person on behalf of the Court, and there is a legal basis for the detention in Article 92 Rome Statute. Once the

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[64] These are set out in Article 91 Rome Statute.

[65] ICC-01/05-01/08-28 *Situation in the Central African Republic* (Prosecutor's Application for Request for Provisional Arrest under Article 92) 23 May 2008 (Pre-Trial Chamber III), §§5 and 6.

[66] ICC-01/05-01/08-3 *The Prosecutor v Jean-Pierre Bemba Gombo* (Demande d'arrestation provisoire de M. Jean-Peirre Bemba Gombo addressee au Royaume de Belgique) 23 May 2008 (Pre-Trial Chamber II).

[67] Rules 40 and 40*bis* Statutes of the ICTY and ICTR.

[68] Article 58(5) Rome Statute stipulates that provisional arrest or arrest and surrender may be requested *on the basis of an arrest warrant*.

[69] Article 9(3) ICCPR.

60-day period expires, so does the legal basis for the detention. In such a case, the State must release the individual or be found to be in violation of Article 55(1)(d) Rome Statute and international human rights law, both of which oblige States not to subject persons to arbitrary detention.

3.3.5. Problems in Human Rights Protection

Arrest and surrender proceedings are perhaps one of the most complicated stages addressed in this study, and certainly the most complicated factual stage involving accused. That being said, it is also the stage that, once the various obligations are set out and understood, poses the fewest problems for human rights protection. In terms of structural problems, there is no issue here, as there is no lack of duty bearers for the entirety of the right to liberty. In terms of implementation problems, these are associated with situations in which more than one actor has an obligation to act, and each actor can argue that it is the other that must protect the right. For arrest and surrender proceedings, the actors will find it difficult to pass the buck in this way.

The division of labour between the ICC and the arresting State is clear. On the one hand, the State that carries out the arrest is responsible for providing the relevant protections, and the judicial authority of that State is responsible for checking whether these protections have been provided. If they have not, the ICC should be informed of this at the time of surrender. As arrests invariably take place on the territory of the arresting State by the authorities of that State, it is hard to argue that another actor must be in charge of protecting the accused's right to liberty. On the other hand, the ICC monitors the actions of the State to check whether the rights of the accused are being respected. Where it finds deficiencies in protection, the ICC must apply pressure on the arresting State where the accused is still in the State's custody, and/or provide a remedy for any violations once the individual is transferred to ICC custody. As the ICC is the forum in which the criminal trial will take place, it cannot be assumed that any other actor will fulfil this role.

The main challenge presented by the arrest and surrender stage does not arise from structural or implementation problems linked to the sharedness of the situation, but rather from the complexity of the obligations. The solution to this lies in raising awareness among State Parties, and in promoting consistency in how the ICC approaches the obligations of this factual stage.

3.3.6. Concluding Observations

At the arrest stage, the ICC is particularly reliant on the assistance of States. Securing a suspect's arrest has been called the Court's 'Achilles' heel',[70] because its reliance on reluctant States is the principal reason why indictees such as Al-Bashir have not yet been tried. Such problems, while important, are entirely political, and so are not the focus of this study. Instead, this section has examined the distribution of obligations between the ICC and an arresting State when it comes to protecting a suspect's right to liberty. The arrest and surrender stage of proceedings at the ICC is right at the fault line between the national justice system and the functions of the Court.[71] The resulting regime is one that is complex, and whose content is very much open to interpretation at multiple stages.

The shared nature of the arrest regime may be complicated, but the result of this complexity is that the sharedness of the situation in fact produces few to any implementation problems. As long as States and the Court are informed as to the content of their obligations, and the approach of the different actors to these obligations is uniform, the sharedness of the arrest stage of ICC proceedings need not produce any distinct problems for human rights protection. This positive conclusion is rather unique among the stages of proceedings examined in this study, and as the next section of this Chapter will show, is certainly not the case once the arrested person arrives at the Court and requests interim release.

3.4. Interim Release Prior to and During an ICC Trial

3.4.1. Introduction

Once a suspect is arrested by a State Party and surrendered to the ICC, the individual faces a long period of detention before the proceedings against him/her are concluded. Detention prior to and during the trial often extends to years in international criminal trials. This tendency has continued in the cases thus far brought to a conclusion at the ICC. From the time they were surrendered to the Court until the end of their trial, Lubanga was detained for 8 years, Katanga for seven years, and Ngudjolo for four years. Appeal proceedings are ongoing in Bemba's case, but from his surrender until his conviction at first instance he was detained for approximately 8 years. For those convicted, the time spent in detention before and during the trial is deducted from their sentence as time served; for Ngudjolo, who was acquitted, there is no compensation mechanism.[72]

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[70] Nick Donovan, 'The Enforcement of International Criminal Court' Aegis (2009), 9.

[71] "Article 59" in Schabas (*supra* note 9).

[72] Article 85 of the Rome Statute allows for compensation, but only in cases of unlawful arrest or detention, or miscarriage of justice, and not simply because there was an acquittal. The claim made by

These extended periods of time in detention prior to conviction seriously compromise the right to liberty. As such, the analysis of this factual stage will focus on this right, and in particular, on protecting the right through interim release. The right to liberty demands that pre-trial detention be the exception and not the norm. This is prominent in the ICCPR and has been succinctly put by the Human Rights Committee: "pre-trial detention should be an exception and as short as possible".[73] The importance of interim release stems from its connection to the presumption of innocence, and the idea that incarceration prior to conviction must be justified by strong reasons.[74]

Interim release can be granted at the ICC during two separate stages: while the suspect remains detained in the custodial State, and once the suspect reaches the detention centre of the ICC. Interim release in the custodial State is governed by Article 59(3). The domestic court must decide whether 'given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release'. The Pre-Trial Chamber of the ICC will make recommendations about interim release,[75] and the domestic court must take them into account. Nevertheless, the final decision remains with the domestic court. The minimal role played by the ICC, and the fact that a person granted interim release would remain in the custodial State, means that this type of interim release does not have a shared dimension; the State handles it on its own.

Once the suspect is surrendered to the custody of the ICC in The Hague however, interim release takes on a distinctly shared character. Simply put, if a suspect is to be released from custody pending trial, they must have somewhere to reside. The ICC itself cannot offer this, as it has no territory of its own. Granting interim release where warranted is an important ICC function, but it is a function which requires the assistance of States. The following sections will discuss the obligations of the two actors involved – the ICC and State Parties – with regards to interim release. This will shed light on whether the protection of the right to liberty, at this stage of ICC proceedings, is adequately protected. The host State is involved only in its capacity as a State Party, and as will be explained, does not derive any particular role from being the ICC host State.

Ngudjolo pursuant to this article after his acquittal was rejected on the basis that he did not suffer a miscarriage of justice – ICC-01/04-02/12-301-tENG *The Prosecutor v Mathieu Ngudjolo Chui* (Decision on the "Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome") 16 December 2015 (Trial Chamber II).

[73] Article 9(3) ICCPR, and Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/Rev.6, 12 May 2003, p. 130. For more see Clemens A. Muller, 'Law of Interim Release in the Jurisprudence of the International Criminal Tribunals, The' (2008) 8 International Criminal Law Review 589, 593-4.

[74] Khan (*supra* note 28), 1474.

[75] Article 59(5) and (6).

3.4.2. Obligations of the ICC

The obligations of the ICC with respect to protecting the right to liberty through interim release are found in Article 60 Rome Statute. Paragraph 1 of this provision obliges the ICC to satisfy itself that the suspect has been informed of his or her right to apply for interim release pending trial. If the suspect choses to exercise this right, the ICC is obliged to hear the application and render a decision. There are three types of situation in which the ICC would be bound to grant an application for interim release. These are listed in paragraphs 2-4 of Article 60.[76]

The first situation in which the ICC would be obliged to grant interim release is where the requirements for the issuance of an arrest warrant are no longer met. Article 60(2) provides as follows:

> A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set for the in Article 58, paragraph 1 are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions

Article 58(1) lists the requirements for the issuance of an arrest warrant, which are:

- There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (Article 58(1)(a)); and
- The arrest of the person appears necessary (Article 58(1)(b)):
    - To ensure the person's appearance at trial,
    - To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
    - Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

The way that Articles 60(2) and 58(1) are structured means that if any of the requirements of the latter provision are met, then the detention is justified and interim release will be denied. This is supported by ICC decisions.[77] Only if, at the time of the application, none of the factors under Article 58(1)(b) are satisfied, must interim release be granted. From the compulsory language in Article 60(2), and from elaboration in ICC decisions, it is clear that the Chamber has no discretion in whether or not to grant release if the

[76] This section will not go into detail regarding what substantive criteria a Chamber must look at when making an interim release decision on the facts. Such an inquiry would not contribute to answering the research question of this study, as the shared dimension is not relevant. For a comprehensive study of these issues, see Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualisation* (Academisch Proefscrift, 2015) from 246 onwards.

[77] Zeegers (*supra* note 76), 247, footnote 291.

conditions are met.[78] Furthermore, the Chamber must review its decision every 120 days.[79]

Article 60(4) contains the second situation in which interim release may be granted: where the suspect has been detained for an unreasonable time due to an inexcusable delay on the part of the Prosecutor. The purpose of this provision is to allow the Chamber to weigh respect for the rights of the suspect, in particular the right to liberty, against the public interest,[80] and is said to be in line with the ICCPR, ECHR, and ACHR requirement of being tried within a reasonable time.[81] Case law confirms that release on this basis can be permitted even if the detention is justified under Article 60(2),[82] although this provision lacks the compulsory nature of Article 60(2), as it only obliges the ICC to consider releasing the accused, leaving the discretion with the judges.

The wording of the Article 60(4) does not elaborate on what can be considered an 'unreasonable time' or an 'inexcusable delay'. The only guidance from practice is that the determination must be made based on the circumstances of the individual case, and not in the abstract.[83] Single Judge Jorda in *Lubanga* held that in examining the circumstances of a case, the case's complexity will be particularly important, determined in part by the amount of evidence and where the evidence is located.[84] Given that international criminal trials are nearly always complex by their very nature, one might assume that the period would need to be long indeed for a determination of unreasonableness to be made. Indeed, one commentator notes that 'in reviewing the overall period of detention, the complexity of the cases has mostly been considered an almost absolute justification for

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[78] ICC-01/05-01/08-475 *The Prosecutor v Jean-Pierre Bemba Gombo* (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) 14 August 2009 (Pre-Trial Chamber II), §77; ICC-01/05-01/08-631-Red *The Prosecutor v Bemba Gombo* (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) 2 December 2009 (Appeals Chamber), §105; *The Prosecutor v Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"* (ICC-01/04-01/06-824) 13 February 2007 (Appeals Chamber), §134. For more decisions, see Zeegers (*supra* note 76), 247.

[79] Article 60(3) Rome Statute and Rule 118(2) ICC RPE.

[80] ICC-01/04-01/06-924 *The Prosecutor v Thomas Lubanga Dyilo* (Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo") 11 June 2007 (Pre-Trial Chamber I), 7.

[81] *Lubanga* (*supra* note 45).

[82] *Lubanga* (*supra* note 78), §4.

[83] ICC-01/04-01/06-586-tEN *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Application for the interim release of Thomas Lubanga Dyilo) 18 October 2006 (Pre-Trial Chamber I), 7; *Lubanga* (*supra* note 78), §122.

[84] *Ibid*, 7.

the length of pre-trial proceedings'.[85] While one year was not enough to qualify as an unreasonable delay in the *Bemba* case,[86] it is important to note that there is not a bright-line rule on what is and is not reasonable.

Article 60(4) is limited in its applicability because the inexcusable delay must be attributable to the ICC prosecutor. In a 2014 decision, Pre-Trial Chamber II tried to side-line this requirement, and used Article 60(4) to release four of the defendants charged with administration of justice offences in relation to the *Bemba* case (hereafter *Bemba* witness interference case).[87] Finding that the defendants would otherwise be detained for an unreasonable period, Single Judge Tarfusser held that Article 60(4) enshrined the paramount concern that pre-trial detention not be unreasonable, regardless of whether the delay is due to the Prosecutor,[88] and ordered their release. The Appeals Chamber overturned this decision, determining that the wording of Article 60(4) was unequivocal, and that prosecutorial fault was required.[89] Article 60(4) has been criticised on the basis that a person detained for an unreasonable period will care little which actor is at fault.[90] Acting on this notion, there is now a third, judge made, ground for granting interim release.

Article 60(3) imposes an obligation on the ICC to review its decision on interim release periodically (the 120-day rule is set out in the RPE). From a simple reading therefore, it does not appear to provide an additional ground for interim release. However, in a decision taken in May 2015, the Appeals Chamber gave it a much more substantial role. Interpreting Article 60(3) pursuant to Article 21(3), it was held to be the 'proper legal avenue to protect the right to liberty of a person, as well as the right to be tried within a reasonable period of time'.[91] According to the decision, the length of time an accused has spent in detention is one of the factors that needs to be considered when conducting the periodic review required by Article 60(3). A balance must struck between the risks under

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[85] Zeegers (*supra* note 76), 269.

[86] *Bemba* 14th August 2009 (*supra* note 78), §28.

[87] ICC-01/05-01/13-703 *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Decision ordering the release of Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido) 21 October 2014 (Pre-Trial Chamber II).

[88] *Ibid,* 5.

[89] ICC-01/05-01/13-969 *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification) 29 May 2015 (Appeals Chamber), §42.

[90] Khan (*supra* note 28), 1482.

[91] *Bemba* 29 May 2015 (*supra* note 89), §43. The way in which the Appeals Chamber used Article 21(3) in this decision does not entirely accord with the author's position in this study, set out in Chapter 2.

Article 58(1)(b) and the duration of the detention, taking into account what caused the delay in proceedings and the circumstances of the case as a whole.[92] If on balance the period of detention has become unreasonable, interim release must be ordered.

Whenever interim release is granted, regardless under which part of Article 60, the Chamber can choose to impose conditions. This is clearly indicated by the wording of paragraphs 2 and 4, and may be assumed in the case of paragraph 3, since there is no reason for interim release under the latter to be treated differently.[93] The types of conditions that can be imposed are found in Rule 119 RPE, and include travel restrictions and restrictions on contact with victims and witnesses.

An overarching question that affects interim release in general is whether the ICC is obliged to secure the cooperation of a State before a person can be released. It seems that the answer is yes. This means that the ICC must identify the State where the accused will be hosted while on interim release, and secure the consent of that State to act as host. This conclusion is not apparent from the Rome Statute protection framework, which contains only one provision on this issue. Regulation 51 of the Regulations of the Court provides that: 'For the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released'. Seeking observations is not the same thing as securing cooperation in a particular case. But there is support for the proposed interpretation of the ICC's obligations in the case law of the ICC.

In a decision that refused interim release to Bemba, the Appeals Chamber stated that the ICC is

> dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective.[94]

On the basis of this reasoning, the Chamber held that an order to grant conditional interim release cannot be made unless a State is identified that is willing to host the accused and enforce any conditions attached to the release.[95] This overturned a Pre-Trial Chamber decision which had granted interim release to Bemba, but had left the determination of conditions and the identification of the host State to a future hearing.[96] Instead, the

[92] *Bemba* 29 May 2015 (*supra* note 89), §45.

[93] Such was the finding of the Appeals Chamber in Bemba 29 May 2015 (*supra* note 89), §48.

[94] *Bemba* 2 December 2009 (*supra* note 78), §107.

[95] *Bemba* 2 December 2009 (*supra* note 78), §106.

[96] *Bemba* 14th August 2009 (*supra* note 78), 35-7. The Appeal Chamber not only dismissed the approach of the Pre-Trial Chamber as to identifying the host State and setting conditions, but also disagreed with the decision to grant interim release at all.

Appeals Chamber determined that the decision to release and the imposition of conditions are to be taken in one unseverable decision.[97]

One can appreciate the logic that the Appeals Chamber was following: if interim release is only possible if conditions are imposed, then before the release is granted a State must be identified that is willing and able to enforce those conditions. However, the author proposes that the same logic can be achieved without the Appeals Chamber's degree of strictness. It should be possible to decide that interim release should be granted, and specify the conditions, and yet defer the decision on which State will host the accused until a later date. This would mean that whether or not release is granted is not dependent on State cooperation, but whether release is implemented is. While one might argue that this does not much improve the situation of an accused where cooperation is lacking, it does provide at least a declarative protection of the right to liberty. Better that the ICC declare that the accused is entitled to release, but have trouble implementing it, than to subjugate the right to liberty entirely to State cooperation by denying interim release where a host State cannot be found. There is no support for the Appeals Chamber's position in the drafting history, Rome Statute protection framework, or other relevant interpretation materials. As such, the author argues that in line with Article 21(3), the interpretation and application of the law that best protects human rights is the one to be preferred.

Article 60 allows for the possibility that an accused would be granted interim release without conditions attached. In this case, the argument of the Appeals Chamber would not apply. This is true in theory, but the author suggests that the situation will not arise in practice. It seems distinctly unlikely that an ICC accused, given their prominence and the gravity of the alleged crimes, would be released unconditionally. Even for accused charged with administration of justice offences, which are relatively minor compared to the core crimes, conditions have been attached for release.[98] It has been the practice of the Court that, at the very least, accused must provide details of the address at which they will be residing while on interim release.[99] This seemingly simple condition necessitates that the accused have made arrangements for where they will be released. In the *Bemba* witness interference case, the addresses were provided to the Court before the accused were released.[100] In the case of Jean-Jacques Mangenda Kabongo, release was deferred

[97] *Bemba* 2 December 2009 (*supra* note 78), §105.

[98] ICC-01/05-01/13-1151 *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Decision Regarding Interim Release) 17 august 2015 (Trial Chamber VII).

[99] *Bemba* 21 October 2014 (*supra* note 87), 6.

[100] Aimé Kilolo Musamba to Belgium, Jean-Jacques Mangenda Kabongo to the UK, Fidèle Babala Wandu to the DRC, and Narcisse Arido to France. *Bemba* 21 October 2014 (*supra* note 87), 5-6.

after the other three defendants were released because arrangements with the UK had not been finalised.[101]

Before concluding the discussion on the ICC's obligations, it is necessary to inquire whether the interpretation of Article 60 passes the Article 21(3) test. It can safely be said that Article 60(2), (3), and (4), provide comprehensive protection for the right to liberty, in the sense that they provide for interim release in the different situations in which it might be warranted. Where matters become problematic in terms of human rights protection is the requirement that the ICC identify and secure the cooperation of a host State before an order for interim release can be implemented. This has been criticised for going down the 'wrong and dangerous'[102] path of making the right to liberty dependent on 'practical arrangements'.[103] Such views are justified given the reluctance ICC judges have noted on the part of States to host accused on interim release.[104] However undesirable this state of affairs, it is attributable to the limitation on the ICC's competence, and on the absence of corresponding obligations on States to host accused. As will be discussed in the following section, Article 21(3) does not require that States be obliged to undertake entirely new obligations to which they did not consent.

3.4.3. Obligations of States Parties

States are clearly indispensable for the implementation of the right to liberty through interim release. The question of great importance is therefore whether they are under an obligation to provide the assistance and cooperation required for interim release to be implemented. No relevant obligations are to be found beyond the Rome Statute protection framework, as human rights law does not require a State to take onto its territory and into its jurisdiction a person who would not otherwise be there. The present inquiry must therefore focus on the Rome Statute protection framework.

There is no provision within this framework that deals explicitly with this point. If such an obligation exists, it would be the result of an interpretation of the cooperation obligations in Part 9 of the Statute. The Single Judge in Pre-Trial Chamber II in the

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[101] 'Aimé Kilolo Musamba, Narcisse Arido and Fidèle Babala Wandu released from ICC custody' (ICC Press Release, 23 October 2014) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1054&ln=en&utm_source=CICC+Newsletters&utm_campaign=6f5a4a7a3f-10_24_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-6f5a4a7a3f-408795633&ct=t(10_24_14_GlobalJustice_Weekly)> visited 12 June 2016.

[102] Göran Sluiter. Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law Atrocity Crimes Year-in-Review (2009) Conference.2009 248, 265.

[103] Sergey Golubok. Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation.2010 295, 308.

[104] See for example, ICC-01/05-01/13-588 *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Decision on "Narcisse Arido's request for interim release") 24 July 2014 (Pre-Trial Chamber II), §27.

Bemba case made some ambiguous remarks on this question. After noting that the Court is dependent on State cooperation, she recalled the general obligation on State Parties to cooperate under Article 86 Rome Statute, and underlined that that provision applied to the whole Statute, including Article 60 on interim release.[105] One commentator offers support for the Single Judge's apparent position when making an argument on the meaning of the phrase 'investigation and prosecution of crimes'. It is in relation to these activities that the general cooperation obligation in Article 86 obliges States to assist the Court. The commentator argues that 'investigation and prosecution' should be given a broad meaning that includes interim release, as this is related to prosecution.[106]

The Appeals Chamber, when reviewing the Single Judge's decision, did not endorse this position. Instead, the judges noted that granting interim release was dependent on identifying a 'willing State'. Contrary to the comments of the Pre-Trial Chamber, this supports the idea that assistance must be provided voluntarily. Moreover, the language used by the Appeals Chamber when discussing possible host States is notable for terms such as 'availability', 'willingness', and 'ability',[107] none of which have a compulsory character. A further indication of the voluntary nature of State assistance is a report by the ICC to the Assembly of State Parties, in which measures to encourage State assistance in interim release are clearly discussed under the heading of 'Voluntary Agreements'.[108] Such reports are valuable as an additional source of practice, outside of judicial decisions, and illustrate how the ICC understands its obligations.

The argument that the term 'investigation and prosecution' can be said to cover interim release has merit, especially in light of Article 21(3). However, the ICC is not empowered – even by Article 21(3) - to create obligations via cooperation requests for States to accept accused on interim release. This interpretation was not envisaged by the Rome Statute, and does not find support in practice, the drafting history, or the Rome Statute protection framework more broadly.

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[105] *Bemba* 14th August 2009 (*supra* note 78), §§85 and 86.

[106] Sluiter (*supra* note 102), 266.

[107] ICC-01/05-01/08-1722 *The Prosecutor v Jean-Pierre Bemba Gombo* (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'") 9 September 2011 (Appeals Chamber), §38; Bemba 24 July 2014 (*supra* note 104), §27.

[108] Assembly of States Parties, 'Report of the Court on cooperation' (9 October 2013) Twelfth Session ICC-ASP/12/35, 5.

3.4.4. Obligations of the Host State

The host State's obligations at this factual stage are somewhat limited.[109] Like State Parties, the Netherlands is under no obligation to host accused granted interim release while awaiting trial, either pursuant to a provision within the Rome Statute protection framework, or beyond it. The same arguments that apply to State Parties apply to the host State also. The only host State specific provision on this point is Article 47(1) of the Headquarters Agreement, which obliges the Netherlands to 'facilitate the transfer of persons granted interim release into a State *other than the host State'*.

The situation in which the host State will have a role to play is when an accused who is granted interim release returns to the Netherlands to stand trial. Pursuant to the Headquarters Agreement, Article 40(2) requires the Netherlands to 'facilitate the re-entry into the host State of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court'. The existence of this obligation is important, as it means that the accused's right to liberty can continue to be respected during the trial as he or she does not have to return to custody in order to be present for the ICC proceedings. From the information available, the four accused granted interim release in the *Bemba* witness interference case do not seem to have been rearrested when they arrived at The Hague for their ICC trial. One must therefore assume that, for the duration of their trial, they resided at liberty somewhere on the territory of the Netherlands.[110]

3.4.5. Problems in Human Rights Protection

At this stage of proceedings, there is an ICC function that needs to be shared, namely the granting of interim release, but the ICC cannot carry out this function without the assistance of States. The State however, is under no legal obligation to provide this assistance. The result is a gap in protection: the actor with the obligation to protect the right to liberty lacks the capacity to do so, and the actor with the capacity to protect the right to liberty lacks the obligation to do so.

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[109] It is also possible to have a discussion on possible host State obligations in relation to non-refoulement at this factual stage, but this does not relate to the right to liberty. There might be non-refoulement concerns if the State to which the accused was released would present a risk to their human rights. Such concerns can be considered in the same way as those relating to convicted individuals who are transferred to an enforcement State, which is addressed in Chapter 5. As such, no separate discussion is necessary here.

[110] The press release mentions that Bemba is in custody, but does not say that the four other defendants returned to custody after their return to The Hague – 'Bemba, Kilolo et al. trial opens at International Criminal Court' (ICC Press Release, 29 September 2015) <https://www.icc-cpi.int//Pages/item.aspx?name=pr1155> visited 12 June 2016.

The structural problem at this factual stage will only be relevant where the accused who is to be granted interim release cannot return to a State that is obliged to take him or her, for example, the State of nationality or of permanent residence. In the *Bemba* witness interference case, the four accused were granted interim release to countries that they were either a national of, or for which they had a visa or residence permit.[111] In future cases it is more than likely that interim release will be granted only on the condition that the accused *does not* return to their home country. This may be in an effort to prevent them from interfering with witnesses, of taking advantage of their network, or because they would not be safe. In these cases, it is necessary that a third State volunteer to host them. The potential problem with this arrangement is evident: how is the right to liberty to be adequately protected if no State agrees to host an accused on interim release?

In acknowledgment of this problem, the ICC has taken a proactive approach. Even though it was not foreseen by the Rome Statute protection framework, the ICC drafted a model agreement on interim release, to be signed by States willing to act as hosts.[112] The agreement is designed to facilitate consultations between the ICC and States (in line with Regulation 51 of the Regulations of the Court), identify willing States, and streamline discussions on State cooperation.[113] Such an agreement was concluded in 2014 between the ICC and Belgium, and the ICC is committed to concluding more with other States.[114]

Such agreements are a step in the right direction, but on inspection, do not solve the structural problem facing interim release at the ICC. The content of the model agreement and the agreement with Belgium are confidential, but Pre-Trial Chamber II provided some crucial details about them in a decision concerning the interim release of one of the accused in the *Bemba* witness interference case. The Agreement is described by the Chamber as *not* providing for an unconditional availability and willingness on the part of Belgium to accept accused, and certainly not establishing an obligation on Belgium to do so.[115] Instead, the agreement regulates the procedure by which consultations are to take place, leaving the ultimate decision on whether to accept a particular individual in a particular instance to the State concerned.[116]

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[111] *Bemba* 21 October 2014 (*supra* note 87), 5-6.

[112] *Supra* note 108, §39.

[113] Anne-Aurore Bertrand and Natacha Schauder, 'Practical Cooperation Challenges Faced by the Registry of the International Criminal Court' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016) 152, 170.

[114] 'Belgium and ICC sign agreement on interim release' (ICC Press Release, 10 April 2014) <https://www.icc-cpi.int/Pages/item.aspx?name=pr993> visited 12 June 2016.

[115] ICC-01/05-01/13-612 *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Decision on the first review of Jean-Jacques Mangenda Kabongo's detention pursuant to article 60(3) of the Statute) 5 August 2014 (Pre-Trial Chamber II), §32.

[116] *Supra* note 114.

In light of this, there are clearly weaknesses in the way that the ICC currently deals with the structural problem facing interim release. This casts serious doubts on the adequacy of human rights protection at this shared stage of ICC proceedings.

3.4.6. Concluding Observations

Extended periods of pre-trial detention appear to be the norm in international criminal justice. While in many cases detention is justified because of flight risk, potential interference with the investigation, and so on, careful consideration must be given in each instance as to whether the accused qualifies for interim release. The mechanism of interim release is an important safeguard for the right to liberty of accused, and is included in the Rome Statute protection framework in Article 60 of the Statute.

Granting interim release where merited is an important function of the ICC. However, the institutional nature of the ICC, in particular its lack of territory on which accused on interim release could live, means that it is a function that the Court cannot carry out alone. A successful interim release system at the ICC is therefore inherently shared between the Court and States. Unfortunately, the Rome Statute protection system does not oblige States to play a part in interim release. This state of affairs results in a structural problem for interim release, in that the right to liberty of accused is left vulnerable to the willingness of States. Agreements on interim release between the ICC and States are a first step in remedying the protection gap, but in their current formulation do not properly address the problem.

3.5. Conclusion

Sharedness is present in ICC proceedings from the very beginning. It is impossible to arrive at the trial stage without first having situations in which the ICC must cooperate with States to carry out its functions. This means that from the outset, the protection of human rights in ICC proceedings is shared.

To assess whether human rights protection is adequate, it must first be understood how human rights are protected in shared situations. To that end, this Chapter examined the obligations of the ICC and States at three different stages: investigation, arrest and surrender, and interim release. At the investigation stage, the fair trial rights of suspects undergoing interrogation are protected by the existence of obligations on both the ICC and the investigation State. Depending on which actor is leading the interrogation, the necessary safeguards are provided by either one actor or the other. Herein lies the potential problem in the implementation of fair trial protections: there is currently no mechanism to determine which actor is the one leading the interrogation. This can create situations where neither actor protects the right.

At the arrest stage, ascertaining the obligations of the actors was more complicated than for the investigation stage. The written provisions are lacking the detail necessary to deal with the involvement of multiple actors in the arrest process. An in-depth analysis of the Rome Statute protection framework revealed that the primary responsibility for protecting the right to liberty of suspects during arrest is borne by the arresting State. The ICC has a monitoring role. While the obligations may be complex, once they are set out and understood, they leave little room for implementation problems that would compromise human rights protection. The sharedness of arrest and surrender proceedings should therefore present fewer challenges than the other stages in ICC proceedings examined in this thesis.

In terms of the adequacy of human rights protection, the most problematic stage in this Chapter is interim release. The ICC's obligations to protect the right to liberty through interim release are clear, but State Parties lack the obligation to assist the ICC in carrying the out. This creates a structural gap in protection, permitting the very real possibility that an accused who is entitled to release pending trial must remain detained. While progress has been made towards a solution, in particular with measures such as interim release agreements, there is still some way to go if human rights are to be adequately protected.