Male Captus Bene Detentus?

Paulussen, C.Y.M.

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MALE CAPTUS BENE DETENTUS? SURRENDERING SUSPECTS TO THE INTERNATIONAL CRIMINAL COURT

Cover: Escorted by police motorcycles, two vehicles, one reportedly carrying ICC suspect Thomas Lubanga Dyilo, arrive at Scheveningen prison, the Netherlands, on 17 March 2006. (AP Photo/Fred Ernst.)

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MALE CAPTUS BENE DETENTUS?

SURRENDERING SUSPECTS TO THE INTERNATIONAL CRIMINAL COURT

PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Tilburg,
op gezag van de rector magnificus, prof.dr. Ph. Eijlander,
in het openbaar te verdedigen ten overstaan van
een door het college voor promoties aangewezen commissie
in de aula van de Universiteit
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door

Christophe Yves Marie Paulussen,

geboren op 29 oktober 1979 te Maastricht

Promotiecommissie:

Promotores:	prof.dr. W.J.M. Van Genugten
	prof.dr. M.S. Groenhuijsen
Overige leden:	prof.dr. A.H.J. Swart
	prof.dr. H.G. Van der Wilt
	prof.dr. G.K. Sluiter
	dr. A.L.M. De Brouwer

To my father Charles and my mother Liesbeth,
the kind of parents that any child should be entitled to

ACKNOWLEDGEMENTS

In the introductory words of his 2007 article 'Abducted Fugitives Before the International Criminal Court: Problems and Prospects', Robert J. Currie puts forward the question of why one would wish to revisit "*every* international law student's favourite essay topic [emphasis added, ChP]". Now, Currie's article is original, inspiring and well-written, but here, he appears to be wide of the mark: he does not provide the reader with any further evidence to sustain this bold statement, thereby seemingly violating one of the most precious commands in the scientific world, namely to write in a verifiable way.

However, was there really any need for Currie to insert a footnote with references here? Of course not. Some statements are simply so true that they do not need to be supported by further evidence.

In 2004, I wrote and defended my master's thesis, entitled 'Male Captus Bene Detentus? Human Rights and the Transfer of Suspects to International Criminal Tribunals', at the Law Faculty of Tilburg University. Luckily, I was (and, by the way, still am) so intrigued by this fascinating topic that I was able to transfer some of my enthusiasm regarding this subject to the text and its readers. As a result, the thesis was well-received, which, among other things, enabled me to gain a position in the first generation of students following the research master of the Tilburg Graduate Law School. This, in turn, led to a PhD position, as from September 2005, at the Department of International and European Public Law, a very competent and cosy department where I already had the privilege to work between 2001 and 2003 as a student-assistant.

Now, four and a half years later, I am writing the final words of this PhD thesis – the acknowledgements. Being aware of the fact that these are normally the most often read words of *any* PhD thesis, especially of those which are so massive that they could be used in a ripping-huge-books-in-half challenge of a strongman competition, I will choose my words carefully.

Obviously, my first words of thanks go to Willem Van Genugten and Marc Groenhuijsen, my supervisors. I will not easily forget their enormous confidence and support in every project I was involved in over the last years, whether it was related to this thesis, to an article, to a lecture, to a presentation or to a project such as Alpe d'HuZes, which had absolutely nothing to do with my work as a PhD researcher in international criminal law. It has been great to work with such excellent researchers and – far more importantly – with such kind personalities.

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More personal thanks go to (my roomies and paranymphs) Vera and Maartje and my many other dear friends and colleagues about whom I could write a *laudatio* of such length here that even the strongest man in the world would not be able to rip this book in half. With dinners, concerts, visits to amusement parks, sporting events, '(vrimi)bo's', movies, holidays abroad, stupid e-mails or just a simple good conversation, they have, in the words of a good friend, "kept me sane in this otherwise oh-so-lonely profession", and hopefully will continue to keep me that way for the rest of my life.

My final words of thanks go to my family, in particular Charles, Liesbeth, Caroline, Maurice and Rens. The endless and unconditional support of these wonderful people in everything I do is moving, to say the least.

Christophe Paulussen
Tilburg, 1 March 2010

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AIDC	Académie Internationale de Droit Comparé
AIDP	Association Internationale de Droit Pénal
ARACHR	Arab Charter on Human Rights
Art(t).	Article(s)
ASP	Assembly of States Parties
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
AU	African Union
CAR	Central African Republic
cf.	*confer* [compare]
CISCHR	Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms
CPI	Cour Pénale Internationale
DARS	Draft articles on responsibility of States for internationally wrongful acts
DEA	Drug Enforcement Administration
Doc.	Document
DRC	Democratic Republic of the Congo
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ed(s).	editor(s)
edn.	edition
enl.	enlarged
EofC	Elements of Crimes
et al.	et *alii/aliae/alia* [and others]
etc.	*et cetera* [and so on]
et seq.	*et sequentes* [and the following ones]
EU	European Union
EUFOR	European Union Force

FBI	Federal Bureau of Investigation
ff	*foliis* [and (on) the following pages]
FRY	Federal Republic of Yugoslavia
FTCA	Federal Tort Claims Act
GA	General Assembly
GC	Geneva Convention
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
Ibid.	*Ibidem* [In the same place]
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force
ILC	International Law Commission
IMT(s)	International Military Tribunal(s)
IRA	Irish Republican Army
KFOR	Kosovo Force
LRA	Lord's Resistance Army
MLC	Mouvement de Libération du Congo
MONUC	Mission de l'Organisation des Nations Unies en République démocratique du Congo (UN Mission in the DRC)
NATO	North Atlantic Treaty Organisation
No(s).	Number(s)
OAS	Organisation de l'Armée Secrète
OAS	Organization of American States
OR	Official Records
OTP	Office of the Prosecutor
p(p).	page(s)
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
QC	Queen's Counsel
Res.	Resolution
rev.	revised
RPE	Rules of Procedure and Evidence
RS	Republika Srpska
SC	(US) Supreme Court
SCSL	Special Court for Sierra Leone
SFOR	Stabilisation Force
SG	Secretary-General
STL	Special Tribunal for Lebanon
Supp.	Supplement

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMID	United Nations-African Union Mission in Darfur
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNSC	United Nations Security Council
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Mission Transitional Administration in East Timor
US(A)	United States (of America)
USSR	Union of Soviet Socialist Republics
Vol.	Volume
WW	World War

PART 1

INTRODUCTION

CHAPTER I
GENERAL INTRODUCTION

1 CONTEXTUALISING THE PROBLEM

1.1 From the past...

> The men in the first car had almost given up hope. They saw the bus stopping but didn't think anything would happen. All of a sudden Kenet noticed someone walking at the side of the road. It was too dark to make out who it was. "Someone's coming," he said to Gabi, "but I can't see who it is." A few seconds later, in a whisper that sounded to him like a shout, he exclaimed, "It's him!" Gabi's heart leapt with excitement. He threw a hurried glance at his men to check that they were all in position. Eli picked out the approaching figure immediately, but it took Gabi another fifteen seconds. Meanwhile, Klement was turning the corner into Garibaldi Street. Kenet hissed in Gabi's ear, "He's got one hand in his pocket – he may have a revolver. Do I tell Eli?" "Tell him," Gabi answered. "Eli," Kenet whispered, "watch out for a gun. He's got his hand in his pocket." Klement was standing right in front of the car. "Momentito," Eli said and sprang at him. Panic-stricken, Klement stepped back. In their practice exercises Eli had used the method called sentry tackle, seizing the man from behind and dragging him backward, but Kenet's warning about the gun forced him to change his tactics. He pounced on Klement to bring him down, but because Klement had stepped back Eli's leap brought them both crashing to the ground. As he fell, Klement let out a terrible yell, like a wild beast caught in a trap.[1]

This extract describes the thrilling details of Ricardo Klement's abduction in Buenos Aires, Argentina, on 11 May 1960. Klement, better known as Adolf Eichmann, the former head of the Gestapo section which had to implement the policy of the 'final solution' of the Jews in Europe,[2] was seized by agents of Israel's Secret Service the

[1] Harel 1975, pp. 165-166.

[2] See the 1946 Judgment of the IMT of Nuremberg, under 'War Crimes and Crimes Against Humanity' and 'Persecution of the Jews' (read by Judge Nikitchenko and available at: http://avalon.law.yale.edu/imt/judwarcr.asp): "In the summer of 1941 (...), plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy."

Mossad[3] and, a little more than nine days after the capture, flown to Israel to face justice.[4]

Like Eichmann, Argentina was not content with the abduction – albeit, of course, for other reasons. The South American State charged Israel with violation of its sovereignty rights and claimed that the latter had illegally exercised authority on Argentine territory.[5] As a consequence, it demanded that Eichmann be returned to Argentina and that the captors be punished by Israel.[6] When Argentina felt that reparation was not forthcoming through direct negotiations with Israel,[7] it lodged a complaint with the UNSC, which requested Israel "to make appropriate reparation".[8] It thereby thus (implicitly) declared that Israel committed an international wrong – otherwise the reparation would not have been necessary. In a joint communiqué issued on 3 August 1960, the two Governments stated that they "resolve[d] to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina".[9]

After the settlement of the 'incident',[10] the trial commenced before the District Court of Jerusalem. Eichmann was charged with crimes against the Jewish people, crimes against humanity, war crimes and membership of hostile organisations.[11] After the 15-count indictment was read to Eichmann, his counsel Servatius raised the preliminary objection that the Court had no jurisdiction because, among other things, "the Accused was seized forcibly and kidnapped and brought before the Court".[12] This can be seen as a reference to the dictum *ex iniuria ius non oritur*, which means that no right (in this case: jurisdiction to try Eichmann) can be derived from a wrong (in this case: Eichmann's abduction in Argentina).[13] Although

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[3] See, for example, Shaw 2003, p. 577, Cryer *et al*. 2007. p. 46 or even the website of the Israeli Secret Service itself, available at: http://www.mossad.gov.il/Eng/About/IsarHarel.aspx. This site, like every site from this book, has been last accessed on 1 March 2010, the date this book was finalised. This also means that this book has not taken into account material which became available after that date.

[4] In the words of the accused himself: "I was assaulted in Buenos Aires, tied to a bed for a week and then drugged by injections in my arms and brought to the airport in Buenos Aires; from there I was flown out of Argentina." (Statement by the Accused on the sentence, The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, Vol. V, Session 120, available at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-120-03.html.)

[5] See Silving 1961, p. 312.

[6] See *ibid.*

[7] See Baade 1961, p. 407.

[8] UNSC Res. 138 of 23 June 1960.

[9] District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 40 (36 *International Law Reports* 1968, p. 59).

[10] For a more thorough examination on the diplomatic tension between Argentina and Israel after Eichmann's abduction, see Subsection 3.3.2 of Chapter III.

[11] See The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, Vol. 1, Session 1, available at:
http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-001-01.html and
http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-001-02.html.

[12] *Ibid*., available at:
http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-001-02.html.

[13] See Lasok 1962, p. 360, Green 1963, pp. 641-642 and Strijards 2003, p. 754.

Attorney-General Hausner did not deny the kidnapping itself, he was not impressed by Servatius' argument and stated:

> [W]here a person is legally [a]ccused of committing a crime and he is legally kept under arrest at the time when he is brought before the Court and stands his trial, the Court should not examine the circumstances which led to the fact that the Accused (…) is brought before the Court. In other words – the circumstances of the Accused's detention, his seizure and his transfer are not relevant for competence and they contain nothing which can affect this competence, and since they are not relevant, they should not be considered and evidence concerning them should not be heard.[14]

The judges of the District Court of Jerusalem, like their colleagues of the Israeli Supreme Court (on appeal), concurred with this counter-argument,[15] which can be viewed as an application of another Latin maxim: *male captus bene detentus*,[16] sometimes referred to as the 'tough luck rule':[17] a court can properly detain a person (read: can properly exercise jurisdiction over a person) (*bene detentus*), even if that person was brought into the power of that court in an irregular way (*male captus*). It is this maxim which is at the core of this study.

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[14] The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, Vol. 1, Session 1, available at:
http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-001-05.html.

[15] See District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Decision on the Preliminary Objections', 17 April 1961, Criminal Case No. 40/61, available at:
http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-006-01.html: "As for the arguments over the circumstances under which the Accused was brought to the State of Israel, in view of the fact that we have found that the Court has jurisdiction to try the Accused, the manner in which he was brought within the jurisdiction of this Court has no relevance according to law, neither has the fact whether he was apprehended abroad by emissaries of the governing authorities of the State of Israel or not."; District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 41 (36 *International Law Reports* 1968, p. 59): "It is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State. The courts in England, the United States and Israel have constantly held that the circumstances of the arrest and the mode of bringing of the accused into the territory of the State have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances."; Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 13 (36 *International Law Reports* 1968, pp. 306 and 307): "[W]e agree with the reasoning of the District Court in its entirety and shall therefore content ourselves here with a brief reply to some of the contentions by which counsel for the appellant sought to destroy it. (…) As has been indicated, the moment it is conceded that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, the Court is no longer bound to investigate the manner and legality of the appellant's detention, as indeed may be gathered from the judgments upon which the District Court has rightly relied."

[16] See Strijards 2003, p. 755 and Sloan 2005, p. 497.

[17] See Paust *et al*. 1996, p. 454.

1.2 …via the 'war on terror'…

Almost half a century later, irregular methods are still used to seize suspects (of serious crimes). For example, in the 'war on terror', it seems that the ends often justify the means: suspects of terrorism are to be caught, while *the way* they are caught is considered less important.[18] For example, in the *Amnesty International Report 2005*, one can read:

> There is strong evidence that the global security agenda pursued since 11 September 2001, the US-led "war on terror", and the USA's selective disregard for international law encouraged and fuelled abuses by governments and others in all regions of the world. In many countries, new doctrines of security continued to stretch the concept of "war" into areas formerly considered law enforcement, promoting the notion that human rights can be curtailed when it comes to the detention, interrogation and prosecution of "terrorist" suspects.[19]

One can easily add the word 'arrest' here as well: in 2006, both a committee from the Council of Europe and the European Parliament issued reports in which one can find several examples of abduction operations involving terror suspects.[20] The most

[18] This is perhaps also due to the dangerous metaphor 'war on terror' which can be interpreted as meaning that the normal rules of criminal justice do not apply in this context at all. (See the famous phrase of Cicero from *Pro Milone*: *silent [enim] leges inter arma*, "[l]aws are silent amid arms" (Garner 2004, p. 1758).) Admittedly, two international armed conflicts have taken place within the wider context of the 'war on terror' (Afghanistan and Iraq) and in those conflicts, most legal rules are different than those applicable in peace situations. (See Borelli 2005, p. 46.) That, however, is not saying at all that the laws are silent in this context. In addition, "[t]o the minds of those who invoke that notion, (…) the "war on terror" extends far beyond the conflicts in Afghanistan and Iraq to encompass all the anti-terror operations which have taken place since September 2001." (*Ibid*.) Every operation within the context of the 'war on terror' not related to proper armed conflicts should be executed within the normal context of criminal justice. In the words of MacDonald: "On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'. (...) We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice." (K. MacDonald, 'Security and Rights' (Speech to the UK Criminal Bar Association), 23 January 2007, available at: http://www.cps.gov.uk/news/articles/security_rights.)

[19] *Amnesty International Report 2005: The state of the world's human rights* (available at: http://www.amnesty.org/en/library/info/POL10/001/2005), under ''Terror', 'counter-terror' and the rule of law'.

[20] See Committee on Legal Affairs and Human Rights (rapporteur: D. Marty), Parliamentary Assembly, Council of Europe, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Doc. 10957, 12 June 2006 and (from the same rapporteur) *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, *Explanatory Memorandum*, AS/Jur (2007) 36, 7 June 2007. See also: Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (rapporteur: G.C. Fava), European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200 (INI)), 30 January 2007 (FINAL A6-0020/2007) and European Parliament, *European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), 14 February 2007 (P6_TA(2007)0032). See finally: Amnesty International, *State of denial. Europe's role in rendition and secret detention*, June 2008. See for earlier publications on this subject, for example: Association of the Bar of the City of New York & Center for Human Rights and

famous example is probably that of Hassan Osama Mustafa Nasr, also known as Abu Omar, in Milan, Italy. On 17 June 2003, this Egyptian cleric was "grabbed on the sidewalk by two men, sprayed in the face with chemicals and stuffed into a van".[21]

> Italian authorities suspect the Egyptian was the target of a CIA-sponsored operation known as rendition, in which terrorism suspects are forcibly taken for interrogation to countries where torture is practiced. (…) The CIA has kept details of rendition cases a closely guarded secret, but has defended the controversial practice as an effective and legal way to prevent terrorism. Intelligence officials have testified that they have relied on the tactic with greater frequency since the Sept. 11, 2001, attacks.[22]

These words show that it might not even be the intention of the kidnappers to bring the suspects to a courtroom, but merely to an interrogation room. In such a case, the *male captus bene detentus* maxim does not even *have* to be applied, for the case will not entail the involvement of a judge.[23] Admittedly, these practices are therefore not directly interesting for the purpose of this book.[24] However, they nevertheless

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Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, ABCNY & NYU School of Law, New York, 2004 and Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After* Rasul v. Bush, NYU School of Law, New York, 2005. It may be interesting to note that apparently, the new US Administration is not going to change its policy in that respect: "The Los Angeles Times on Sunday (1 February [2009]) revealed that according to executive orders signed by Mr Obama on 22 January, the CIA is to be permitted to engage in the abduction of terrorist suspects, so long as this is only performed for short-term periods." (L. Phillips, 'US rendition flights to continue', *EUobserver*, 3 February 2009, available at: http://euobserver.com/9/27523.) In Phillips' article, one can also find the following interesting remarks: "The US daily quotes an anonymous administration official as saying that the practice could be expanded as it is the last mechanism that remains to capture individuals suspected of terrorism. "Obviously you need to preserve some tools – you still have to go after the bad guys," the US official told the LA Times. "The legal advisors working on this looked at rendition. It is controversial in some circles and kicked up a big storm in Europe. But if done within certain parameters, it is an acceptable practice.""

[21] C. Whitlock, 'Europeans Investigate CIA Role in Abductions', *The Washington Post*, 13 March 2005, available at: http://www.washingtonpost.com/wp-dyn/articles/A30275-2005Mar12.html.

[22] *Ibid*. Note that such tactics, even though '9/11' strengthened the feeling that they could be used in the terrorism context, were, in fact, indeed already part of a pre-'9/11' policy. A good example of this is Presidential Decision Directive (PDD) 39, 'US Policy on Counterterrorism' of 21 June 1995 (signed by Clinton): "If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government". (See Borelli 2004, p. 351.) See also Kash 1997.

[23] See also Arbour 2006, pp. 514-515, who contrasts the 'old normal' with the 'new normal': "Reasonable people may disagree about the appropriate framework that should govern the apprehension and transfer to trial of an international terrorist suspect, war criminal or torturer. (...) But what all these cases [in the 'old normal', ChP] have in common (...) is that they were ultimately aimed at bringing alleged criminals to justice. (...) [The] features of the 'new normal' are characterized by the fact that it would appear that terrorist suspects are being arrested, detained and interrogated with no apparent intention of bringing them to trial." See also Parry 2005, p. 529.

[24] However, one can imagine (or at least hope) that *if* a suspect, after being kidnapped, interrogated and tortured, would nevertheless be brought before a judge, that that judge has no option but to refuse

clearly demonstrate more generally that in the context of the struggle against terrorism, authorities may not hesitate to resort to irregular means of obtaining custody over high-level suspects. Now, if suspects of terrorism are 'lucky' enough to be brought to justice after their alleged irregular arrest, and if the outcome of the suspect's case is not already settled because of an established rule of law applicable to *any* suspect, whether that suspect is charged with fraud, genocide or terrorism (*cf.* the case in *Eichmann* and the text in footnote 15), one can imagine that the judge, in balancing all the different interests at stake, will probably not refuse jurisdiction too readily because of the seriousness of the suspect's alleged crimes and hence the importance of the continuation of the trial.[25]

1.3 …to the International Criminal Court

It has become clear from the above that the use of irregular means was (*Eichmann*) and is still (*Abu Omar*) considered an option in apprehending suspects, especially when the interests are (considered to be) strong. After all, it seems obvious that the authorities of State A would not easily put, among other things, relations with State B on the line by abducting a person from the latter State if that person is merely suspected of fraud. Conversely, the authorities of State A might consider the possibility of abduction more seriously if that person is suspected of serious crimes such as genocide or terrorism.

The link with the International Criminal Court (hereinafter: ICC) is now easily made: this Court tries suspects of "the most serious crimes of concern to the international community as a whole",[26] namely genocide, crimes against humanity, war crimes and aggression.[27] The crime of terrorism – the previous subsection was

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jurisdiction. See also the remainder of Arbour's words (in n. 23): "And I say 'with no apparent intention of bringing them to trial' because the circumstances of their arrest, detention and interrogation – take only the length of their detention – would in any credible jurisdiction amount to such an abuse of process that trial jurisdiction, if it ever existed, could never be exercised."

[25] Although much will, of course, depend on the exact circumstances. *Cf.* the *Al-Moayad* case, to be discussed in Chapter V.

[26] Art. 5, para. 1 of the Rome Statute of the International Criminal Court (hereinafter: ICC Statute).

[27] Note that at the time the ICC Statute was signed in Rome, there was no consensus on the exact definition of the crime of aggression (the waging of an unlawful war). Between 31 May and 11 June 2010, a Review Conference will be held in Kampala, Uganda, to review and where necessary amend the ICC Statute (see Art. 5, para. 2 of the ICC Statute: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 [entitled 'Amendments', ChP] and 123 [entitled 'Review of the Statute', ChP] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.") and this will, of course, constitute an excellent opportunity to retry reaching consensus on a precise definition. If that were to be realised, then the possibility of the ICC to actually prosecute persons responsible for waging an unlawful war would be within reach. The point 'Proposals for a provision on the crime of aggression' has, in any case, been included in the provisional agenda of the Review Conference, see point 9 (b) of the draft provisional agenda, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RevConf-prov-agenda.ENG.15-September-2009.pdf. See for more information on this topic, for example, A. Seibert-Fohr, 'The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC', *ASIL Insights*, Vol. 12, Issue 24, 18 November 2008, available at: http://www.asil.org/insights081118.cfm.

not only included to show that abductions still take place in our times – is not mentioned in the ICC's jurisdiction *ratione materiae*, but this might change in the future.[28] Furthermore, acts of terrorism might also fall under existing ICC crimes.[29]

Now, what is the ICC's position on suspects[30] claiming to have been the victim of a *male captus*? Does it opt for effectiveness (in the sense of achieving prosecutions and convictions), *male captus bene detentus* and a continuation of the case? Or is it of the opinion that values such as fairness, human rights and the integrity of its proceedings demand that in the case of an irregular arrest, the exercise of jurisdiction must be refused: *ex iniuria ius non oritur*?[31] Of course, one

[28] As explained in the previous footnote, the ICC Statute, including its jurisdiction *ratione materiae*, can be amended pursuant to Art. 121 of the ICC Statute. In this context, reference should be made to Resolution E adopted at the Rome Conference in 1998 (see Annex 1 ('Resolutions Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court') to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, UN Doc. A/CONF.183/10, 17 July 1998). This resolution states, among other things: "The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Having adopted the Statute of the International Criminal Court, (…) Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court, (…) Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court [emphasis in original, ChP]." In the context of the 2010 Review Conference, the Netherlands has proposed to include terrorism as a distinct crime in the ICC Statute pursuant to the above-mentioned Resolution E (comparable with the method used in 1998 in the context of the crime of aggression, meaning that the crime should now be included and that States can later agree on its exact definition and on the conditions regarding the exercise of jurisdiction with respect to that crime). See for more information on this proposal (and the initial reactions from other States): ASP, Eighth session, The Hague, 18 – 26 November 2009, OR (ICC-ASP/8/20), Annex II (*Report of the Working Group on the Review Conference*), paras. 40-51.

[29] See Goldstone and Simpson 2003, p. 24: "The effectiveness of the ICC as a forum for the prosecution of acts of terrorism is hampered by the fact that the crime of terrorism may only be included within the ICC's jurisdiction by way of amendment, which can happen no earlier than seven years after the Statute has come into force (i.e., 2009). Moreover, if such an amendment is made to the Statute, it will only be binding on those States Parties that accept it. In the interim, other kinds of fora must be used to prosecute any acts of terrorism that occur, unless of course the acts also fall under the definition of one of the crimes already within the ICC's competence [original footnotes omitted, ChP]."

[30] The word 'suspect' has been chosen in this book to typify the person under ICC investigation whose charges have not been confirmed yet – the person who will normally make the *male captus* claim. (After the confirmation of the charges, the actual trial process starts and the 'suspect' becomes an accused.) However, one must be aware of the fact that the term 'suspect' has been merely chosen for convenience sake: the ICC Statute itself does not use it. See also Hall 2008 A, p. 1097: "The drafters of the Rome Statute decided not to use the term "suspect", in part because some states thought that it would lead to premature prejudice against the person targeted by an investigation. However, in line with others who have sought to avoid the resulting awkwardness, this Commentary uses the term "suspect" to describe a person with regard to whom "there are grounds to believe that [he or she] has committed a crime within the jurisdiction of the Court" and with respect to whom the Pre-Trial Chamber has not confirmed charges pursuant to article 61 para. 7, at which point a suspect becomes an "accused"". *Cf.* also Edwards 2001, p. 332, n. 33.

[31] This dilemma is reminiscent of Packer's two models of the criminal process: the Due Process Model and the Crime Control Model (see Packer 1968, pp. 149*ff*). See also Trechsel 2005, p. 84: "Crime

can assume that much will depend on the exact circumstances here, for example, on the sort of *male captus* involved, but it is nevertheless good to keep this basic dilemma in mind when embarking on this study.

Luckily, this intriguing dilemma can now be examined, for already in the very first cases of the ICC, *male captus* claims were made to which the judges had to respond. However, when the first words of this book were written (in September 2005), when it was not yet clear that the ICC would issue *male captus* decisions, it was already predicted that the ICC would probably be confronted by *male captus* cases *some day*. This prediction was based on the following two features of the ICC's system.

First, the ICC cannot try suspects *in absentia*, that is, without them being present in the courtroom.[32] Hence, a trial can only commence when the suspect is in The Hague and, in most cases, that means that the person must be arrested and surrendered.[33] In other words, the arrest and surrender normally constitutes a *conditio sine qua non* to prosecution.[34]

Secondly, the ICC does not have its own police force. This means that it is dependent on others – one could hereby think of States and international forces – in the enforcement of arrests and surrenders. It can be seen, to use Cassese's famous and often-quoted metaphor when he was typifying the ICTY, as "a giant without arms and legs"[35] who "needs artificial limbs to walk and work".[36]

These two features can lead to the following two scenarios.

First, it may occur that a State is unwilling to cooperate with the ICC, for example, because the suspect still enjoys considerable support from the public back home and those in power do not feel like taking measures which will not be well received by their constituents[37] or because those in power are themselves being investigated by the Court.[38] In those cases, the ICC is dependent on a State which does not want to cooperate with the Court in The Hague. The question is how long the ICC can wait for suspects to be arrested – how damaging a prolonged period of

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control emphasizes outcome justice, effectiveness, and speediness, while due process centres on the right of the individual, the rights of defence, in short the concept of procedural justice."

[32] See Art. 63, para. 1 of the ICC Statute. See n. 1 and accompanying text of Chapter VIII for more information.

[33] As will become clear in Subsection 3.1 of Chapter VIII, a suspect can also be summoned to come to The Hague (without the necessity of arrest). Finally, there is the possibility that a suspect appears voluntarily before the judges. However, even though the ICC case of Abu Garda has already shown that an arrest may not be necessary, one can assume that this situation will not occur too often.

[34] See also Young 2001, p. 317.

[35] Cassese 1998, p. 13.

[36] *Ibid*. See in that respect also the title of Maogoto's article: 'A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime' (Maogoto 2004).

[37] *Cf.* in that respect the case of Croatian 'war hero' Gotovina in the context of the ICTY. See also Ph. Vallières-Roland, 'Prosecuting War Criminals: A Critique of the Relationship between NATO and the International Criminal Courts', Centre for European Security and Disarmament (CESD) – Briefing Paper, February 2002, available at http://www.isis-europe.org/pdf/2008_artrel_87_2002_archives_59_paper.natoandiccs.pdf, p. 7.

[38] See in that respect the situation in Darfur, Sudan before the ICC.

non-cooperation is for the ICC's credibility in the world.[39] Now, the ICC is a permanent international criminal court, so in a way, time is on its side: it can wait.[40] However, victims of the suspect in whom the ICC is interested (especially if that suspect is still continuing to commit his[41] crimes) do not have this luxury: they cannot wait. Their existence, in contrast to the ICC's, is not eternal.[42] Hence, it is not difficult to imagine that if a situation of non-cooperation lasts for quite some time, (international) pressure for 'results' will increase. And such pressure will probably not only be focused on the non-cooperative State, but also on the ICC itself as the latter, in the eyes of the international community, may not have been as efficient in trying suspects of international crimes as was hoped for.[43] In such a situation, it is not unthinkable that ICC officials may be inclined to look for more 'creative' ways in bringing suspects to The Hague,[44] even if such methods do not strictly follow the legal procedures to which the Court should adhere.[45]

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[39] *Cf.* Ruxton 2001, p. 20, writing on the experience of the ICTY: "We had great difficulty in securing arrests in the early period. To such an extent that the credibility of the whole institution was put in jeopardy."

[40] See the following words of Chief Prosecutor of the ICC Moreno Ocampo: "To be indicted by the ICC is very serious. I would like Harun to be arrested quickly, but the court is a permanent one and it can wait." (S. Bradley, 'Prosecutor has Darfur masterminds in sights', *Swissinfo*, 12 March 2008, available at: http://www.swissinfo.org/eng/search/Result.html?siteSect=882&ty=st&sid=8848704.)

[41] As will become clear in the remainder of this study, almost all the suspects who will be reviewed in this book have the dubious honour of being male persons. As a result, the words 'he' and 'his' will be used when the sex of the suspect to which is being referred is not clear. For convenience sake, the masculine words 'he' and 'his' will also be used for other persons than suspects if the sex of that person is unclear. However, it is evident that in both situations, the feminine words 'she' and 'her' could and should be read here as well.

[42] See the above-mentioned (see n. 40) interview where Moreno Ocampo's words "it can wait" are followed by: "The problem is the victims. Harun is still active. It's not just about punishing him; we need to stop his activities." (Bradley 2008.) Note furthermore that long delays may also have other consequences, see Harmon and Gaynor 2004, p. 410, writing on the context of the ICTY: "Delays in securing the prompt arrest of indicted persons result in considerable problems in prosecuting and defending cases in the ICTY. The quality and availability of evidence may deteriorate over time: memories fade, witnesses die, and as witnesses settle into new, stable lives in the former Yugoslavia and elsewhere, some become reluctant to The Hague to retell and, in a sense, relive the horror of their past experiences."

[43] This, in turn, could have an effect on the credibility of the ICC. *Cf.* in that respect the following quotation from 1996 – the year in which not even one of the over fifty indicted persons had been detained by the ICTY – of the then ICTY's Prosecutor Goldstone: "This failure of the ICTY to follow through and arrest those indicted could well be fatal to the credibility of the Tribunal". (Goldstone 1996, p. 13.) (It must be noted, of course, that the ICC has already several suspects in its custody, but the remark of Goldstone can still be relevant for those (future) ICC situations under investigation where suspects are not surrendered to The Hague.) See finally also the words of Ruxton in n. 39.

[44] See also the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at: http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, para. 89: "Articles 91 and 92 set forth arrest procedures in coordination with requested States. [The arrest procedures of the ICC, including Artt. 91 and 92 of the ICC Statute, will be addressed in detail in Chapter VIII of this book, ChP.] However, situations may arise where the Prosecutor is compelled, due to non-co-operation by a requested State or the sensitivity of "tipping off" the requested State, to explore *ad hoc* measures to effectuate arrest. The type of co-operation the Prosecutor may need from various

Although such a scenario will probably not happen too often (it cannot be completely excluded, however), the second scenario of an alleged *male captus* can occur quite easily. (It is also this scenario by which ICC judges were confronted in their very first case.) What is meant is the situation that a State (or international force) allegedly arrests or detains a suspect unlawfully before surrendering him to the ICC.[46]

It is not difficult to imagine that especially in a State (recently) torn apart by war,[47] less attention may be paid to exactly following the legal rules in arresting/detaining a person. Only a month after the above-mentioned prediction was made in September 2005, a situation occurred which confirmed the idea that the ICC would probably have to decide a *male captus* case stemming from this second scenario at some stage. This situation had to do with the ICC's case in Uganda, against the (initially) five leaders of the LRA: Joseph Kony, Vincent Otti, Raska

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States to execute an arrest warrant under these circumstances could lead to innovative and extraordinary measures not contemplated by the Statute or the rules." *Cf.* in that respect also the (failed) attempt in 2007 of the ICC to divert a plane, allegedly carrying ICC suspect Harun, see P. Worsnip, 'ICC bid to arrest Sudan suspect failed – spokeswoman', *Reuters*, 6 June 2008, available at: http://www.reuters.com/article/idUSN06455243: "The idea was to divert a plane carrying Ahmad Harun, Sudan's minister for humanitarian affairs, as it was heading for Saudi Arabia, where the annual Muslim haj pilgrimage is held in Mecca, [ICC] spokeswoman Florence Olara said. The pilgrimage, which Muslims must perform at least once if they are able, took place last year from Dec. 17-21. "Using cooperation from some states, the plane would have been diverted," Olara said. "There was a country ready to receive the plane once it was diverted, but he was tipped off and got off the plane. So he never went to Mecca."" See finally also Gillett 2008, p. 27: "In light of the difficulties experienced by the ICC in its efforts to arrest those people accused of international crimes, creative solutions grounded in the principles underpinning the Rome Statute must be explored." (Note, however, that Gillett does not see a solution in, for example, an abduction legally 'approved' by the *male captus bene detentus* rule, see *ibid*., p. 24.)

[45] *Cf.* in that respect the ICTY *Dokmanović* case (see Subsection 3.1.1 of Chapter VI) where an investigator of the ICTY lured (see Subsection 1.3 of Chapter III for more information on this method) Dokmanović from the Former Republic of Yugoslavia to Croatia where he was subsequently arrested, an operation which was deemed legal by the ICTY, but not by Sluiter (2001, p. 153) who qualified Dokmanović's arrest as unlawful. (*Cf.* also Scharf 1998, p. 376 and Van Sliedregt 2001 B, p. 79.) See finally Swart 2002 C, p. 1675 (writing about "abduction and other methods of getting hold of a person"): "There may be a special temptation to use these methods in relation to States which have refused to comply with requests or orders for arrest or transfer issued by a tribunal."

[46] Indeed, even private individuals may play a role in this context, see again the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at: http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, para. 89: "Alternatively, arrests may simply be spontaneously effected by private individuals in absence of any request or authorisation. This has on occasion occurred before the *ad hoc* Tribunals, where third parties have, *via* irregular processes, simply detained indictees on their own initiative and thereafter delivered them to peacekeeping forces obliged to transfer indictees to the seat of the Tribunal, thus prompting an immediate jurisdictional challenge before a Pre-Trial Chamber." This topic will also be addressed in detail in this book.

[47] This may also constitute an additional complication for the ICC's functioning: in contrast to several other international(ised) criminal tribunals, the ICC may often have to deal with ongoing conflicts. However, it should also be noted that the fact that the ICC may operate in such a context does not *necessarily* mean that it will be harder for the ICC to have persons arrested, see n. 35 and accompanying text of Chapter VIII.

Lukwiya, Okot Odhiambo and Dominic Ongwen.[48] After it had become clear in 2005 that some of the rebels led by Vincent Otti might have fled to neighbouring DRC, the *Los Angeles Times* stated that Ugandan President Museveni "has said if the Congolese army doesn't apprehend the rebels, he'll send his army across the border to do the job".[49] Although this case has not seen any arrests yet, it is clear that if Otti were to be arrested in the DRC by the Ugandan army, he would probably claim to have been kidnapped before being brought to The Hague by the Ugandan authorities.[50]

Furthermore, the inter-State context of the struggle against terrorism described above may also lead to States taking a tougher stance on suspects of serious crimes more generally. That, in turn, may also have its consequences for the ICC, because that institution, as explained, is dependent on those States.[51]

2 GOALS, CENTRAL QUESTION AND METHODOLOGY

It is clear from the above section that this study more generally wants to combine two fascinating subjects which have not previously been put together in one book: *male captus bene detentus* and the ICC. As a result, the Latin maxim, the ICC (arrest and surrender) system and, most importantly, the area where these two subjects merge, namely the actual ICC position on *male captus* cases, will be thoroughly analysed. This might not merely be interesting to the reader; perhaps it might also be helpful. One could think here of (ICC) judges struggling with the topic and in need of more background information. Nevertheless, with respect to the ICC *male captus*

[48] The proceedings against Raska Lukwiya were terminated on 11 July 2007 when it became clear that Lukwiya was killed on 12 August 2006, see ICC, Pre-Trial Chamber II, Situation in Uganda, *In the Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, 'Decision to Terminate the Proceedings Against Raska Lukwiya' (Public), ICC-02/04-01/05, 11 July 2007.

[49] E. Sanders, 'Ruthless Rebels of Uganda Appear to Be Losing Steam', *Los Angeles Times*, 10 October 2005, available at: http://articles.latimes.com/2005/oct/10/world/fg-uganda10. *Cf.* also the following words (which seem to constitute implicit concerns) of UNSG Annan one year later in his *Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)*, 29 June 2006, S/2006/478, para. 54: "It should be emphasized that the countries of the region have an overwhelming capacity to address the LRA threat. If the Governments in the region find a mutually agreeable way to strengthen cooperation on the ground among their security forces, it could create a solid basis to deal more effectively with the lingering threat from LRA. However, I would urge them to seek a coherent approach to this challenge, which should be based on strict adherence to the provisions of international law, including respect for the inviolability of the internationally recognized borders and territorial integrity of the States affected by the activities of LRA and other illegal armed groups."

[50] Currie (2007, pp. 383-384) provides another example, namely of a national leader or another perpetrator who commits crimes on the territory of an ICC State Party and then flees to a non-State Party: "One can easily imagine circumstances in which vengeful politicians in a post-conflict or post-dictatorship government were motivated enough by an individual's crimes to employ their own forces – or bounty hunters – to apprehend their otherwise unreachable quarry." Note that Kony, Odhiambo and Ongwen are believed to have fled to Sudan, but this State "has given permission to the Ugandan army to pursue the wanted individuals on Sudanese territory." (Bekou and Shah 2006, p. 524, n. 132.)

[51] *Cf.* in that respect also Ülgen 2003, p. 441 (writing on the context of the ICTY, an institution which is also dependent on States).

position, this study does not want to confine itself to a 'mere' description or analysis; it also wants to know how the ICC position is doing in a broader context. In short, it wants to assess. All this leads to the following

Central question:

How does the ICC currently cope with the dilemmas that a male captus *case can give rise to and how should this approach be assessed?*

Describing and analysing the principle *male captus bene detentus*, the ICC (arrest and surrender) system and the current ICC position on the *male captus* issue is unproblematic in terms of methodology. These subjects and their correlations 'only' have to be sorted out and written down in such a manner as to be clearly understood by the reader.

It is the assessment exercise that needs some explanation here. This study is interested in two main questions, namely 1) how similar or different is the ICC *male captus* position to the position of other courts that have dealt with this problem before; and 2) how is the ICC position to be assessed in relation to its *own* law? Hence, what this study is striving for is to create two evaluative frameworks against which the ICC *male captus* position can be assessed, an external one (*vis-à-vis* the position of other courts) and an internal one (*vis-à-vis* the law of the ICC itself).

The last evaluative framework is probably the most important one for the ICC. It wants to compare the actual ICC *male captus* position with what the law of the ICC prescribes the judges to do. By making such a comparison, one can hopefully see if the practice of the ICC is in conformity with the theory, if the law in action is in accordance with the law in the books. This framework will be created by a detailed examination of Article 21 of the ICC Statute, which is entitled 'Applicable law' and which prescribes the legal route that judges must follow in making their decisions. It is submitted that with help of this framework, one should be able to see if the ICC is functioning as it should function according to its own law.

The first evaluative framework is more non-committal but certainly no less interesting. Its goal is not to see whether the ICC is acting as it should act; its goal is to see how other judges have coped with the problem in order to find out whether the ICC judges follow their colleagues or whether they take a different stance (and, if possible, what the reasons for potential divergence are/could be). Even if the ICC judges are not obliged to follow case law from other jurisdictions,[52] it is the opinion of this study that an examination of this case law can nevertheless be instructive as a comparison will help in elucidating the exact position of arguably the most important institution in the field of international criminal justice in this old[53] and

[52] Whether this is truly the case will be addressed when examining Art. 21 of the ICC Statute, see Chapter IX of this study.

[53] Bauer notes, for example, that Baldus de Ubaldis (1327-1400), one of the most famous jurists from the Middle Ages, already argued that a court has no jurisdiction over a person who has been the victim of an abduction on foreign territory: "„In isto puncto videtur prima facie dicendum, quod quum dictus

very interesting discussion in which so many have given their opinions before.[54] This framework will be created by reviewing the position of courts dealing with *male captus* cases from the context between States on the one hand and between States and international(ised) criminal tribunals other than the ICC on the other.[55]

This study will try to examine case law, literature and regulatory documents as objectively (but certainly not uncritically!) as possible because it is believed that only such an approach can lead to useful internal and external evaluative frameworks. However, the material can sometimes be interpreted in several ways. In such instances, this study will, of course, not hesitate in taking a position either.

This latter point also has to do with the third and final objective of this study; as well as more generally combining two fascinating subjects which have not previously been put together in one book and more specifically answering the above-mentioned central question, this study also seeks to make a contribution to the *male captus* discussion itself, to the discussion as to how ICC judges and judges in general can best deal with alleged irregularities in the pre-trial phase of their case, to the discussion on how proceedings can be achieved which are considered both effective and fair. Hence, this study will also contain several recommendations, of which the most important ones will be presented in the final chapter, after the central question of this book has been answered.

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violenter captus, licet extra territorium, est quocumque modo sub fortia judicis, ubi deliquit, ibidem veniat puniendus. Sed his non obstantibus est veritas: *quia non licuit eum capere in territorio alieno* … forma (sc. remissionis) non servata debet captus tanquam spoliatus propria libertate in eandem libertatem restitui." [emphasis in original, ChP]" (Bauer 1968, p. 144, n. 2.)

[54] In addition to this evaluative value for this study, an overview of *male captus* case law from other jurisdictions can also be helpful to (ICC) judges struggling with the *male captus* problem and in need of more background information, just like the general information on the maxim itself and the ICC's surrendering system. After all, in many cases where a judge is confronted by a *male captus* case, abundant reference is often made by the Defence and Prosecution to *male captus* cases from different jurisdictions. For example, in the first *male captus* case before the ICC's Appeals Chamber (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006), all the parties involved referred to (inter)national case law to back their positions. Overviews, which summarise the most important *male captus* cases from both the inter-State context and the context of the international(ised) criminal tribunals, may to a certain extent help judges who can no longer see the wood for the trees, who are trying to assess the relevance of these cases for their own decision, who are more generally struggling with the dilemmas *male captus* cases can bring forth and who would not mind to learn from the views of other judges who have already coped with the problem (even if they would not be obliged to follow their views).

[55] The precise benchmarks, namely the *exact* courts to be used in this external framework, will be further explained in Chapter IV.

3 OUTLINE

This research is composed of five parts.

Part 1 (and Chapter I) will end with this section and consists of a first introduction to the subject, including the goals, central question, methodology and outline of this study.

Before examining the status of *male captus bene detentus* in practice, the maxim itself will be scrutinised in Part 2. "Where does it come from?" and "What does it mean exactly?" are the two main questions of this rather theoretical part. As a result, an attempt will be made to find the (Roman?) origin of these four Latin words (Chapter II). In addition, the different elements of the maxim will be thoroughly analysed (Chapter III). In this third chapter, answers will be provided to four main questions, namely 1) "Which *male captus* situations exist?", 2) "What is violated by these *male captus* situations?", 3) "Who violates?" and 4) "What are the consequences of such violations?" At the end of this part, the reader will have been presented with concepts, delimitations and definitions which are necessary for a good understanding of the rest of this study.

In Part 3, after a short introduction (Chapter IV), the material necessary to create the external evaluative framework will be presented: attention will be paid to *male captus* case law from the context between States (Chapter V) and from the context between States and international(ised) criminal tribunals (Chapter VI). Furthermore, and when necessary for a better understanding of the problem, information will also be provided on (the reaction by) legal literature (to those cases) and on the legal systems in which those different courts function – one could hereby think of the transfer regime in the context of the international criminal tribunals. Finally, in Chapter VII, the principles distilled from Part 3, the actual external evaluative framework of this study, will be presented.

Part 4 is dedicated to the ICC. After providing general information on its arrest and surrender regime (Chapter VIII), attention will be paid to the crux of the internal evaluative framework: Article 21 of the ICC Statute (Chapter IX). After that, the two most important subjects of this study – *male captus bene detentus* and the ICC – will be put together to find the ICC's current position on this (by then hopefully very familiar) maxim (Chapter X).

In Part 5 (and Chapter XI) – the conclusion of this research – the successive parts will be brought together in order to answer the study's central question: "How does the ICC currently cope with the dilemmas that a *male captus* case can give rise to and how should this approach be assessed?" Furthermore – and in an effort not to deliver only a descriptive and analytic work – recommendations will be provided which might hopefully be of help to anyone interested in the topic, in particular the ICC judge confronted by a *male captus*. Finally, this study will end with a brief epilogue.

PART 2

ANALYSING *MALE CAPTUS BENE DETENTUS*

CHAPTER II
THE ORIGIN OF THE MAXIM

1 INTRODUCTION

This chapter should start with an explanation as to why it will be somewhat different from the rest of this study. As will be shown in the next part of this book – perhaps it has already become clear from some sentences written in the previous chapter – this study will in principle only look at *male captus* cases where a jurisdictional border has been crossed. Of course, *male captus bene detentus* may be applied within one and the same jurisdiction as well, meaning that a judge from State A would approve the trial of a suspect who was improperly arrested in State A by State A police forces. However, as the 'target' context of this book, that of the ICC, is characterised by a suspect being tried in another jurisdiction than the one in which he was arrested, only *male captus* cases with a multi-jurisdictional dimension will be examined in this study. To be even more precise, attention will only be paid to multi-jurisdictional *male captus* cases where the border *of a country* has been crossed.[1] (There are also multi-jurisdictional *male captus* cases within one and the same country, for example between the several States of the US.)[2] This further delimitation has been chosen because the surrender of a suspect from a country to an international criminal tribunal like the ICC is more akin to (although absolutely not the same as) extradition between two sovereign countries than to surrender between two entities within one sovereign country. After all, the ICC and the country which surrendered the suspect are not equal parts of a higher sovereignty, such as, for example, Texas and Ohio are of the US. Because of this international focus, it may be good to slightly adjust the introductory and rather general definition of *male*

[1] Note that the focus should be here on the country's *legal* border. After all, it might be possible that the person surrendered into the jurisdiction of the court does not physically leave the geographical national borders of a State. For example, when the Dutch authorities transfer or surrender a person from their own national jurisdiction to the ICTY or ICC (which have their headquarters in The Hague), a national jurisdictional and not a national geographical boundary is crossed. (The same goes for Sierra Leone and the SCSL and other internationalised criminal tribunals (with the exception of the STL).)

[2] Despite the fact that almost all the political entities within the country US are called 'States', the word 'State' in his book is most often used to designate an independent, sovereign country.

captus bene detentus as could be found in the first chapter of this book[3] because the words "was brought into the power of that court" could also be applied to a purely domestic context, a context on which this book does not focus. Hence, it is suggested to now understand the maxim to mean that a court can exercise jurisdiction over a person, even if the way that person was brought from one jurisdiction to another (namely the jurisdiction in which the court before which the suspect is now standing operates) was irregular.

Why then is this chapter different? As it is merely looking at the origin of the maxim, which may perhaps be found in a purely national setting, the above-mentioned delimitation does not need to be applied here as well. Nevertheless, the fact that the purely internal situation might also be looked at in the following pages does not mean that special attention cannot be paid, in this chapter as well, to the most interesting context for this book, namely the one where national borders are crossed.

2 ROMAN ORIGIN?

In several books and articles in which the topic of *male captus bene detentus* is addressed, history is often used to illustrate and contextualise the problem involved. One of the most comprehensive books on this subject, Wilske's *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen*, even starts with the *mythical* Oedipus who, while in exile in Kolonos, had to defend himself against agents from Thebe who tried to bring him back to their territory "mit List und Gewalt".[4] One of the oldest *historical* inter-State *male captus* cases in which not only the abduction itself but, more importantly, also its legal context are described can be found in an article by O'Higgins. It is the intriguing case of Dr. John Story, who was seized by British agents in Antwerp in 1569:

> Story (…) was a bitter persecutor of religious dissentients under Mary. During the reign of Elizabeth he was under suspicion for some time and eventually was arrested. He escaped and with the aid of the Spanish Ambassador in London reached asylum in Flanders. Here, under the Duke of Alva, he was given the task of searching all vessels that called at Antwerp for English goods, and in particular for heretical books. Believing that Story was engaged in plotting against Elizabeth, Cecil instructed some of his agents to abduct Story from Spanish territory. Story was induced to board a ship at Antwerp by the report of one of Cecil's agents that it carried a number of blasphemous books. As soon as Story came aboard the vessel set sail for England, where he was put on trial for treason. He denied the jurisdiction of the English courts on the ground that he had become a Spanish national but made no attempt to oust their jurisdiction on the ground of the violation of Spanish sovereignty committed by Cecil's agents. The Spanish Ambassador did on two occasions demand Story's

[3] See Subsection 1.1 of the previous chapter: a court can properly detain a person (read: can properly exercise jurisdiction over a person) (*bene detentus*), even if that person was brought into the power of that court in an irregular way (*male captus*).
[4] Wilske 2000, p. 27.

> release and the punishment of those who has been concerned in his abduction. But without result and Story was executed [original footnotes omitted, ChP].[5]

Now, this is all very interesting, but it does not say anything about the history of the principle itself. Who was the first to 'invent' the maxim as such, namely the four words *male captus bene detentus*?[6] In his report to the *Re Argoud* case, which will be examined in detail in Subsection 2.1 of Chapter V, rapporteur Comte is sure of at least one thing, namely that the maxim "is certainly not from Virgil".[7] However, that does not help this study further, of course. Nevertheless, Comte's remark may imply that the maxim has antique roots (even if these roots cannot be traced back to the Roman poet Virgil).

Since the four words are Latin, it is indeed not illogical to think that their origin might be found in antiquity. In fact, an initial inquiry into some basic sources dealing with Latin rules[8] shows that a considerable number of them *can* be traced back to Roman times. To give two well-known examples: Cicero's already-mentioned phrase from *Pro Milone*: *silent [enim] leges inter arma*[9] ("[l]aws are silent amid arms")[10] and Celsus' phrase [*i*]*us est ars boni et aequi*[11] ("[l]aw is the science of what is good and just").[12] However, this is not the case with *male captus bene detentus*. This fact alone should make one doubt whether the above-mentioned (and *prima facie* logical) mental leap is in fact correct. Notwithstanding this uncertainty, the rule has often been labelled in literature as a(n "ancient"[13] or "old")[14] *Roman* maxim.[15] Unfortunately (but perhaps understandably), in none of these articles, a reference to a Roman source is made.

Therefore, it might be useful to shift the focus of this quest from the more basic sources dealing with Latin maxims to Roman law itself to see whether the latter reveals some information on the origin of *male captus bene detentus*.

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[5] O'Higgins 1961, pp. 281-282.

[6] Or other representations of the same maxim such as: *mala captus bene detentus* or *male captus bene iudicatus*. The latter version of the adage is arguably the most correct one (see, for example, Schultz 1967, Poort 1988, Grams 1994, Bugnion 2002 and Van der Wilt 2004) as it represents the best translation of the idea that a judge can try a person/can exercise jurisdiction over him (*iudicare*), even if the way that person was brought into the court's jurisdiction was irregular. In addition, this formulation of the maxim also circumvents the possible confusion which might be created by the fact that an unlawful detention (which one may easily translate as *male detentus*) may also fall within the notion of *male captus*), see n. 6 and accompanying text of Chapter III. However, since the maxim is most often written as *male captus bene detentus* (and thus recognised as such), the latter version will be used in this book.

[7] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 104 (Report of M. le Conseiller Comte).

[8] See, for example, Stein 1966 and Liebs, Lehmann and Strobel 1982.

[9] See Liebs, Lehmann and Strobel 1982, p. 197. See also n. 18 of Chapter I.

[10] Garner 2004, p. 1758.

[11] See Liebs, Lehmann and Strobel 1982, p. 105.

[12] Garner 2004, p. 1728.

[13] See, for example, Webb 1975, p. 171, Gray 1991, p. 172 and Stark 1993, p. 125.

[14] See, for example, Goldie 1987, p. 131, n. 31.

[15] See, for example, Cherif Bassiouni 1973, p. 45, Vincenzi 1987, p. 211 and Semmelman 1992, p. 514.

In such an examination, one should not leave out the legislation of Emperor Justinian (483-565), which

> mark[ed] the end of the first period of the history of Roman law and the beginning of the second period. Together the Digest, the Code and the Institutes give a comprehensive picture of the way in which Roman law developed from the first century BC up to and including the sixth century. Although the compilers undoubtedly altered the texts in places, adapting them to their own time, they did not make any major changes. Consequently these three works are still the most important source of our knowledge about classical Roman law.[16]

Unfortunately, the maxim will not be found in the *Digest*, *Code* and *Institutes* either.[17] In fact, some rules seem to point to a(n international) legal context in which a rule like *male captus bene detentus* had perhaps no place at all. Taking the "most important"[18] work of the three, the *Digest*, as an example, and focusing first on the most interesting (inter-State) context for this book, the following rules are quite illustrative in that respect:

> -The governor of a province has authority only over the people of his own province, and that only while he is in the province. For the moment he leaves it, he is a private citizen. Sometimes he has power even in relation to non-residents, if they have taken direct part in criminal activity. For it is to be found in the imperial warrants of appointment that he who has charge of the province shall attend to cleansing the province of evil men; and no distinction is drawn as to where they may come from.[19] (…) -One who administers justice beyond the limits of his territory may be disobeyed with impunity.[20] (…) -It is customary for the governors of provinces in which an offense has been committed to write to their colleagues [in whose provinces] the perpetrators are alleged to live, requesting that they be returned along with those who are to prosecute them; this also is laid down in a number of rescripts.[21]

From such rules, the 17th century writer Matthaeus (logically) concludes that the governor from a province where a crime was committed could not arrest the alleged perpetrator on his own authority if the latter was residing in another province.[22] He continues:

> But the commentators ask what must be said if a judge has begun the pursuit of an accused person in his own territory, or when the accused was escaping into another territory. Can he continue to chase and arrest him? It is nearer to the truth to say that he cannot do so; for if he were to do so, he would be exercising jurisdiction in

[16] Tellegen-Couperus 1993, p. 148.
[17] One can easily scan these works on the very practical website http://www.thelatinlibrary.com/justinian.html.
[18] Stein 1999, p. 33.
[19] D.1.18.3 (from Paul, *Sabinus, book 13*). See Mommsen, Krueger and Watson 1985 A, pp. 34-35.
[20] D.2.1.20 (from Paul, *Edict, book 1*). See Mommsen, Krueger and Watson 1985 A, p. 42.
[21] D.48.3.7 (from Macer, *Duties of the Governor, book 2*). See Mommsen, Krueger and Watson 1985 B, p. 801a.
[22] See Hewett and Stoop 1994, p. 498.

> another's territory, not in his own. Everyone realised how dangerous this would be and how easily it would offer a reason for conflict.[23]

This valid argument is very simple yet very strong. If two States wish to live peacefully together, they should respect each other's sovereignty. Conversely, lack of this necessary respect will lead to distrust and potentially to complete chaos. That this powerful argument has not lost any strength over the centuries is evidenced by the UNSC's condemnation of Eichmann's abduction in Argentina (see Subsection 3.3.2 of Chapter III for more information).

This short overview appears to show that inter-State abductions were not permissible in antiquity either. Nevertheless, that does not necessarily imply that the rule *male captus bene detentus* was never applied in those days.[24] An analogy can be drawn to modern times here: even though the UNSC did indeed condemn the inter-State abduction of Eichmann, it did not lead to the refusal of exercising jurisdiction in the Israeli courts, where the judges applied *male captus bene detentus*. Notwithstanding this, and reconsidering the above-mentioned rule that "[o]ne who administers justice beyond the limits of his territory *may be disobeyed with impunity* [emphasis added, ChP]", one may doubt whether the international legal context of classical Roman law offered a good breeding ground for the growth of *male captus bene detentus*.

In the 1991 case *Opinion in State v. Ebrahim*,[25] which will be addressed in more detail in Chapter V, Judge Steyn of the South African Appellate Division (Supreme Court) examined "our common law"[26] on the issue of an abduction's effect on the jurisdiction of a court. As this South African common law "is still substantially Roman-Dutch law as adjusted to local circumstances"[27] Steyn also looked at Roman law. Referring to exactly the same rules from the *Digest* already mentioned *supra*,[28] Steyn explains:

> This limitation on the legal powers of Roman provincial governors and lawgivers is understandable and was unavoidable in the light of the great number of provinces comprising the Roman Empire in classical times, with their ethnic and cultural diversity, and their different legal systems which the politically pragmatic Romans allowed to remain largely in force in their conquered territories. Until late in the history of the Roman Empire certain provinces were controlled by the Senate and others by the Emperor. Intervention by one province in the domestic affairs of another was a source of potential conflict. In order to maintain sound mutual relations, a

[23] *Ibid*.
[24] It is therefore hard to agree with Burr, who states with (a probably unjustified) certainty that "Roman courts (…) declined to exercise jurisdiction over kidnapped suspects brought before (…) [their] courts [original footnote omitted, ChP]." (Burr 2001, p. 108.)
[25] In this chapter, the edited and abbreviated English translation in *International Legal Materials* (prepared by John Dugard) was used: Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), pp. 888-899.
[26] *Ibid*., p. 892.
[27] *Ibid*., p. 895.
[28] See ns. 19-21 and accompanying text.

> practice developed among provincial governors relating to the arrest and extradition of offenders.[29]

After clarifying the fact that this practice became law in Justinian's *Novellae Constitutiones*,[30] he concludes:

> It is inconceivable that the Roman authorities would recognize a conviction and sentence, and allow them to stand, when they were the result of an abduction of a criminal from one province on the order or with the co-operation of the authority of another province. This would not only have been an approval of illegal conduct, and therefore a subversion of authority, but would also have threatened the internal inter-provincial peace of the Empire.[31]

This conclusion confirms the above-mentioned idea that acceptance of a rule which approves the trial of an internationally abducted person would not have seemed very appropriate in classical Roman law.

What can be said about the domestic context of classical Roman law? Again, one can turn here to Matthaeus, who also explains the arrest procedure in this context:

> If an accused person is present [in a footnote from the editors, one can read that here is meant "in the province", ChP] or if it is known to the judge where he is hiding, he orders him to be produced and taken into custody by an *apparitor* (minor public servant) (…). And it makes no difference whether he is arrested in public or at his home. Now some people think that formerly it was not permissible to drag an accused out of his house, but this is not true, for the rule which forbids this pertains to civil, not criminal cases (…). On the contrary, men can even be dragged from a sacred building, if they are accused of the more serious crimes like murder, adultery, or abduction (…).[32]

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[29] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 893.

[30] *Ibid*. See Novella 134, Chapter 5: "When any one of the criminals whom we have just mentioned conceals himself, or leaves the province in which he has committed the offence, We order the judge to call him into court by the publication of lawful edicts, and if he does not obey, the judge shall proceed in the manner prescribed by the laws. If it should be ascertained that the guilty party is living in some other province, We order the judge of the district in which the offence was committed to notify the judge of the province in which the delinquent resides, by means of a letter, to arrest him on his own responsibility and that of his court, and to send the accused to him. When the judge who has received a public letter of this kind fails to do what We have stated, and his court does not surrender the criminal, or if it does not execute the orders given it, We decree that the said magistrate shall pay a fine of three pounds in gold, and his court an equal amount. If, induced by a desire for gain, a judge, or any officer of his court, does not arrest a person of this description, or if, after having arrested him, he does not deliver him up, he shall, after conviction, be deprived of his office, and sent into exile."

[31] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 894.

[32] Hewett and Stoop 1994, p. 497. The word "or" (in the sentence: "If an accused is present [in the province], or if it is known to the judge where he is hiding") might be a little confusing here. One could namely understand it to mean that a person can also be dragged from his home when the person is not living in the province if the judge knows where he is hiding abroad. Nevertheless, as has been shown earlier, one was not allowed to do that.

This information could be interpreted as meaning that the above-mentioned breeding ground for *male captus bene detentus* was perhaps more present in the domestic field than in the international context. However, the fact that an accused could be dragged out of his house in criminal cases is not an indication that the rule *male captus bene detentus* was accepted in classical Roman domestic law: if arresting a person at home was legally possible (as is the case in our modern society if law enforcers have fulfilled several procedural conditions) then one can no longer speak of *male captus* as the *captus* was perfectly legal: *bene captus*. Logically, if there is no *male captus* involved, then the judge cannot pronounce a decision summarised by the maxim *male captus bene detentus*. After all, in such a situation, the essential premise (namely that there was an irregular arrest) is not fulfilled. In conclusion, strong doubts remain about the origin of the Latin maxim in classical Roman law.

Until now, the focus of this Roman law survey was on classical Roman law, which 'merely' deals with a specific Roman law period (even if that period covers no less than seven centuries). However, also in more general sources on Roman criminal law, the maxim was not found.[33]

Although this survey cannot and will not be exhaustive, it is, in any case, clear that the true origin of the maxim is extremely difficult to find in sources on Roman criminal law. In fact, the legal contexts searched do not seem to be perfect places for the maxim to flourish at all.

In conclusion, one could assert that, notwithstanding its old-fashioned appearance, *male captus bene detentus* does not seem to have its roots in Roman criminal law. The four-word phrase may be *Latin*, but it is probably not *Roman*.[34]

3 MODERN ORIGIN?

In fact, the origin of the four-word Latin phrase may perhaps be relatively modern: the oldest text found which actually uses this phrase is M.H. Cardozo's article 'When Extradition Fails, Is Abduction the Solution?', which was published in the *American Journal of International Law* of January 1961.[35] Cardozo hereby refers to

[33] Books searched include Mommsen 1955 ("the platform on which any worker in the field of Roman criminal law must build" (Robinson 1995, p. x)), Strachan-Davidson 1969 and Santalucia 1998.

[34] *Cf.* in that respect, for example, the Latin maxim *nullum crimen, nulla poena sine lege*, which can be traced back 'only' to P.J.A. Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, Georg Friedrich Heyer: Giessen 1801, para. 20. See Schreiber 1976, p. 17: "Die lateinische, bis heute allgemein gebräuchliche Formulierung des Satzes findet sich bekanntlich erstmals bei Feuerbach, und zwar in § 20 seines im Jahre 1801 erschienenen Strafrechtslehrbuches. Freilich hat Feuerbach hier dem Prinzip im Rahmen seines – später noch eingehend zu erörternden – Systems nur die klassisch gewordene Formel gegeben. Das Prinzip selbst ist älter, schon vor Feuerbach hat es in den Vereinigten Staaten während der siebziger Jahre des 18. Jahrhunderts und in Europa in Österreich (1787), Preußen (1794) sowie in für die weitere Zukunft maßgeblicher Gestalt in den Art. 7 und 8 der französischen Erklärung der Menschen- und Bürgerrechte vom 23. 8. 1789 und den Revolutionsverfassungen der folgenden Jahre gesetzlichen Ausdruck gefunden. Nach ganz allgemeiner Ansicht ist der Satz in der bis heute geltenden Gestalt ein Ergebnis des Rechtsdenkens der Aufklärungsepoche (...). Die Ansicht, es handele sich um ein Prinzip des römischen Rechts, stellt nur eine gänzlich unhistorische Kuriosität dar [original footnote omitted, ChP]."

[35] See Cardozo 1961, p. 132.

the 1952 *Frisbie v. Collins* case and also to Hyde's *International Law*[36] but the maxim will not be found in these sources either. The same can be said of the reference to the rule in the equally 'old' article by H.W. Baade: 'The Eichmann Trial: Some Legal Aspects'.[37] In footnotes 12-15 of this article, published in *Duke Law Journal* in the summer of 1961, Baade refers to several older sources, but in none of them, the four-word Latin phrase can be found.[38]

Taking all the above into account, one can say that there are several factors pointing to the fact that the maxim might 'just' be relatively modern.[39] A maxim that nicely and concisely summarises the legal reasoning that an irregular arrest will not prejudice the exercise of a court's jurisdiction.

4 ORIGIN OF THE REASONING BEHIND THE MAXIM

If one tries to find the origin of the legal reasoning *behind* the Latin maxim, then one might have more success. Focusing on the, for this book, most interesting (inter-State) context, one might think back to the case of Dr. Story, which was introduced at the beginning of this chapter. However, in this 16th-century case, the legal reasoning of the English courts with respect to the effect on the exercise of jurisdiction of an (alleged) irregular arrest abroad was not presented (by O'Higgins).

A case which keeps re-appearing in literature and case law as the oldest one with a truly multi-jurisdictional, international dimension[40] and in which one *can* find such a consideration is the *Ex Parte Susannah Scott* case, decided by Lord Chief Justice Tenterden of the Court of King's Bench on Tuesday 19 May 1829.[41] In England, a

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[36] See *ibid*., p. 132, n. 33. Hyde's book, in turn, refers to: "Ker *v*. Illinois, 119 U.S. 436; *Ex parte* Wilson, 140 S.W. 98; Mr. Bacon, Acting Secy. of State, to the Mexican Chargé, June 22, 1906, For. Rel. 1906, II, 1121. See also United States *v.* Unverzagt, 299 Fed. 1015; People *ex rel.* Stilwell *v.* Hanley, 207 N.Y.S. 176; *Ex parte* Campbell, 1 F. Supp. 899. See documents in Hackworth, Dig., IV, § 345." (Hyde 1945, p. 1032, n. 4.)

[37] See Baade 1961, p. 404.

[38] They are the following: "Lord Goddard, C.J., in *Ex Parte* Elliott, [1949] 1 All E.R. 373, 377-78 (K.B.). (…) *Ex Parte* Susannah Scott, 9 B & C 446, 109 E.R. 166, 167 (K.B. 1829). (…) Afouneh v. Attorney-General, [1941-1942] Annual Digest and Reports of Public International Law Cases 327, 328 (…) (Supreme Court of Palestine, sitting as Court of Criminal Appeal, 1942); (…) Yousef Said Abu Dourrah v. Attorney-General, *id*. 331, 332 (same court, 1941). See the authorities collected in Note, 165 A.L.R. 947 (1946) [this is Williams 1946, ChP], and in Scott[, Jr.] (…) 1953 (…) Garcia-Mora (…) 1957 (…). (…) Ker v. Illinois, 119 U.S. 436 (1886); Mahon v. Justice, 127 U.S. 700 (1888) (…) Lascelles v. Georgia, 148 U.S. 537, 543 (1893); *In re* Johnson, 167 U.S. 120, 125-27 (1897). (…) Fairman (…) 1953 (…). (…) Frisb[i]e v. Collins, 342 U.S. 519, 522 (1952)."

[39] That may include a period like the Middle Ages, *cf*., for example, the words of Baldus de Ubaldis (1327-1400) as mentioned in n. 53 of the previous chapter (opposing the idea behind *male captus bene detentus*).

[40] There is another multi-jurisdictional case from 1829 as well, but that one was within one State (namely within the US): *State v. Smith*, 1 *Bailey Law* 283, 19 *Am. Dec.* 679 (S.C. 1829). See Plumb, Jr. 1939, p. 340, n. 13.

[41] Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), pp. 446-448; 109 *English Reports* (1829), pp. 166-167. Factual information from this case has been obtained from 9 *Barnewall & Cresswell's King's Bench Reports* (1829), p. 446; 109 *English Reports* (1829), p. 166.

certain Susannah Scott was indicted for perjury. Lord Chief Justice Tenterden granted a warrant for her arrest, specially directed to the English police officer Ruthven. When the latter apprehended her in Brussels, Scott applied to the English Ambassador for assistance. When he refused to interfere, Ruthven took her to Ostend, and from there to England. There, she was brought before Tenterden, and committed by him to the King's Bench Prison. Scott asked for her discharge (release) on the basis of *habeas corpus*[42] but Tenterden refused, stating:

> The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, *or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.* If the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it [emphasis added, ChP].[43]

This quote is one of the oldest, if not *the* oldest, demonstration of a[44] *male captus bene detentus* reasoning in an international context:[45] an irregular arrest abroad will

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[42] *Habeas corpus*, literally meaning "that you have the body", is "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal (*habeas corpus ad subjiciendum*)." (Garner 2004, p. 728.) See for more information on the history of this concept Duker 1980. Although the goal of *habeas corpus* is that the person detaining someone must bring the person deprived of his liberty to court so that a judge can check whether the deprivation of liberty is lawful, the aim is, of course, also that the person deprived of his liberty be released if the judge deems the deprivation unlawful. Well-known *habeas corpus* provisions, such as Art. 9, para. 4 of the ICCPR and Art. 5, para. 4 of the ECHR (to which considerable attention will be paid in the next chapters), also mention this remedy of release.

[43] Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), pp. 448; 109 *English Reports* (1829), p. 167.

[44] As will be shown in this book, there are more rationales behind invoking the *male captus bene detentus* rule. In this case, the judge did not refuse jurisdiction because it was not in his power (see the word "cannot") to look at pre-trial irregularities. Another example of a *male captus bene detentus* rationale is that a judge continues to exercise jurisdiction, not because he believes that he cannot look at the way in which a person was brought before him but simply because he is not interested in this pre-trial phase.

[45] In *Ex parte Susannah Scott*, reference was made to two older criminal cases to support the idea that "the court will not inquire into the manner in which the caption was effected" (Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), p. 447; 109 *English Reports* (1829), p. 166): *Rex v. Marks*, 3 *East,* 175 from 1802 and *Ex parte Krans* 1 *B. & C.* 258 from 1823. However, both *habeas corpus* cases took place within one jurisdiction, see Plumb, Jr. 1939, p. 340, n. 13. (There is something special about *Ex parte Krans*: this case was born out of a battle on the high seas between a British Navy cutter and a smuggling boat. The men from the latter ship were arrested and brought to another ship, the *Severn*. "The principle question on appeal to the King's Bench from the denial of the writ [of *habeas corpus*, ChP] was whether the time of the smuggler[s]' (…) detention in the hold of the *Severn* was unreasonable so as to demand their release." (Birkett 1991, p. 609.) Chief Justice Abbott (actually the same judge as the one in *Ex Parte Susannah Scott*: Chief Justice Lord Tenterden is a title, see Birkett 1991, p. 610, n. 78) stated: "It appears to me that our proper course is, not to inquire into the facts of the case, whatever may be our power, but to commit the prisoners to the custody of the Marshal of the Marshalsea, that they may afterwards be taken before a magistrate, who may investigate the charge against them [original emphasis

not endanger the exercise of jurisdiction in another State for it is not within the power of the judges to examine the circumstances of the apprehension.[46]

Before continuing to discuss other interesting *male captus* case law in Part 3 of this book, it is first important to pay attention, in the next chapter, to the different concepts, delimitations and definitions within the context of the maxim *male captus bene detentus*, for it is believed that a good understanding of these matters is essential for being able to clearly follow the remainder of this study.

omitted, ChP].” (Birkett 1991, p. 610.) Although this case seems to have an international dimension, Plumb, Jr. (see the beginning of this footnote) probably correctly placed this case in the category ‘illegal arrest within the jurisdiction’. See in that respect Birkett 1991, p. 609, n. 75: “The ship was apparently flying no flag and contained stolen goods and liquor. As such it was a ship having no status as sovereign territory. Thus, the boarding of this ship cannot properly be considered a violation of any principle of sovereign territory.”)

[46] It should, however, also be mentioned that the international dimension of Scott’s case was probably only limited to its facts, namely that she was brought from the Netherlands to England. “Lord Tenterden held that the Court could not inquire into the circumstances of the arrest. It is significant, however, that the learned Judge seems to have thought only in terms of a violation of Belgian law, not of international law.” (Morgenstern 1953, p. 273.) (Note that in 1829, the State of Belgium did not exist yet (but was part of the Netherlands).)

CHAPTER III
DISSECTING THE MAXIM: CONCEPTS, DELIMITATIONS AND DEFINITIONS

1 WHICH *MALE CAPTUS* SITUATIONS EXIST?

1.1 Introduction

In the very first subsection of this book, the maxim was defined to mean that a court can properly detain a person (read: can properly exercise jurisdiction over a person) (*bene detentus*), even if that person was brought into the power of that court in an irregular way (*male captus*). Because the words "brought into the power of that court" could also be applied in a purely domestic *male captus* situation, and because this book is focusing on the international context, it was suggested in the introduction of the previous chapter that the introductory and rather general definition of *male captus bene detentus* from the first chapter should be slightly adjusted so as to mean that a court can exercise jurisdiction over a person, even if the way that person was brought from one jurisdiction to another (namely the jurisdiction in which the court before which the suspect is now standing operates) was irregular. This chapter seeks to clarify the different elements of this maxim in more detail. To start with its first part, which situations fall under the words *male captus*?

Before addressing that question however, it must be emphasised that the information in this section is merely there for reasons of clarity. Of course, one can come up with the most lucid theoretical examples of *male captus* situations, but reality often shows a mix of different and more complex situations. However, as the following pages want to clarify instead of to confuse, only the basic scenarios will be reviewed. Furthermore, it must be understood that in the end, it will be up to the suspect to claim that a certain situation is to be seen as a *male captus* situation which must lead to the refusal of jurisdiction by the judges. In the same spirit, it is up to the judges to hear that argument and to decide whether the alleged *male captus* situation is indeed a proper one and if so, whether this has any impact on their exercise of jurisdiction.

Taking this into account (and returning to the question that was just posed), the spectrum of possible *male captus* situations may be broader than thought of initially. Probably because of the word *captus*, the concept of *male captus* is most often

identified with an unlawful *capture*. However, as already explained, the maxim has to do with irregularities connected with the way a person was brought from one jurisdiction to another (namely the jurisdiction in which the court before which the suspect is now standing operates). And although the apprehension is an important aspect of this process, it is not the *only* aspect. After all, an arrest as such does not bring the arrested person before the judges: he may be put in pre-trial detention first and, of course, he needs to be surrendered to the court. Hence, it is submitted that all those pre-trial irregularities which are related to this process, to the process of bringing a suspect from one jurisdiction to another, can fall under the term *male captus*. Recall in that respect – see Chapter I – the words of Attorney-General Hausner in the *Eichmann* case:

> [T]he circumstances of the Accused's *detention, his seizure and his transfer* are not relevant for competence and they contain nothing which can affect this competence, and since they are not relevant, they should not be considered and evidence concerning them should not be heard [emphasis added, ChP].[1]

The pre-trial irregularities may also include irregularities *preceding* the (official) arrest. For example, in the ICTY *Nikolić* case (see Chapter VI), it was assumed that the defendant was abducted in the FRY "by unknown individuals having no connection with SFOR and/or the Tribunal",[2] brought to Bosnia and Herzegovina – where he was officially arrested by SFOR – and then transferred to The Hague. This irregularity preceding the official arrest by SFOR was used by Nikolić to challenge the exercise of jurisdiction by the ICTY. According to the Trial Chamber, Nikolić brought forth two lines of reasoning in that respect. The first was that

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[1] The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, Vol. 1, Session 1, available at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-001-05.html. See also the reasoning of the judges in the District Court of Jerusalem (see also n. 15 and accompanying text of Chapter I): District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Decision on the Preliminary Objections', 17 April 1961, Criminal Case No. 40/61, available at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-006-01.html: "As for the arguments over the circumstances under which the Accused was brought to the State of Israel, in view of the fact that we have found that the Court has jurisdiction to try the Accused, *the manner in which he was brought within the jurisdiction of this Court* has no relevance according to law, neither has the fact whether he was apprehended abroad by emissaries of the governing authorities of the State of Israel or not [emphasis added, ChP]."; District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 41 (36 *International Law Reports* 1968, p. 59): "It is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his *arrest or of the means whereby he was brought within the jurisdiction of that State*. The courts in England, the United States and Israel have constantly held that the *circumstances of the arrest and the mode of bringing of the accused into the territory of the State* have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances [emphasis added, ChP]."

[2] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 21.

> by taking over the accused from the unknown individuals, SFOR and/or the Prosecution have acknowledged and adopted the alleged illegal conduct of those individuals. The illegality of the acts of the individuals thereby becomes attributable to SFOR and to the Prosecution.[3]

The second line of reasoning was that "the illegal character of the arrest [by the "unknown individuals", ChP] in and of itself should bar the Tribunal from exercising jurisdiction over the accused."[4]

Thus, when this book refers to *male captus* situations, these situations can encompass in fact every pre-trial irregularity which can be seen to have occurred within the context of a certain case. Hence, they may include irregularities related to the surrender itself,[5] to the pre-trial detention,[6] to the official arrest and even to matters which occurred prior to that.[7] Notwithstanding the theoretically broad scope of this term, it must be admitted that most attention will be paid to irregularities dealing with the (formal) arrest.[8] After all, the word *captus* refers first and foremost to the capture, to the apprehension.

In the discussion of the case law in the remainder of this book, several (combinations of) *male captus* situations will be reviewed. To properly understand these situations, it is worth first giving some information on three basic situations.

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[3] *Ibid*., para. 29.

[4] *Ibid*. See also *ibid*., para. 25 where the Trial Chamber mentions the Defence's submission "that the forcible removal of the Accused from the FRY [by the private individuals prior to the handing over to SFOR, ChP] entailed a breach of both the sovereignty of the FRY and the Accused's individual due process guarantees; and that although such breaches occurred *prior* to the delivery of the Accused into the custody of SFOR and the Tribunal, these breaches were of such magnitude that even absent the involvement of SFOR or Prosecution, the release of the Accused from the custody of this Tribunal and the dismissal of the indictment against him is the only appropriate remedy [emphasis in original, ChP]."

[5] Although the surrender/transfer *itself* (the actual transportation of the suspect from one place to another) will normally be without any problems, a suspect may claim that the ground for his surrender is unlawful, hence affecting the surrender itself. One could, for example, think here of the still-to-discuss *Milošević* case, see Subsection 3.1.3 of Chapter VI, in which case the former President of Yugoslavia claimed that his transfer to The Hague was illegal.

[6] See in that respect also the still-to-discuss 'Order of Provisional Detention' in the case of Kaing Guek Eav, alias Duch, where the co-investigating judges of the Extraordinary Chambers in the Courts of Cambodia, discussing the *male captus bene detentus* rule, explained: "Many examples exist in domestic as well as international law which apply this maxim, whereby the circumstances which bring an Accused before a tribunal have no effect on the judgement of the Accused. Although most of these precedents are based on the initial arrest of the Charged Person, and more rarely on the condition of their prior detention, in both cases the reasoning is the same as that with which we are now confronted [emphasis in original, ChP]." (ECCC, Office of the Co-Investigating Judges, Criminal case File No: 002/14-08-2006, Investigation No: 001/18-07-2007, 'Order of Provisional Detention', 31 July 2007, para. 5.) See also Sluiter 2003 C, p. 649: "There has always been, and remains to be, abundant scholarly debate on the *mala captus bene detentus* doctrine. This doctrine enables a court to exercise jurisdiction even over an individual who has been unlawfully arrested *or detained* [emphasis added and original footnote omitted, ChP]."

[7] However, as already stated, whether those irregularities are really to be seen as *male captus* situations is up to the judges to decide.

[8] As perhaps has already become clear from the previous two chapters where the words 'irregular arrest' were sometimes used.

They are the following: disguised extradition, luring and kidnapping/abduction.[9] As these situations originate from the context between States, they will now be explained in light of that specific framework. When examining case law in contexts different from that between States (such as between States and international(ised) criminal tribunals), it will, of course, be explained to what extent this difference in context affects these *male captus* situations. For now, however, it suffices to examine them in their original legal setting. Note finally that in this chapter's first section, the focus will be on explaining the situations as such (and not on the values which are violated by these *male captus* situations; that will be the subject of Section 2 of this chapter).

1.2 Common context

To better understand the following explanations on disguised extradition, luring and abduction/kidnapping, the following short common context might be useful. Suppose State A wants to try a person residing in State B. First, the former needs to have the legal means or laws to start a trial. However, that is not enough: State A also needs to have the person in its power.[10]

The situations mentioned below will continue here: how will the person get from State B (which, in this book, depending on the situation, may be referred to as, for example, the State of residence/the injured State/the sending State) into the jurisdiction of State A (which, in this book, depending on the situation, may be referred to as, for example, the forum State/prosecuting State/'abducting' State/receiving State)?

Normally, the suspect will arrive in State A as a result of the very old[11] method of extradition, which "designates the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution

[9] See, for example, also Van der Wilt 2004, p. 276. As one can see, these are primarily examples of apprehensions in which the normal procedures were not followed. However, a suspect can, of course, also claim that the arrest procedures themselves were perfectly correct, but that the actual arrest was executed with an excessive amount of force, hence leading to a *male captus*. Another example of a *male captus* situation is an excessively long pre-trial detention.

[10] Unless, of course, State A accepts the possibility of a trial *in absentia* (without the suspect being present during the trial). This book will, however, focus on the situation that a person is tried in his presence as a trial *in absentia* is not only in violation of a provision of the ICCPR (see its Art. 14, para. 2 (d)) but also in violation of all the Statutes of the international(ised) criminal tribunals which will be discussed in this book, see Artt. 21, para. 4 (d) of the ICTY Statute, 20, para. 4 (d) of the ICTR Statute, 63, para. 1 of the ICC Statute and 17, para. 4 (d) of the SCSL Statute. An exception to this, however, is the STL, see n. 1169 and accompanying text of Chapter VI.

[11] Shearer (referring to "W. Mettgenberg, 'Von mehr als 3000 Jahren', 23 *ZVölkR* 23 (1939) citing S. Langdon and A.H. Gardner, in 6 *Journal of Egyptian Archeology* 179 (1920)") shows that "[i]n what has been described as the oldest document in diplomatic history, the peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III (*c.* 1280 B.C.), provision was made for the return of the criminals of one party who fled and were found in the territory of the other." (Shearer 1971, p. 5.)

of a sentence."[12] The exact form of extradition may vary, but in any case, a certain arrangement is required. In the words of Gilbert:

> [S]ome form of arrangement, whether formal or informal,[13] whether general or *ad hoc*, is necessary between the States involved. The arrangement may be based on a treaty, bilateral or multilateral, or on the application with respect to the requesting State of the requested State's domestic extradition legislation. Regardless, some level of agreement must have been reached between the two States acknowledging that a fugitive might be surrendered given that certain prerequisites are met.[14]

It is thus important to understand that there is not necessarily a problem if State B wants to fulfil the extradition request but does not have an extradition treaty with State A.[15] Much will depend on the domestic situation in that case:

> [G]eneral international law contains no limitations on a State's freedom to extradite, except for those fundamental (…) human rights that can be considered as part of (…) *jus cogens*. Whether, beyond that bar, extradition is admissible in the absence of a treaty is decided solely under domestic law. While the common law countries and, for example, the Netherlands are prevented from extraditing in the absence of a treaty, most civil law countries do grant extradition without treaty on the basis of reciprocity[16] and according to their national extradition acts.[17]

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[12] Stein 1995, p. 327.

[13] With informal arrangements, one could think of "written instruments to express national obligations with greater precision and openness than tacit or oral agreements but without the full ratification and national pledges that accompany formal treaties." (Lipson 1991, p. 502.) Lipson continues explaining (*ibid*): "These informal arrangements range from executive agreements and nonbinding treaties to joint declarations, final communiqués, agreed minutes, memoranda of understanding, and agreements pursuant to legislation. Unlike treaties, these informal agreements generally come into effect without ratification and do not require international publication or registration." Note, however, that other definitions of extradition may not accept such informal arrangements, see, for example, European Commission for Democracy through Law (Venice Commission), Opinion no. 363/2005 (CDL-AD(2006)009, Strasbourg, 17 March 2006) on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), para. 12: "*Extradition* is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence [emphasis in original, ChP]."

[14] Gilbert 1998, p. 27.

[15] A good example of extradition without an extradition treaty is extradition on the basis of the (principle of mutual recognition respecting) European Arrest Warrant (EAW), although some may wonder whether, due to the EAW's far-reaching simplified scheme, one should still speak of extradition here. See, for example, Fennelly 2007, pp. 519-520: "It is a remarkable (even astounding) fact that, within a very short space of time, an entirely new common binding system of surrender of suspects for criminal prosecution has come into effect between twenty-seven states. That system has replaced a multiplicity of bilateral extradition treaties and similar arrangements. Perhaps more importantly, it has introduced a system of extradition (if one is permitted to continue to use this term) between many states which previously had no such arrangements of any kind."

[16] Although this principle, which may be summarised by the Latin maxim *quid pro quo* (something for something) is *especially* interesting in extradition situations where there is no treaty available, it can be viewed as a principle of extradition law more generally (meaning that it also has importance in cases

Gilbert shows that there is even a growth of *ad hoc* extradition arrangements and that, as a consequence, one might think that there is less need for States to use methods not involving extradition to bring (or take!) a suspect from one jurisdiction to the other.[18] Nevertheless, such methods are sometimes used[19] and it is with respect to these 'techniques' that problems may occur.[20] In the words of Shearer:

> [I]t is necessary to stress the point that extradition is the only regular system devised to restore fugitive criminals to the jurisdiction of a court competent by municipal and international law to try them. As will be shown, the possible alternative methods are either irregular or are methods devised for some other primary purpose, in either event having only the probable *de facto* result of delivering fugitive criminals to a jurisdiction wishing to prosecute or punish them.[21] Whether from the aspects of

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where there are treaties available). See Stein 1995, p. 330: "Traditionally, the principle of reciprocity underlies the whole structure of extradition. Where general extradition relations are established by virtue of a treaty, reciprocity to a large extent is guaranteed, although even here optional grounds for denying extradition may result in the equality of reciprocal obligations. Extradition in the absence of a treaty is the field where the principle of reciprocity is mainly applied; here, surrender takes place usually only after assurances of reciprocity have been expressly given by the requesting State. The precondition of strict reciprocity, however, is increasingly considered as being detrimental to the interests of justice. Some recent extradition treaties and statutes, therefore, either do not mention reciprocity at all, allow considerable exceptions or express the principle in optional terms, thus conceiving reciprocity as a political maxim rather than as a legal precondition." Next to reciprocity, extradition is also possible on the basis of comity.

[17] Stein 1995, p. 329.

[18] See Gilbert 1998, p. 335.

[19] See *ibid*.

[20] Note, however, that there are also ways not involving extradition to bring a suspect from one jurisdiction to another which seem rather well-accepted. One could hereby think, for example, of a removal of a person from one jurisdiction to the other under the authority of Status of Forces Agreements (SOFAs). Sluiter explains: "There are instances where persons are delivered up to other states for the purpose of prosecution that are outside the realm of extradition. For example, under the Status of Forces agreements, states that send troops practically exercise exclusive jurisdiction over those soldiers. When they exercise their jurisdiction, the receiving state has a duty to hand over the requested person." (Sluiter 2003 C, pp. 607-608, n. 6.) For more information on this topic, see Norton 1975.

[21] An irregular method which will not be addressed here in detail but which should nevertheless be briefly mentioned is the technique of informal/simple return, "that is where one State hands over a fugitive to another without recourse to any officially recognised or organised procedure". (Gilbert 1998, p. 13.) (See also Cherif Bassiouni 1974, p. 121.) This method is much linked to disguised extradition, see, for example, the still-to-discuss *Öcalan* case (where the ECtHR, however, concluded that Öcalan's arrest and detention were in accordance with a procedure prescribed by law, see ns. 348 and 351 and accompanying text). This method has also been qualified as an abduction, but then as an abduction in which the authorities of the State of residence cooperated. (See also Acting Justice of Appeal O'Linn's term 'official abduction' in the *Mushwena* case, see n. 782 of Chapter V.) Because of this cooperation, there will not be any violation of the sovereignty of the State of residence, but the operation itself seems to be without any procedural guarantees. *Cf.* also Loan 2005 (writing on 'the right of an individual to be free from extraterritorial abduction'): "The basis of this right stems from the absence of procedural protections available to an abductee and the deliberate attempt by the abducting state to disregard the procedural safeguards available to the individual under the domestic law of the host state. This individual right exists independently from a breach of a state's sovereignty and can therefore be invoked by an individual in situations when the host-state is complicit in the abduction." (Loan 2005, p. 293.)

> regularity and fairness or from the practical consideration of certainty, extradition is clearly superior to any other system.[22]

1.3 Disguised extradition

The first *male captus* situation, disguised extradition, is a good example of the second method referred to by Shearer ("methods devised for some other primary purpose"). It is a method

> by which a state relies upon its immigration laws to deny an alien the privilege of remaining in that state and then, in carrying out the exclusion, expulsion, deportation or denaturalization provisions of such laws against the individual, it places him directly or indirectly in the control of the agents of another state that is seeking him.[23]

Thus, what happens is that a mechanism, set up for *other* purposes,[24] is unlawfully used to make an impossible extradition possible or to make a possible, but, for example, too slow or expensive, extradition quicker or cheaper.[25] In other words: the

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[22] Shearer 1971, p. 67. See also Gilbert 1998, p. 13 (hinting, however, that in some extreme cases, such techniques may be acceptable): "Given extradition is only possible where an international arrangement exists between the requested and requesting States, whether permanent or *ad hoc* in nature, and that many States do not have any such arrangements, then fugitives will sometimes be returned by other means. No problems arise as long as these other options are considered to be merely alternatives *in extremis* – in terms of international public order, overall efficiency and human rights, extradition must always be the primary method."

[23] Cherif Bassiouni 1987, p. 147.

[24] See Stein 1995, p. 327: "Unlike the case where an alien is expelled or deported (…), the motive for the return of a fugitive from justice [by extradition, ChP] is not the maintenance of domestic public order or security, but the furtherance of foreign criminal proceedings." In that respect, it is rather strange to hear that "*the European Convention on Human rights permits co-operation between states*, within the framework of extradition treaties or *on matters of deportation*, *for the purpose of bringing fugitive offenders to justice*, provided that this co-operation does not interfere with any specific rights recognised in the Convention [original footnote omitted and emphasis added, ChP]." (*Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 104.) The omitted footnote refers to para. 86 of the ECtHR's decision of 12 May 2005 in *Öcalan*, see ns. 325-326 and accompanying text.

[25] See Stein 1995, pp. 327-328: "In numerous instances (...), expulsion and deportation have been and continue to be used as alternatives to extradition, sometimes in order to accelerate the transfer of the fugitive, in other cases also to circumvent rules of extradition law which would preclude the return of the fugitive". See also Borelli 2004, p. 338. Note that the other *male captus* situations may also be resorted to because of these reasons; because of the fact that the normal procedures are unavailable, have failed or are considered to be too slow or too cumbersome. See, for example, the 'Brief of the Government of Canada as *Amicus Curiae* in Support of Respondent' in the still-to-discuss *Alvarez-Machain* case (see Subsection 1.2 of Chapter V): "The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the spectre not only of federal, but more likely of official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow or unavailable, in violation of Canada's territorial integrity." (31 *International Legal Materials* (1992), p. 923.) See also Scott, Jr. 1953, pp. 91-93. In his book *The Capture and Trial of Adolf Eichmann*, Moshe Pearlman explains the arguments of one of the Israeli agents to capture Eichmann in Argentina and bring him back to Israel as follows: "Assuming Klement to be Eichmann, it was possible, of course,

mechanism to bring the suspect from State B to State A itself may not be irregular but its unlawful use in this particular case makes the whole procedure irregular.[26]

A well-known case in that respect is *Bozano*.[27] Bozano, an Italian national, was arrested on a charge of abduction and murder of a 13-year-old Swiss girl, Milena Sutter.[28] He was also charged with indecency and indecent assault with violence on four women.[29] The Italian Assize Court of Appeal, giving judgment *in absentia*[30] on 22 May 1975, sentenced Bozano to life imprisonment for the murder on Sutter and to four years' imprisonment for the other crimes.[31] Bozano, however, had taken refuge in France where he was arrested during a routine check.[32] Italy subsequently requested his extradition but the French Court of Appeal in Limoges ruled on 15 May 1979 that the Italian trial *in absentia* was incompatible with French public

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to arrange for the Argentine government to be notified, in the hope that it would take appropriate action against him as a war criminal. But the procedures, even for the issue of a warrant, were likely to be so lengthy that Eichmann would have time to escape once again. He could certainly count on the help of his Nazi friends in Buenos Aires. And, with the best will in the world, the Argentine government could not prevent a Nazi sympathizer from tipping off Eichmann that he was "wanted" and had best make himself scarce. Nor was the Argentine government under the legal obligation to allow his extradition to Israel. For the extradition treaty between the two countries had not yet been ratified." (Pearlman 1963, pp. 43-44.) See also *ibid*., p. 64, quoting an Argentinian political leader: "Even though our patriotic feelings have been hurt somewhat by the kidnaping of Eichmann, we understand that there was no other way in which he could be brought to justice. If our extradition procedures were regularized, there would be no cause for kidnapings." (Note that the word "kidnap(p)ing" and "kidnap(p)ed", especially in older contributions and cases (but see also the still-to-discuss 1992 *Alvarez-Machain* case), is sometimes written with one "p" only, but this is no error, see ns. 261 and 561 of this chapter, n. 434 and accompanying text of this chapter, ns. 213 and 407 of Chapter V and n. 208 and accompanying text of Chapter V.) As explained in the first chapter of this book, *male captus* techniques may be especially interesting for prosecuting authorities in the context of suspects of international crimes, *cf.* again (see also n. 45 of Chapter I) Swart 2002 C, p. 1675, writing about "abduction and other methods of getting hold of a person" in the context of the tribunals: "There may be a special temptation to use these methods in relation to States which have refused to comply with requests or orders for arrest or transfer issued by a tribunal." See finally Arendt 1994, p. 264, writing on Eichmann's abduction and his trial in Israel: "Its justification was the unprecedentedness of the crime and the coming into existence of a Jewish State. There were, moreover, important mitigating circumstances in that there hardly existed a true alternative if one indeed wished to bring Eichmann to justice. Argentina had an impressive record for not extraditing Nazi criminals; even if there had been an extradition treaty between Israel and Argentina, an extradition request would almost certainly not have been honored."

[26] *Cf.* also Cowling 1992, p. 254: "The essence of the concept of deportation is the decision by the appropriate authorities in a particular state that the continued presence of an alien in that state is undesirable. So such alien is ordered to leave the territory. The expelling state should not concern itself with the destination of the deportee, nor should deportation be preceded by a request from another state. Thus if a supposed act of deportation was initiated by a request from another state (...) to the effect that an alien should be deported to that state with the ultimate objective of his standing trial, this would constitute a clear case of disguised extradition."

[27] ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986.

[28] See *ibid*., para. 12.

[29] See *ibid*.

[30] Bozano claimed that due to medical reasons, he could not appear in court.

[31] See ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, para. 14.

[32] See *ibid*., para. 17.

policy.[33] Therefore, the French Government could not extradite Bozano to Italy.[34] On the evening of 26 October 1979, the day on which the investigating judge of Limoges issued an order committing Bozano for trial on charges of less serious French crimes,[35] three plain-clothed policemen stopped Bozano on his way home and ordered him to follow them.[36] When he protested, he was seized, forced into an unmarked car, handcuffed and brought to Limoges where he was served with a deportation order dated 17 September 1979[37] in which it was stated that his presence in French was "likely to jeopardise public order".[38] The same night, he was forced to get into an unmarked BMW which drove him to the Swiss border.[39] After a first (and unsuccessful) attempt to cross the border and a few telephone calls, a Swiss unmarked car appeared and a Swiss policeman got out.[40] After other handcuffs were put on Bozano, he was made to sit in the Swiss car which crossed the border in the early hours of 27 October.[41] A couple of months after these events, Switzerland extradited Bozano to Italy where he was imprisoned.[42]

In his article 'Male Captus Male Detentus[43] – a Human Right', Frowein writes that "[i]t is frequently stated that expulsion may not be used to circumvent extradition proceedings."[44] Nevertheless, it would be quite difficult for a suspect to prove that the authorities abused their power to circumvent the regular procedures (*détournement de pouvoir*). After all, the fact that someone is wanted abroad does not mean that he cannot be deported, even if his extradition is impermissible.[45]

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[33] See *ibid.*, para. 18.
[34] See *ibid.*
[35] Namely forging and falsifying administrative documents and using false identity documents. (See *ibid.*, para. 21.)
[36] See *ibid*., para. 23.
[37] See *ibid*., paras. 23-24.
[38] *Ibid*., para. 24.
[39] See *ibid*., para. 25.
[40] See *ibid*., para. 26.
[41] See *ibid*.
[42] See *ibid*., para. 27.
[43] This is another version of the maxim *ex iniuria ius non oritur* and means that the irregular way in which a person was brought into the jurisdiction of the court (*male captus*) must lead to a refusal of jurisdiction (*male detentus*). The oldest source in which this study could find this maxim is Dugard 1991.
[44] Frowein 1994, p. 179. See also Schomburg 1995, p. 105, citing Resolution No. 9 relevant to the topic 'The Protection of Human Rights in International Cooperation in Criminal Matters' (unanimously approved at the closing session of the XV Congress of the International Association of Penal Law in Rio de Janeiro, 4-10 September 1994): "[P]rocedures such as deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures should be avoided."
[45] See Van der Wilt 2004, p. 285. See also the following words of Lord Denning in the *Soblen* case: "If a fugitive criminal is here and the Secretary of State thinks that in the public good he ought to be deported, there is no reason why he should not be deported to his own country, even though he is there a wanted criminal." (Court of Appeal, *Reg.* v. *Governor of Brixton Prison, Ex Parte Soblen*, 31 August 1962, *International Law Reports*, Vol. 33 (1969), p. 279.) See also Michell 1996, pp. 391-392: "The mere fact that an individual has been deported from state X to state Y, and Y seeks to prosecute him, is neither inherently objectionable nor a violation of international law. It only becomes objectionable when X deports the individual to Y with the intent of circumventing extradition proceedings, or perhaps where extradition would ordinarily be unavailable. The key question involves the circumvention of extradition

Moreover, the deporting State often has no choice but to deport the undesirable alien to his State of origin, where criminal proceedings may also have been initiated against him, because only that State is obliged, from an international law point of view, to take him back.[46]

In addition to this, some judges may only consider whether the deportation or expulsion order as such was lawful (and not whether it was used for the right purpose). Notwithstanding this uncertainty in the law,[47] Gilbert explains that "there seems to be a trend for courts to query more forcefully attempts to achieve *de facto* extradition by deporting the fugitive offender."[48]

1.4 Luring

As shown above, disguised extradition is a method executed by State B itself. Therefore, State A does not really have to do anything except wait to 'receive' the person from State B.[49] However, what happens if State B does not know that the person is on its territory or knows but is unwilling (or unable and not using the technique of disguised extradition) to deliver the person to State A, which is very eager to detain the suspect? In such situations, State A itself might act. Two techniques can be used in these situations: abduction/kidnapping (which will be discussed in the next subsection) and luring.

Luring (or trickery) is a method by which "deceit, fraud and tricks [are used] to lure individuals from the country of their residence to a location where there is jurisdiction to arrest the suspects."[50] This location does not necessarily have to be

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procedures by means of deportation [original footnotes omitted, ChP]." It would be easier for a suspect to prove abuse of power if he is not deported to the most obvious country such as the country whose borders are closest to the place from which the person is deported. In the *Bozano* case, for example, one can wonder why Bozano was deported to Switzerland and not to Spain (a country closer to Limoges than Switzerland), see also ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, paras. 31 and 59. In addition, the Defence argued that "in choosing Switzerland out of five neighbouring countries (…), the authorities knew that they were handing him over to the European State most likely to extradite him to Italy, owing to the existence of an extradition agreement between Italy and Switzerland and the nationality of the murdered girl." (*Ibid*., para. 29.) See also Michell 1996, p. 391: "Deportation to a specific foreign state may give rise to the suspicion that "disguised extradition" is taking place, thus depriving the individual of the procedural protections inherent to formal extradition proceedings."

[46] See Van der Wilt 2004, p. 285.

[47] See Gilbert 1998, p. 366: "The law in this area is in a state of flux. Some decisions favour the fugitive, while others merely look to see if the deportation or expulsion is technically lawful, regardless of the underlying motive of the requested State to avoid its extradition procedure."

[48] *Ibid*., p. 373.

[49] Nevertheless, it is clear that very often, there will be some involvement of State A in the disguised extradition operation as well. After all, the idea behind this *male captus* situation is not that State B deports the suspect to a random place, but to a place where State A can (directly or indirectly) get hold of him.

[50] Paust *et al*. 1996, p. 426. See also Mundis 2003, p. 1018, n. 15.

State B itself, as became clear in the *Yunis* case,[51] a good example of a luring operation.

In *Yunis*, the US Government sought to arrest and bring to justice the leader of a group of men who hijacked and later blew up a Jordanian aircraft in Beirut.[52] After months of investigation, the US identified Lebanese citizen Fawaz Yunis as the leader of this group.[53] It was with the help of a former friend of Yunis and now US informant, Jamal Hamdan, that this identification was made possible.[54] A detailed plan was made to lure Yunis, under the promise of a lucrative narcotics deal, from Lebanon to a location in international waters off the coast of Cyprus.[55] On 13 September 1987, the FBI-led operation 'Goldenrod' began: that morning, Hamdan and Yunis boarded a small motorboat off the coast of Cyprus which brought the men to a yacht anchored in international waters.[56]

> Immediately upon boarding the yacht, defendant was greeted, given a routine pat down and then offered a beer by one of the FBI agents. S.A. [Special Agent, ChP] George Gast, who assumed the role of one of the narcotic contacts, escorted Yunis to the stern of the boat where he and Yunis joined S.A. Donald Glasser. At a prearranged signal – a slight nod – the two agents, who were then positioned alongside Yunis, engaged in a "*take down*". Together, they grasped the defendant's arms, "kick[ed] his feet out from underneath him, and [took] him down to the deck and put handcuffs on him [original footnote omitted, ChP]."[57]

1.5 Kidnapping/abduction

The James Bond calibre of the final basic *male captus* situation, abduction or kidnapping,[58] is even greater. In this *male captus* situation, the way State A obtains custody of the suspect residing in State B without that latter's consent does not involve non-violent techniques such deceit, fraud and tricks, but plain force. One could hereby also think of the threat of use of force, for example, if an agent visits the suspect and, while holding him at gunpoint, orders him to come with him to the forum State. A (if not *the* most) famous example of this situation has already been described in the very first pages of this book: the *Eichmann* case.

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[51] US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909).
[52] See *ibid.*, p. 912.
[53] See *ibid.*
[54] See *ibid.*
[55] See *ibid.*
[56] See *ibid.*
[57] *Ibid.*, p. 913.
[58] Some jurisdictions recognise a difference between the two crimes. See, for example, Gershenson 1954, writing on the Penal Law of the State of New York, at p. 35: "An abduction always must involve a female, a kidnapping may be committed as to either sex. An abduction always concerns a sexual purpose, a kidnapping concerns a seizure or detention and requires no sexual element." However, in the specific context of international criminal law, the two nouns (and the verbs deriving from them) are used interchangeably. Hence, that is what this book will do as well.

Although luring and abduction thus differ from each other, they are often put in the same category: see in that respect the often-used definition from Shearer, which defines abduction as "the removal of a person from the jurisdiction of one state to another by the use of force, the threat of force or by fraud."[59] In the same vein, Scharf explains that "most countries do not distinguish between abduction by fraud and abduction by force."[60] However, it is hard to disagree with the idea that abduction is clearly more objectionable than luring, since in the latter case only tricks and no weapons are used.[61]

Nevertheless, it may sometimes be difficult to 'label' certain situations. For example, while the above-mentioned situation of a threat of use of force can clearly be seen as an abduction and a threat from a foreign agent operating from another State (for example, via a telephone call) to induce the suspect to come to the forum State as a luring operation, it is more difficult to specify the latter situation if it takes place on the territory of the State of residence; on the one hand, the foreign agent uses a threat of force on the territory of the State of residence with the result that the suspect arrives in the forum State (abduction) but on the other hand, weapons were not used (luring). Another example illustrating the problem of 'labelling' is that two States may informally cooperate in transferring the suspect without any guarantees from one State to another. Such an informal transfer much resembles the situation of disguised extradition, but in the latter case, the transferring State still tries to give the operation a legal appearance by using its immigration laws to (unlawfully) deport/expel the suspect. However, a State may not even need to resort to those laws and just informally hand over the suspect with no guarantees.[62] This could also be done in a more forceful way, resembling the technique of abduction. The 'only' difference would then be that the State of residence consents to the operation.[63]

In short, the three situations – disguised extradition, luring and abduction – have been presented to clarify three basic situations which one will often find in *male captus* case law. However, as will also be shown in the next chapters, practice may also produce other *male captus* situations which do not clearly fall within one of

[59] Shearer 1971, p. 72. See also Garner 2004, pp. 4: Abduction is "[t]he act of leading someone away by force or fraudulent persuasion." and 886: Kidnapping is, *inter alia*, "[t]he crime of seizing and taking away a person by force or fraud."

[60] Scharf 1998, p. 374. See also *ibid*., p. 382: "[B]oth are generally objectionable."

[61] See also Scharf 2000, p. 970: "As an extraterritorial law enforcement practice, luring is much more common, and less objectionable, than abductions. Unlike abduction by force, weapons are not used to get the suspect to the location where the arrest will occur. A luring can be accomplished telephonically, by fax, or by e-mail." See also Sluiter 2001, p. 152: "[F]orcible abduction is more serious than luring an accused". See finally also Costi 2003, pp. 64-65: "There is (…) abundant practice and legal opinion differentiating between forcible abduction and the luring of an individual from the state of refuge. Luring is found to be less objectionable since it involves no use of force or flagrant violation of the territorial sovereignty of the state of refuge [original footnote omitted, ChP]."

[62] See, for example, the still-to-discuss *Hartley* case, see Subsection 1.2 of Chapter V.

[63] *Cf.* in that respect also the term 'official abduction' (an abduction in which the authorities of the State of residence cooperated), to be found in the (still-to-discuss) *Mushwena* case (a case which, however, could perhaps be best qualified as a disguised extradition), see n. 21 of the present chapter and ns. 94 and 782 of Chapter V.

those three categories and are therefore difficult to label. However, perhaps the exact label is not *that* important. What is arguably more important is to find out which values such techniques violate and what the result of such violations are.

2 WHAT IS VIOLATED BY THESE *MALE CAPTUS* SITUATIONS?

A number of important values can be violated by the three basic *male captus* situations, the three most important being: 1) State sovereignty, 2) human rights and 3) the rule of law.[64]

2.1 State sovereignty

One of the most important characteristics of a State is its independence, its sovereignty. This concept has an internal and external aspect. The internal one is that State A is the only one having authority over the territory of State A.[65] This means, for example, that it does not have to tolerate authority over its territory by State B. The external aspect signifies that State A itself must also respect the sovereignty of *other* States, meaning that it cannot intervene in the domestic affairs of State B. (There are, however, some exceptions but these will be addressed *infra*.)

That States (or even the UN)[66] in principle cannot intervene in each other's internal affairs is clearly a principle of international law;[67] this has been confirmed

[64] See, for example, also Van Sliedregt 2001 B, pp. 75*ff*.

[65] Note that a State's territory is not limited to the land of that State (which includes the territorial subsoil), but also extends to its territorial sea, internal waters and the airspace above its land, internal waters and territorial sea. See Brownlie 2003, p. 115. The high seas/international waters are outside the jurisdiction of any State, although States have, in principle, exclusive jurisdiction over ships flying their flag on the high seas. Hence, if a person with the nationality of State B is arrested on a ship with the nationality of State A (the flag State) in international waters, State A does not violate the territorial sovereignty of State B, see also the briefly mentioned (see n. 56 and accompanying text) *Yunis* case. (Note, however, that the luring in Lebanon (which led to the arrest in international waters) might be seen as a violation of Lebanon's sovereignty, but this point will be returned to *infra* and in Chapter V.) A very topical exception to the above-mentioned rule that, in principle, only the flag State has jurisdiction over the ship flying its flag is related to piracy, see Art. 19 of the 1958 Convention on the High Seas (available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf): "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

[66] See Art. 2, para. 7 of the UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

[67] See generally Shen 2001, who argues that this fundamental principle (including its corollaries such as the prohibition on the use of force) constitutes a norm of *ius cogens*. Note that, although the principle of non-intervention and the prohibition on the use of force are often addressed together, there is a clear difference between the two: the former is general and broad in nature and encompasses the latter, see, for example, *ibid*., p. 6: "[N]o intervention, whether economic, political, military or otherwise, is

in numerous political statements and documents, such as the United Nations General Assembly's 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty'[68] of 1965 and 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' of 1970.[69]

The following authoritative cases also confirm the principle of non-intervention in relation to the (territorial) sovereignty of a State. In the *S.S. Lotus* case, the Permanent Court of International Justice (PCIJ) held that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[70] In the *Corfu Channel* case, the successor of the PCIJ, the International Court of Justice (ICJ), recognised that "between independent States, respect for territorial sovereignty is an essential foundation of international relations."[71] The ICJ ruled again on this topic in the 1986 *Military and Paramilitary Activities* case where it stated that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference".[72] The concept of "exercise of power in any form" obviously includes the exercise of police powers. In the words of Lauterpacht, writing about "the obligation of States to refrain from performing jurisdictional acts within the territory of other States except by virtue of a general or special permission",[73] "[s]uch acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime."[74]

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tolerable without explicit prior agreements under international law. Armed intervention or other forms of intervention involving the use of force are further prohibited by the principle of non-use of force".

[68] UNGA Res. 2131 (XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1408th plenary meeting, 21 December 1965. In this document, the UNGA solemnly declared, among other things, that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economical and cultural elements, are condemned."

[69] UNGA Res. 2625 (XXV). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1883rd plenary meeting, 24 October 1970 (annex). One apt quotation from this declaration can be found in its Preamble, in which the UNGA states that it is "[*c*]*onvinced* that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security".

[70] PCIJ, *The case of the S.S. "Lotus"*, 'Judgment', 7 September 1927, *Publications of the Permanent Court of International Justice*, Series A. – No. 10, Judgment No. 9, p. 18.

[71] ICJ, *The Corfu Channel Case* (Merits), 'Judgment', 9 April 1949, p. 35.

[72] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits), 'Judgment', 27 June 1986, para. 202.

[73] Lauterpacht 1970, pp. 487-488.

[74] *Ibid*., p. 488. See also the Third Restatement of the Foreign Relations Law of the United States (American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States,

Returning to the three basic *male captus* situations, it is clear that an abduction by State A on the territory of State B violates the latter's (territorial) sovereignty and integrity and the norm of non-intervention.[75] This was also recognised by the UNSC in the *Eichmann* case (see also Subsection 3.3.2 of this chapter), when it, in Resolution 138 of 23 June 1960, considered "that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations", noted "that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded", and declared

1987), which stipulates in Section 432 ('Measures in Aid of Enforcement of Criminal Law'), para. 2: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Comment (b) on this rule (*ibid*.) clarifies that the rule is "universally recognized". See also the positions of the UNGA's Sixth (Legal) Committee, ("[I]nternational law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has given its consent." (Morris and Bourloyannis-Vrailas 1994, p. 357)) and of the UN Commission on Human Rights' Working Group on Arbitrary Detention (Commission on Human Rights, Fiftieth session, Item 10 of the provisional agenda, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1994/27, 17 December 1993, Decision No. 48/1993 (United States of America), pp. 135-140), pp. 138-139: "Another basic principle of international law and of international relations is respect for the territorial sovereignty of States, a principle which, in addition to prohibiting the use of force and intervention by one State in the affairs of another – includes refraining from committing acts of sovereignty in the territory of another State, particularly acts of coercion or judicial investigation. (...) What is more, intervention by one Power in the territory of another is not only a breach of international law but, in addition, if it is repeated, it may "endanger international peace and security" (United Nations Security Council, Claim by Argentina in the Eichmann case, resolution 138 (1960))." See finally Gluck 1994, p. 620: "It is a well-established primary rule of international law that no state may exercise its police power in the territory of another state without the consent of the host state [original footnote omitted, ChP]."

[75] See not only the already-mentioned quotation of Lauterpacht (see the previous footnote and accompanying text) but, for example, also Jennings and Watts 1992, pp. 387-388, writing about violations of independence and territorial and personal authority, "the three main aspects of the sovereignty of a state" (*ibid*., p. 382) ("It is (…) a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime [original footnote omitted, ChP]."), Michell 1996, p. 411 ("It is beyond controversy that a states violates customary international law by sending its agents into another state to abduct an individual for trial. Respect for the territorial integrity of other states is a fundamental principle of international law. (…) It would make a mockery of state sovereignty, a principle at the very foundation of the international legal order, if states were free to send their agents into other states to abduct fugitives [original footnotes omitted, ChP].") and Costi 2003, p. 61: "A state cannot send agents abroad to abduct an alleged criminal. An abduction carried out by agents instructed by the state within the territory of another state is a violation of international law. This rule is firmly rooted in the principle of respect for territorial sovereignty and integrity of other states and in the ensuing obligation of non-intervention in the internal and external affairs of another state [original footnote omitted, ChP]."

"that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security."[76]

[76] UNSC Res. 138 of 23 June 1960, UN Doc. S/4349. Although it is thus clear that such an abduction violates the norm of non-intervention, and also involves the (threat of) use of force, it is less obvious whether it also violates the more specific prohibition on the threat or use of force as can be found in Art. 2, para. 4 of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Although the UNSC in the *Eichmann* case has not explicitly qualified the abduction as such (see also Findlay 1988, p. 25), authors and cases have nevertheless used the *Eichmann* case to found their argument that abductions violate Art. 2, para. 4 of the UN Charter. See, for example, Glennon 1992, pp. 746-747: "Numerous authorities have viewed it as flatly impermissible under longstanding customary norms for one state to send its agents to seize an individual located in the territory of another state without the consent of the government of that state. (…) This norm not only is a bedrock of customary international law but is, in addition, incorporated in numerous treaties, among them the United Nations Charter (…) [Glennon hereby refers to Art. 2, para. 4 of the UN Charter, ChP.] Following Israel's 1960 abduction of the nazi war criminal Adolf Eichmann, the UN Security Council construed Article 2, paragraph 4 of the Charter as proscribing abduction without the consent of the state in which the abduction occurs [original footnotes omitted, ChP]." See also the still-to-discuss *Toscanino* case: "Here, (…) Toscanino alleges that he was forcibly abducted from Uruguay, whose territorial sovereignty this country has agreed in two international treaties to respect. The Charter of the United Nations, the members of which include the United States and Uruguay (…) obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity of political independence of any state . . .." See U.N. Charter, art. 2 para. 4. Additionally, the Charter of the Organization of American States, whose members also include the United States and Uruguay (…) provides that the "territory of a state is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever . . ." See O.A.S. Charter, art. 17. That international kidnappings such as the one alleged here violate the U.N. Charter was settled as a result of the Security Council debates following the illegal kidnapping in 1960 of Adolf Eichmann from Argentina by Israeli "volunteer groups." (…) The resolution merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state". (US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), pp. 277-278.) See for the same argument (but without reference to the *Eichmann* case), for example, Scharf 2000, p. 967: "The unconsented exercise of such powers constitutes an infringement of the sovereignty and territorial integrity of the host state in violation of the U.N. Charter [Here, Scharf refers to Art. 2, para. 4 of the UN Charter, ChP.] and customary international law [original footnote omitted, ChP]." See also Lamb 2000, p. 222. However, the opposite has also been asserted, see, for example, Findlay 1988, p. 25: "Publicists agree that many exercises of power within the territorial domain of another state do not rise to the level of a "threat or use of force against the territorial integrity or political independence of any state" within the meaning of article 2(4) of the United Nations Charter. Thus, according to Professor Bowett, actions directed against individuals within the territory of a state do not violate the territorial integrity or political independence of the state [original footnotes omitted, ChP]." However, it can be argued that this view is rather restricted and that it would be better to view the words "against the territorial integrity and political independence" broader as to mean territorial inviolability. State A does not need to have an intention to, for example, occupy State B; when it sends its agents into State B without the latter's consent, one can arguably already speak of a violation, by State A, of State B's territorial integrity and of Art. 2, para. 4 of the UN Charter. *Cf.* also Shen 2001, pp. 23 and 26-28: "D'Amato (…) argued that the prohibition of the use of "force against the territorial integrity or political independence" of states was technical and did not incorporate all uses of force, and in particular did not include the concept of territorial inviolability, but instead was confined to "preventing the permanent loss of a portion of one's territory" (…). "Political independence" does not simply refer to the maintenance of a State's government. It is a term broad

It is also clear that the method of disguised extradition does *not* violate a State's sovereignty as agents from State A in that situation do not exercise police powers on State B's territory. After all, although State A may also collude in the operation (and may thus be complicit in the commission of the *male captus*), it does not need to violate State B's sovereignty for the latter State will transfer the suspect from its territory to the territory of State A itself.[77]

Luring is more complex in that respect.[78] The idea behind luring is that agents of State A get hold of the alleged criminal 'only' by using deceit, fraud and tricks to lure the individual from State B to a location where there is jurisdiction to arrest the suspect. Very often, agents from State A do not have to enter the territory of State B to be able to lure the suspect to another State. For example, they simply can make telephone calls from another State to convince the suspect to leave his State of refuge.[79] However, it is also possible that those agents *do* enter the territory of State

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enough to cover a State's *political* integrity, dignity and sovereignty to manage its own internal and external affairs free from any foreign interference. (…) Similarly, "territorial integrity" cannot be narrowly regarded as merely referring to the inalienability of a State's territory. Rather, it refers to the *territorial* sovereignty, dignity and *inviolability* of a State. (…) Lauterpacht, in *Oppenheim's International Law*, convincingly wrote with force that "territorial integrity, especially when coupled with 'political independence,' is synonymous with territorial inviolability" (…). This and other evidence confirms that the fundamental principles of international law relating to non-intervention and the non-use of force, as embodied in the Charter, do not simply prohibit intervention and the threat or use of force aimed at dismembering a State or causing the permanent loss of a portion of its territory, but also proscribe any other form of intervention or use of force that otherwise offends a State's sovereignty, international personality, dignity, territorial inviolability and political freedom from foreign interference. The narrow interpretation of Article 2(4) is not only contrary to *lex lata*, but also dangerous and harmful to all nations. If we were to accept D'Amato's proposition, then Mexican law enforcement officers would be entitled to come across the border into Texas to capture criminal suspects without violating the "territorial integrity" of the United States, unless by doing so they designed to separate Texas from the federation [emphasis in original, ChP]." See also Skubiszewski 1968, p. 746: "The intentions of the framers of the Charter, though not always clearly expressed, were directed at removing force as a means of settling all international disputes, and, therefore, the ban equally covers situations where territory or independence are not at stake. Also, the principle of effectiveness requires Article 2 (4) to be read as prohibiting all threat or use of force unless the Charter, in other provisions, expressly permits its use."

[77] See also Morgenstern 1953, p. 270: "[T]he numerous cases in which individuals have been surrendered by agents of the state of refuge without resort to extradition proceedings are not directly relevant here. The state which receives the fugitive for prosecution has not exercised any force on the territory of the state of refuge and has in no way violated its territorial sovereignty. There is thus no violation of international law."

[78] See also Van der Wilt 2004, p. 283.

[79] See also Scharf 2000, p. 970: "A luring can be accomplished telephonically, by fax, or by e-mail. In this way, physical presence of law enforcement authorities in the territory of the host state can be avoided. Therefore, the risk of injury, damage, or incident in the host state is minimized." Note, however, that such an operation has also been viewed as violating the sovereignty of a State, see the still-to-discuss 1982 Swiss case *X*. See also Mann 1989, pp. 408-409: "It is submitted that a violation of international law occurs also where the State or its agent does not abduct the victim by force, but induces him by fraud or other illegal means to leave the country of refuge and proceed to some other country where he is apprehended. *In such circumstances* (…) *the wrong is committed in the foreign State, because the illegal means* are used or *have their effect there*. A State, being sovereign, is not expected to tolerate acts that involve generally recognized illegality, though they are not performed by force. It is not necessarily the use of force, but the illegality, that constitutes the wrong done to the

B. This would be done, not with the aim of making the actual arrest there (in that case, the operation could be qualified as an abduction/kidnapping), but with the aim of enabling the luring operation to succeed. It is highly likely that the suspect will not be convinced by the telephone calls or other techniques from other States,[80] thus making it necessary for the agents to enter the territory to persuade the suspect in a face-to-face conversation to come to another State. One can wonder whether such an operation, in which agents from State A enter State B's territory, not to make an arrest, but to make an arrest elsewhere possible, is a violation of State B's territory. Although the clearest enforcement operation, the arrest itself, is not carried out on State B's territory, one cannot deny that in such situations, operations on State B's territory are being carried out with the purpose of making the arrest possible. Therefore, one can very well argue that these operations are also to be seen as "jurisdictional acts" to which Lauterpacht was referring *supra*, even if the climax of the whole operation (the actual arrest) is effected elsewhere. Arguably more in line with the principle of respect for another State's sovereignty is not the (restricted) idea that agents of other States are not allowed to arrest persons in another State without that latter State's consent, but rather the (broader) idea that agents of other States are not allowed to carry out *police operations* in that other State, whether these operations amount to an actual arrest or not.[81] More far-reaching in that respect is the already briefly mentioned (see footnote 44) Resolution No. 9 relevant to the topic 'The Protection of Human Rights in International Cooperation in Criminal Matters' (unanimously approved at the closing session of the XV Congress of the International Association of Penal Law in Rio de Janeiro, 4-10 September 1994) which views luring *in general* (whether agents from State A are operating on State B's territory or not) as a violation of State B's territory:

> Abducting a person from a foreign country or enticing a person under false pretences to come voluntarily from another country in order to subject such a person to arrest

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sovereignty of the State [emphasis added, ChP]." See further the following general words of Paust *et al*. 1996, p. 435: "The international community appears to view the practice of abduction by fraud as a violation of territorial sovereignty and international law [original footnote omitted, ChP]." See also Knoops 2002, pp. 244-245: "Strict adherence to this principle [the principle of non-intervention, ChP] implies that even if no physical violation of the foreign territory whatsoever took place and the luring was merely conducted over the phone, radio, email or fax between law enforcement officials and the suspect, an infringement of international law can be present [original footnote omitted, ChP]." See finally Swart 2002 D, who notes that "the Dutch government has always maintained the view that activities of foreign police officers aimed at inducing a suspect to leave the Netherlands need prior consent of the competent Dutch authorities since the sovereignty of the Netherlands is at stake. This is the case even if the foreign agent himself does not enter the Netherlands."

[80] Note that such techniques may be in violation of the law of the 'luring' State, but they are often not seen as violations of international law as they do not take place on the territory of the suspect's State of residence. (See for other views, however, the previous footnote.)

[81] See also the following examples of Jennings and Watts 1992, p. 386: "A state is not allowed to send (…) its police forces into or through foreign territory, (…) or to carry out official investigations on foreign territory or let its agents conduct clandestine operations there, or to exercise an act of administration or jurisdiction on foreign territory, without permission [original footnotes omitted, ChP]."

> and criminal prosecution is contrary to public international law and should not be tolerated (...).[82]

Notwithstanding this, it must be repeated that, even if luring indeed violates another State's sovereignty, this violation can be seen as less serious than the case of an abduction in which actual force is used on the territory of the injured State without that State's consent.[83]

2.1.1 Exceptions

There are some exceptions though. There are circumstances which ensure that the wrongfulness of an action (such as sending agents into another State's territory to seize a person) is precluded. Here, it might be useful to consult the rather influential ILC's 'Draft articles on responsibility of States for internationally wrongful acts'.[84] In Chapter V of these Draft articles (hereinafter: DARS) are six wrongfulness-precluding circumstances which ensure that no internationally wrongful act will take place. In an effort not to complicate matters too much (see also the 'disclaimer' in Subsection 1.1), only the two best-known circumstances will be addressed here: consent and self-defence.[85] In addition to that, some attention will be paid to interventions based on humanitarian grounds.

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[82] Schomburg 1995, p. 105. See also ns. 79-80.

[83] See, again (see also n. 61), Costi 2003, pp. pp. 64-65: "There is (…) abundant practice and legal opinion differentiating between forcible abduction and the luring of an individual from the state of refuge. Luring is found to be less objectionable since it involves no use of force or flagrant violation of the territorial sovereignty of the state of refuge [original footnote omitted, ChP]."

[84] See the *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), pp. 26-143. Here, one can find both the articles and the commentaries to these articles which were commended to the attention of governments "without prejudice to the question of their future adoption or other appropriate action" by the UNGA, see UNGA Resolutions 56/83 of 28 January 2002 (para. 3) and 59/35 of 16 December 2004 (para. 1). With respect to the authority of the Draft articles, see Caron 2002, who concedes that the articles are influential but who is also concerned "that the ILC's work, primarily because of its form, will have unwarranted influence." (*Ibid.*, p. 866.) See also *ibid.*, pp. 872-873: "The articles will have great effect, and that is a significant achievement. But they should have effect because of their integrity and value, not because they emerged from the ILC in a form that looks like a treaty. The ILC's work on state responsibility will best serve the needs of the international community only if it is weighed, interpreted, and applied with much care. (…) The articles are a mix of codification and progressive development; to be frank, it would often be difficult to say which article partakes more of one or the other. (…) The articles have already affected legal discourse, arbitral decisions, and perhaps also state practice. Now that they have been adopted by the ILC, they are likely to have even greater impact. To apply them correctly, decision makers must avoid a simple reading of the articles but, instead, must consult the commentaries and reports for each article, which illuminate the practice underlying the rule, the discussions of the ILC, and the comments of various governments. Together these sources bring life to the articles and reveal the degree of consensus."

[85] The other four are: Countermeasures in respect of an internationally wrongful act (Art. 22), *Force majeure* (Art. 23), Distress (Art. 24) and Necessity (Art. 25).

2.1.1.1 Consent

In Article 20 of the DARS, one can read: "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent." Thus, if State B gives consent to the exercise of police powers by State A on the territory of State B, there is no internationally wrongful act by State A. Consent to (otherwise unlawful) conduct may be given "in advance or even at the time it is occurring".[86] Consent given *after* the conduct does not take away the unlawfulness of the conduct (as is the case with respect to consent given in advance or at the time of occurrence). It is merely "a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45."[87] According to the ILC, consent precluding wrongfulness "must be freely given and

[86] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73. A good example of prior consent could be a treaty between two States in which the topic of hot pursuit is regulated. See also Gilbert 1998, p. 363, who argues that the concept, "which is undergoing a revival in Europe", allows "for the police authorities of one State to cross into a neighbouring State in order to effect the arrest of a fugitive in flight. Its popularity in Europe is due to the policy of internal open borders within the European Union from 1993." An example in that respect is the Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Prüm Convention), signed in Prüm (Germany) on 17 May 2005 and available at: http://www.libertysecurity.org/IMG/pdf/Prum-ConventionEn.pdf. Art. 27, para. 2 (10) of this Convention reads: "The Contracting Parties' competent authorities shall provide one another with assistance (…), in particular by: (…) supplying information on practical implementation of cross-border surveillance, cross-border hot pursuit and controlled deliveries". For the concept of hot pursuit in the context of the law of the sea, see, for example, Shaw 2003, p. 551, who notes that "[t]he right of hot pursuit of a foreign ship is a principle designed to ensure that a vessel which has infringed the rules of a coastal state cannot escape punishment by fleeing to the high seas. In reality it means that in certain defined circumstances a coastal state may extend its jurisdiction onto the high seas in order to pursue and seize a ship which is suspected of infringing its laws." The modern origin of this right can be found in Art. 23 of the already-mentioned (see n. 65) 1958 Convention on the High Seas. Note finally, and to also come back to the plane diversion plan of the ICC as mentioned in the first chapter of this book (see n. 44 of that chapter), that a number of States neighbouring the State of the suspect could also cooperate in the air, agreeing, for example, that a plane carrying that suspect cannot enter their territory (which includes, it is reminded, see n. 65, the airspace above its land, internal waters and territorial sea). If that plane nevertheless enters their territory, States could lawfully divert that plane to an airfield in order to arrest the suspect. *Cf.* also Shaw 2003, p. 475, where he is writing about "[t]he right of a state to require a civil aircraft to land at a designated airport, where the aircraft is flying above its territory without authority".

[87] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73. Art. 45 of the DARS ('Loss of the right to invoke responsibility') reads: "The responsibility of a State may not be invoked if: (a) The injured State has validly waived the claim; (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."

clearly established".[88] In addition, it must be actually expressed (rather than presumed),[89] and it "may be vitiated by error, fraud, corruption or coercion".[90] An example of a case of consent, provided by the ILC, is the famous *Savarkar* case. The facts of this case between France and Great Britain can be found in the Permanent Court of Arbitration's award of 24 February 1911:[91]

> [I]t is established that, by a letter dated the 29th June 1910, the Commissioner of the Metropolitan Police in London informed the "Directeur de la Sûreté générale" at Paris, that the British Indian Vinayak Damodar Savarkar was about to be sent to India, in order to be prosecuted for abetment of murder, etc., and that he would be on board the vessel "Morea" touching at Marseilles on the 7th or 8th July. (…) [O]n the 7th July, the "Morea" arrived at Marseilles. The following morning, between 6 and 7 o'clock, Savarkar, having succeeded in effecting his escape, swam ashore and began to run; he was arrested by a brigadier of the French maritime gendarmerie and taken back to the vessel. Three persons, who had come ashore from the vessel, assisted the brigadier in taking the fugitive back.[92]

The Court concluded:

> [I]t is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory,[[93]] (…) there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, (…) all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.[94]

The ILC's commentary explains that the Permanent Court of Arbitration considered that there was no violation by Great Britain of France's sovereignty because "France had implicitly consented to the arrest through the conduct of its gendarme, who

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[88] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73.
[89] See *ibid*.
[90] *Ibid*.
[91] See 'Award of the Permanent Court of Arbitration in the Case of Savarkar, between France and Great Britain, February 24, 1911', to be found in the *American Journal of International Law*, Vol. 5 (1911), pp. 520-523.
[92] *Ibid*., p. 521.
[93] These words can be used as authority for the idea that not only abductions, but also luring operations (as a fraudulent method of gaining custody over a person abroad) are to be seen as violating the concept of State sovereignty, see the discussion *supra* in Subsection 2.1. See also Schultz 1967, p. 71: "Dieses Urteil (…) hat unbestrittenermaßen klargestellt, daß das Völkerrecht verletzt ist, wenn sich ein Staat durch List oder Gewalt strafprozessualen Zugriff auf einen im Ausland befindlichen Angeschuldigten verschafft." See also Schultz 1984, pp. 100-101.
[94] 'Award of the Permanent Court of Arbitration in the Case of Savarkar, between France and Great Britain, February 24, 1911', to be found in the *American Journal of International Law*, Vol. 5 (1911), pp. 522-523.

aided the British authorities in the arrest [original footnote omitted, ChP]."[95] This was so even though the French central Government protested the arrest of Savarkar and had demanded his restitution.[96] Hence, consent (not leading to a violation of State sovereignty) can, in certain circumstances, be given by a local official.[97]

An interesting point which ought to be mentioned here is that the ILC had explained that consent "may be vitiated by error, fraud, corruption or coercion",[98] but that this case can arguably be seen as an example in which error (namely on the part of the French gendarme, who mistakenly cooperated with the British agents on French territory as he did not know exactly what was going on) was *not* viewed as a means which could jeopardise the consent.[99] Hence, on the basis of this case, one

[95] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73.

[96] See 'Award of the Permanent Court of Arbitration in the Case of Savarkar, between France and Great Britain, February 24, 1911', to be found in the *American Journal of International Law*, Vol. 5 (1911), p. 520.

[97] *Cf.* also Michell 1996, p. 421: "Consent from local officials is sufficient". It would perhaps have been better if Michell had used the word "may" here. After all, some expressions of consent from a local official can arguably never lead to valid consent from a State. One could hereby think of consent from a local police official that another State can establish a military base on the territory of the 'consenting' State. One can argue that only the central government can consent (or not) to these kinds of matters. (See also the *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73.) See for another opinion than the one of Michell: Henkin 1990, p. 313: "The police of State X may not enter the territory of State Y (without Y's consent) to arrest an individual for violation of X's laws, not even to enforce law that is subject to universal jurisdiction. International law, sensitive to State autonomy and impermeability, requires that any consent to such entry be authentically that of high officials who authoritatively represent the State; the acts or omissions of local officials may be attributable to the State for some purposes, but generally are not sufficient to constitute State consent to foreign police activities [original footnotes omitted, ChP]." *Cf.* finally De Sanctis 2004, p. 553: "[I]t can be argued that the exercise of jurisdiction by foreign officials on one's own soil should require the explicit, or at least implicit, consent of a high-level agent of the State, such as the chief of police. Holding that every State official has the authority to consent to a transnational seizure on his territory (…) may result in a legitimisation of the law of the jungle, where decisions deeply affecting fundamental rights of individuals may be taken by low-ranking officials without a clear assumption of responsibility at the high levels of the chain of command [original footnotes omitted, ChP]."

[98] See n. 90 and accompanying text.

[99] See 'Award of the Permanent Court of Arbitration in the Case of Savarkar, between France and Great Britain, February 24, 1911', to be found in the *American Journal of International Law*, Vol. 5 (1911), pp. 521-523: "[F]rom the statements made by the French brigadier to the police of Marseilles, it appears: That he saw the fugitive, who was almost naked, get out of a porthole of the steamer, throw himself into the sea and swim to the quay; That at the same moment some persons from the ship, who were shouting and gesticulating, rushed over the bridge leading to the shore, in order to pursue him; That a number of people on the quay commenced to shout "Arretez[-]le;" That the brigadier at once went in pursuit of the fugitive and, coming up to him after running about five hundred metres, arrested him. Whereas the brigadier declares that he was altogether unaware of the identity of the person with whom he was dealing, that he only thought that the man who was escaping was one of the crew, who had possibly committed an offence on board the vessel. (...) Whereas, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British police, there is no rule of international law imposing, in circumstances such as those which have been set out above, any

would perhaps sooner conclude that, in the words of Michell, "[c]onsent from local officials is sufficient, even if it is mistaken or *ultra vires* [original footnote omitted, ChP]."[100]

Also briefly addressing the *ultra vires* point made by Michell: a local official may indeed go beyond his powers in finding that he has authority to consent on behalf of his State with a certain arrest operation orchestrated by another State. In such a case, it might be possible that the 'injured State' consented to the operation, even if the central Government did not agree (see *Savarkar*) and even if this local official was not authorised to consent on behalf of his State. However, this situation must arguably be differentiated from the situation where, for example, another State bribed local police officials of the State where the operation took place to cooperate in the events. Such a case also involves local police officials agreeing with the operation and acting *ultra vires*, but they consent to the operation because of personal financial reasons. However, it can be argued that they do not consent to the operation with the idea in mind that they do so *on behalf of* their State. And that is, it is submitted, essential before one can speak of valid consent from the State where the operation took place.[101]

A final important point, made by Michell (especially when looking at the context of this book which often deals with conflict zones where there might be no functioning government), is the following: "Where there is no effective government in the host territory, no offense, consent, or protest is possible. Thus, an abduction will engender no state responsibility on the abducting state's part [original footnote omitted, ChP]."[102] One well-known case in which this element played a role is the

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obligation on the Power which has in its custody a prisoner, to restore him because of a *mistake committed by the foreign agent* who delivered him up to that Power [emphasis added, ChP]."

[100] Michell 1996, p. 421. See also n. 97 where it was argued that it would perhaps have been better if Michell had used the word "may" here because some expressions of consent from a local official can arguably never lead to valid consent from a State.

[101] See the *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73: "Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so *on behalf of the State* (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor [emphasis added and original footnote omitted, ChP]." Hence, there is not only the question of authority which may play a role here (see also n. 97), but also the question of whether the consent was given on behalf of the State.

[102] Michell 1996, p. 421. See also Weissman 1994, p. 471, n. 78: "[N]o violation of national sovereignty could occur in the case of a suspect abducted from a territory with no effective sovereign government. (…) This is so because in the absence of a government, the asylum nation has no political independence or territorial sovereignty to violate." *Cf.* finally the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, para. 4.22 (p. 33): "In a failed or collapsed state situation, with no government effectively able to exercise the sovereign responsibility of protecting its people, the principle of non-intervention might seem to have less force."

1948 *Chandler* case.[103] In this case, a US citizen called Douglas Chandler was accused of treason against the US[104] and brought from occupied Germany to the US.[105] He contended that the way in which he was brought before the US courts was unlawful, among other things, because he was not extradited according to the interbellum extradition treaty between the US and Germany. Chief Judge Magruder rejected this argument and showed that the extradition treaty was not to be consulted at all:

> Passing these difficulties with the argument, the treaty on its face has no application to the abnormal situation here presented. (…) To establish that the treaty has been violated here, appellant would have to show from the language of the treaty that the United States thereunder assumed a contractual obligation as follows: that if a citizen of the United States should betake himself to Germany upon the eve of the outbreak of war between the United States and Germany, and if after war is declared between the two countries the American citizen should commit in Germany acts of treason against the United States, and if the armed forces of the United States and those of its Allies should invade and occupy Germany, supplant the defunct Government of the German Reich, and assume the powers of sovereignty, then, in such event, the United States contracts that it will not apprehend such traitor and bring him to trial for treason. Putting the proposition in this naked form, its absurdity is manifest. The United States made no such contract in the extradition treaty. (…) Chandler was not taken into custody and returned to the United States pursuant to the extradition treaty between the United States and Germany. His arrest by our occupying forces was

[103] US Court of Appeals, First Circuit, *Chandler v. United States*, 3 December 1948, No. 4296 (171 F.2d 921). Another case is the 1886 *Ker-Illinois* case, which will be discussed in detail in Subsection 1.1 of Chapter V, see n. 20 of that chapter.

[104] More specifically, "[t]he indictment charged that the defendant, in various places within the German Reich, and at all times beginning on December 11, 1941, and continuing thereafter up to and including May 8, 1945, he then and there being a native-born citizen of the United States, and a person owing allegiance to the United States, in violation of said duty to allegiance, did knowingly, intentionally, and traitorously adhere to the enemies of the United States, and more particularly, to wit, the Government of the German Reich, and the German Radio Broadcasting Company and the officials and employees thereof, giving to the said enemies of the United States aid and comfort within the United States and elsewhere; that the aforesaid adherence of the defendant and the giving of aid and comfort by him to the aforesaid enemies of the United States 'consisted of working as a radio speaker and commentator in the U.S. zone of the Short Wave Station of the German Radio Broadcasting Company, a company controlled by the German Government, which work included the preparation and composition of commentaries, speeches, talks and announcements, and the recording thereof for subsequent broadcast by radio from Germany to the United States'; that these activities of the defendant 'were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of said war, and to weaken and destroy confidence in the administration of the Government of the United States.'" (US Court of Appeals, First Circuit, *Chandler v. United States*, 3 December 1948, No. 4296 (171 F.2d 921), p. 928.)

[105] See *ibid*., p. 927: "In May, 1945, shortly after the close of hostilities in Europe, Chandler was taken into custody by the U.S. Army at his home in Durach, Bavaria, but he was returned to Durach, and apparently released from custody, on October 23, 1945. He was rearrested by the Army on or about March 12, 1946, at the request of the Department of Justice. On December 10, 1946, still in military custody, he was taken by plane to the United States, via Paris, the Azores, and Newfoundland."

> wholly outside the treaty, and not in violation of any international undertaking either expressed or implied in the treaty.[106]

This elucidates that there could not have been any violation of the extradition treaty or of the sovereignty of Germany because at the time Chandler was arrested, there was no effective German authority.[107]

However, it is clear that this cannot be easily established.[108] Gillett, for example, explains:

> There is a virtually uniform practice in international law and politics of treating any group of nationals in control of their territory as the legitimate government. If the consenting party is the incumbent government, then the fact it has lost control over the state territory will not prevent its consent being recognized [original footnotes omitted, ChP].[109]

Nevertheless, if there is *really* "no recognizable or organized authority within a territory that is capable of declaring a legally valid consent, and if there is no pre-existing instrument of consent",[110] it will be hard to establish whether consent has been given or not.

2.1.1.2 Self-defence

The wrongfulness-precluding circumstance of self-defence can be found in Article 21 of the DARS: "The wrongfulness of an act of a State is precluded if the act

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[106] *Ibid*., pp. 935-936.

[107] See also Morgenstern 1953, p. 273, n. 4 (distinguishing this case from the Palestinian *Afouneh* case (see Subsection 3.1 of Chapter V)): "The unlawful seizure [of Afouneh, ChP] took place on Syrian territory at a time when that country was under British occupation. An irregular apprehension by British forces was thus facilitated but not justified, because Syria did not lose her independence and extradition did not fall within the powers of the occupation authorities. On the other hand, the decision of a United States Circuit Court of Appeals in the case of *Chandler* v. *United States* (1948), 171 F. 2d 921, to the effect that there was jurisdiction to try a person who had been arrested in Germany by American military forces of occupation may be justified by reference to the fact that at the time Germany's independence was in suspense." See also Cardozo 1961, p. 133 ("There was no sovereign whose sovereignty was offended by the action of foreign officers on its soil.") and finally Weismann 1994, p. 471, n. 78: "The First Circuit Court of Appeals (…) stated that U.S. agents did not violate Germany's territorial sovereignty because no effective government existed at the time of the abduction."

[108] See Gillett 2008, pp. 24-25: "[T]here are publicists who argue that when a state's governmental authorities have substantially collapsed (…) no rights of sovereignty pertain to that territory. On that basis, it is argued that an incursion into that territory to carry out a lawful arrest would not constitute any breach of general international law. However, that approach is problematic. Whilst it is true that underlying the doctrine of consent is a presumption of representative autonomy, the principles of the international legal order are strongly oriented towards the continued recognition of a state, existing or nascent, within any given territory. Even the most dysfunctional of the State Parties to the Rome Statute will not readily be considered to lack sovereign rights, and thus fair game for external intervention [original footnotes omitted, ChP]."

[109] *Ibid*., p. 25.

[110] *Ibid*., p. 26.

constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations." The principle of self-defence is undisputed.[111] See also in that respect the wording of Article 51 of the UN Charter, speaking of an "inherent right":

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 21 of the DARS refers to "a *lawful* measure of self-defence [emphasis added, ChP]". This requires, among other things, compliance with the concepts of proportionality and necessity.[112] Randelzhofer explains:

> Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for the defence have to be strictly necessary for repelling the attack [original footnotes omitted, ChP].[113]

In addition, Article 21 of the DARS requires that this "lawful measure of self-defence [is] taken in conformity with the Charter of the United Nations." This is a reference to the above-mentioned Article 51 of the UN Charter.

The principle of self-defence has been used in the context of *male captus* situations as well. In the words of Halberstam: "Not all abductions are violations of international law. Abduction of terrorists may be justified self-defense under Article 51 of the United Nations Charter and may thus not be in violation of international law."[114] Paust, writing about "an individual whose present activity forms part of a process of armed attack on a state in violation of the United Nations Charter",[115] comes back to the above-mentioned concepts of necessity and proportionality in his observation that abduction of such an individual "may provide a less violent and

[111] See *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 74.
[112] See *ibid*., p. 75. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, 'Advisory Opinion', 8 July 1996, para. 41: "The submission of the exercise of self-defence to the conditions of necessity and proportionality is a rule of customary international law." (Referring to ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits), 'Judgment', 27 June 1986, para. 176.) See generally Gardam 2004.
[113] Randelzhofer 2002, p. 805.
[114] Halberstam 1992, p. 736, n. 5.
[115] Paust 1993, p. 566.

injurious option than general military strikes or targeting that is otherwise reasonably necessary and proportionate."[116]

A comparable idea can be found in Calica's article 'Self-Help Is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists', in which he argues:

> In essence, under the efficient breach justification, forcible abductions of terrorists are optimal because the benefits to the breaching nation and to the international community outweigh its costs. (…) Where abduction would constitute a breach of international law, breach is efficient if (1) the terrorist threat appears imminent and the opportunity for abduction is fleeting; (2) the target nation is unwilling to extradite or prosecute; (3) the operation involves minimal threat to bystanders; (4) the territorial infringement is reasonably limited; and (5) the accused will receive humane treatment and a fair trial [original footnotes omitted, ChP].[117]

Calica thus asserts that an imminent threat, among other things, may justify an abduction whereas the above-mentioned remarks by Halberstam and Paust refer to the seemingly stricter requirement of an armed attack. (Halberstam refers to Article 51, which in turn refers to the occurrence of an armed attack.) Although Calica's proposition is not limited to the context of self-defence,[118] it is interesting to look

[116] *Ibid. Cf.* also Bush 1993, p. 980. Note that acts of non-State actors, such as terrorists, might indeed lead to an armed attack, as a result of which a State can exercise its right of self-defence. However, whether this is only possible if these acts can be attributed to a State or not is the object of debate. See in that respect Trapp, commenting on the case ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda)*, 'Judgment', 19 December 2005, in which the World Court did not address this question: "The Court's continued refusal to engage the issue (…) has resulted in scholars taking extreme positions regarding the right to use force in self-defence against non-State actors – either reading the Court's jurisprudence as requiring that armed attacks always be attributable to a State before they give rise to a right to use force in self-defence in foreign territory (or supporting a similar position), or arguing that there is an emerging right under international law to use force in self-defence directly against non-State terrorist actors, irrespective of the territorial host State's non-involvement in the terrorist attacks [original footnotes omitted, ChP]." (Trapp 2007, p. 141.) See Trapp's article and Ruys and Verhoeven 2006 for a middle position. Gill (2007, p. 118) is of the opinion that "[n]othing in either Article 51 or customary law says that attacks can only be carried out by States. (…) Any act of force which can be deemed to constitute an armed attack can trigger the right of self-defense, irrespective of whether such an attack is carried out by official State organs, by a State acting indirectly through other agents, such as armed bands, militias, terrorist groups and so forth, or by a non-State entity which is capable of mounting an attack on its own." Note finally that even if an abduction of persons can in theory be seen as a very proportionate and limited form of self-defence (see, however, Quigley (1988, p. 208): "Measures of self-defense may be taken only against a state. They may not be taken against individuals, even individuals operating on behalf of a state."), one can assume that a State will only turn to self-defence if the danger posed is so great that the defending State will probably not limit itself to a mere abduction operation, see Bush 1992, p. 980: "[S]elf-defense and related rationales have always assumed an overwhelming exigency for which only a military response would suffice [original footnote omitted, ChP]."

[117] See Calica 2004, pp. 414-415. See also McNeal and Field 2007, pp. 519*ff*. See for older accounts: Kash 1997 and Izes 1997.

[118] See Calica 2004, p. 394: "The theory of efficient breach justifies self-help and takes into account both a country's need to protect its nationals as well as the self-defence justification." For the meaning of the concept of self-help, see, for example, Mrazek, 1989, p. 99: "Self-help, or autoprotection, is of

more generally to the concept of imminence in order to see at what moment in time the right of self-defence may be exercised.

In explanations related to the concept of imminence, reference is often made to the *Caroline* incident. Here, one can find "[t]he traditional definition of the right of self-defence in customary international law".[119]

> In 1837, the United Kingdom was facing a rebellion in Canada, which at the time was still under British control. It was in the context of this rebellion that British forces attacked and sank a forty-five ton, privately-owned, U.S. steamer, the *Caroline*. A number of the rebel forces acting in support of the Canadian rebellion, (the majority of which being U.S. nationals) were stationed on Navy Island, in British territory. They were supplied in munitions and personnel by the *Caroline*, which was hired for that purpose. On December 29, while the *Caroline* was docked at Schlosser, in U.S. territory, it was attacked by British-Canadian forces that set fire to the steamer and towed it over the Niagara Falls. In the process, Amos Durfree, a U.S. citizen, was killed [original footnotes omitted, ChP].[120]

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limited significance in present international law. The concept itself has been given different meanings. Historically, it involved retaliatory measures of a state against another state that had violated its rights protected by international law. The basic idea of self-help consisted in the fact that there was no centralized enforcement in the international community. Self-help covered retorsions, reprisals, both armed and peaceful, and peaceful blockade as well as war itself. The limits on its use were vague and depended on the will of the state. Furthermore, self-defence was considered to be self-help by numerous authors. [Note that Gill (2007, p. 152), for example, also views self-defence as a form of self-help, ChP.] In Article 51 of the United Nations Charter, however, self-defence was defined as a separate institution, while self-help is not mentioned by the Charter at all. At present self-help includes retorsions and peaceful reprisals, but as a separate, although exceptional, means of the use of armed force, it has no support in contemporary international law." In the commentaries to the DARS, one can read that nowadays, there is at least one category of accepted self-help, namely countermeasures, see *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 128: "It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances. This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds." See also *ibid*., p. 136: "Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives."

[119] Shaw 2003, p. 1024.

[120] Green 2006, p. 433.

This violation of US territory and the death of at least one US national[121] caused some uproar and the tensions between the UK and the US were not sufficiently resolved through diplomatic channels.[122] In November 1840, when the British-Canadian Alexander McLeod was arrested in New York for his alleged involvement in the incident, the intrusion by Britain was again the centre of (diplomatic) debate.[123] In a letter to the British Special Representative to the US, Lord Ashburton (dated 27 July 1842), US Secretary of State Daniel Webster quoted a letter he had sent to the British Minister in Washington, Henry Fox, on 24 April 1841:

> [I]t will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended. It will be for that Government *to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, *even supposing the necessity* of the moment authorized them to enter the territories of the United States at all, did *nothing unreasonable or excessive*; since the act justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it [emphasis added, ChP].[124]

The British did not agree with the facts as understood by the Americans, but they *did* agree on the above-mentioned principles.[125] These principles are now "accepted as part of customary international law [original footnote omitted, ChP]".[126]

As *Caroline* does not mention the requirement of an armed attack, one could argue that on the basis of *Caroline*, a State may also be permitted to exercise its right of self-defence *before* an armed attack has actually occurred. After all, *Caroline* only stipulates that a State must show a 'necessity of self-defence'. That could mean that a State can also exercise its right of self-defence when an armed attack is *going* to occur, thereby creating a necessity for the target-State-to-be to defend itself. Nevertheless, in that case, the attack (or whatever circumstance is creating the necessity: as already mentioned, *Caroline* does not speak of an armed attack) must be imminent. In the words of *Caroline*, a government must show "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[127] [128]

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[121] See *ibid*., pp. 433-434, n. 11: "It should be noted that some more recent accounts refer to the death of the ship's cabin boy, "Little Billy." (...) However, this may be brought into question, as this death was not mentioned in the various testimonies of the crew."
[122] Green 2006, p. 434.
[123] *Ibid*.
[124] *Ibid*., p. 435 (referring to its original source in the *British and Foreign State Papers*).
[125] *Ibid*., p. 436.
[126] Shaw 2003, p. 1025.
[127] There are in fact two concepts of necessity in *Caroline*. The first is the above-mentioned idea that a State must show a necessity of self-defence: a State can only use self-defence if it is really necessary. The second concept has been explained by Randelzhofer (see n. 113 and accompanying text) and is only important *if* the State is justified in using self-defence. In that case, it is not allowed to take just *any* measures. Its freedom to use measures of self-defence is restricted: it may only take those measures which are strictly necessary to defend itself. (See for both concepts the following words of *Caroline*:

What is the correlation between the arguably broader notion of self-defence as found in *Caroline* and the version of Article 51 of the UN Charter, to which the DARS refer and which states that self-defence is only possible "if an armed attack occurs"?

The examination of this very controversial point[129] can start with the already-mentioned fact that Article 51 of the UN Charter refers to an "inherent" right of self-defence. That could mean that the broader, inherent, customary right to self-defence (from *Caroline*) is not affected by Article 51 and that UN Member States would also

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"[T]he act justified by the necessity of self-defense must be limited by that necessity, and [must be] kept clearly within it.")

[128] This formulation, by the way, clearly excludes the so-called 'Bush doctrine' on self-defence, where the attack may not necessarily be imminent but located in a more distant future. See *The National Security Strategy of the United States of America*, 17 September 2002 (available at: http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf), p. 15: "Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first. (…) For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather." See also 'President Bush Delivers Graduation Speech at West Point' (United States Military Academy, West Point, New York, 1 June 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html): "We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long." See for criticism on this doctrine, for example, Gill 2007, pp. 147-150. Gill notes, among other things: "Self-defense however defined, has always been linked to the existence of a concrete (threat of an) attack within at least the foreseeable future. While this is not necessarily the immediate temporal future in the sense of minutes, hours or even days, the principles of immediacy and necessity are central to the concept of self-defense itself and cannot be open ended as the NSS implies." (*Ibid*., p. 149.)

[129] Randelzhofer 2002, p. 792.

be able to use the customary right of self-defence (not requiring the 'trigger' of an armed attack).[130] The ICJ, in the *Nicaragua* case, stated on this point:

> As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter (…) by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question (…) customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.[131]

Nevertheless, even though the ICJ recognises that the law of self-defence can be found in both customary as well as in conventional law, one could also argue that the customary version is only of importance with respect to those issues which are not regulated by the conventional version, for example, regarding the definition of the concept of an armed attack or the principles of necessity and proportionality. It seems, however, that the ICJ does not recognise that the right of self-defence can be invoked by a party to the UN (Charter)[132] in situations other than in the case of an armed attack.[133] Although the "inherent right" of self-defence is referred to in

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[130] That would thus also mean that States could argue that Art. 21 of the DARS is complied with if they would abduct a terrorist implicated in an imminent attack. (The argumentation would then be: Art. 21 of the DARS refers to the conventional version of self-defence, which in turn refers to the broader (anticipatory) inherent right of self-defence.)

[131] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits), 'Judgment', 27 June 1986, para. 176.

[132] Almost every territorial entity in the world is a member of the UN and thus bound by the UN Charter. (Exceptions are, for example, the Holy See (a non-member State maintaining Permanent Observer Mission at UN Headquarters) and Palestine (an entity maintaining Permanent Observer Mission at UN Headquarters), see http://www.un.org/members/index.shtml.)

[133] In that case, the ICJ's acceptance of the principle of necessity does not imply that UN Member States can refer to the first concept of necessity in *Caroline* as was explained in n. 127, namely that a State only has to show a necessity of self-defence before it can resort to self-defence. After all, in the above-mentioned view, an armed attack (and not merely a 'necessity of self-defence') is the required trigger of

Article 51, it is also clearly connected to the words "armed attack": "[T]he (…) text of Article 51 (…) mentions the "inherent right" of individual or collective self-defence, (…) which applies in the event of an armed attack."[134]

Does this mean that a State can never act in anticipation of an attack, can never use anticipatory self-defence?[135] Randelzhofer, first referring to those who would argue that the above-mentioned question is to be answered in the negative,[136] explains that this would indeed not be permissible:

> An anticipatory right of self-defence would be contrary to the wording of Art. 51 ('if an armed attack occurs'), as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. Since the (alleged) imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the State concerned. The manifest risk of an abuse of that discretion which thus emerges would *de facto* undermine the restriction to one particular case of the right to self-defence. Therefore Art. 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched [original footnotes omitted, ChP].[137]

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self-defence. Hence, the fact that the ICJ accepts the principle of necessity can, in this view, only refer to the second concept of necessity in *Caroline* (see also the explanation of Randelzhofer at n. 113 and accompanying text and n. 127), meaning that a State, *after an armed attack has started*, can only take those measures which are strictly necessary to repulse that attack. This view is supported by the above-mentioned words of the ICJ in the *Nicaragua* case (para. 176): "For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the attack and necessary to respond to it, a rule well established in customary international law."

[134] See in that respect also para. 193 of the *Nicaragua* case where the ICJ noted "that in the language of Article 51 of the United Nations Charter, *the inherent right (or "droit naturel") which any State possesses in the event of an armed attack*, covers both collective and individual self-defence [emphasis added, ChP]."

[135] The ICJ did not comment on this issue in the *Nicaragua* case as the facts of that case did not demand this, see its para. 194: "In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue."

[136] "[I]n particular those authors who interpret Art. 51 as merely confirming the pre-existing right of self-defence consider anticipatory measures of self-defence to be admissible under the conditions set up by Webster in the *Caroline* Case, i.e. when 'the necessity of that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation' [original footnotes omitted, ChP]." (Randelzhofer 2002, p. 803.)

[137] *Ibid*. See also *ibid*., p. 793: "The content and scope of the customary right of self-defence are unclear and extend far into the spheres of self-help [Recall the title of Calica's article, ChP.] in such a way that its continuing existence would, to a considerable extent, reintroduce the unilateral use of force by States, the substantial abolition of which is intended by the UN Charter." This view might lead to problems with respect to the problem of nuclear weapons where one can doubt whether a State, which has become the victim of a nuclear attack, is still able to defend itself. Randelzhofer (*ibid*., p. 804) explains: "[I]t must be pointed out that the prohibition of anticipatory self-defence embodied in Art. 51 is compatible with the nuclear strategy of the Super-powers only as States are able to defend themselves against a pre-emptive strike launched against them. Should this so-called second-strife capability become void, the prohibition of anticipatory self-defence would not be removed as such, but it would nevertheless be diminished in its observance by States."

The word "inherent" (as in: inherent right of self-defence) would in that view simply mean that every State (even a State which is not a member of the UN) has a 'natural right' to defend itself.[138] Nevertheless, those States which have signed the UN Charter can only exercise this 'natural' right under certain circumstances, namely if the armed attack has started.

It should, however, be repeated that this is a very controversial point.[139] Gill, for example, states:

> While there are some[140] international lawyers who, relying on a literal textual interpretation of Article 51, reject the possibility of any form of anticipatory self-defense altogether, most authorities and States are prepared to concede the possibility of some degree of anticipatory action within what are frequently referred to as the "strict criteria" of the *Caroline* case [original footnote omitted, ChP].[141]

Gill, repeating the point already mentioned by the ICJ in the *Nicaragua* case that "the right to self-defense cannot be interpreted solely on the basis of Article 51 of the Charter",[142] is of the opinion that one should follow Article 51 of the UN Charter where it is clear, for example in requiring the occurrence of an armed attack,[143] but that where it is not, for instance regarding the exact meaning of an armed attack or

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[138] See *ibid*., p. 793. Randelzhofer hereby explains (*ibid*., p. 792, n. 25) that the Special Rapporteur of the ILC, R. Ago (in his *Eight Report on State Responsibility, ILC Yearbook (1980), Vol. 2, part 1*, p. 67, n. 263) "takes the term 'inherent' to emphasize that the ability of lawfully defending itself against an armed attack is a prerogative of every sovereign State which it is not entitled to renounce".

[139] See also Wilmshurst 2006, p. 963: "There are few more controversial questions in international law than the proper limits of the right of self-defence."

[140] Note, however, that Gill, in n. 2 of his article, asserts that "[a] *significant* number of scholars oppose any notion of anticipatory or preemptive self-defense prior to the actual launching of an armed attack [emphasis added, ChP]." (Gill 2007, p. 113, n. 2.)

[141] *Ibid*., p. 125. See also 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' which clarify: "[T]he view that States have a right to act in self-defence in order to avert the threat of an *imminent* attack – often referred to as 'anticipatory self-defence' – is widely, though not universally, accepted. It is unrealistic in practice to suppose that self-defence must in all cases await an actual attack [original footnotes omitted, ChP]." (Wilmshurst 2006, p. 964.) The Chatham House hereby refers, among other things, to the UNSG's report *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, 21 March 2005, para. 124: "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."

[142] Gill 2007, p. 117. Gill hereby refers to "both the drafting history of Article 51 and the fact that it was never intended to completely codify the law of self-defense." (*Ibid*., pp. 116-117.) According to him, Art. 51 "primarily sought to safeguard the right to mutual assistance provided for in regional self-defense agreements and delineate the relationship between the right of States to exercise self-defense and the system of collective security contained in Chapter VII of the Charter. This relationship is spelled out in detail in Article 51, while the substance of the right is merely mentioned." (*Ibid*., p. 117.)

[143] See *ibid*.: "Where Article 51 is specific it will clearly prevail, as for instance in subjecting the exercise of self-defense to the requirement of an armed attack, or in providing for the Security Council as *the* ultimate arbiter of the continued necessity of the exercise of self-defense [emphasis in original, ChP]."

the starting point of this armed attack,[144] one can turn to the customary law version of self-defence. And as this customary version (read: *Caroline*) recognises some form of anticipatory self-defence, States do not have to wait, for example, for the missile to be actually launched. In short,

> self-defense is a right, grounded in both Charter and in customary law, which allows some degree of anticipatory action to counter a clear and manifest threat of attack in the immediate, or at least proximate, future, within the confines of the well-known and widely accepted 1837 *Caroline* incident criteria, relating to necessity, immediacy and proportionality [original footnote omitted, ChP].[145]

Notwithstanding these controversies – to which already enough attention has been paid here – it is clear that Paust's earlier mentioned example of the abduction of a terrorist will probably be accepted under the DARS as he refers to an armed attack.[146] Whether one also accepts Calica's proposition, which is not restricted to the context of self-defence but also covers the field of self-help, is more problematic and will partly depend on one's view on the above-mentioned discussion.

In conclusion, self-defence (from the perspective of State A)[147] or consent (from the perspective of State B) are two important scenarios which do not lead to a

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[144] See *ibid*: "However, where Article 51 is incomplete, as in leaving open what constitutes an armed attack and when an attack has commenced, or silent, as in relation to other requirements governing self-defense, recourse must be had to customary law as a means of complementing the Charter *lex scripta*."

[145] *Ibid*., p. 114. Gill further explains that "immediacy in relation to anticipatory self-defense is not primarily a question of time, but one of the existence of a credible threat of probable (or in some cases potential) attack, which together with necessity and the absence of feasible alternatives, make anticipatory action justifiable or even imperative. While time is a relevant consideration, it is not the only one, nor necessarily the most important." (*Ibid*., p. 146.) "[A] classic example of a lawful anticipatory self-defense" (*ibid*.) mentioned by Gill is the Six Day War: "The conduct of Israel's neighbors in creating a crisis, engaging in preparations for a potential attack, and uttering hostile pronouncements formed an immediate threat which justified Israel's anticipatory action in self-defense. Irrespective of whether such an attack was in fact on the point of being launched, or ever would have been, Israel had every reason at the time to believe that there was a high possibility, that an attack would be mounted in the near future. How near was unknown, but under the circumstances that fact hardly mattered. Likewise, it was clear that waiting would only increase Israel's vulnerability, without any likelihood that the situation would resolve itself." (*Ibid*.)

[146] Paust wrote about "an individual whose present activity forms part of a process of armed attack on a state in violation of the United Nations Charter". (See Paust 1993, p. 566 or n. 115 and accompanying text.)

[147] It is interesting to also briefly mention here the subject of 'protection of nationals abroad', which is sometimes seen as a form of self-defence. In that view, it is not the State itself, but its nationals (to be seen as 'little parts' of that State) who are under attack, which in turn leads to resorting to self-defence. The most famous example in that respect is the Entebbe rescue operation in 1976 during which Israel intervened in Uganda (at the Entebbe airport) to free hostages from a plane hijacked by terrorists. Shaw, also examining similar incidents, explains: "It is difficult to extract from the contradictory views expressed in these incidents the apposite legal principles. While some states affirm the existence of a rule permitting the use of force in self-defence to protect nationals abroad, others deny that such a principle operates in international law. (...) On balance, and considering the opposite principles of saving the threatened lives of nationals and the preservation of the territorial integrity of states, it would seem preferable to accept the validity of the rule in carefully restricted situations consistent with the conditions laid down in the *Caroline* case [original footnote omitted, ChP]." (Shaw 2003, p. 1034.) See

violation of State's A obligation to refrain from interference in State B's domestic affairs.

A final matter which should be discussed here are interventions based on humanitarian grounds.

2.1.1.3 Humanitarian grounds

Although the concept of State sovereignty was earlier presented as rather absolute, it is, of course, true that in the modern world, in which States through various means are interconnected (for example, via the internet) and in which many problems are seen as international problems (for example, global warming), (legal) boundaries seem to disappear and with that the importance of State sovereignty. This also goes for the human rights context.[148]

It may be that in the past, a tyrant could commit genocide on its territory with impunity by shielding outside interference with the notion of State sovereignty, arguing that it was a domestic affair with which other States had no business.[149] However, that was then. Nowadays, such a tyrant cannot get away with it as easily as he perhaps used to; these kinds of issues are now also considered to be of interest to other countries and the international community as a whole.[150] For example, if genocide occurs in a certain State, that State can no longer convincingly assert that it is a purely internal matter, with which other States or the international community as a whole have no business.

It was mentioned *supra* that the concept of State sovereignty has both an internal and external aspect.

The internal aspect, it was stated, meant that State A is the only one having authority over the territory of State A. However, it should be understood that that

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for more information on this subject in the context of abductions Findlay 1988 (who, by the way, views this justification as distinct from the justification 'self-defence'). On p. 29 of his article, he writes: "[T]he United States could seize terrorists on the territory of another country pursuant to the doctrine of humanitarian intervention to protect nationals, as long as the capture was necessary to prevent future harm to its citizens and the mission's objectives were strictly confined to that task. If the United States acted under this doctrine, the territorial state would have little basis to complain about a violation of its territorial sovereignty [original footnote omitted, ChP]."

[148] See generally Flinterman 2000 and Lauren 2004.

[149] See Lauren 2004, pp. 16 and 26. At this last page, Lauren provides the interesting example of Hermann Goering, who "declared in response to accusations of crimes against humanity: "But that was our right! We were a sovereign state and that was strictly our business." [original footnote omitted, ChP]"

[150] See Van Genugten 1992, p. 205, writing on the (now defunct) UN Human Rights Commission: "The former argument of non-intervention ('mind your own business') today makes little impression and is brushed aside without wasting words ('it *is* our own business') [own translation, ChP]."

does not mean that State A can do whatever it pleases on its territory.[151] Having the supreme power over a territory also brings with it responsibilities.[152]

It seems more and more accepted that in compelling cases such as genocide, in which the territorial State is unwilling or unable to fulfil its responsibility to protect its own people from barbarity, political/economic pressure by other States to stop the atrocities may not be enough. It might be necessary to actually intervene. The argument that such an intervention would violate the foundation of the international order can then be countered by the idea that in fact non-intervention would damage that order. Perhaps non-intervention in each and every case makes the legal order stable (in that no State interferes with another State) but one can doubt whether such an 'order', in which genocide can take place without a serious reaction from another State, does not gravely undermine its own basic values.[153] In addition, one can wonder whether the above-mentioned idea that non-intervention makes the legal order stable would also be accurate in such a situation. After all, in our interconnected world, a conflict of considerable size – if not tackled soon enough – can easily spread to other countries and become a regional conflict, thereby creating a direct threat to the stability of the international order.[154] In such cases, it is obvious that intervention, as an *ultimum remedium*, should not be ruled out.[155] The most

[151] See the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, para. 1.35 (p. 8): "The defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people."

[152] See *ibid*.: "It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."

[153] One of the purposes of the UN is "[t]o achieve international co-operation (…) in promoting and encouraging respect for human rights and for fundamental freedoms for all". (Art. 1, para. 3 of the UN Charter.) See also Art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (…) c. universal respect for, and observance of, human rights and fundamental freedoms for all") and 56 of the UN Charter ("All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.") See also the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, para. 8.31 (p. 75): "[T]he very term "international community" will become a travesty unless the community of states can act decisively when large groups of human beings are being massacred or subjected to ethnic cleansing." *Cf.* finally Silving 1961, p. 358, who writes that the UN Charter "declares it to be one of its several goals "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person," and postulates encouragement of "respect for human rights and for fundamental freedoms for all. …" If these words are more than so-called "jurisprudential niceties," perhaps they might be taken to afford a basis for argument that, given most exceptional circumstances, "fundamental human rights" ought to override considerations of conventional international law."

[154] Think, for example, of the flux of refugees to neighbouring countries.

[155] These two aspects (serious violations of the basic values of the international order and a direct danger to the stability of that order) are also reflected in the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, para. 4.13 (p. 31): "The Commission found in its consultations that even in states where there was the strongest opposition to infringements on

appropriate route through which such a military intervention for humanitarian aims should be effected is clearly the UNSC, acting under Chapter VII of the UN Charter ('Action with respect to threats to the peace, breaches of the peace, and acts of aggression'). Nevertheless, in some cases, an intervention will take place without the UNSC's approval. If such an intervention, often called 'humanitarian intervention', is more or less accepted (afterwards) by the international community,[156] one can imagine that the apprehension of the person allegedly behind the genocide, in the context of the more general operation to stop that (imminent) genocide, would be acceptable as well.

Nevertheless, one can seriously doubt whether an intervention without the approval of the UNSC, only consisting of the apprehension of that same person a couple of years later, after he has been charged with the genocide that has in the meantime ended, would also be condoned.[157] After all, the emergency situation,

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sovereignty, there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies. Generally expressed, the view was that these exceptional circumstances must be cases of violence which so genuinely "shock the conscience of mankind," or which present such a clear and present danger to international security, that they require coercive military intervention."

[156] Note that such an intervention without the approval of the UNSC, in contrast to consent and self-defence, is not yet seen as an established exception to the norm of non-intervention. See Shen 2001, p. 29: "The "humanitarian" intervention doctrine, although seemingly attractive, cannot be sustained as an exception to the non-intervention principle. International law does not recognize this alleged exception as such." See also Shaw (2003, pp. 1045-1046) who is, however, less outspoken: "[I]t [the right to humanitarian intervention, ChP] is difficult to reconcile today with article 2(4) of the Charter unless one either adopts a rather artificial definition of the 'territorial integrity' criterion in order to permit temporary violations or posits the establishment of the right in customary law. Practice has also been in general unfavourable to the concept, primarily because it might be used to justify interventions by more forceful states into the territories of weaker states. Nevertheless, it is not inconceivable that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens due to an outside intervention. In addition, it is possible that such a right might evolve in cases of extreme humanitarian need."

[157] *Cf.* also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 60. However, *if* the UNSC were to approve an arrest operation of a person suspected of having committed international crimes (even though one can imagine that it will be very unlikely that this will happen), this would be unproblematic, see also Van der Wilt 2004, p. 295. *Cf.* in that respect, for example, Sharp, Sr. 1997, p. 435: "The coercive authority of the Security Council has also been used to authorize the arrest and prosecution of persons suspected of international crimes against noncombatants in an area of ongoing conflict. On June 6, 1993, the Security Council unanimously reaffirmed the authority of the Secretary-General to take all measures necessary to ensure the arrest and prosecution of those persons responsible for the murder of twenty-four U.N. peacekeepers in Somalia on June 5, 1993. This resolution served as the authority for the U.N. Special Representative to publicly call for the arrest of General Aideed, and to conduct an aggressive series of military operations to arrest him. Accordingly, as a coercive measure to maintain international peace and security under Article 39 of the Charter, the Security Council has the authority to impose upon states an obligation to search and arrest persons suspected of war crimes [original footnotes omitted, ChP]." Although it must be borne in mind that this situation involved a State which was under the control of an international force (namely UNOSOM II), such an operation might also be condoned with respect to a State which is not under such international supervision. See also Scharf

justifying an intervention, no longer exists. The 'damage' – unfortunately – has already been done.[158] It may sound harsh, especially for the victims, but in the context of an intervention without the approval of the UNSC, an arrest of a person who is actually committing, or, in the very near future is about to commit genocide would probably be more acceptable than the arrest of a person who is charged with *already having* committed the genocide.[159]

However, the concept of humanitarian intervention ignoring for now, such an arrest may perhaps be based on other humanitarian considerations. The idea that a suspect who is charged with such serious crimes that it is imperative that there should be no safe haven for him and that he is to be brought to justice (irrespective of the means), may perhaps be founded in the Latin (but again not Roman, see Chapter II) maxim *aut dedere aut iudicare*.[160] This maxim, meaning 'extradite or prosecute', "requires a state which has hold of someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts."[161] For example (and as will be shown in Chapter VIII), such an *aut dedere*

2000, pp. 966-967: "[W]ithout the authorization of the Security Council, the consent of the territorial state in a peace agreement, or a situation that qualifies as self-defense, an apprehension of an indicted war criminal may constitute an "unlawful abduction" in violation of international law."

[158] *Cf.* the 'just cause threshold' from the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, p. XII: "Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm *occurring* to human beings, *or imminently likely to occur*, of the following kind: A. large scale loss of life, *actual or apprehended*, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or B. large scale 'ethnic cleansing', *actual or apprehended*, whether carried out by killing, forced expulsion, acts of terror or rape [emphasis added, ChP]."

[159] It is, of course, possible to arrest an indicted war criminal in the context of a humanitarian intervention (*cf.*, for example, *ibid.*, paras. 7.26 and 7.49 (pp. 62 and 66)) but in those situations, the arrests are 'only' small parts of the bigger humanitarian intervention. However, in these cases, the arrests cannot be seen *as* humanitarian interventions. That seems only possible if the person is not yet indicted for, but is actually, or on the verge of, directing a genocide.

[160] This famous rule comes from Grotius' maxim *aut dedere aut punire* (extradite or punish). See Hugo Grotius' *De Iure Belli Ac Pacis*, Book 2, Chapter XXI, para. 4 (entitled: "Nisi *aut puniant aut dedant*: quod exemplis illustratur [emphasis added, ChP]"), especially under 1: "Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos poenae expetendae nomine veniat, neque id expediat, sequitur ut civitas apud quem degit * qui culpae est compertus, *alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis. * hoc enim illud est dedere*, quod in historiis saepissime occurrit [emphasis added and original footnotes omitted, ChP]." (See Grotius 1913, p. 368.) The translation by Kelsey goes as follows: "Since as a matter of fact states are not accustomed to permit other states to cross their borders with an armed force for the purpose of exacting punishment, and since such a course is inexpedient, it follows that the state in which he who has been found guilty dwells *ought to do one of the two things. When appealed to it should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal. This latter course is rendition*, a procedure most frequently mentioned in historical narratives [emphasis added and original footnotes omitted, ChP]." (Kelsey 1925, p. 527.)

[161] Bassiouni and Wise 1995, p. 3.

aut iudicare obligation already exists with respect to grave breaches of the Geneva Conventions.[162]

It must be noted that this maxim addresses the State of residence (State B); the maxim only demands that *that* State does something, namely prosecute (on its own territory)[163] or extradite the suspect.[164] However, a third State could perhaps argue, if the State of residence does not either prosecute or extradite the suspect itself, and if by doing so violates an international obligation, that it must act itself to ensure that the suspect does not escape justice.[165]

In that context, it may invoke the concept of countermeasures,[166] which is, like consent and self-defence, an accepted wrongfulness-precluding circumstance which

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[162] *Cf.* also Michell 1996, p. 423, n. 205: "[I]n cases where the fugitive is accused of war crimes or crimes against humanity, it is arguable that the presumption against enforcement jurisdiction within the territory of another state may be realigned. States may be able to abduct a fugitive from another state and charge him with crimes under international law without incurring international responsibility for the violation of the latter's territorial sovereignty, particularly where the asylum state has refused to either extradite or prosecute a fugitive accused of an international crime."

[163] *Cf.* also Van der Wilt 2004, pp. 280-281, rightly explaining that one should not confuse the authority (or obligation) to create universal jurisdiction with the physical enforcement of criminal law (enforcement power). See also Lamb 2000, pp. 220-221 and Strijards 2001, p. 99. The obligation to arrest and prosecute suspects charged with grave breaches of the Geneva Conventions is only valid for a State's own territory and does not extend to the territory of other States.

[164] Note that the maxim *aut dedere aut iudicare* could perhaps be used by the State of residence to argue that it, if it cannot prosecute the suspect itself, will deliver the suspect to a third State, whether or not it has extradition arrangements with that State. Although the above-mentioned translation and explanation of the maxim speak of (the lawful method of) extradition, the rule itself uses the broader term *dedere*. (See also Bassiouni and Wise 1995, p. 4, n. 7: "[S]trictly speaking, *dedere* means "surrender" or "deliver" rather than "extradite."") This could be interpreted as meaning that if State B cannot prosecute the suspect itself, it has an obligation to deliver him to a State which is willing and able to prosecute, even if no extradition arrangements exist with that State.

[165] See in that respect also the interesting 1662 case of Okey, Corbet and Barkestead presented by Strijards (see Strijards 2001, pp. 93-95). In this case, three former members of the English parliament "pledged their vote in favour of the decapitation of King Charles the first." (*Ibid*., p. 93.) Unfortunately for them, however, the Royal Government was restored. As a result, the men fled to The Hague, where they were arrested by English officials and brought back to England. The Dutch Grand Pensionary Johan de Witt explained the States of Holland, which had decided to admit the English men for an application for asylum, that the action on Dutch territory was in accordance with the law of nations. In the words of Strijards: "Because of the unchallengeable egregiousness of the act of regicide, the Dutch Republic was in its relationship to England under the obligation either to prosecute and punish the regicidici or to extradite them to the State where their abominable deeds were done ("*aut dedere aut iudicare*"). Whereas the Republic failed to act in either manner in order to comply with its obligations directly prompted by ius cogens (international peremptory law) – it did not prosecute itself, it did not comply with the English request for extradition – England, as the grieved party, had the right to grant itself the right to exercise its national penal enforcement power on Dutch soil [original footnote omitted, ChP]." (*Ibid*., p. 94.) See also Izes 1997, p. 18 (writing on the *Eichmann* case): "Other authorities justify Israel's action under the international legal principle of "extradite or prosecute." This principle holds that no state should offer a safe haven to individuals who are accused of serious crimes under international law." See finally Gurulé 1994, pp. 490-491.

[166] See Art. 22 of the DARS ('Countermeasures in respect of an internationally wrongful act'): "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three."

ensures that no internationally wrongful act will take place. Nevertheless, countermeasures may not involve the threat or use of force,[167] which would exclude a *male captus* technique such as abduction.[168] However, perhaps, the concept could be used to justify a luring operation, although it must also be noted that countermeasures must not affect obligations for the protection of fundamental human rights.[169] (And that a luring operation may affect the right to liberty and security, a human right with, at least, customary international law/general international law status. This point will be addressed in Subsections 2.2 and 2.2.5.)

Before turning to the next subsection, it must be stressed that humanitarian grounds may very well lead to a justified arrest of a suspect without the consent of the State of residence, but much will depend here on the circumstances. However, more generally, it can be stated that even though the concept of State sovereignty is being eroded, it is still the fundament of the fragile inter-State community[170] and should therefore only be trespassed in clearly accepted situations. If one goes beyond these accepted situations, it is arguably a matter of time before the law of the jungle re-enters the international arena. In the words of the Argentine Ambassador Mario Amadeo in his speech to the UNSC after Eichmann's capture in Buenos Aires:

> [T]he main threat to international peace and security does not arise from the fact (which in itself is prejudicial to the rule of law) of the violation of Argentine sovereignty and its unfortunate repercussions on Argentine-Israel relations. It results from the supreme importance of the principle impaired by that violation: the unqualified respect which States owe to each other and which precludes the exercise of jurisdictional acts in the territory of other States. If this principle were to fall into abeyance, if it could be violated with impunity, if each State considered itself entitled, whenever it so desired, to supersede the authority of another State and take justice

[167] See Art. 50 of the DARS ('Obligations not affected by countermeasures'): "1. Countermeasures shall not affect: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; (*d*) other obligations under peremptory norms of general international law. 2. A State taking countermeasures is not relieved from fulfilling its obligations: (*a*) under any dispute settlement procedure applicable between it and the responsible State; (*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents."

[168] *Cf.* Borelli 2004, p. 363, n. 127. *Cf.* also Lamb 2000, pp. 220-221: "When armed insurgents are sent by a State (or with the connivance of a State) into the territory of a third State to effect an arrest, this could be categorized as either a breach of the principle of non-intervention in the domestic affairs of the third State, a violation of the territorial integrity of that State, or even, exceptionally, as an armed attack. This is so despite the fact that States are, in view of their treaty obligations (most notably those arising under the 1949 Geneva Conventions), obliged to prosecute and punish persons accused of serious violations of international humanitarian law. Although the existence of this obligation is undisputed, its scope nevertheless extends only to the borders of the prosecuting State and not into the territory of a third State [original footnotes omitted, ChP]." (See also n. 163.)

[169] See n. 167.

[170] See Shaw 2003, p. 410: "The principle of respect for the territorial integrity of states is well founded as one the linchpins of the international system". See also the International Commission on Intervention and State Sovereignty's report *The Responsibility to Protect* (December 2001), available at: http://www.iciss.ca/pdf/Commission-Report.pdf, paras. 4.11 and 4.12 (p. 31).

> into its own hands, international law would very soon be replaced by the law of the jungle. (...) Can it be argued that the repetition of such incidents is not likely to strike at the very roots of international order?[171]

2.2 Human rights

The previously mentioned argument by Eichmann that his capture violated the sovereignty of Argentina is a *male captus* defence originating from classical international law when it "concerned itself exclusively with the relationship between states".[172] It was *étatiste* international law so to say.[173]

States were the only real actors in the international community and respect for State sovereignty was the most important principle governing this system of inter-State/'inter-*nation*al' law.

By contrast, individuals played no important role in this field.[174] This meant that State sovereignty and not human rights was the most important value to complain about in the case of, for example, an abduction.[175]

In addition, only States and not individuals could complain about these violations of State sovereignty.[176]

In the words of the District Court of Jerusalem:

> The *ratio* of this rule is that the right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.[177]

> Indeed, there is no escaping the conclusion that the question of the violation of international law by the manner in which the accused was brought into the territory of

[171] UNSC, 15th Year, OR, 865th meeting, 22 June 1960, UN Doc. S/PV.865, para. 34 (p. 7). See also Mann 1989, p. 420: "The wrongful abduction from a foreign State's territory is bound to lead to international anarchy and friction, both in law and in fact."
[172] Goldstone 1996, p. 1.
[173] See Feinrider 1997, p. 81.
[174] See Strijards 2003, p. 755.
[175] A very good example of this can also be found in Art. 16 ('Apprehension in violation of international law') of the 1935 Harvard Research in International Law's Draft Convention on Jurisdiction with Respect to Crime, see the *American Journal of International Law Supplement*, Vol. 29 (1935), pp. 435-651 for the entire research. This *male captus male detentus* article states: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures."
[176] Note that not only the State whose sovereignty had been violated could protest the abduction, but also the home State of the abducted person. However, in the latter case, the home State has to exercise its prerogative of diplomatic protection (see Feinreider 1997, p. 81) which is "the protection given by a (...) subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law." (Geck 1992, p. 1046.)
[177] District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 44 (36 *International Law Reports* 1968, p. 62).

> a country arises at the international level, namely, the relations between the two countries concerned alone, and must find its solution at such level.[178]

Although it is not often mentioned in literature,[179] Eichmann not only tried to plead a violation of the sovereignty of Argentina, he also brought forth a human rights argument. On appeal, his counsel Servatius stated:

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[178] *Ibid*., para. 50 (36 *International Law Reports* 1968, p. 70). Note that this stance, which was, for example, also followed by the French *Argoud* (see n. 389 and accompanying text of Chapter V) and US *Noriega* (see n. 207 of Chapter V) cases, was rejected in the context of the international criminal tribunals, see ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić a/k/a/ "Dule"*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', Case No. IT-94-1-AR72, 2 October 1995, para. 55: "Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, recently this concept has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights. Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest." It should be clarified, however, that the fact that a suspect has *ius standi* to plead an alleged violation of State sovereignty does not mean that this plea will also be successful; as will be shown at n. 582 and accompanying text of Chapter VI, if there is no request by the injured State for the return of the suspect, the latter's argument for returning him to the injured State is doomed to failure. (Although this does not mean, of course, that the suspect cannot claim that his case should be dismissed on other (human rights/due process) grounds.) See *ibid*., para. 56: "The Trial Chamber was (...) fully justified to write, on this particular issue: "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused – Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and *the accused cannot claim the rights that have been specifically waived by the States concerned* (...) [emphasis added, ChP]."" See also ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanovic', Case No. IT-95-13a-PT, 22 October 1997, para. 76 (see n. 259 of Chapter VI), ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 32 (this case will be discussed in Subsection 3.1.2 of Chapter VI) and ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 97 (and n. 107) (see Subsection 3.1.4 of Chapter VI). See finally also the discussion of the ICTY Appeals Chamber's decision in *Nikolić* in the same Subsection 3.1.4 of Chapter VI.

[179] See, however, Quigley 1988, p. 198. The point is also mentioned in an annex to a motion from the Defence in the still-to-discuss *Nikolić* case, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the

> The District Court is wrong to assume that only the states concerned can derive rights resulting from violation of international law. This conception must be considered obsolete on account of the development of international law. The individual, having duties imposed on him deriving from international law, must also be granted rights to the same extent in the case of infringements committed. It cannot be accepted that an individual becomes a toy of states who, for the sake of national interests, disregard the interests of the individual.[180]

Regarding "the development of international law", Servatius referred to the 1948 UDHR and, more specifically, to the 1950 ECHR. Although he conceded that Israel was not a party to the European Convention, he made a sort of customary international law plea by arguing that both instruments mention the right to liberty and security, "a basic principle which ought to serve as a guideline to every country".[181] The Israeli Supreme Court, however, was not impressed by these arguments: it agreed with the reply of the Attorney-General that Israel was simply not a party to the European Convention. In addition, it was stated that "[f]rom the point of view of customary international law, (…) the abduction of the appellant is no ground for denying to the Court the competence to try him once he is within the area of its jurisdiction."[182]

Times have changed, however. The UDHR and the ECHR, born out of the horrors of WW II, set in motion the signing of other human rights treaties such as the ICCPR.[183] More and more, individuals entered the arena of international law. This was also visible in the field of mutual assistance in criminal matters which "increasingly focused on the individual."[184] And rightly so. After all, individuals are

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Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, p. 18.

[180] Supreme Court of Israel, *Adolf Eichmann, Appellant versus The Attorney General, Respondent*, Criminal Appeal No. 336/61, 31 January 1962, Written Pleadings Submitted by Counsel for the Appellant Adolf Eichmann, available at: http://www.nizkor.org/ftp.py?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Pleading-01-01.

[181] Supreme Court of Israel, *Adolf Eichmann, Appellant versus The Attorney General, Respondent*, Criminal Appeal No. 336/61, 22 March 1962, Transcripts of Appeal Session 1, available at: http://www.nizkor.org/ftp.py?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-01-01.

[182] Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 13 (36 *International Law Reports* 1968, p. 308).

[183] See also Zappalà 2002 A, p. 1187 and Lauren 2004, p. 25.

[184] Trechsel 2005, p. 431. See also Cherif Bassiouni and Wise 1995, p. ix: "International law traditionally has been the law of a society made up almost exclusively of sovereign national states. It is becoming the law of a planetary community of which all human beings are members". See also Costi 2003, p. 68. In that connection, it is also interesting to compare the UNSC's condemnation of abductions in 1960 (focusing on the rights of the injured State alone) and the following condemnation in 1985 where there was a focus on the rights of the individual as well: UNSC Res. 579 of 18 December 1985 states: "*Considering* that the taking of hostages and abductions are offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States, (…) 1. *Condemns unequivocally* all acts of hostage-taking and abduction; 2. *Calls for* the immediate safe release of all hostages and abducted persons wherever and by whomever they are being held; 3. *Affirms* the obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their

more than little parts of States.[185] Now that they have rights independent of the States where they live or of which they are nationals, they should be able to protest against a *male captus* situation, even if the injured State consents to the operation, hence even if there is no problem from a classical international law point of view (between States).[186]

Nevertheless, one will not find generally drafted human rights (conventions) specifically forbidding the techniques of disguised extradition, luring and abduction as methods to bring a person to justice.[187] What a victim of a *male captus* situation

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safe release and to prevent the commission of acts of hostage-taking and abduction in the future; (…) 5. *Urges* the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism [emphasis in original, ChP]."

[185] See also ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić a/k/a/ "Dule"*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', Case No. IT-94-1-AR72, 2 October 1995, para. 97: "[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well."

[186] See Michell 1996, p. 439: "Under international human rights law, individuals have legal rights and duties; they are not stand-ins or beneficiaries of rights derived from states. Thus, individuals may assert their own rights and need not wait for the injured state to do this for them." One may also argue, as was done in the ICTY *Tadić* case, see n. 178, that individuals should be able to plead a violation of State sovereignty. Nevertheless, as also stated in the same n. 178, this does not mean that such a plea will be successful; much will depend here on the reaction of the injured State and that State may not protest the abduction or demand the return of the suspect, see Rayfuse 1993, p. 890: "Even in the face of an egregious violation of international law there may be occasions when no protest is forthcoming from the offended State – for any number of reasons which may not necessarily be related to the case at hand. For example, in *Ker* [see Subsection 1.1 of Chapter V, ChP] the individual in question had not been a national of Peru, the country from which he was abducted. Although Peruvian territory had been violated Peru would probably have had little interest in protesting in order to seek the return of a non-national – assuming the authorities were even aware that he had been kidnapped – especially during a time of national emergency such as Peru was experiencing at the time." However, this dependence on the reaction of the injured State is lacking in the context of human rights, which individuals enjoy irrespective of the reaction of any State.

[187] An example where the prohibition on kidnapping can be seen in another context is the International Convention for the Protection of All Persons from Enforced Disappearance, whose signing ceremony took place in Paris on 6 February 2007. This Convention is focused on kidnappings as tools to make persons disappear (instead of kidnappings as tools to bring persons to justice), see its Art. 2 which states: "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, *followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law* [emphasis added, ChP]." Another human rights example where one can see a condemnation of kidnapping can be found in Art. 35 of the Convention on the Rights of the Child, adopted by UNGA Res. 44/25 of 20 November 1989: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Nevertheless, this positive obligation to prevent abductions is only applicable in the context of a limited group of

could do, however, is rely on more general human rights provisions from international and regional human rights treaties.[188] Before giving examples, two remarks should be made. First, the examples only cover the basic *male captus* situations. Of course, during an abduction, the suspect may also be mistreated or even tortured by his kidnappers. In fact, in many cases in this book, the suspect alleges that he was mistreated. In such situations, he can also turn to articles such as Article 3 of the ECHR,[189] Article 7 of the ICCPR (the prohibition of torture) or Article 10, paragraph 1 of the ICCPR ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person").[190] To keep matters clear, however, the examples in the following pages

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individuals, namely children. Art. 1 of the same Convention explains what a child is: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." It may finally be interesting to mention that a bilateral treaty has been drafted which explicitly forbids the use of abductions as a means to bring suspects to justice, but this instrument has not entered into force. This instrument is the Treaty Between the Government of the United Mexican States and the Government of the United States of America to Prohibit Transborder Abductions, which was drafted after the (in)famous *Alvarez-Machain* case of 1992, which will be discussed in Subsection 1.2 of Chapter V. (The treaty can be found in Abbell 2001, at A-303-A-306.) Although both Mexico and the US signed the treaty on 23 November 1994, it was never submitted to the US Senate for advice and consent to ratification. As a result, it has never entered into force. See, for example, Henderson 2006, p. 196 and US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 619.

[188] See also the following statements. (It must be mentioned that these were made before the International Convention for the Protection of All Persons from Enforced Disappearance, which explicitly states in Art. 1, para. 1 that "[n]o one shall be subjected to enforced disappearance" (which includes an abduction). Nevertheless, as already explained in the previous footnote, such an abduction is not focused on bringing a person to justice (the context in which this study is interested) but on making a person disappear.) Costi 2003, p. 69: "No international treaty explicitly recognises an individual human right against forcible abduction or irregular rendition. Yet, such a right has been read into the provisions of regional and international human rights instruments relating to the right to liberty and security of the person and to protection against torture or other degrading treatment." American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 432 ('Measures in Aid of Enforcement of Criminal Law'), Reporters Note 1 ('Exercise of enforcement functions in foreign state without consent'): "None of the international human rights conventions to date (…) provides that forcible abduction or irregular extradition is a violation of international human rights law. However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view." Borelli 2004, p. 356: "Forcible abduction is not expressly prohibited by any human rights treaty or customary rule. Nevertheless, the kidnapping of an individual implies *per se* the violation of several fundamental rights protected by international law. For instance, concerns like the preservation of the security of the individual, the condemnation of arbitrary arrest and detention, the respect of the right to a fair trial may be interpreted to preclude State-sponsored kidnapping [original footnote omitted, ChP]." See finally also Quigley 1988, p. 198.

[189] For example, in the *Öcalan* case (see Subsection 2.2.4), the suspect in question claimed that his *male captus* from Kenya to Turkey did not only violate his right to liberty and security but also "his right to respect for his physical integrity. He added that the circumstances in which the arrest had been effected also amounted to degrading and inhuman treatment." (ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 177.) (The Court, by the way, did not agree with this, see *ibid*., para. 185.)

[190] See also Quigley 1988, pp. 199-201.

will focus on 'simple' *male captus* situations, where these complicating and aggravating factors are not present.[191] Secondly, the examples will only involve (the more important)[192] general human rights treaties. To take again a suspect who alleges to have been mistreated during the *male captus*: such a person could perhaps also rely on more specific treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, an inquiry into all these specific instruments would only complicate matters, whereas this chapter – as has already been said several times – is merely there to clarify. (They may appear in the remainder of this book however.)

The arguably two most important human rights that can be violated in basic *male captus* situations are the right to liberty and security and the right not to be subjected to arbitrary arrest or detention.[193]

However, before analysing these two rights, it is also worth mentioning the right to a fair trial here. Although the provisions in human rights treaties where the word 'fair' can be found are mainly dedicated to a fair hearing in court, this does not preclude a suspect from arguing more generally that his trial must be considered unfair if something goes wrong during, for example, his arrest and judges in court subsequently do not pay attention to this matter.

Arguably, the concept of a fair trial is not limited to the hearing *in court*, but encompasses the whole criminal proceedings, including the pre-trial phase and hence also the arrest proceedings.

See in that respect the following words of Nowak, commenting on Article 14 of the ICCPR:

> The claim to a fair trial in court on a criminal "*charge*" ("accusation") does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned. This is usually the

[191] *Cf.* Garner 2004, p. 886: a simple kidnapping is a "[k]idnapping not accompanied by an aggravating factor" whereas an aggravated kidnapping is a "[k]idnapping accompanied by some aggravating factor (such as (…) injury of the victim)." Although "Professor Henkin also stated (…) that "[a]bduction would also appear to be 'cruel, inhuman or degrading treatment' in violation of" human rights law [original footnote omitted, ChP]" (Paust 1993, p. 563), the view of Paust himself is arguably better: "I do not agree (…) that every abduction or capture of a person in foreign state territory without foreign state consent (…) is necessarily (…) "cruel," "inhuman," or "degrading" within the meaning of relevant human rights standards." (Paust 1993, p. 564.)

[192] For example, the Charter of Fundamental Rights of the European Union will not be discussed because the older European Convention is clearly more authoritative.

[193] One may also look at a right such as the one mentioned in Art. 13 of the ICCPR ("An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.") to contest a disguised extradition, as will be shown *infra* when discussing the case *Giry v. Dominican Republic*.

> first official notification of a specific accusation, but in certain cases, this may also be as early as arrest [original footnotes omitted, ChP].[194]

Going back to the more specific right to liberty and security and the right not to be arrested or detained arbitrarily, these rights are recognised, at least on paper, around the world, in both global and regional human rights treaties.[195]

In addition, many countries have adhered to these legal provisions. For example, the ICCPR has currently[196] 165 States Parties.

The fact that so many States have adhered to these provisions (State practice) plus the fact that States arguably have done this because they feel they have a legal

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[194] Nowak 1993, p. 244. Another interesting quotation can be found in ECtHR (Chamber), *Case of Miailhe v. France (No. 2)*, Application No. 18978/91, 'Judgment', 26 September 1996, where the ECtHR stated in para. 43 that it must "satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any". (Note, however, that this case dealt with the admissibility of evidence.)

[195] See for the right to liberty and security of person: Artt. 3 of the UDHR, 9 of the ICCPR, 5 of the ECHR, 7 of the ACHR, 6 of the ACHPR, 5 and 8 of the ARACHR and 5 of the CISCHR. See for the right not to be subjected to arbitrary arrest or detention/imprisonment: Artt. 9 of the UDHR, 9 of the ICCPR, 7 of the ACHR and 6 of the ACHPR. (Note that the three other conventions (ECHR, ARACHR and CISCHR) do not explicitly use the words "right not to be subjected to arbitrary arrest or detention" but that other rights could very well encompass this right, see Art. 5 of the ECHR ("[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law"), Art. 8 of the ARACHR ("no one shall be arrested, held in custody or detained without a legal warrant and without being brought promptly before a judge") and Art. 5 of the CISCHR ("[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure established by national legislation"). What strikes is that there is no regional human rights treaty for Asia. Tomuschat explains this point as follows: "This failure is due not only to political difficulties, but also to the fact that Asia is a continent which lacks cultural homogeneity. The Arab countries are a world apart, and although their endeavours to produce a human rights instrument came to fruition in 1994, the Arab Charter of Human Rights, the outcome of their joint efforts has not attracted any ratifications to date. India views itself almost as a continent with a rich intellectual heritage, and China, the Middle Kingdom, has always considered that it is the true centre of the world. Japan, too, has a distinct cultural identity which can by no means be equated with Chinese culture. Not only do historical and ethnic traditions compete with one another. Asia is also divided by the different religions of its peoples. Given such divergencies, there is not the slightest prospect that one day an Asian convention on human rights reflecting a specific Asian civilization might see the light of the day [original footnotes omitted, ChP]." (Tomuschat 2003, pp. 33-34.) Note, however, that this might change in the future. One possible (but admittedly still restricted) sign could be the fact that on 20 November 2007, 10 Member States of the Association of Southeast Asian Nations or ASEAN (namely Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao PDR, Myanmar and Cambodia) signed the ASEAN Charter, whose Art. 14 ('ASEAN Human Rights Body') states: "1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body. 2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting." Moreover, on 23 October 2009, the inaugural ceremony of the ASEAN Intergovernmental Commission on Human Rights (AICHR) was held, see 'AICHR unveiled, for the betterment of all ASEAN peoples', available at: http://www.aseanhrmech.org/news/AICHR-unveiled-for-betterment-of-ASEAN-people.htm.

[196] See http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.

obligation under international law to do so (*opinio iuris*) means that these rights have customary international law status.[197]

Furthermore, it could be asserted that this right can be seen as part of general international law,[198] if not because of the great number of States which have ratified the ICCPR,[199] then because of the provisions' customary international law status.[200]

[197] For further evidence of the assertion that these rights have customary international law status, see, for example, para. 8 of the Office of the High Commissioner for Human Rights, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6: "[P]rovisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be." See also Rayfuse 1993, p. 891: "It would seem uncontroversial to suggest that the rights to liberty and security of the person and to freedom from arbitrary arrest are rights which (…) are now firmly rooted in the corpus of customary international law." See also Higgins 1994, p. 70 and De Zayas 2005 p. 22: "The above international norms [De Zayas refers hereby to international and regional human rights protecting the liberty and security of person, ChP] reflect a universal consensus that an individual cannot be deprived of liberty except pursuant to specific legislative authority and with respect for procedural safeguards." See finally De Londras 2007, p. 240: "As well as being protected in specific conventions as outlined above, the right to be free from arbitrary detention also forms part of customary international law. By analysis under the two relevant considerations – 'the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'' – it is clear that the right to be free from arbitrary detention is a customary international law right. In particular, the establishment of the UN Working Group on Arbitrary Detention, the production of the Body of Principles for the Protection of All Those in Any Form of Detention or Imprisonment and the conclusion of the Draft International Convention for the Protection of All Persons from Enforced Disappearance testify to this assertion [original footnotes omitted, ChP]."

[198] See Rodley 1999, p. 264 where he explains that the right to liberty and security is "a right which (...) is recognized by general international law". See also *ibid*., p. 341: "There are also strong indications that the International Court of Justice considers that violation of the right to liberty and security of person and the prohibition of arbitrary arrest and detention is a violation of general international law (...). Here the statement of the World Court in the *Tehran Hostages* case will be recalled: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." This statement appears to have been a specification of the more general finding that, by keeping the hostages effectively imprisoned at the US embassy in Tehran, Iran had committed 'successive and continuing breaches of the obligations laid upon it by the ... applicable rules of general international law'. The language hardly admits of an interpretation that does not cover the principles concerning arbitrary arrest and detention and liberty and security of person [original footnotes omitted, ChP]." *Cf.* finally the still-to-discuss *Barayagwiza* case before the ICTR (see Subsection 3.2.1 of Chapter VI) where the judges held even more generally that "[t]he International Covenant on Civil and Political Rights is part of general international law". (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 40.)

Now that the status of these articles has been clarified to a certain extent, it is worth looking at their content. Even though it will be shown that the two rights are not exactly the same, the following pages will address them in concert, because they are mentioned almost everywhere in one and the same article.[201]

What is the exact meaning of this right to liberty and security/the right not to be subjected to arbitrary arrest or detention? It would go beyond the scope of the present study to examine all the different versions of this right in detail but some important aspects should be addressed. Attention will hereby be paid to arguably the two most important human rights treaties for the field of international criminal law, namely the ICCPR (see Article 9, paragraph 1)[202] and the ECHR (see Article 5, paragraph 1).[203] [204] Alongside a more theoretical examination of both provisions (in

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[199] See Brownlie 2003, p. 4: "[T]reaties binding a few states only are dubbed 'particular international law' as opposed to 'general international law' comprising multilateral 'law-making' treaties to which a majority of states are parties [original footnote omitted, ChP]."

[200] *Cf.* Tunkin, presenting the prevailing theory (in 1993) as follows: "General international law is customary law only. Conventional norms, even if all States are parties to a treaty, need the *opinio juris* of these States to become norms of general international law. In other words, treaty provisions must be converted into customary norms, in order for them to become norms of general international law." (Tunkin 1993, p. 535.) Note, however, that Tunkin himself was of the opinion that multilateral treaties (and not only customary law) could also lead to general international law, see *ibid*., p. 541: "I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international law."

[201] See n. 195.

[202] "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[203] "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[204] See, for example, the following words from the ICTR Appeals Chamber in the *Barayagwiza* case on 'Applicable and Authoritative Provisions': "The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 40.) Although the American Convention is also mentioned here, it can be argued that the ECHR is more authoritative. *Cf.* in that respect, for example, Sluiter 2003 B, p. 940, n. 20 when writing on the regional conventions: "In particular the ECHR can be considered to reflect customary

Subsections 2.2.1 and 2.2.3), how the human rights bodies supervising the ICCPR (namely the HRC, see Subsection 2.2.2) and the ECHR (namely the (now defunct) ECmHR and the ECtHR, see Subsection 2.2.4) have interpreted these provisions in the context of alleged *male captus* cases will also be examined. It should be emphasised that most of the cases from these supervisory bodies do not go into the real *male captus* discussion as they do not need to analyse the effect of the specific *male captus* on the jurisdiction of the court. They are 'only' there to determine whether a violation of their instruments has occurred.[205] As a result, most of these cases will be discussed in this part of the book and not in Part 3. Nevertheless, some decisions of the supervisory bodies will also be found in Chapters V and VI, for example, because it may be interesting to see how an inter-State/tribunal case, after being addressed at the national level/the level of the tribunals, was continued at the level of these supervisory bodies, or because the supervisory body seemed to do more than just determine whether or not a certain act had led to a violation of the human rights instrument in question (see the *Al-Moayad* case, to be addressed in Subsection 2.2 of Chapter V).

2.2.1 Article 9, paragraph 1 of the ICCPR

Nowak, in his commentary to this article, explains that "it is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful."[206]

> It obligates a State's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedures to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.[207]

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international law. It is true that this is only a regional convention and therefore the ensuing State practice is by definition limited, but this Convention dates from 1950 and served as a model for the ICCPR."

[205] See also Currie 2007, p. 360 (also writing on *male captus* case law from (inter)national(ised) courts): "Decisions of the human rights supervisory bodies are not exactly on point with the current discussion, as they fulfil different functions than either the national courts or the international criminal tribunals. While abduction and illegal rendition may cause jurisdictional inquiries in the latter fora, being the very courts which can try the individuals, bodies such as the European Court of Human Rights and the United Nations Human Rights Committee have a supervisory function. At their most specific these courts will adjudge whether a particular prosecution undertaken in spite of abduction or illegal rendition was itself a violation of its constitutive human rights instrument, or at least whether the mode of apprehension itself was offensive." See also *ibid*.: "As might be expected, these cases rest on the illegal acts themselves as human rights violations, rather than speaking to the inherent process of the court." See finally IACtHR, *Velásquez Rodríguez*, 'Judgment', 29 July 1988, Ser. C., No. 4 (1988), available at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm, para. 134: "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

[206] Nowak 2005, p. 211.

[207] *Ibid*., pp. 211-212.

Thus, a person's deprivation of liberty must not only be "on such grounds and in accordance with such procedure as are established by law" (lawful); it must not be arbitrary either.[208] The first condition encompasses the principle of lawfulness/legality and has two dimensions: a substantive one ("on such grounds (…) as are established by law") and a procedural one ("in accordance with such procedure as [is] established by law")[209] and the second condition contains the prohibition on arbitrariness.[210]

How do these conditions, which will be further examined *infra*, relate to each other? It is clear from the above that if, for example, a police official maintains that an arrest or detention did not violate Article 9, paragraph 1 of the ICCPR, then he has to prove both conditions, meaning that he must show that the arrest violated neither the principle of legality nor the prohibition of arbitrariness. Consequently, this also means that any arrest which does *not* comply with one of the conditions can be seen as violating Article 9, paragraph 1 of the ICCPR. Hence, if it is established that an arrest violated the principle of legality (for example because it was not "in accordance with such procedure as [is] established by law"), there is already a violation of Article 9, paragraph 1 of the ICCPR. It is not necessary in that case to also prove that the arrest was arbitrary because the principle of legality was already violated. As a result, the arrest can never comply with both conditions (and only that will lead to the conclusion: no violation of Article 9, paragraph 1 of the ICCPR). Likewise, a violation of Article 9, paragraph 1 of the ICCPR can also be established if the arrest did not violate the principle of legality, but was 'merely' arbitrary.[211]

Focusing now on these conditions and looking first at the principle of legality, it must be clarified that the word "law" primarily refers to national law.[212] Nevertheless, from the remainder of the article, it becomes clear that an arrest or detention must not only be lawful according to national law but also according to international law. For example, in his discussion on paragraph 5 of this article (which will be further discussed in Subsection 4.2), Nowak writes:

> Arrest or detention is unlawful when it contradicts one of the provisions in Art. 9(1) to (4) and/or a provision of domestic law. (…) [A]n arrest may be consistent with

[208] See *ibid*., p. 223. See also *ibid*., p. 224: "It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily."
[209] See *ibid*., pp. 223-224.
[210] See *ibid*., pp. 224-228.
[211] See in that respect Nowak's presentation of the *Van Alphen* case: "In *van Alphen v. The Netherlands*, concerning a Dutch solicitor who was detained for more than nine weeks in order to force him to waive his professional obligation to secrecy and to solicit evidence which could be used in the criminal investigations against his clients, the [ICCPR's Human Rights] Committee gave a general legal opinion about the factors that may render arbitrary an otherwise lawful detention. In conformity with the drafting history, the Committee held that remand in custody pursuant to a lawful arrest must not only be lawful but reasonable and necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. After carefully balancing the different arguments, it found a violation of Art. 9(1) [original footnote omitted, ChP]." (*Ibid*., p. 227.)
[212] *Ibid*., p. 224.

> domestic laws but nevertheless *unlawful under international law*, regardless of whether this is arbitrary or in violation of the procedural guarantees in paras. 2 to 4 [emphasis in original and original footnote omitted, ChP].[213]

The same goes for paragraph 4 (which will also be examined in detail in Subsection 4.2):

> In decisions concerning the mandatory detention of immigrants and asylum seekers who enter the territory of Australia without a valid entry permit, the [ICCPR's Human Rights] Committee held that judicial review of the lawfulness of detention under Art. 9(4) must also include the compatibility with *international law*, above all the Covenant itself [emphasis in original and original footnote omitted, ChP].[214]

Returning to the prohibition of arbitrariness, what does it entail? Nowak, writing on the negotiations of Article 9 of the ICCPR, explains:

> Whereas some delegates were of the view that the word "*arbitrary*" ("arbitraires") meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality, as well as the Anglo-American principle of *due process of law* [emphasis in original and original footnotes omitted, ChP].[215]

Hence, arbitrariness covers the notion of unlawfulness, but is in fact much more than that.[216] This additional element is, of course, to be welcomed; otherwise, there

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[213] *Ibid*., p. 238.
[214] *Ibid*., p. 224.
[215] *Ibid*., p. 225.
[216] *Cf*. also the 1964 United Nations Committee 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile'. According to Marcoux, Jr. (1982, p. 366), this committee "provides one of the most important interpretations of "arbitrary" [original footnote omitted, ChP]". And indeed, if one looks at the material examined by the committee, one can only agree with this. Marcoux, Jr. explains the committee's methodology and outcome as follows (*ibid.*): "During the course of its study, the United Nations Committee consulted the preparatory works and legislative history of the Universal Declaration and the Covenant on Civil and Political Rights. The Committee also referred to the reports of the United Nations Seminars on the Protection of Human Rights in Criminal Law or Procedure, and the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the first United Nations Congress for the Prevention of Crime and Treatment of Offenders. In addition, the Committee examined documents of the League of Nations and work undertaken by regional organizations, such as the Organization of American States and the Council of Europe. Finally, the Committee collected information relating to the laws and practices concerning arrest and detention in "as many countries as possible." After this exhaustive study, the Committee concluded that "'arbitrary' is not synonymous with 'illegal' and … the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary." Accordingly, the Committee adopted the following definition of "arbitrary": "Arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person" [original footnotes omitted, ChP]." One could argue that on the basis of this definition, an illegal arrest/detention is *always* (and not

would be nothing wrong with a deprivation of liberty which may be based on a law but which may nevertheless be clearly arbitrary (for example because the law on which it is based is also manifestly unreasonable).

The word "unproportionality" in the previous quotation shows that the requirement of non-arbitrariness is relative in nature:[217] it will depend on the specific situation and the circumstances of the case whether a certain case of deprivation of liberty will be viewed as arbitrary or not. Nowak also notes this when he states:

> Cases of deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case [original footnote omitted, ChP].[218]

This quotation shows that one should not only look at the correctness of the law on which the arrest and detention was based, but also at the correctness of the enforcement of the law in this specific case.[219] A couple of pages earlier, however, Nowak explained:

> At this stage, a further limit on the scope of personal liberty should be mentioned. The traditional view is that it relates solely to the *fact of deprivation of liberty* and the observance of the minimum guarantees specifically formulated in this context, and not to the manner in which liberty is deprived. For example, if a person is arrested and not informed of the reasons, this is a violation of personal liberty; if he is mistreated in the process, this has nothing to do with personal liberty [emphasis in original, ChP].[220]

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almost always, see *supra*) arbitrary because it will fall under the first category of arbitrary arrests/detentions.

[217] See also Marcoux, Jr. 1982, p. 374: "The more a law operates to deprive individuals of the right to personal liberty, the more such a law becomes arbitrary. At the same time, the state has a correspondingly greater duty to justify its actions. In this manner, "arbitrary" is not an absolute concept with a single, ascertainable meaning. Rather, it is as a relative concept: a law may be more or less arbitrary as it more or less derogates from the fundamental right to personal liberty. "Arbitrary" may thus be conceptualized as a continuum, at one end of which is complete maximization of the right to personal liberty, and at the other, complete minimization of the right to personal liberty. According to this analysis, one may judge a law or proposed law by the greater or lesser extent to which it places a restriction upon the right to personal liberty. The state may be able to justify impositions on the right to personal liberty by referring to other universally recognized goal values, and by arguing that factors such as necessity and proportionality justify its action. However, the state has the burden of justifying its derogation. This burden becomes greater as infringement upon the personal liberty value increases."

[218] Nowak 2005, p. 225.

[219] See also n. 208. In that respect, Nowak's quotation seems to go further than the (admittedly also quite old) 1964 United Nations Committee 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile' (see n. 216) which did not seem to look at the specific manner in which the arrest was made. (The 1964 Study focused on the question whether the arrest and detention were lawful and whether the purpose of the law on which the arrest and detention were based was compatible with the right to liberty and security.)

[220] Nowak 2005, pp. 212-213.

Although it indeed seems clear that other problems which may come with deprivation of liberty, such as mistreatment of the arrested person, are not within the scope of the right to liberty and security, the fact that the second quotation states that one should not look at "the manner in which liberty is deprived" appears to contradict the first quotation where one can read that one may look at "the specific manner in which an arrest is made". It looks like the last-mentioned idea (in the first quotation) is, however, Nowak's view. This may be discerned from the fact that the second quotation speaks of the "traditional view" with which Nowak may not agree.[221] Another argument in favour of looking at the specific manner in which the arrest was made is that this view can also be found in Nowak's statement that "the enforcement of the law in a given case must not take place arbitrarily".[222]

Whatever the case may be, this study will follow, as others seem to do as well,[223] the first quotation in that one should also look at the correctness of the specific manner in which an arrest is made. That one should take into account the specific manner in which an arrest was made in the determination of whether the arrest was proportional (to come back to that point) seems logical. One can imagine that the arrest of a high-level person who, it is known, will do anything to evade justice may justify other methods of arrest than in the case of the arrest of a 'normal' suspect who, it is known, will cooperate with the police. However, it may be the case that applying the arrest methods of the first suspect to the second suspect (where this is absolutely not necessary and, in fact, disproportional for the goal of arrest) may render the otherwise perfectly legal arrest arbitrary. Hence, applying certain methods of arrest may not lead to a violation of a person's right to liberty and security in one case but may lead to a violation in another case.

Paust, however, goes one step further (and arguably one step too far) when he asserts:

> What is "arbitrary," otherwise "unlawful," or "unjust" will have to be considered in context and with reference to other legal policies at stake. (…) [I]t may not be incompatible with principles of justice, "unjust," "unlawful" or otherwise "arbitrary" to abduct or capture an international criminal in a context when action is reasonably necessary to assure adequate sanctions against egregious international criminal activity [original footnote omitted, ChP].[224]

Although one can imagine that the same legal arrest is non-arbitrary in one case and arbitrary in the other, it is allegedly not so that an operation that is so often labelled as unlawful and arbitrary that one may assert that it is *always*, in every case,

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[221] However, it must be admitted that if this is indeed the case, Nowak does not clearly present it as such.
[222] Nowak 2005, p. 224. See also n. 208.
[223] See, for example, Chapter IV ('Overview of International Human Rights and Humanitarian Law Standards') of the Training Manual on Human Rights Monitoring (available at: http://hrlibrary.ngo.ru/monitoring/chapter4.html) under D 2 (a).
[224] Paust 1993, pp. 563-564.

unlawful or arbitrary (such as an abduction, see Subsections 2.2.2 and 2.2.4),[225] may become less unlawful or arbitrary under certain circumstances.

After having reviewed this theory, one would think that all three basic *male captus* situations (disguised extradition, luring and abduction) violate Article 9, paragraph 1 of the ICCPR.[226] (Whether the law in practice agrees with this will be disclosed in a few moments when the actual case law of the HRC is addressed.) After all, they all involve operations in which the normal route of bringing a person from State B to State A, namely extradition, is circumvented. Hence, such apprehensions are arguably not "in accordance with such procedure as [is] established by law" because one can assume that States will not draft legislation explicitly approving disguised extradition/luring/abduction. However, even if they did, such legislation would arguably be arbitrary in nature. That would seem logical with respect to abduction, but the same can be argued for disguised extradition and luring.[227]

In the first case (disguised extradition), procedures in place for other purposes are used to extradite a person to another State. Although these procedures as such may be procedurally correct, their use as a means to extradite a person to another State is arguably not in conformity with the principle of legality. However, even if that argument were to be rejected, one could assert that the deprivation of liberty is

[225] *Cf.* also Shearer 1971, p. 75 (see also Gilbert 1998, pp. 358 and 362, referring to Shearer): "[A]bduction is such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition in securing custody of fugitive offenders." See also Nowak 2005, pp. 227-228: "[O]bvious examples of arbitrary arrest and detention include the practice of enforced disappearances and incommunicado detention, as well as kidnappings by secret service agents abroad [original footnotes omitted, ChP]." With respect to *incommunicado* detention, this remark should, however, be refined, see Office of the High Commissioner for Human Rights and International Bar Association 2003, pp. 210-211: "The practice of holding detainees *incommunicado*, that is to say, keeping them totally isolated from the outside world without even allowing them access to their family and lawyer, does not per se appear to be outlawed by international human rights law, although the Human Rights Committee has stated in its General Comment No. 20, on Article 7 of the Covenant, that "provisions should ... be made against incommunicado detention". What is clear from the jurisprudence, however, is that *incommunicado* detention is not allowed to interfere with the effective enforcement of the legal guarantees of people deprived of their liberty. In a case where the authors had been held *incommunicado* during the first 44 days of detention, the Committee concluded that both articles 9(3) and 10(1) of the Covenant had been violated because they had not been brought promptly before a judge and because of the *incommunicado* detention. (…) Brief *incommunicado* detention, that is, deprivation of liberty for a short period of time in complete isolation from the outside world, including family and lawyer, does not per se appear to be illegal under international human rights law, but it cannot be used in order to bar the detainee from exercising his or her rights as an arrested or detained person [original footnotes omitted, ChP]."

[226] *Cf.* also Van der Wilt 2004, p. 276, arguing that the three methods violate a person's right not to be arrested or detained arbitrarily.

[227] See also Currie 2007, p. 360: "[A]bduction and forms of rendition that are not prescribed by law are generally viewed as being human rights violations." See also Gilbert 1998, pp. 358-359 (whose words can arguably also be applied to luring): "[S]ince abduction and collusive deportation clandestinely avoid extradition, an arrest for either purpose must, by definition, be unlawful."

more generally to be seen as arbitrary.[228] It seems, in any case, hard to state that in such a case, there is nothing wrong with the deprivation of liberty.

Now, it is true that the ICCPR provision appears to focus on the actions of a State's *own* investigating authorities and that it does not refer to actions of authorities from other States which may execute the actual disguised extradition. Nevertheless, as already explained,[229] one can imagine that in many cases, the 'receiving' State may very well collude with the sending State in the disguised extradition operation. In addition, even if this is not the case, one could argue that a person's right to liberty and security/right not to be arrested or detained arbitrarily has been violated by *some* State and that it is the responsibility of the receiving State (which in a way profits from the violation of the sending State) to determine that, in the more general process of depriving a person of his liberty and bringing him to the jurisdiction of the court in the receiving State, the person's right to liberty and security/right not to be arrested or detained arbitrarily was violated.[230] If that were not done, then a person whose liberty was factually unlawfully/arbitrarily deprived could not exercise the human right he is entitled to, thereby ending up in a legal vacuum caused by the fragmentation of the deprivation of liberty over two legal systems.[231] That is obviously to be prevented. Sluiter, writing on the context of the tribunals, states: "It is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or more jurisdictions."[232] That reasoning should arguably also count for the inter-State context.

What can be said about the second case: luring? Can a luring operation be seen as a deprivation of liberty not in violation of the right to liberty and security/the right not to be arrested or detained arbitrarily? It seems that it can. In Subsection 2.1, where whether luring could violate a State's sovereignty was examined, a passage from a resolution from the International Association of Penal Law was quoted. This resolution also looked at the question as to whether the practice of luring violates a person's human rights and arguably answered this in the affirmative by stating that "[t]he violation entails liability in respect of the person concerned and the State whose sovereignty has been violated, without prejudice to any criminal liability of the persons responsible for the abduction."[233] Perhaps the following quotation by Paust who refers to the position of another international organisation, the International Law Association (which is also of the opinion that luring can be seen as a form of abduction, see Subsection 1.5) is clearer:

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[228] *Cf.* also Sluiter 2003 C, p. 648: "Both disguised extradition and abductions are generally considered violations of the right to be free from arbitrary arrest and detention [original footnote omitted, ChP].

[229] See n. 49.

[230] *Cf.* also Frowein 1994, p. 182 (writing on the European context): "[O]ne should recognize that it is a violation of Article 5 of the Convention if European countries work together to circumvent the guarantee of personal liberty enshrined in Article 5 of the Convention."

[231] For more information about the negative effects of two overlapping legal systems, see Sjöcrona and Orie 2002, pp. 18 and 270.

[232] Sluiter 2001, p. 156.

[233] Schomburg 1995, p. 105.

> The International Law Association recognizes that kidnapping by deception is a form of abduction, and abduction to another State to stand trial violates the territorial sovereignty of the state from which the person is abducted. The abduction is also a violation of the human rights of the abductee. The abductee is unlawfully arrested and detained, which is a direct violation of several international human rights conventions [original footnote omitted, ChP].[234]

Before turning to the case law, one important point must still be made. It was argued above (when discussing disguised extradition) that even though Article 9 of the ICCPR appears to focus on the actions of a State's *own* police, a judge confronted by a *male captus* committed by another State should also look at these allegations so that he can avoid a potential legal vacuum for the victim of such a *male captus*. The same can be argued with respect to extraterritorial police actions by a certain State. Although one may argue that Article 9 of the ICCPR only looks at the arrest proceedings *within* a certain State and hence only covers illegal domestic arrests (and not inter-State disguised extraditions (to the extent that State A is colluding in such an operation), luring and abduction operations), such a view is arguably too restricted. Again, in order to ensure that suspects do not become the victim of a legal vacuum, of proceedings that are fragmented over several jurisdictions, the judge reviewing the legality of the arrest and detention should look at the entire deprivation of liberty proceedings, including those preparatory parts abroad which made it possible to, in the end, effectuate the arrest.[235]

2.2.2 Case law from the HRC

Although the Human Rights Committee, the body supervising the ICCPR, has not clearly pronounced itself on the method of luring and disguised extradition, it has decided several cases involving abductions, of which four will now be examined.[236]

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[234] Paust *et al*. 1996, pp. 436-437. See also International Law Association 1994, pp. 162-163.

[235] See also the HRC's General Comment No. 31: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." (HRC's General Comment No. 31 [80]: 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 10.)

[236] In addition to these cases, there is another case by the HRC not clearly falling within the different *male captus* situations but still often referred to (see, for example, Rayfuse 1993, p. 892, Michell 1996. p. 441, Costi 2003, p. 70 and Loan 2005, p. 272) when these matters are examined: HRC, *Pierre Giry v. Dominican Republic*, Communication No. 193/1985 (20 July 1990), UN Doc. CCPR/C/39/D/193/1985 (1990), available at: http://www1.umn.edu/humanrts/undocs/session39/193-1985.html. In this case, the author of the complaint, the French citizen Pierre Giry, stated that he stayed for two days in the Dominican Republic and then went to the airport to buy a ticket to Saint-Barthélemy (*ibid*., para. 3.1). On the airport, however, he was taken to a police office, searched and (two hours and forty minutes later) put on a plane bound for Puerto Rico (*ibid.*). It was there where he was arrested, charged with conspiracy and attempt to smuggle drugs into the US, tried before a US District Court, convicted, sentenced to 28 years' imprisonment and fined $ 250,000 (*ibid*., paras. 3.1-3.3). (Puerto Rico is US territory with commonwealth status where US federal law applies.) Giry claimed that the Dominican

In *Celiberti de Casariego v. Uruguay*,[237] Lilian Celiberti de Casariego, a Uruguayan citizen by birth and Italian national, was arrested in Brazil on 12 November 1978 by Uruguayan agents with the connivance of two Brazilian police officials.[238] After a detention of seven days in her apartment, she was driven to the Uruguayan border and forcibly abducted into Uruguayan territory, where she was detained again.[239] The Committee first explained that the ICCPR can have extraterritorial force:

> Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.[240]

After this remark, which confirms the above-mentioned idea that a provision such as Article 9, paragraph 1 should have extraterritorial force so as to avoid a legal vacuum for the *male captus* victim and which should hence be welcomed, the HRC concluded that Uruguay had violated, among other things, "article 9 (1), because the

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Republic had violated, among other things, Artt. 9 and 13 (see n. 193) of the ICCPR (*ibid*., para. 2). The Committee, limiting itself to an examination of Art. 13 (*ibid*., para. 5.4), found that there was indeed a violation and stated: "The Committee notes that, while the State party has specifically invoked the exception based on reasons of national security for the decision to force him to board a plane destined for the jurisdiction of the United States of America, it was the author's very intention to leave the Dominican Republic at his own volition for another destination. In spite of several invitations to do so, the State party has not furnished the text of the decision to remove the author from Dominican territory or shown that the decision to do so was reached "in accordance with law" as required under article 13 of the Covenant. Furthermore, it is evident that the author was not afforded an opportunity, in the circumstances of the extradition, to submit the reasons against his expulsion or to have his case reviewed by the competent authority." (*Ibid*., para. 5.5.) Four members of the Committee, in an individual opinion (available at: http://www.unhchr.ch/tbs/doc.nsf/0/1c06d841819e0385c1256acb00449e95?Opendocument), noted that it was not Art. 13, but Artt. 9 and 12 (right to liberty of movement) of the ICCPR that should have been looked at. With respect to the most important article here, Art. 9, the four members stated: "In the present case, the Dominican Republic was not able to produce or refer to any administrative act ordering the expulsion or extradition of Mr. Giry before or after his arrest at the airport. Had there been an administrative act, even an irregular one, this might have been a case of expulsion falling within the scope of article 13. In the absence of such an act, identifiable, *inter alia*, by its date, by the authority taking the decision and by its nature, it appears to the signatories that the arrest of Mr. Giry and his enforced boarding of an Eastern Airlines flight when he wished to travel to Saint-Barthélemy constitute unlawful and arbitrary arrest within the meaning of article 9, paragraph 1, of the Covenant." This case could be seen as evidence that the HRC is of the opinion that *male captus* cases which do not qualify as proper abductions may nevertheless violate Art. 9, para. 1 of the ICCPR.

[237] HRC, *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R.13/56 (29 July 1981), UN Doc. Supp. No. 40 (A/36/40) at 185 (1981), available at: http://www1.umn.edu/humanrts/undocs/session36/13-56.htm.

[238] *Ibid*., para. 9.

[239] *Ibid*.

[240] *Ibid*., para. 10.3.

act of abduction into Uruguayan territory constituted an arbitrary arrest and detention."[241]

The second case is also against Uruguay. In *Sergio Ruben Lopez Burgos v. Uruguay*, the author of the complaint asserted that her husband, the Uruguayan national Lopez Burgos, was kidnapped on 13 July 1976 in Buenos Aires by members of the 'Uruguayan security and intelligence forces' in cooperation with Argentine para-military groups.[242] After two weeks of secret detention in Buenos Aires, he was illegally transported to Uruguay, where he was again secretly detained until his official arrest on 23 October 1976.[243] The Committee agreed with these facts.[244] As in *Celiberti de Casariego*, the Committee explained that the ICCPR can have extraterritorial force[245] and then concluded that Uruguay had violated, among other things, "article 9 (1), because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention."[246]

And the third case, which even led to the suspension of diplomatic relations, is also against Uruguay. In *María del Carmen Almeida de Quinteros* et al*. v. Uruguay*,[247] the Uruguayan national Almeida de Quinteros submitted a communication on her own behalf (not related to the right to liberty and security) and on behalf of her daughter Elena (among other things related to Article 9 of the ICCPR). According to Almeida de Quinteros, Elena was arrested on 24 June 1976.[248] Four days later, she was taken by military personnel to a specific place in Montevideo near the Embassy of Venezuela.[249] Almeida de Quinteros explained: "My daughter would appear to have told her captors that she had a rendezvous at that place with another person whom they wished to arrest."[250]

The following appalling details were then provided by Almeida de Quinteros about her daughter's subsequent kidnapping:

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[241] *Ibid*., para. 11.

[242] See HRC, *Sergio Ruben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (29 July 1981), UN Doc. Supp. No. 40 (A/36/40) at 176 (1981), available at: http://www1.umn.edu/humanrts/undocs/session36/12-52.htm, para. 2.2.

[243] See *ibid*., paras. 2.2-2.3.

[244] See *ibid*., para. 11.2: "As regards the whereabouts of Lopez Burgos between July and October 1976 the Committee requested precise information from the State party on 24 March 1980. In its submission dated 20 October 1980 the State party claimed that it had no information. The Committee notes that the author has made precise allegations with respect to her husband's arrest and detention in Buenos Aires on 13 July 1976 by the Uruguayan security and intelligence forces and that witness testimony submitted by her indicates the involvement of several Uruguayan officers identified by name. The State party has neither refuted these allegations nor adduced any adequate evidence that they have been duly investigated."

[245] See *ibid*., para. 12.1.

[246] *Ibid*., para. 13.

[247] HRC, *María del Carmen Almeida de Quinteros* et al*. v. Uruguay*, Communication No. 107/1981 (21 July 1983), UN Doc. CCPR/C/OP/2 at 138 (1990), available at: http://www1.umn.edu/humanrts/undocs/newscans/107-1981.html.

[248] See *ibid*., para. 1.2.

[249] See *ibid*.

[250] *Ibid*.

> Believing that Elena was going to denounce someone, her captors brought her near to the Embassy, allowing her freedom of movement so that she could go to the supposed rendezvous. Elena, who had already given thought to the possibility, went into the house next to the Embassy. From there she managed to jump over the dividing wall, thus landing in Venezuelan territory. She shouted "Asylum!" and stated her name and occupation. When they realized what was happening, the policemen escorting her came through the gate giving access to the gardens of the Embassy, without being stopped by the four policemen on guard. When they heard Elena shouting, the Ambassador and his secretary, as well as other officials, ran towards her and were able to see her being beaten and dragged by the hair by the policemen who were trying to remove her by force from Venezuelan territory. The Counsellor of the Embassy, Mr. Frank Becerra, and the Secretary, Baptista Olivares, tried to prevent the woman seeking refuge from being removed from the Embassy garden before she could enter the residence itself. While Elena was being dragged outside, the two diplomats were grappling with the police, grabbing hold of Elena's legs. One of the policemen struck Mr. Becerra, who fell, thus enabling them to take Elena away and put her in a greenish Volkswagen (…). In their anger, the police even went to the inhuman lengths of slamming the car door hard against Elena's legs while she was being bundled into the car, certainly causing a fracture. The car then moved off at high speed, with its doors still open, against the oncoming vehicles and despite the heavy traffic to be found at that hour (…).[251]

Again, the Committee agreed with these facts as Uruguay did not furnish the Committee with satisfactory evidence to the contrary. As a result, the Committee concluded that Uruguay had violated, among other things, Article 9 of the ICCPR.[252]

The last case is *Cañón García v. Ecuador*.[253] On 22 July 1987, the Colombian citizen Edgar A. Cañón García, together with his wife, travelled to Guayaquil in Ecuador.[254]

> At around 5 p.m. the same day, while walking with his wife in the reception area of the Oro Verde Hotel, they were surrounded by 10 armed men, reportedly Ecuadorian police officers acting on behalf of Interpol and the United States Drug Enforcement Agency (D.E.A.), who forced them into a vehicle waiting in front of the hotel.[255]

After half a day of detention in what appeared to be a private residence, Cañón García was brought to the airport of Guayaquil, "where two individuals, who had participated in his "abduction" the previous day, identified themselves as agents of the D.E.A. and informed him that he would be flown to the United States on the

[251] *Ibid*., para. 10.3.
[252] See *ibid*., para. 13.
[253] HRC, *Cañón García v. Ecuador*, Communication No. 319/1988 (5 November 1991), UN Doc. CCPR/C/43/D/319/1988 at 90 (1991), available at: http://www1.umn.edu/humanrts/undocs/html/dec319.htm.
[254] See *ibid*., para. 2.1.
[255] *Ibid*. 9

basis of an arrest warrant issued against him in 1982."[256] Cañón García's complaint to Ecuador[257] was that "in the light of the existence of a valid extradition treaty between the State party and the United States at the time of his apprehension, he should have been afforded the procedural safeguards provided for in said treaty."[258] In contrast to Uruguay, Ecuador was frank and conceded that things had gone wrong.[259] Notwithstanding this, the Committee concluded that Ecuador had violated, among other things, Article 9 of the ICCPR.

What strikes is that in three of these cases,[260] the State of residence colluded in the operation. Notwithstanding the fact that there was hence consent from the State of residence and thus no problem from a classical (inter-State) international law point of view, the HRC still found that an abduction had taken place and that this abduction violated modern (human rights) international law. As a result, "[t]he Committee reinforced the customary international law rule prohibiting forcible abduction and transplanted the rule into the human rights context, protecting individuals *qua* individuals."[261]

2.2.3 Article 5, paragraph 1 of the ECHR

Like Article 9, paragraph 1 of the ICCPR, Article 5, paragraph 1 of the ECHR requires that a deprivation of liberty must be in accordance with the law. Comparable with the ICCPR context is that this requirement has both a substantive aspect – related to the grounds of the deprivation – and a procedural aspect, in that

[256] *Ibid*., para. 2.2.

[257] With respect to the role of the US authorities, the Committee "observed that several of the author's allegations appeared to be directed against the authorities of the United States, and deemed the relevant parts of the communication inadmissible, since the United States had not ratified, or acceded to, the Covenant or the Optional Protocol." (*Ibid*., para. 5.1.)

[258] *Ibid*., para. 3.

[259] See *ibid*., para. 4.1: "Since it is the basic policy of the Ecuadorian Government to monitor the application of and respect for human rights, especially by the law enforcement authorities, a thorough and meticulous investigation of the act has been conducted which has led to the conclusion that there were indeed administrative and procedural irregularities in the expulsion of the Colombian citizen, a fact which the Government deplores and has undertaken to investigate in order to punish the persons responsible for this situation and to prevent the recurrence of similar cases in the country."

[260] Namely in *Celiberti de Casariego v. Uruguay*, *Sergio Ruben Lopez Burgos v. Uruguay* and *Cañón García v. Ecuador.*

[261] Michell 1996, p. 442. See also Loan 2005, p. 282: "The right to be free from abduction exists independently of whether there is also a breach of the host-state's sovereignty. To make a breach of an individual's rights dependant on there first being a breach of state sovereignty is to effectively limit the scope of the right to being no more than a derivative of a state's right to territorial inviolability. If the prohibition of arbitrary detention is to be an effective human right it must also be available to protect an individual in situations where the host-state consents to their abduction. This approach is endorsed by Harry Blackmun, a dissenting Supreme Court Justice *in United States v. Alvarez-Machain*, who commented, "even [*with*] the consent of the foreign sovereign, [kidnaping] a foreign national flagrantly violates peremptory human rights norms." [See also n. 434 and accompanying text, ChP.] Such a view recognizes that the rights of an abducted individual will be affected in the same manner whether the host-state is complicit in the abduction or not [original footnotes omitted, ChP]."

certain procedures must be followed.[262] In this context, the ECHR, again just like the ICCPR, essentially refers back to national law.[263] Hence, it is clear that both rights are almost identical. Nevertheless, there are some differences. For example, the ECHR, in contrast to the ICCPR, does not contain an explicit prohibition of arbitrariness. However, notwithstanding this, Trechsel claims that the ECHR still offers more protection than the ICCPR.[264] This is, according to him, because in paragraph 1 of Article 5 ECHR, one can find an *exhaustive* list mentioning the only possible exceptions to the right of liberty ("No one shall be deprived of his liberty save in the following cases"). Conversely, the ICCPR is more open and states in paragraph 1 of Article 9 that "[n]o one shall be deprived of his liberty except on such grounds (…) as are established by law."[265] In addition to this, the prohibition of arbitrariness has already been explicitly mentioned in case law as a purpose of Article 5, paragraph 1 which, of course, must be complied with:

> [T]he "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (...).[266]

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[262] See Trechsel 2005, p. 406.
[263] See *ibid*., p. 420.
[264] See *ibid*., p. 407. *Cf*. also n. 195.
[265] See, however, Marcoux, Jr. (1982, pp. 371-372) for another view: "By its limitationist approach, the European Convention provides a substantially lower standard of protection than do the Universal Declaration and the Covenant on Civil and Political Rights because the word "lawful" qualifies all the limitations to the right to personal liberty found in Article 5. To the extent, therefore, that "arbitrary" should protect against arbitrary laws, the United Nations prohibitions provide a higher standard or protection than does the European Convention [original footnote omitted, ChP]."
[266] ECtHR (Third Section), *Case of Stašaitis v. Lithuania*, Application No. 47679/99, 'Judgment', 21 March 2002, para. 58 (referring to ECtHR (Third Section), *Case of Jėčius v. Lithuania*, Application No. 34578/97, 'Judgment', 31 July 2000, para. 56). See also ECtHR (Chamber), *Case of Winterwerp v. The Netherlands*, Application No. 6301/73, 'Judgment', 24 October 1979, paras. 39 and 45, in which the Court first focused on national substantive and procedural law respectively, law which is in principle to be decided by national authorities (para. 40 and 46), but then stated that "no detention that is arbitrary can ever be regarded as "lawful"." (para. 39) and "the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary." (para. 45) and that *that* is something the ECtHR can surely look into. See also the already briefly mentioned (see n. 27 and accompanying text) and still further to discuss (see Subsection 2.2.4) decision ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, para. 54: "The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness [original footnote omitted, ChP]." See finally the (still-to-discuss, see Subsection 2.2 of Chapter V) 2007 decision in the case *Al-Moayad against Germany*, para. 78: "The Convention lays down the obligation to conform to the substantive and procedural rules of national law. However, it requires in addition that any

This quotation shows as well that although the focus of this article is on national law, international law, namely the Convention itself, should also be looked at in establishing whether a deprivation of liberty is lawful or not (*cf.* the ICCPR), see the last sentence of the above-mentioned quotation.[267]

Before turning to the case law of the European institutions related to *male captus* situations, it can again be argued that also in the context of the ECHR, Article 5 should be able to have extraterritorial force, even though it is admitted that the rights of the Convention are in principle territory-based.[268] As explained already in the context of the ICCPR, in order to ensure that suspects do not become the victim of a legal vacuum, of proceedings that are fragmented over several jurisdictions, the judge reviewing the legality of the arrest and detention should look at the entire deprivation of liberty proceedings, including those preparatory parts abroad which are executed by officials from the State party to the Convention and which made it possible to, ultimately, effectuate the arrest.

2.2.4 Case law from the ECmHR and the ECtHR

What is the ECmHR and ECtHR's position on alleged *male captus* situations? Are disguised extradition, luring and abduction in violation of Article 5 of the ECHR?

Starting with disguised extradition and recalling the already-mentioned *Bozano* case (see Subsection 1.3, where it was explained what a disguised extradition in fact entails), the defendant in this case brought applications against the three relevant countries: France,[269] Italy[270] and Switzerland.[271] The application against the

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deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness". (With reference to, among other things, ECtHR (Third Section), *Case of Čonka v. Belgium*, Application No. 51564/99, 'Judgment', 5 February 2002, para. 39, *cf.* also n. 605 of Chapter V, and ECtHR (Grand Chamber), *Case of Öcalan v. Turkey*, Application No. 46221/99, 'Judgment', 12 May 2005, para. 83, see Subsection 2.2.4.)

[267] This point can already be found in the passages from the *Winterwerp*, *Bozano* and *Al-Moayad* cases as can be found in the previous footnote (referring to the Convention), but in (para. 78 of) the *Al-Moayad* case, the ECtHR stated even more generally: "The Court reiterates that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law" within the meaning of Article 5 § 1, the Convention refers back essentially to national law, including rules of public international law applicable in the State concerned".

[268] See ECtHR (Grand Chamber), 'Decision as to the Admissibility of Application No. 52207/99 by Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom', 12 December 2001, para. 61: "The Court is of the view (…) that Article 1 of the Convention ["The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.", ChP] must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".

[269] ECmHR (Plenary), *Bozano v/France*, Application No. 9990/82, 'Decision of 15 May 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 119-146. The English translation can be found at pp. 133-146.

deporting State, France, was declared admissible with respect to Bozano's complaint concerning the alleged disguised extradition and the ECtHR, in its decision of 18 December 1986, concluded that

> the applicant's deprivation of liberty in the night of 26 to 27 October 197[9] was neither 'lawful' within the meaning of Article 5 (1)(f)[[272]] nor compatible with the 'right to security of person'. Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to 'detention' necessary in the ordinary course of 'action ... taken with a view to deportation'.[273]

Before further discussing this important decision of the European Court, it may first be good to point out that both the application against Switzerland, the State which extradited Bozano, after his disguised extradition from France, to Italy, and the application against Italy, the State where Bozano was eventually brought to justice, were found inadmissible.[274] The fact that Bozano could be brought to justice in

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[270] ECmHR (Plenary), *Bozano v/Italy*, Application No. 9991/82, 'Decision of 12 July 1984 on the admissibility of the application', *Decisions and Reports*. No. 39, pp. 147-157. The English translation can be found at pp. 153-157.

[271] ECmHR (Plenary), *Bozano v/Switzerland*, Application No. 9009/80, 'Decision of 12 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 58-70. The English translation can be found at pp. 65-70; ECmHR (Plenary), *Bozano v/Switzerland*, Application No. 9009/80, 'Decision of 13 December 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 71-74. The English translation can be found at pp. 73-74.

[272] Which reads: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[273] ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, para. 60. It hereby attached great weight to the findings of the presiding judge of the Paris Tribunal de Grande Instance and of the Limoges Administrative Court. The first stated that "[t]he various events between Bozano's being apprehended and his being handed over to the Swiss police disclose manifest and very serious irregularities (...). Moreover, it is surprising that precisely the Swiss border was chosen as the place of deportation although the Spanish border is nearer Limoges. [See also n. 45, ChP.] Lastly, it may be noted that the courts have not been given an opportunity of making a finding as to the possible infringements of the deportation order issued against him, because as soon as the order was served on him, Bozano was handed over to the Swiss police, despite his protests. The executive thus itself implemented its own decision. It therefore appears that this operation consisted, not in a straightforward expulsion on the basis of the deportation order, but in a prearranged handing over to the Swiss police ..." (*Ibid*., para. 31.) The Limoges Administrative Court stated: "[I]n reality, the executive sought, not to expel the applicant from French territory, but to hand him over to the Italian authorities via the Swiss authorities, with whom Italy had an extradition agreement; the executive was therefore seeking to circumvent the competent judicial authority's negative ruling which was binding on the French Government; ... the impugned decision was [therefore] an abuse of powers ...". (*Ibid*., para. 35.)

[274] See Michell 1996, p. 443, n. 307: "Bozano brought an application against Switzerland complaining of his arrest on French territory by Swiss police. (…) The Commission considered the application to be partly admissible and partly inadmissible, but held that Switzerland could not have avoided its treaty obligations to extradite the fugitive to Italy, even if he had been unlawfully deported to Switzerland

Italy, notwithstanding the fact that he had been brought from France to Switzerland via the method of a disguised extradition, could be seen as support for the *male captus bene detentus* reasoning.[275] Furthermore, the fact that Switzerland could extradite Bozano to Italy, notwithstanding the fact that Bozano was brought from France to Switzerland through a disguised extradition, can be seen as support for a concept which is sometimes referred to as *male captus bene deditus*: one can extradite a person to a third State (*bene deditus*), even if that person arrived in the extraditing State in an irregular way (*male captus*).[276]

Returning to the European Court's decision with respect to France, Van den Wyngaert has qualified this decision as "a great step forward in that it contains the first unequivocal international judicial condemnation of deprivation of liberty for the purposes of disguised extradition [original footnote omitted, ChP]."[277] Nevertheless, others were less enthusiastic. One such was Judge Schermers, who wrote a dissenting opinion to this case. He first noted that "both parties brought convincing arguments before the Commission"[278] and that "[i]n a case of doubt where two interpretations are possible, it is justifiable to give priority to that interpretation that best suits the long term purpose of the Convention."[279] This was, according to him, "that interpretation of the provisions on extradition inside Western Europe that best facilitates co-operation between the legal systems."[280] After having pointed to the fact that in Europe, criminals can easily move from one jurisdiction to another, he stated that this necessarily means that they "should be brought before the courts of the jurisdiction affected with a[s] few formalities as possible."[281]

> It does not serve (…) the unity of Europe or the rule of law for a person to get greater protection when he moves from one national jurisdiction to another than when he stays within one jurisdiction. Special legal protection against extradition may be sound when the extradition is to a foreign country, but for re-extradition within Europe (one could call it intradiction) such protection should not be necessary. (…) [I]t should be normal for a person lawfully convicted in one Western European State

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from France. (…) Bozano also brought an application against Italy (…). Bozano's allegations that the Italian authorities had corroborated with their counterparts in France and Switzerland to secure his return were deemed to be "manifestly ill-founded.""

[275] See also Warbrick 2000, p. 495, writing on Bozano's applications against France and Italy: "[I]t is the case that detention for the purposes of disguised extradition violates the obligations of the detaining State under Article 5(1)(f) but, equally, that the State to which such a person is returned has no Convention obligation not to put him on trial [original footnotes omitted, ChP]." See also *ibid*., p. 496: "Convention law does not require an automatic abstention from trial of a defendant simply because there were defects in the way in which custody over him was obtained." *Cf.* also n. 293 and accompanying text and n. 351.

[276] This point will be returned to in Chapter V, for example, in cases like *X*, *Schmidt* and *Al-Moayad*.

[277] Van den Wyngaert 1990, p. 774.

[278] Dissenting Opinion of Judge Schermers to the ECtHR's decision of 18 December 1986 in *Bozano*, available at 9 *European Human Rights Reports* 326-327, p. 326.

[279] *Ibid*.

[280] *Ibid*.

[281] *Ibid*.

> to be brought to the prisons of that State from any of the other Western European States without further formalities.[282]

Focusing on this case, Schermers was hence of the opinion that "[t]he factual deprivation of liberty by the French authorities was justified by the need to bring a convicted criminal to prison and, therefore, permitted by Article 5(1)(a)."[283] This view, which clearly favours cooperation over procedural correctness, is arguably too much focused on *lex ferenda*: one may, of course, be of the opinion that a detention is *justified* by a certain need, but that does not also mean (see the word "therefore") that the detention is also *legally* correct (both substantively and procedurally). One can agree with the European Court that not Article 5, paragraph 1 (a), but in fact Article 5, paragraph 1 (f) of the ECHR had to be looked at in this case.[284]

Whatever one may think of this case, it must be repeated (see Subsection 1.3) that it will be quite difficult for a suspect to prove abuse of power (*détournement de pouvoir*) on the part of the deporting/expelling State. After all, the fact that someone is wanted abroad does not mean that he cannot be deported, even if his extradition is impermissible.[285] However, recalling the different purposes of extradition and

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[282] *Ibid.*

[283] *Ibid.*, p. 327. Art. 5, para. 1 (a) of the ECHR reads: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) the lawful detention of a person after conviction by a competent court".

[284] See ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, para. 53: "The applicant, the Government and the majority of the Commission were of the view that only sub-paragraph (f) applies in the instant case in addition to the first sentence of paragraph 1 and the beginning of the second sentence. The Court shares this view. The issue before it is not the sentence of life imprisonment Mr. Bozano is serving in Italy after his "conviction by [the] competent court" within the meaning of sub-paragraph (a), but the deprivation of liberty he suffered in France during the night of 26 to 27 October 1979. The impugned forcible removal was effected "after" the aforementioned conviction only in a chronological sense. In the context of Article 5 § 1 (a) (art. 5-1-a), however, the preposition "after" denotes a causal link in addition to a succession of events in time; it serves to designate detention "consequent upon" and not merely "subsequent to" the criminal court's decision (…). This was not so in the instant case, since it was not incumbent on the French authorities themselves to execute the judgment delivered by the Genoa Assize Court of Appeal on 22 May 1975 (…). Nor was it for the French authorities to ensure that that judgment was executed, since the Indictment Division of the Limoges Court of Appeal had, by its negative ruling of 15 May 1979 (…), caused the Italian extradition request to be refused. The disputed deprivation of liberty was, consequently, not undergone as part of "action ... with a view to extradition"; rather, it was the means chosen for giving effect to the ministerial [deportation, ChP] order of 17 September 1979, the final stage of "action ... with a view to deportation...". Sub-paragraph (f) therefore applies only in respect of the latter words."

[285] See Van der Wilt 2004, p. 285. Nevertheless, as already stated (see n. 45), it would be easier for a suspect to prove such abuse of power if he is not deported to the most obvious country such as the country whose borders are closest to the place from which the person is deported. In the *Bozano* case, for example, one can wonder why Bozano was deported to Switzerland and not to Spain (a country closer to Limoges than Switzerland), see also ECtHR (Chamber), *Case of Bozano v. France*, Application No. 9120/80, 'Judgment', 18 December 1986, para. 25. See also n. 273.

deportation,[286] the suspect should have a chance to prove that his deportation is not used as a tool to remove him from a State – for example because he is endangering the public order and security of his State of residence – but as a tool to bring him to another State *because* that State is, for example, interested in prosecuting him.

However, the following two cases from the ECmHR and the ECtHR seem to contradict this idea.

The first case is *C. v. the Federal Republic of Germany*.[287] According to the facts of the case, the applicant, a German citizen, was convicted of criminal offences including insulting the constitution and dissemination of propaganda for unconstitutional organisations and sentenced to nine months' imprisonment. When he fled to Belgium, Germany did not request his extradition because his convictions did not concern extraditable offences under the German-Belgium treaty. On 26 August 1983, he was arrested in Belgium, brought to the German border and handed over to the German police. The applicant claimed that the German authorities had instigated his arrest and unlawful expulsion by the Belgian authorities. However, according to the Court of Appeal of Schleswig-Holstein, which confirmed a regional court's decision, the applicant had not submitted concrete evidence to show this: "The circumstance that the applicant had been expelled to Germany as an undesirable alien was to be seen as a simple fact."[288] When the applicant made a constitutional complaint, a committee of the Constitutional Court decided not to accept it and stated that the Basic Law (the Constitution) did not "prevent the German authorities from asking a foreign State to extradite a convicted person even though there existed no legal obligation for that State to extradite the person in question under an extradition treaty."[289] The applicant subsequently went to Strasbourg and claimed, among other things, that Article 5 of the ECHR had been violated. The Commission first stated

> that there existed no rule of international law preventing the German authorities from seeking the applicant's extradition from Belgium despite the fact that the offences for which he had been convicted were not extraditable under the German-Belgian extradition treaty.[290]

Thus, even if Belgium could not extradite him under the German-Belgian extradition treaty, it was up to the Belgian authorities to decide on the basis of national law whether he could nonetheless be extradited in another way.[291] Hence,

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[286] See n. 24: "Unlike the case where an alien is expelled or deported (…), the motive for the return of a fugitive from justice [by extradition, ChP] is not the maintenance of domestic public order or security, but the furtherance of foreign criminal proceedings." (Stein 1995, p. 327.)

[287] ECmHR (Plenary), *C. v/the Federal Republic of Germany*, Application No. 10893/84, 'Decision of 2 December 1985 on the admissibility of the application', *Decisions and Reports*, No. 45, pp. 198-204.

[288] *Ibid*., p. 200.

[289] *Ibid.*, p. 201.

[290] *Ibid*., p. 203.

[291] *Ibid*.: "In principle, the question whether or not the offences in question were extraditable or whether they were political offences justifying a refusal of extradition was a matter to be judged by the Belgian authorities on the basis of the applicable Belgian law." (*Cf.* also Subsection 1.2 where it was explained

"[a]s there was no right for the applicant not to be extradited there could be no question in this case of an inadmissible extradition being circumvented by an expulsion procedure."[292] The Commission then distinguished this case from the *Bozano* case but arguably confirmed the *male captus bene detentus/deditus* reasoning underlying that case (with respect to the applications against Italy and Switzerland):

> In this respect the case can be clearly distinguished from Application No. 9990/82 v. France, where the courts had already established the inadmissibility of extradition and the authorities nevertheless proceeded to the expulsion of the applicant to a third country obliged under a treaty to extradite him to his home country. As the Commission found, this way of proceeding might raise an issue under Article 5 para. 1 (f) read in conjunction with Article 18 of the Convention as to the lawfulness of the detention of the expelling state (…). However, as the Commission also found in its decisions concerning that applicant's subsequent detention in the third country involved (No. 9009/80 v. Switzerland (...)) and in his home country (No. 9991/82 v. Italy (...)), *its lawfulness was not affected by the possible unlawfulness of the actions of the expelling State*. Similarly in the present case, *the lawfulness of the applicant's detention in the Federal Republic of Germany could not be affected even if his previous detention and expulsion by Belgium might have been unlawful* [emphasis added, ChP].[293]

Then, the Commission made the following general statement:

> There is nothing in the Convention to prevent a State from expelling a person to his home country even if criminal proceedings are pending against him in that country or if he has already been convicted in that country. Nor does the Convention prevent cooperation between the States concerned in matters of expulsion, provided that this does not interfere with any specific rights recognised in the Convention.[294]

It is submitted that these last words, namely that the Convention does not prevent cooperation between States in matters of expulsion, are rather strange. After all, the nature of expulsion/deportation has arguably nothing to do with cooperation between two States but only with a unilateral action of one State, namely to remove an unwanted person from its territory. In the context of expulsion/deportation, the destination of the removed person is in principle[295] not relevant (whereas it is, of

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that a person can be extradited on another basis if extradition on the basis of an extradition treaty is not possible. That would hence not only be the case if there is no extradition treaty at all, but also if the existing extradition treaty does not cover the crime with which the person in question is charged. However, if a treaty would explicitly prohibit extradition for a certain crime, this prohibition can, of course, not be circumvented by extraditing that person on another basis.)

[292] *Ibid*., p. 203.

[293] *Ibid*.

[294] *Ibid.*

[295] This may, of course, be different when a domestic law states that the expelled/deported person shall be expelled/deported to the State, for example, of which that person has a passport or of which that person is a citizen/national.

course, in the context of extradition, where a person is removed to a specific location, namely to the State interested in that person); all that matters is that the person is removed from the expelling/deporting State's territory. Although these words may not have the truly 'colluding' meaning as they appear to have (perhaps the words merely refer to the simple cooperative situation that the unilaterally deporting/expelling State informs the State to which the person is being deported/expelled that he is coming), another, more famous, case arguably confirms the above-mentioned conjecture that the European institutions may view deportation and expulsion as means, not so much to remove a person from a State's territory but to bring a person into the power of the authorities of a State which is interested in prosecuting that person.

This is the famous[296] *Öcalan* case.[297] In this case, the leader of the Workers' Party of Kurdistan (PKK) and one of Turkey's greatest enemies,[298] Abdullah Öcalan, claimed, among other things, that Turkey had violated Article 5 of the ECHR because of his alleged abduction from Kenya. What had happened? On 9 October 1998, Öcalan was expelled from Syria, where he had lived for many years.[299] After a rather complicated trip to several places where the authorities denied his application for political asylum (Greece, Russia, Italy and then back to Russia and Greece), he was taken to Kenya where "[h]e was met at Nairobi Airport by officials from the Greek Embassy and put up at the Greek Ambassador's residence."[300] He also lodged an application for political asylum with this Ambassador, but he never received an answer from him.[301] The Kenyan authorities were obviously not happy with Öcalan's presence, which, according to them,

[296] See Künzli 2004, p. 141 (commenting on the (comparable) decision of the ECtHR's Chamber of the First Section, which was referred to the Grand Chamber): "This case has been referred to as 'one of the most significant and high-profile cases ever to come before the European Court' and understandably so. It deals with Turkey's most wanted man, with terrorism, with the death penalty, and with fundamental human rights as laid down in Articles 2, 3, 5, and 6 of the European Convention on Human Rights (…). The case also fits in with a whole series of cases dealing either with the relationship between the fight against terrorism and the rights under the Convention – right to a fair trial, prohibition of arbitrary detention – or with violations of human rights by Turkish officials [original footnotes omitted, ChP]."

[297] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005.

[298] See *ibid*., para. 18: "The Turkish courts had issued seven warrants for Mr Öcalan's arrest and a wanted notice ("red notice") had been circulated by Interpol. In each of those documents the applicant was accused of founding an armed gang in order to destroy the territorial integrity of the Turkish State and of instigating various terrorist acts that had resulted in loss of life." The Turkish Court of Cassation, upholding the death penalty imposed by the Ankara State Security Court which tried Öcalan after his arrest, held that "[a]s a result of the acts of violence carried out by the PKK from 1978 until the applicant's arrest (in all, 6,036 armed attacks, 3,071 bomb attacks, 388 armed robberies and 1,046 kidnappings) 4,472 civilians, 3,874 soldiers, 247 police officers and 1,225 village guards had died" (*ibid*., para. 49) and that "the PKK, founded and led by the applicant, represented a substantial, serious and pressing threat to the country's integrity." (*Ibid*., para. 50.) (Almost three years after the decision of the Court of Cassation, the Ankara State Security Court commuted Öcalan's death penalty to life imprisonment because of an amendment to Turkey's Constitution, see *ibid*., para. 51.)

[299] See *ibid*., para. 14.

[300] *Ibid*., para. 15.

[301] See *ibid*.

constituted "a major security risk",[302] and the fact that the Greek authorities had organised this whole operation without informing them.[303]

On the last day of his stay in Kenya, Öcalan was informed by the Greek Ambassador "that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him."[304] However, things went a little different in practice. When the Kenyan officials went to the Embassy to bring Öcalan to the airport,

> [t]he Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, the applicant got into a car driven by a Kenyan official. On the way to the airport the car in which the applicant was travelling left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m.[305]

After the domestic proceedings in Turkey,[306] the case went to Strasbourg. There, Öcalan challenged before the Grand Chamber of the ECtHR the decision of the Chamber of the ECtHR of 12 March 2003,[307] in which the judges had held "that his detention by Turkish officials was lawful and that his interception by Kenyan officials and transfer to the Turkish aircraft where Turkish officials were waiting for him could not be regarded as a violation of Kenyan sovereignty or international law."[308] According to Öcalan, "there was prima facie evidence that he had been abducted by the Turkish authorities operating overseas, beyond their jurisdiction, and that it was for the Government to prove that the arrest was not unlawful."[309] Öcalan also stressed, referring to the above-mentioned *Bozano* case, "the individual's liberty and security from arbitrariness"[310] and argued that "his forced expulsion had amounted to extradition in disguise and had deprived him of all procedural and substantive protection."[311] Because Öcalan used both the concepts of abduction and disguised extradition, his arguments are not very clear. This is because, as was shown earlier, a disguised extradition is mainly a method used by the State in which the suspect is residing and which hence does not lead to a violation of that State's sovereignty whereas in the case of a classical abduction, the

[302] *Ibid*., para. 16.
[303] See *ibid*.
[304] *Ibid*., para. 17.
[305] *Ibid*.
[306] See n. 298.
[307] ECtHR (First Section), *Case of Öcalan v. Turkey*, Application No. 46221/99, 'Judgment', 12 March 2003.
[308] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 74.
[309] *Ibid.*
[310] *Ibid*., para. 77.
[311] *Ibid*.

forum State violates the sovereignty of the State of residence.[312] Be that as it may, Öcalan also argued that the 1996 decision of the ECmHR in the *Illich Ramirez Sánchez* case was not relevant and was thus not to be followed. In this case,[313] whose national case history will be addressed in Subsection 2.2 of Chapter V and in which Ramirez Sánchez[314] also complained of a *male captus* situation related to the way he was brought from Sudan to France,[315] the Commission, underlining the importance of inter-State cooperation, especially in the context of serious crimes,[316] stated:

> [T]he Convention contains no provisions either concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It follows that even assuming that the circumstances in which the applicant arrived in France could be described as a disguised extradition, this could not, as such, constitute a breach of the Convention.[317]

Öcalan argued that this case was not to be followed as Sudan and France had cooperated with one another whereas there had been no cooperation between Kenya and Turkey in *Öcalan*.[318]

Although the above-mentioned quotation seems to run counter to the decision of the European Court in *Bozano* (where it was, after all, found that the disguised extradition of Bozano from France to Switzerland constituted a violation of Article 5 of the ECHR), it must be remembered that the basis for determining that Bozano's deportation was in fact an extradition in disguise was founded in the law of France,

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[312] See also n. 21 where it was explained that this case may perhaps also be seen as an informal return.

[313] ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, pp. 155-162.

[314] Note that the European Commission speaks of Sánchez Ramirez whereas Ramirez Sanchéz is more often used, see for example: ECtHR (Grand Chamber), *Case of Ramirez Sanchez v. France*, Application No. 59450/00, 'Judgment', 4 July 2006 (which involved a decision related to another complaint).

[315] See ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 156: "He alleged that, while he was staying lawfully in Khartoum, Sudanese police officers had seized, bound, drugged and hooded him and handed him over to French police officers, who had put him, by force, into a French military plane bound for Villacoublay military base".

[316] See *ibid*., p. 162: "It does not appear to the Commission that any cooperation which occurred in this case between the Sudanese and French authorities involved any factor which could raise problems from the point of view of Article 5 of the Convention, particularly in the field of the fight against terrorism, which frequently necessitates cooperation between States." It can be argued that this is not a very clear sentence as the specifics of this case (the first part of the sentence) are connected to a general statement that cooperation is highly needed in the field of the fight against terrorism (the second part of the sentence). In any case, the fact that the importance of an effective fight against terrorism is stressed may be viewed as evidence for the idea that the seriousness of a suspect's alleged crimes may play a role in the *male captus* discussion, see also Cazala 2007, pp. 859-860.

[317] ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 162.

[318] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 78.

a State Party to the Convention over which the Court has jurisdiction.[319] This was not the case in the *Ramirez Sánchez* decision as Sudan is not a State Party to this treaty. The same can be said of Kenya and that could be a reason for the Court in *Öcalan* to follow *Ramirez Sánchez* and not *Bozano*. (This point will be returned to when discussing the views of the Court itself.)

Alongside these international decisions, Öcalan referred to national *male captus male detentus* case law such as the to-be-discussed *Bennett*, *Hartley* and *Toscanino* cases[320] and argued

> that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.[321]

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[319] *Cf.* also Frowein 1994, p. 180: "In several cases the Commission has decided that where the expelling state was not a member of the Convention it was impossible to argue before the Commission that this state had circumvented extradition proceedings." However, if the 'receiving' State is a party to the European Convention, and if there is *prima facie* evidence supporting his case, a suspect could perhaps argue that the receiving State colluded in the operation, hereby violating the provisions of the Convention. See also *ibid.*, p. 175: "Where the country from which the applicant was extradited or expelled is a country not bound by the European Convention on Human Rights it can only be argued that accepting him in a country bound by the Convention is in violation of his rights."

[320] Reference was also made to the South African case "[*Mohamed*] *and Dalvie v. The President of the Republic of South Africa and others,* (CCT 17/01, 2001 (3) SA 893 CC)", decided by the Constitutional Court of South Africa on 28 May 2001 and available at: http://www.saflii.org/za/cases/ZACC/2001/18.html. In this case, the Constitutional Court decided that the removal of Khalfan Khamis Mohamed, one of the suspects of the bombings of the US Embassy in Dar Es Salaam (Tanzania) in 1998, from South Africa to the US, was unlawful, see para. 69 of that decision: "Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him." However, as Mohamed was already transported to the US, the South African judges could not do more than make a declaration that the handing over of Mohamed from South Africa to the US was unlawful and that the American judge now trying the case had to be informed of this declaration as a matter of urgency. (See *ibid.*, para. 74.) In the American case in which this declaration was the subject of proceedings (US District Court, Southern District of New York, *United States v. Bin Laden*, 23 July 2001, No. S(7) 98 CR 1023 LBS (156 F.Supp.2d 359)), "Mohamed's request that the Court direct the Government to discontinue its capital case against him (…) [was] denied and his request that he be permitted to present the decision of the Constitutional Court of South Africa as a mitigating factor (…) [was] granted". (See *ibid.*, under V. ('Conclusion').) In the end, "[o]n July 10, 2001, after deliberating for approximately two days, the jury informed the Court that they were "unable to reach a unanimous verdict either in favor of a life sentence or in favor of a death sentence, for any of the capital counts" and indicated that they understood "that the consequence of this is that Khalfan Khamis Mohamed will be sentenced to life imprisonment without the possibility of release." (…) There is no way to gauge the significance that the jury attached (…) to the decision of the Constitutional Court during the weighing process." (See *ibid.*, under IV. ('Addendum').)

[321] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 79.

The Turkish Government, in response, argued that Öcalan was arrested by Kenyan authorities and handed over to Turkish authorities in the framework of cooperation between two States confronted by terrorism and that this could not be seen as an extradition in disguise violating the Convention.[322]

The European Court, after having explained that a deprivation of liberty cannot be arbitrary (see the already discussed *Bozano* case)[323] and that "[a]n arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's individual rights to security under Article 5 § 1"[324] (see the still-to-discuss *Stocké* case *infra*), noted – and this was the point under discussion before this case was presented in this study – that "[*t*]*he Convention does not prevent cooperation between States*, within the framework of extradition treaties or *in matters of deportation, for the purpose of bringing fugitive offenders to justice*, provided that it does not interfere with any specific rights recognised in the Convention [emphasis added, ChP]".[325] As mentioned earlier,[326] this is arguably rather strange as the aim of expulsion/deportation is to remove a person from a State's territory and not to bring that person into the hands of the authorities of a foreign State.[327]

The Court then turned to the fact that in this case, one of the States (Kenya) was not a State Party to the Convention (leading to the observation that possible irregularities in Kenya could not be reviewed by the Court).[328] It explained that

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[322] See *ibid*., paras. 81-82.
[323] See *ibid*., para. 83.
[324] *Ibid*., para. 85.
[325] *Ibid*., para. 86. This general statement was also made by the ECmHR in the still-to-discuss *Stocké* case (which will be examined in a few moments when discussing the method of luring/abduction), see n. 374. See also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 104.
[326] See n. 24.
[327] See also Michell 1996, p. 391: "Extradition and deportation are conceptually distinct procedures with different purposes. The purpose of deportation is to expel unwanted immigrants. In theory, a state which deports an individual has no preference as to her destination – it simply wants her to leave. Extradition, by contrast, is concerned with the transfer of an individual to a specific foreign state so that she may be prosecuted there for specified offenses." See, however, Frowein 1994, pp. 181-182: "No problem under the Convention arises where the expulsion procedure *is used to bring a person before the judicial authorities of a foreign country* if, under the laws of the expelling state, there are proper reasons for expulsion. Those reasons might exist in connection with a generally unlawful entry and stay in the country or criminal or other unlawful behaviour. (…) [T]he notion of disguised extradition (…) should only be seen in the context of the national law concerned. Deportation cannot be used in the cooperation between different national authorities only where national law makes it unlawful. Where, however, such deportation is fully in line with domestic law, no reason exists to [compel] states only to use a formalized extradition procedure [emphasis added, ChP]."
[328] See ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 90: "Irrespective of whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question which only falls to be examined by the Court if the host State is a party to the Convention – the Court …". See on this point also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, pp. 112-113 (see n. 388).

> [a]s regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful.[329] The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (…).[330]

Before commenting on this remark by the European Court, it is worth briefly discussing the case to which the judges, among other things, refer here, namely the *Barbie* (or *Altmann*) decision. After the national proceedings in France (which will be discussed in Subsection 2.2 of Chapter V), Barbie filed a complaint with the ECmHR,[331] claiming to have been the victim of a disguised extradition in violation of Article 5 of the ECHR.[332]

First, the Commission made the general statement (comparable with the one made in the *Ramirez Sánchez* case, see footnote 317 and accompanying text)

> that the Convention contains no provisions either on the condition under which extradition may be granted or on the procedure to be applied before the extradition may be granted. It follows that, even if the applicant's expulsion could be described as a disguised extradition, this would not, as such, constitute a breach of the Convention.[333]

However, the Commission also noted that the question nevertheless arose "of whether any concerted action between the two Governments, or the fact that he was expelled rather than extradited, would constitute grounds for considering the applicant's imprisonment after he was handed over to the French authorities as illegal."[334] After having referred to the *Winterwerp* jurisprudence of the ECtHR (see footnote 266), namely that the lawfulness of a person's detention is essentially a reference to domestic law, in the first place to be decided by national authorities, but that the European institutions should also check whether the detention is in

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[329] It must be noted that "[t]he Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted." (ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 89.) See also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 105.

[330] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 87.

[331] See ECmHR (Plenary), *Klaus Altmann (Barbie) v/France*, Application No. 10689/83, 'Decision of 4 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 37, pp. 225-235. (The English translation of this decision can be found at pp. 230-235.)

[332] In the application, it is even said that Barbie complained "that his arrest in Bolivia and his subsequent transfer from Bolivia to French [Guiana], were effected under an illegal procedure for which the French authorities were responsible. He considers that he was virtually kidnapped on the initiative of the French Government with the complicity of the Bolivian authorities." (*Ibid*., p. 232.)

[333] *Ibid*., p. 233.

[334] *Ibid*., p. 234.

conformity with the prohibition of arbitrariness,[335] the Commission turned to the facts of this case and concluded, without any real motivation, that

> it forms no part of its task to examine whether the Court of Cassation correctly interpreted the French law in this case in arriving at the conclusion that the applicant's detention complied with this law. In the context of the Commission's examination, it is sufficient to state that the Court of Cassation did not apply the law in an arbitrary manner and that there is no other ground for concluding that the detention had not been ordered "in accordance with a procedure prescribed by law", or that it was not "lawful", within the meaning of Article 5 (1) (c) of the Convention.[336]

As a result, the application was declared inadmissible.[337] The case's legacy within the context of the European human rights dimension will be discussed at the end of this subsection.

Returning to the *Öcalan* case and the remark by the ECtHR that "[t]he fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5", the Court further clarified that in the context of cooperation, even an atypical extradition could not as such be seen as being contrary to the Convention, "provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin".[338] This quotation, of course, very much resembles the excerpts already presented in the context of the *Ramirez Sánchez* and *Barbie* cases mentioned *supra*,[339] although the words "atypical extradition" are probably better chosen than the words "disguised extradition".[340] These observations were clearly inspired by the following 'Schermers'-like argument (see the discussion of the *Bozano* case) made by the Court, which stressed the importance of cooperation in the fight against crime:

> Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would

[335] See *ibid*.
[336] *Ibid*., p. 235.
[337] See *ibid*.
[338] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 89. See also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 107.
[339] See ns. 317 and 333 and accompanying text.
[340] Note that the Chamber of the First Section of the ECtHR (before the case was referred to the Grand Chamber) used the expression "extradition in disguise", see ECtHR (First Section), *Case of Öcalan v. Turkey*, Application No. 46221/99, 'Judgment', 12 March 2003, para. 91.

> not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition (…).[341]

After having explained these general principles, the Court considered the facts of this specific case and noted first that the Convention was applicable to Turkey, even though Turkish officials had operated outside their territory[342] – this point was already argued in the final words of Subsection 2.2.3. It then turned to the question as to whether the arrest was lawful under Turkish law. With respect to the substantive element of lawfulness, it noted that, among other things, the seven Turkish warrants for Öcalan's arrest ensured that "his arrest and detention complied with orders that had been issued by the Turkish courts "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence"".[343] The Court then turned to the procedural element of lawfulness and stated that it had to find out

> whether the applicant's interception in Kenya immediately before he was handed over to Turkish officials on board the aircraft at Nairobi Airport was the result of acts by Turkish officials that violated Kenyan sovereignty and international law (as the applicant submitted) or of cooperation between the Turkish and Kenyan authorities in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure (as the Government submitted).[344]

The Court agreed with the Turkish Government. Important reasons to reach that conclusion were, for example, the fact that "[t]he car in which the applicant was travelling was driven by a Kenyan official, who took him to the aircraft in which

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[341] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 88. These words were used for the first time in the famous *Soering* case, see ECtHR (Plenary), *Case of Soering v. The United Kingdom*, Application No. 14038/88, 7 July 1989, para. 89.

[342] See ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 91: "The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport. It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey". The Court referred here, among other things, to the *Ramirez Sánchez* case, where the ECmHR held: "[T]he applicant is essentially complaining about the deprivation of his liberty by the French authorities. According to the applicant, he was taken into the custody of French police officers and deprived of his liberty in a French military aeroplane. If this was indeed the case, from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction, of France, even if this authority was, in the circumstances, being exercised abroad". (ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, pp. 161-162.)

[343] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 92.

[344] *Ibid*., para. 93.

Turkish officials were waiting to arrest him"[345] and the fact that "[t]he Kenyan authorities did not perceive the applicant's arrest by the Turkish officials on board an aircraft at Nairobi Airport as being in any way a violation of Kenyan sovereignty."[346] As a result, the Court found that Öcalan had not proven that "Turkey failed to respect Kenyan sovereignty or to comply with international law in the present case"[347] and hence concluded that his arrest and his detention "were in accordance with "a procedure prescribed by law" for the purposes of Article 5 § 1 of the Convention."[348] The final conclusion was thus that this provision was not violated.[349]

Besides the fact that the Court only mentions[350] and does not address the element of non-arbitrariness here, it still appears strange that the Court concludes that Öcalan's arrest and detention were not only substantively but also procedurally correct under Turkish law, even though the arrest and detention were made in the context of mere cooperation and "in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure".[351]

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[345] *Ibid*., para. 94.

[346] *Ibid*., para. 95. See also *ibid*.: "The Kenyan authorities did not lodge any protest with the Turkish Government on these points or claim any redress from Turkey, such as the applicant's return or compensation." This latter point, however, could mean that if Kenya would have protested and would have asked for the return of Öcalan, the Court might have decided that the arrest of Öcalan was unlawful and that he had to be returned to Kenya. See also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 108: "This means that in case of a violation of Kenya's sovereignty, the Court would consider a request of return as a logical means of redress. Therefore, the continuity of the inter-state proceedings in Turkey would be impaired; the proceedings would have been enforced against a person, which would not be lawful under the jurisdiction of that state, especially in view of the fact that the return of the person is considered a means of reparation."

[347] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 98. Currie 2007, p. 362, referring to this paragraph and para. 90 of the decision, notes that "the Court confirmed its jurisprudence to the effect that violation of either the sovereignty of the "refuge" state or of an existing extradition or other cooperative arrangement between the two states is required for the arrest to be deemed illegal [original footnote omitted, ChP]."

[348] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 99.

[349] *Ibid.* Hence, if there is no extradition treaty or other formal cooperation regime in force between two States, the handing over of a person does not in itself make the arrest unlawful under Art. 5 of the ECHR. In such circumstances, there are two requirements, namely that the substantive and procedural domestic rules regarding arrest and detention have been followed by the requesting State and furthermore that the requesting State's actions did not violate the sovereignty of the requested State. See the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 107.

[350] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 83.

[351] See the above-mentioned quotation at n. 344 and accompanying text and n. 21. See also Künzli 2004, p. 147, commenting on the (comparable) decision of the ECtHR's Chamber of the First Section: "[I]t is remarkable that the Court could find a 'procedure described by law' in the absence of an extradition treaty or even an extradition agreement between Turkey and Kenya." (*Cf.* also De Sanctis 2004, p. 554.) Künzli warns that "[b]y not finding any violation of the Convention in the circumstances leading to the

One can agree with Borelli (who at that time commented on the (comparable) decision of the Chamber of the First Section of the European Court) that there is a clear difference between the HRC and the ECtHR regarding the point to what extent the statal dimension must be taken into account in the process of establishing a human rights violation:

> [W]hile according to the Human Rights Committee the attitude of the state whose territorial sovereignty has been violated is irrelevant, the European Court of Human Rights still seems inclined to consider that the forcible abduction of a fugitive constitutes per se a violation of the rights protected by the Convention only in the case where the authorities of the territorial state do not consent to the abduction, and where the procedures put in place by any existing extradition treaty have not been followed.[352]

It indeed seems bizarre to make a violation of a human right dependent on the 'injured' State's attitude towards the *male captus*:[353] is it not odd that one cannot

arrest and in the arrest itself, the Court left the door open for 'co-operation' between states in order to arrest suspects of crimes by means of extradition in disguise or abduction. With the current fear of terrorism and the development of communication technologies, certain forms of co-operation might seriously endanger individual liberty and security and indeed lead to arbitrary arrest and detention. Herewith the Court apparently adheres to the *male captus bene detentus* doctrine, notwithstanding efforts to prohibit abduction and even raise this prohibition to the level of peremptory norms of international law [original footnote omitted, ChP]." (*Ibid*., p. 148.) See also Trechsel 2005, p. 432 (see n. 388 and accompanying text).

[352] Borelli 2003, p. 807.

[353] See also Künzli 2004, p. 146, (as earlier explained) also commenting on the (comparable) decision of the ECtHR's Chamber of the First Section: "[C]o-operation does not necessarily legitimize the abduction itself. Although it no longer violates the principle of territorial sovereignty and non-intervention, it can still lead to arbitrary detention and arrest, and ultimately result in a denial of justice, since the abducted person is not able to challenge the abduction and to prevent it by legal means. (…) [I]n the present case the European Court did consider the violation of territorial sovereignty in case of abduction, and concluded that Kenya had consented and thereby taken away the illegality, but the Court refrained from judging on abduction in itself as a violation of human rights law, in particular Articles 5 and 6 of the Convention [original footnote omitted, ChP]." See also Trechsel 2005, p. 433 (like Borelli and Künzli commenting on the (comparable) decision of the ECtHR's Chamber of the First Section): "[I]t is not quite convincing that the respect of the applicant's rights under Article 5 of the Convention should depend on the question whether the sovereignty of Kenya has been respected. Kidnapping suspects abroad cannot be compatible with the rule of law." See also Clapham 2003, pp. 478-479 (like Borelli, Künzli and Trechsel also commenting on the (comparable) decision of the ECtHR's Chamber of the First Section): "While the Court's reasoning with regard to the possible violation of Kenyan sovereignty seems incontrovertible, one may ask why the Court, in determining the legality of the detention, only looks at the possible violation of sovereignty by Turkey, and not the possible violation of human rights by the Kenyan authorities. (…) It is true that the Court cannot determine the legality of the arrest in Kenya under the law of Kenya or indeed under the ECHR; but the Court could try to determine whether the detention is in conformity with *international human rights law*. If a European state knowingly received a detainee subsequent to an illegal arrest procedure, in international law, that European state in assisting, abetting, facilitating or benefiting from a violation of international law such complicity would normally incur responsibility in general international law [emphasis in original and original footnote omitted, ChP]." Although one can agree with Clapham that the Court focuses too much on the issue of State sovereignty here, one can wonder whether Clapham's test regarding State responsibility is not too broad. In his article (see *ibid*., p. 479, n. 8), Clapham refers to Art. 16 of the

speak of a human rights violation if the suspect has clearly been the victim of a *male captus*, only because the 'injured' State – for whatever dubious reasons – has consented to the operation?[354] Furthermore, this also creates the situation that comparable *male captus* cases can lead to different outcomes, something which is, of course, to be avoided from the point of view of legal certainty.[355]

Whether the European human rights bodies were of the opinion that the other two techniques, namely luring and abduction, violate Article 5 of the ECHR was addressed in the *Stocké* luring case.[356] In this case, Walter Stocké, a German citizen, was held in custody because he was suspected of tax offences.[357] He was provisionally released, but when the Ludwigshafen District Court found that he had not complied with the conditions of this release, his redetention was ordered.[358] At that moment, in November 1977, Stocké fled to Switzerland and from there to Strasbourg in France.[359] In 1978, a certain Köster, a police informer who himself was the subject of criminal proceedings, offered Hoff, a police officer, his assistance in finding Stocké because he knew a certain Werner, a former colleague of

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DARS which states that "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State." (*Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 65.) The commentary to this article even mentions, as an example of conduct falling under this article, "facilitating the abduction of persons on foreign soil". (*Ibid*., p. 66.) However, this would seem to require active assistance in the conduct, see *ibid*.: "Article 16 limits the scope of the responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself." Hence, merely benefiting from a violation of international would not seem to fall under this article.

[354] *Cf.* also Mowbray 2003, p. 317 (like Borelli, Künzli, Trechsel and Clapham also commenting on the (comparable) decision of the ECtHR's Chamber of the First Section): "The judgment of the Chamber displayed a united resolve to support States in their legitimate attempts to bring suspected offenders, who have fled to another country, back to face trial in the territory where their alleged crimes occurred. (…) [T]he Chamber determined that extra-territorial actions taken in a non-member State by a party to the Convention would violate the fugitive's right to liberty (Article 5) if they were proven, beyond reasonable doubt, to have infringed the sovereignty of the host State and thereby contravened international law. This approach allows member States considerable latitude in devising and applying strategies to secure the return of wanted suspects." *Cf.* also the warning of Künzli mentioned in n. 351.

[355] See the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 109: "The breach of sovereignty may impair the arrest and detention of the individual, but the motion of the state, where he or she was previously located, proves the existence of a breach. It may be noted that in this way uncertainty is created in the exercise of the individual's right."

[356] ECtHR (Chamber), *Case of Stocké v. Germany*, Application No. 11755/85, 'Judgment', 19 March 1991.

[357] See *ibid*., para. 9.

[358] See *ibid*.

[359] See *ibid.*

Stocké.[360] At a meeting with Hoff's superiors, the prosecutor in charge of Stocké's investigation told Köster that although his department did not have the funds to reward individuals helping the police, his assistance might play a role at his own trial.[361] It was emphasised, however, "that any action had to be lawful and designed either to discover the applicant's whereabouts abroad, for the purpose of extradition proceedings,[362] or to induce him to return to the Federal Republic of Germany of his own accord".[363] Köster introduced Hoff to Werner to talk about a business proposal but it was decided to meet again in Luxembourg because Hoff wished to talk to Stocké in person.[364] The 'Luxembourg' plan failed, however, and a new meeting was set up in Strasbourg. It was there that Köster, Werner and Stocké met on 7 November 1978. Köster told Werner and Stocké that the other parties had not been able to make it to Strasbourg but were waiting in Luxembourg for them and that he had chartered a plane to get there.[365] Köster secretly asked one of the two pilots to touch down at Saarbrücken (Germany) and it was there that Stocké was arrested by the German police.[366]

The ECmHR stated that the applicant's arrest was effected on the basis of a valid warrant of arrest and was as such justified under Article 5, paragraph 1 (c) of the ECHR.[367] However, the Commission also (and arguably correctly) looked at the pre-arrest phase.[368] It stated that the words "within their jurisdiction" from Article 1 of the ECHR, which stipulates that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention [namely Articles 2-18, ChP]" are not limited to the territory of the State Party.[369] It "extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad."[370] These words,

[360] See *ibid*., paras. 10-11.
[361] See *ibid*., para. 11.
[362] In November 1977, an international request for the location of Stocké's whereabouts was issued, but this had not led to any results. (See *ibid*., para. 9.) After Köster become involved in the case, "the Kaiserslautern public prosecutor's office had renewed the international request for the location of Mr Stocké's whereabouts (…) for the purpose of seeking his extradition from France." (*Ibid*., para. 16.)
[363] *Ibid*. para. 11.
[364] See *ibid*., para. 12.
[365] See *ibid*., para. 18.
[366] That this case involved a luring operation was assumed from the outset, see ECmHR (Plenary), *Walter Stock*[*é*] *against the Federal Republic of Germany*, Application No. 11755/85, *Report of the Commission* (Adopted on 12 October 1989), para. 173: "The Commission, like the parties, starts from the assumption that K [Köster, ChP] *tricked* the applicant into boarding an aeroplane allegedly destined for Luxembourg, whereas K had arranged for a landing at Saarbrücken-Ensheim airport [emphasis added, ChP]." The parties even referred to the term abduction so now and then, see *ibid*., paras. 183-185.
[367] See *ibid*., para. 164.
[368] See *ibid*., para. 165: "However, the lawfulness of the applicant's deprivation of liberty must also be established in the light of the events resulting in this act, namely the alleged activities of German authorities before the arrest of the applicant who was resident in France."
[369] See *ibid*., para. 166. See also ECtHR (Grand Chamber), *Case of Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, 'Judgment', 23 March 1995, para. 62.
[370] ECmHR (Plenary), *Walter Stock*[*é*] *against the Federal Republic of Germany*, Application No. 11755/85, *Report of the Commission* (Adopted on 12 October 1989), para. 166.

which are a reminder of the above-mentioned communications of the HRC (see Subsection 2.2.2) and of the ECtHR's decision in *Öcalan* (see footnote 342 and accompanying text), are, of course, to be welcomed because they avoid the legal gaps in which victims of *male captus* situations can fall if such a situation takes place in several legal systems. The Commission then clarified that "a person, who is on the territory of a High Contracting Party may only be arrested according to the law of that State."[371] Conversely,

> [a]n arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 para. 1.[372]

This statement, which is reminiscent of the one made in the *Öcalan* case (see footnote 324 and accompanying text), clearly spells out that the more serious technique of abduction violates Article 5 of the ECHR, but says nothing of the technique of luring, where the arrest is not made on the territory of another State. Nevertheless, in its determination of what the effect of the involvement of a private police informer would be on the responsibility of the prosecuting State, the Commission stated more generally:

> In the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual *for the purpose of returning against his will a person living abroad, without consent of his State of residence, to its territory where he is prosecuted*, the High Contracting Party concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. The Commission considers that *such circumstances may render this person's arrest and detention unlawful within the meaning of Article 5 para. 1 of the Convention* [emphasis added, ChP].[373]

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[371] *Ibid*., para. 167.

[372] *Ibid.* To an extent, the ECmHR decoupled this right from the classical (inter-State) international law context when it continued stating: "The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention." (*Ibid*.) See also Michell 1996, p. 445. However, one must not forget either that the ECmHR still demands a statal element for a human rights violation to materialise, namely that there was no prior consent of the injured State. (An element which was lacking in the context of the HRC case law, where violations were established, even when the injured State cooperated in the *male captus*.)

[373] ECmHR (Plenary), *Walter Stock*[*é*] *against the Federal Republic of Germany*, Application No. 11755/85, *Report of the Commission* (Adopted on 12 October 1989), para. 168.

Thus, according to the Commission,[374] merely (colluding for the purpose of) returning against his will a person living abroad, without the consent of his State of residence, to the territory of a High Contracting Party where the latter State can prosecute that person (this is arguably broader than the technique of abduction where the person is actually arrested on the territory of the State of residence) can also entail the responsibility of the prosecuting State and can also lead to an unlawful arrest/detention within the meaning of Article 5 of the ECHR.

The question now is, of course, whether a luring operation can be seen as an operation against the will of the person. It is clear that this is a difficult matter,[375] but at first sight, it appears not to be an operation against the will of the person. Recall in that respect the facts of the *Yunis* and *Stocké* cases. It is true that the defendants were lied to so that they could be apprehended. It is also true that they would never have agreed to board the motor boat and the aeroplane respectively if they had known that this would lead to their arrest. Nevertheless, even if they were tricked, they boarded the boat and aeroplane voluntarily and not against their will. It is important to distinguish this situation from an abduction where a person is, for example, held at gun-point and summoned to board a boat or aeroplane. One could argue that in that case also, a person is not physically dragged into the boat or aeroplane and hence makes a 'voluntary' move. However, the quotation marks say enough: this person, even though he enters the boat or aeroplane by himself, does not act voluntarily but under duress, for example, because he does not want to experience the possible physical injuries of his refusal to enter the boat or aeroplane. This is clearly different from a normal luring operation as, in the abduction situation, the person does not want to follow his abductors but does it anyway because he fears the consequences of his refusal, whereas in most situations of luring, a person truly wants to join his (unknown) arresting authorities because he has been tricked and he does not know what he can expect. (Otherwise, he would not have wanted to follow them.) However, as already explained, much will depend on the circumstances. For example, if agents of another State call the suspect and threaten to kill him if he does not come to the luring State, and if the suspect, pressured by these threats, agrees in the end, it can be argued that the suspect's coming to that State was clearly against his will.

Although it can be argued that in this case, Stocké's luring can probably not be seen as being against his will, the Commission appeared to take another view of this

[374] Which, by the way, continued saying: "The Commission would add that the Convention does not prevent co-operation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (…). A problem under Article 5 para. 1 may, however, arise in exceptional circumstances, e.g. if a deportation amounting to a disguised form of extradition is designed to circumvent a domestic court ruling against extradition". (*Ibid*., para. 169.) (*Cf*. the holding of the ECtHR in the *Öcalan* case (also speaking about deportation) and the holding of the ECmHR in the *C. v. the Federal Republic of Germany* case (speaking about expulsion).)

[375] See Paust *et al*. 1996, p. 426: "Unlike abduction by force, weapons are not used to get the suspect to the location where the arrest will occur. However, whether tricks can overbear the will of an individual just as much as a gun is a controversial issue."

matter. In its finding that there was no collusion between the German authorities and the private individual Köster in the luring operation – the main focus of the Commission[376] – it arguably took for granted that the luring operation was in fact a forcible operation, an operation against the will of the suspect.[377] However, even if the operation was indeed against the will of Stocké, and notwithstanding the fact that German officials cooperated with Köster in the phase before the arrest of Stocké,[378] Germany did not collude in the luring operation *itself* and hence did not violate Article 5 of the ECHR.[379] Nevertheless, if the German authorities had colluded in the luring operation, this would arguably have constituted a violation of this provision.[380]

On appeal, the ECtHR agreed with the Commission that Stocké was lured to Germany by Köster.[381] The Court then noted that French inquiries *vis-à-vis* the luring operation had not shown that Stocké's boarding of the plane was against his will:

> In a letter of 30 October 1980 the public prosecutor's office in Strasbourg informed the office in Kaiserslautern that it had discontinued the proceedings initiated on the

[376] "In the present case, the Commission has to determine (…) whether there was collusion between the German authorities and K to return the applicant, against his will and without knowledge of the French authorities, to the territory of the Federal Republic of Germany in order to effect his arrest, thereby incurring the responsibility of the Federal Republic of Germany." (ECmHR (Plenary), *Walter Stock*[*é*] *against the Federal Republic of Germany*, Application No. 11755/85, *Report of the Commission* (Adopted on 12 October 1989), para. 170.)

[377] See not only the previous footnote but also *ibid*., paras. 178 ("[T]here is no conclusive evidence about an agreement with K concerning the applicant's forced return to the Federal Republic of Germany"), 191 ("[T]he Commission finds that the payment of K's expenses (…) does not necessarily lead to the conclusion that the prosecution authorities had known beforehand about K's plan to return the applicant against his will"), 192 ("The Commission (…) finds that (…) it has not been established that German authorities had known about the applicant's return against his will from France and consented to this plan, and that there was thus a particular collusion in this respect"), 193 ("The Commission has next examined whether the general concept of co-operation between the German prosecution authorities and K in the search for the applicant was such as to cover also the applicant's involuntary return from France") and 197: "It follows that it has not been established that the co-operation between German authorities and K in general also covered the applicant's return against his will from France."

[378] That was certainly the case, see *ibid*., para. 174: "The Commission finds that the applicant's arrest at Saarbrücken-Ensheim airport was preceded by a close co-operation between German prosecution authorities and the police informer K."

[379] The Commission came to the conclusion "that the facts found do not show that the co-operation between the German prosecution authorities and K also covered unlawful activities abroad such as to return the applicant against his will from France to the Federal Republic of Germany." (*Ibid*., para. 202.) Another argument by Stocké, namely that his trial was unfair under Art. 6, para. 1 of the ECHR because of the circumstances of his arrest and detention, was also rejected. (*Ibid*., para. 212.)

[380] See again (see also n. 373 and accompanying text) *ibid*., para. 168. See also Rayfuse 1993, p. 892: "[T]he Commission was quite clear in its reasons that if involvement on the part of the German authorities has been proved then a violation of the Convention would have been established [original footnote omitted, ChP]."

[381] ECtHR (Chamber), *Case of Stocké v. Germany*, Application No. 11755/85, 'Judgment', 19 March 1991, para. 49: "The Court notes at the outset that the applicant was induced by a trick to board a plane chartered by Mr Köster".

> complaint [lodged by Stocké, alleging false imprisonment, ChP], as no offence has been committed on French soil; the inquiries that had been made had shown that the applicant had boarded the plane of his own free will and not under duress (…).[382]

After having stated that several witnesses examined by the Commission "all denied having known about Mr Köster's plan to bring Mr Stocké back to the Federal Republic of Germany against his will or having agreed to such a plan being carried out",[383] the Court concluded:

> Neither the facts found by the Commission nor the circumstances of the case as a whole established that the cooperation that there had unquestionably been between the German prosecuting authorities and Mr Köster had extended to "unlawful activities abroad such as [returning] the applicant against his will from France to the Federal Republic of Germany".[384]

A number of issues are now clear: there was a luring operation and there was cooperation between the German authorities and Köster. Nevertheless, this cooperation did not extend to unlawful activities abroad such as returning Stocké against his will from France to the Federal Republic of Germany. However, the exact stance of the Court with respect to luring remains obscure because the statement that the cooperation between the German authorities and Köster did not extend to unlawful activities abroad such as returning the applicant against his will from France to the Federal Republic of Germany can be read in two different ways.

The first reading is that Germany did not commit unlawful activities abroad, not because the Germans did not cooperate in the luring operation, but because a luring operation *in general* cannot be seen as an inter-State return of a person against that person's will. Proof for that reading may be found in the fact that the Court referred to the findings of the French authorities that Stocké had boarded the plane of his own free will. That may mean that the Court, seemingly in contrast to the Commission, is of the opinion that luring a person to another State is not against that person's will and hence can never constitute an unlawful activity, even if German authorities cooperated in it.

The second reading is that the Court concurs with what is arguably the Commission's finding that a luring operation constitutes an inter-State return against the will of the deceived person and hence an unlawful activity.[385] However, because in this case, the German authorities did not cooperate 'enough' in this illegality, it

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[382] *Ibid*., para. 50.
[383] *Ibid.*, para. 51.
[384] *Ibid.* See also *ibid*., para. 54: "Like the Commission, the Court considers that it has not been established that the cooperation between the German authorities and Mr Köster extended to unlawful activities abroad."
[385] See in that respect also the fact that the Court referred to the denials of the Commission's witnesses that they had known about "Mr Köster's plan to bring Mr Stocké back to the Federal Republic of Germany *against his will* or having agreed to such a plan being carried out [emphasis added, ChP]". (*Ibid*., para. 51.)

cannot be concluded that Germany, as a State, committed an unlawful activity.[386] In short, the first reading represents the view that Germany did not commit an unlawful activity because luring in general cannot be seen as an inter-State return of a person against that person's will and the second reading represents the view that Germany did not commit an unlawful activity because it was not involved 'enough' in the luring operation, which nevertheless has to be seen as an inter-State return of a person against that person's will (and hence as an unlawful activity).

One final point has to be made here. The above has shown that whether or not luring can be seen as an unlawful activity *in general* (the following does not concern the point whether or not it can be seen as an unlawful activity *by the State* (*of Germany*)) depends on the question whether it can be seen as a technique of returning a person against his will from one State to another.[387]

That implies that as long as the deceived person boards the plane (*Stocké*) or boat (*Yunis*) of his own free will and not under duress, he comes voluntarily to a jurisdiction where the arrest can be executed. In that view, there is nothing wrong with this technique as long as that person arrives voluntarily in the jurisdiction where the arrest is effected.

However, one can wonder whether this view is not too restrictive and does not lead to unfair results: one can also argue that even if a lured person voluntarily enters a jurisdiction, his deprivation of liberty may nevertheless be viewed as violating Article 5 of the ECHR. That may be the case because the operation involves a circumvention of an impossible extradition (and hence cannot be seen as an apprehension "in accordance with such procedure as [is] established by law") or because such an operation may not withstand the test of non-arbitrariness in general.

This may also be the reason why Trechsel writes, referring to this case (and to *Öcalan* and *Barbie*): "[D]oes the Convention support the thesis of *male captus bene detentus* (or *judicatus*)? It would seem that it does [original footnote omitted, ChP]."[388] Although it must not be forgotten that the Commission/Court in principle

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[386] *Cf.* also Rayfuse 1993, p. 892 who states: "[T]he Commission was quite clear in its reasons that if involvement on the part of the German authorities has been proved then a violation of the Convention would have been established. Given its decision with respect to lack of State involvement the Court did not find it necessary to comment on this point. The Commission's reasoning, therefore, still stands [original footnote omitted, ChP]."

[387] Recall (see n. 384 and accompanying text) the words: "Neither the facts found by the Commission nor the circumstances of the case as a whole established that the cooperation that there had unquestionably been between the German prosecuting authorities and Mr Köster had extended to "*unlawful activities abroad such as* [*returning*] *the applicant against his will from France to the Federal Republic of Germany*" [emphasis added, ChP]."

[388] Trechsel 2005, p. 432. See also n. 275 (with respect to the *Bozano* case) and n. 293 and accompanying text (with respect to the case *C. v. The Federal Republic of Germany*). *Cf.* also Van den Wyngaert 1990, p. 778 (referring to *Barbie*): "Neither the European Commission nor the Court has unequivocally condemned the practice based on the maxim *male captus, bene detentus* [original footnote omitted, ChP]." See also Künzli 2004, p. 148, referring to the *Öcalan* case (see also n. 351): "By not finding any violation of the Convention in the circumstances leading to the arrest and in the arrest itself, the Court left the door open for 'co-operation' between states in order to arrest suspects of crimes by means of extradition in disguise or abduction. With the current fear of terrorism and the development of communication technologies, certain forms of co-operation might seriously endanger

only focuses on the question of whether certain conduct constitutes a violation of the Convention, and not on the question of whether certain conduct would deprive a court of jurisdiction, it is true that the European institutions, arguably more than the ICCPR's HRC, appear not only to take into account the human rights dimension of a case, but also the other interest by which domestic courts are confronted, namely the importance of bringing suspects to justice. The following, above-mentioned words from the *Öcalan* case nicely illustrate this:

> Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world

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individual liberty and security and indeed lead to arbitrary arrest and detention. Herewith the Court apparently adheres to the *male captus bene detentus* doctrine, notwithstanding efforts to prohibit abduction and even raise this prohibition to the level of peremptory norms of international law [original footnote omitted, ChP]." See finally the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, pp. 112-113: "As regards extradition treaties between states, when both are parties to the European Convention on Human Rights, the issue of "continuity of criminal procedure" is more acute. The Court recently dealt with a case in which a violation of Article 5, paragraphs 2 and 4, arose regarding the extraditing state. However, it mentioned nothing relating to the issue of continuity in the sense of the maxim *male captus, male detentus*. More specifically, in the Chamaïev judgment, in which the Court had the chance to examine the responsibility of both the extraditing and the receiving states, it did not deal with this specific issue. One could infer from the Court's silence that the responsibility of the extraditing state arises under the respective articles, but the establishment of jurisdiction over the person concerned by the receiving state remains lawful. Following this interpretation, the principle of *male captus, bene detentus* seems to apply, but there are no straightforward arguments by the Court to support this reasoning unequivocally. On the contrary, given the fact that the procedural rights stipulated in Article 5, paragraphs 2 and 4, of the Convention are an integral part of the extradition procedure concerning the arrest and detention of the individual – even in the absence of a specific treaty between the states parties – in the event that they are not respected by the requested state, the lawfulness of the subsequent detention in the receiving state may be called into question. It would constitute a violation of the law of extradition of the requested state and, therefore, unlawful conduct under the European Convention on Human Rights. Room for this interpretation has been left opened by the Court in the Öcalan judgment, which stated that the question of the violation of the requested state's legislation would be examined only if the latter were a contracting state. There may, therefore, be a violation of Article 5, if the lawful conditions of arrest in the requested state are not complied with. Moreover, the European Convention on Human Rights is not a common multilateral treaty; on the contrary, it creates a space of "European public order" and the obligations created therein are "obligations *erga omnes partes*". This means that a state's obligations are not only to individuals under their jurisdiction, but also to the community of states that have signed the Convention. The right to inter-state petition itself stems from this particular nature of the Convention. Such a community of obligations would be endangered if gaps were to be left in cases of co-operation between the states parties; it would legitimise breaches of common obligations and at the same time it would undermine the inter-state petition system, in the sense that the receiving state would be estopped from using the inter-state petition scheme in view of its acceptance of an unlawful act by the extraditing state. Additionally, the dictum *ex iniuria ius non oritur,* which is part of the principle of good faith and refers to the rule of law, which is an inherent principle in the system of the Council of Europe, reinforces the argument of illegality of arrest and detention by the requesting state of a person in breach of international obligations; not only concerning sovereignty issues, but also international human rights commitments stemming from several sources. It, therefore, circumvents the maxim *male captus, bene detentus* [original footnotes omitted, ChP]."

> becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition (…).[389]

2.2.5 Exception: war or other public emergency

If a State is at war or in another state of public emergency,[390] certain human rights may be curtailed under strict circumstances.[391] See in that respect, for example, Article 4, paragraph 1 of the ICCPR[392] and Article 15, paragraph 1 of the ECHR.[393]

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[389] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 88. See also n. 341. For criticism with respect to such a balancing exercise in the context of Art. 5 of the ECHR, see De Sanctis 2004, p. 555. (Note that De Sanctis is not focusing here on para. 4 of this article, a crucial provision which will be returned to in this study.)

[390] One could hereby also think of actions taken in self-defence, see *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 74: "Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence."

[391] Note that in principle this does not go for humanitarian law obligations. See in that respect Meron 1989, pp. 215-216: "It is now generally accepted that humanitarian instruments, having been adopted to govern situations of armed conflict, are not subject to derogations on such grounds as public emergency except in the rather narrow context of such provisions as Article 5 of Geneva Convention No. IV ["Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.", ChP] and Article 45(3) of Protocol I ["Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.", ChP]. These provisions parallel the limitation clauses of human rights instruments [original footnotes omitted, ChP]."

[392] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

[393] "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly

This point may also be of relevance to the context of the international criminal tribunals, as many cases and situations considered by these tribunals take place during public emergencies and wars. This does not mean that the judges or prosecutors of these tribunals should be less concerned about certain rights because they are dealing with suspects possibly originating from a State which is in a state of public emergency or war,[394] but it may perhaps influence the legality of certain actions at the national level (on which the international tribunals, in turn, may depend).[395]

Should an illegal arrest by national forces in times of public emergency or war be looked at differently than an illegal arrest effected in times of (relative) peace? This may depend on the question of whether the right to liberty and security/the right not to be arrested or detained is a non-derogable human rights provision: although it is true that certain human rights can be curtailed in these harsh contexts, some rights are considered so important that they have a non-derogable status: they have to be respected at all times, even in the case of a public emergency or war.[396]

Which rights are non-derogable and is the right to liberty and security/the right not to be arrested or detained arbitrarily one of them?

In that connection, it is worth looking at paragraph 2 of the above-mentioned Articles 4 of the ICCPR and 15 of the ECHR. Article 4, paragraph 2 of the ICCPR states: "No derogation from articles 6,[397] 7,[398] 8 (paragraphs I[399] and 2),[400]

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required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

[394] *Cf.* also Sluiter 2003 B, p. 938, writing on the conditions of derogation: "These conditions (…) concern the application of human rights within national societies and may not fit easily into the application of human rights by international criminal tribunals." See also *ibid*., p. 940: "[W]hereas States are permitted to derogate from certain human rights on limited and specific grounds, one can hardly imagine how these grounds could apply to the Tribunals [original footnote omitted, ChP]." See finally Stapleton 1999, p. 600, writing on the ICTY and ICC: "The concept of derogation, justifications for derogation, and the standards for review applied to derogation all rely on the premise that in a state of emergency a government must maintain the flexibility to deal with a crisis without losing control of the state. In the Decision on the Motion for Protective Measures [this is the criticised *Tadić* case, see n. 132 of Chapter VI, ChP], the ICTY implied that the fact that a national government can derogate from the rights of the accused in a state of emergency indicates that "these rights are not wholly without qualification." What the Tribunal does not say is that qualification of these rights is strictly limited to situations where national sovereignty is endangered and, even then, derogation is subject to review by international human rights bodies. Obviously, the ICC is not a state, and as such, it does not face the same dangers as a national government and cannot justify derogation [original footnote omitted, ChP]."

[395] See also n. 202 and accompanying text of Chapter VIII.

[396] Note that in the case of an international armed conflict/non-international (or internal) armed conflict, one must, of course, also look at the specific rules of international humanitarian law, such as the four Geneva Conventions of 1949 and Additional Protocol I of 1977 (international armed conflict) and common Art. 3 to the above-mentioned four Geneva Conventions and of Additional Protocol II of 1977 (non-international/internal armed conflict). For example, and focusing here on an international armed conflict, if combatants of State A capture and detain a combatant of State B (the enemy of State A), then that deprivation of liberty must be executed in accordance with the provisions stemming from the Third Geneva Convention (related to the treatment of prisoners of war). See, for example, Art. 13 of that Convention: "Prisoners of war must at all times be humanely treated."

[397] The right to life. (Note that the following descriptions (from both the International and European treaty) are often summarised.)

11,[401], 15,[402] 16[403] and 18[404] may be made under this provision." The European paragraph states: "No derogation from Article 2,[405] except in respect of deaths resulting from lawful acts of war, or from Articles 3,[406] 4 (paragraph 1)[407] and 7[408] shall be made under this provision."

It thus seems that the right to liberty and security/the right not to be arrested or detained arbitrarily, even though it can be seen as having customary international law and general international law status (see Subsection 2.2), is not a non-derogable right and can be curtailed in times of emergency.[409]

And indeed, "[i]n the context of the "war on terror" the United Kingdom has derogated from Article 5 of the ECHR, as it did with regard to Article 9 of the ICCPR."[410]

Notwithstanding this, the HRC, in its General Comment No. 29 ('States of Emergency (Article 4)'), has also clarified:

> In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below. (...) (b) *The prohibitions against* taking of hostages, *abductions* or unacknowledged detention *are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law* [emphasis added, ChP].[411]

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[398] The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[399] The right not to be held in slavery.
[400] The right not to be held in servitude.
[401] The right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation.
[402] The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.
[403] The right to recognition everywhere as a person before the law.
[404] The right to freedom of thought, conscience and religion.
[405] The right to life.
[406] The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
[407] The right not to be held in slavery or servitude.
[408] The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.
[409] See also Rodley 1999, pp. 342-343: "[U]nder the International Covenant on Civil and Political Rights, articles 9 (...) and 10 (humane treatment) are derogable. The same is true for the articles analogous to Covenant article 9 in the European Convention on Human Rights (article 5) and the American Convention on Human Rights (article 7)."
[410] De Zayas 2005, p. 22. Note, however, that this derogation was later deemed invalid by the House of Lords, see its ruling of 16 December 2004 (Belmarsh prison), see *ibid*.
[411] HRC's General Comment No. 29: 'States of Emergency (Article 4)' CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 13. It is interesting to note that the HRC qualifies the prohibition against abductions as an absolute prohibition, as a norm of general international law, even though there is no general treaty explicitly forbidding abductions as a method to bring a person before justice (see n. 187 and accompanying text).

An interesting document to which reference can be made here is the 1995 Declaration of Turku,[412] which

> affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.[413]

This declaration lists amongst these standards the prohibition of abduction[414] and also a specific part of the human right to liberty and security, namely the already briefly mentioned[415] right to *habeas corpus*: the right to challenge the lawfulness of one's detention and to be released if the detention is found to be unlawful, see, for example, Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 4 of the ECHR (this right will be examined in more detail in Subsection 4.2).[416]

It seems logical to qualify this part of the right to liberty and security as non-derogable. After all, how can the fact that a person cannot challenge the lawfulness of his detention be viewed as "strictly required by the exigencies of the situation" (see footnotes 392 and 393)?

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[412] Declaration of Minimum Humanitarian Standards, reprinted in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, UN Doc. E/CN.4/1995/116 (1995) (Declaration of Turku), available at: http://www1.umn.edu/humanrts/instree/1990b.htm.

[413] Art. 1 of the Declaration of Turku.

[414] Art. 3, para. 2 (d) of the Declaration of Turku.

[415] See n. 42 of Chapter II.

[416] See Art. 4, para. 3 of the Declaration of Turku: "Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.". See also UN Economic and Social Council, UN Doc. E/CN.4/Sub.2/1996/19, 18 June 1996, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-eighth session, Item 10 (a) of the provisional agenda: *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency, Ninth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, presented by Mr Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37, para. 13, where it is stated that the remedy of *habeas corpus* is "a guarantee which is not derogable at any time or under any circumstance". Although Rodley had already indicated that he viewed the general right to liberty and security to fall under general international law (see n. 198), he more explicitly confirms this with respect to the right to *habeas corpus*, see Rodley 1999, p. 340: "That the Covenant and at least two of the regional human rights conventions have the above elements in common is strong evidence that they express a rule of general international law. These elements may be defined as: (a) the right in criminal cases of a detained person to be brought promptly before a judge and (b) the right of anyone deprived of liberty to challenge the lawfulness of detention and to be released if the detention is found to be unlawful." These words of Rodley were confirmed by Zappalà 2003, p. 68. *Cf.* also Principle 32, para. 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UNGA Res. 43/173 of 9 December 1988, available at: http://www2.ohchr.org/english/law/bodyprinciples.htm): "A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful."

In the words of Rodley (writing on prolonged *incommunicado* detention and denial of the right to challenge the lawfulness of detention):

> [I]t may well be that measures are necessary to prevent an arrested or detained person from pursuing violent conspiracies, or colluding with alleged co-offenders, or warning them of the interest of the authorities; it may even be that administrative internment is not yet beyond the bounds of international law and that it may have a certain preventive utility, but none of this requires that the detained person be barred from all contact with the outside world, legal, medical, and family, or that the detention not be effected according to the terms and procedures established by the law authorizing it [original footnote omitted, ChP].[417]

Rodley explains that cases from the ECtHR "tend to confirm this approach",[418] but more explicit in that respect are the two Advisory Opinions of the IACtHR on this subject. In the first, of 30 January 1987, the Court held, unanimously, "[t]hat (...) the legal remedies guaranteed in Articles 7(6)[[419]] and 25(1)[[420]] of the Convention may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27(2)[[421]] prohibits."[422] In the

[417] Rodley 1999, p. 344. See also Nowak 1993, p. 85, who points to para. 70 of the 'Siracusa Principles' (UN, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights', Annex, UN Doc. E/CN.4/1984/4 (1984)), which, among other things, stresses the fundamental importance of *habeas corpus*: "Although protections against arbitrary arrest and detention (Art. 9) and the right to a fair and public hearing in the determination of a criminal charge (Art. 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular: (…) (d) where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal".

[418] Rodley 1999, p. 344. See on this point also De Londras 2007, pp. 253*ff*.

[419] "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

[420] "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[421] "The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

[422] IACtHR, *Habeas Corpus in Emergency Situations*, 'Advisory Opinion OC-8/87', 30 January 1987, Ser. A., No. 8 (1987), available at: http://www1.umn.edu/humanrts/iachr/b_11_4h.htm, para. 44.

second, of 6 October 1987, the Court confirmed this reasoning, holding unanimously

> [t]hat the "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo,[423] and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.[424]

Finally, the HRC has also confirmed the importance of *habeas corpus* in times of emergency. Here, one can refer to paragraph 16 of its above-mentioned General Comment No. 29:

> Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant [original footnote omitted, ChP].[425]

Now that there is support for the idea that the right to *habeas corpus* not only has customary international law/general international law status, but can also be seen as non-derogable,[426] that other term often affiliated with non-derogability comes into sight: *ius cogens* (see also the last footnote). This term stems from Articles 53 and 64[427] of the 1969 Vienna Convention on the Law of Treaties. The first article reads:

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[423] See *ibid*., para. 32: ""[A]mparo," (...) is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention."

[424] IACtHR, *Judicial Guarantees in States of Emergency*, 'Advisory Opinion OC-9/87', 6 October 1987, Ser. A., No. 9 (1987), available at: http://www1.umn.edu/humanrts/iachr/b_11_4i.htm, para. 41 (1).

[425] HRC's General Comment No. 29: 'States of Emergency (Article 4)' CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 16.

[426] See also more generally De Londras 2007, pp. 250-251: "[C]ertain rights (including, but not limited to, *jus cogens* rights) are incapable of derogation. No international covenant expressly deems the right to challenge the lawfulness of detention as one that is non-derogable. That notwithstanding, international institutions have developed a position whereby this right appears to have become accepted as a non-derogable right as a result of both its role in ensuring the Rule of Law and principle of legality, and its fundamentality to the protection of individuals from the violation of their other expressly non-derogable freedoms. Thus, emergencies may justify the introduction of legislation allowing for a longer period of detention without charge, but cannot result in the absolute prohibition of a means to challenge the lawfulness of that detention."

[427] "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character.

Although it thus seems that *ius cogens* can be equated with non-derogable rights, the latter category is arguably broader than the former: while every norm of *ius cogens* must be non-derogable (see the above-mentioned provision of the Vienna Convention on the Law of Treaties), not every non-derogable right is *ius cogens*.[428] Although the right to liberty and security/the right not to be arrested or detained arbitrarily can arguably be seen as customary international law/general international law and part of that right as a non-derogable norm, it is unclear whether (parts of) the right to liberty and security can be seen as *ius cogens* as well, a term which requires not just any norm of general international law as such, but a *peremptory norm* of general international law. This is because this term has often been reserved for such core norms as the unlawful use of force, genocide, slave trading and piracy,[429] norms which makes one doubt whether (parts of) the right to liberty and security is also included.[430]

Notwithstanding this, the right to liberty and security has also been linked with the term *ius cogens*, although the exact threshold differs and is thus unclear. Seiderman, for instance, is of the opinion that arbitrary detention can be seen as a

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[428] See Meron 1986, pp. 15-16: "The relationship between *jus cogens* and derogability is an interesting one. The principal human rights instruments (the Political Covenant, the American Convention, the European Convention) contain the same hard core of nonderogable rights, yet different lists of nonderogable rights. Rights that are nonderogable under such instruments are not necessarily *jus cogens* (e.g., the right not to be imprisoned merely on the ground of inability to fulfill a contractual obligation, which is stated in Article 11 of the Political Covenant, or perhaps the more important nonderogable right to participate in government, which is stated in Article 23 of the American Convention) and some of them may not even have attained the status of customary law. Conversely, can a right whose derogation is permitted by a primary international human rights agreement (the Political Covenant) be regarded as *jus cogens* in light of the statement of the principle of *jus cogens* in Article 53 of the Vienna Convention (a norm from which no derogation is permitted)?"

[429] See Shaw 2003, p. 117.

[430] See also the *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 85: "Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. (...) Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination [original footnote omitted, ChP]." See also Lamb 2000, p. 202 (writing on "individual rights such as liberty and due process" in the context of the ICTY): "Such due process rights of an accused, while doubtless important, are not of the same non-derogable or indelible character as are *jus cogens* or peremptory norms of international law [original footnote omitted, ChP]."

peremptory norm.[431] Arbitrary detention is also considered to be *ius cogens* by the Third Restatement of the Foreign Relations Law of the United States, but then only if it is prolonged.[432] Knoops argues more generally that "the right to liberty is recognized as a *jus cogens* norm"[433] and Blackmun is of the opinion, focusing on one specific *male captus* situation, that "kidnaping a foreign national flagrantly

[431] See Seiderman 2001, p. 121: "While the identification of *jus cogens* in the human rights has never approached an international consensus, it is possible to extract a minimum core by reference to analogous non-derogable treaty rights, international criminal law, and judicial and scholarly pronouncements. Thus, safely included among these peremptory norms are: the right to life, including the prohibitions against genocide, summary and extrajudicial executions and the application of the death penalty to juveniles and the prohibitions on torture; cruel, inhuman and degrading treatment or punishment; arbitrary detention; disappearances; racial and other forms of discrimination; slavery and the slave trade; and criminal violations of humanitarian law, including crimes against humanity and some war crimes."

[432] See American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 702 ('Customary International Law of Human Rights'), comment under 'n' ('Customary law of human rights and jus cogens'): "Not all human rights norms are peremptory norms (jus cogens), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void." Clauses (a) to (f) consist of: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention and (f) systematic racial discrimination. It may be interesting to note that para. 11 ('Human rights law and jus cogens') of the Reporters' Notes to the Restatement also goes into the just-discussed point that, on the one hand, prolonged arbitrary detention is considered *ius cogens*, but, on the other hand, is not recognised as a non-derogable norm. It explains: "It has been suggested that a human rights norm cannot be deemed jus cogens if it is subject to derogation in time of public emergency; see, for example, Art. 4 of the Covenant on Civil and Political Rights (...). Nonderogability in emergency and jus cogens are different principles, responding to different concerns, and they are not necessarily congruent. In any event, the rights recognized in clauses (a) to (f) of this section are not subject to derogation in emergency under the Covenant. Article 4 of the Covenant explicitly excludes from derogation the right to life and freedom from slavery and from torture, as well as from racial discrimination. Freedom from arbitrary detention is not included among the nonderogable provisions, but since derogation is permitted only "in time of public emergency which threatens the life of the nation," and only "to the extent strictly required by the exigencies of the situation," detentions that meet those standards presumably would not be arbitrary." Although one can agree with the idea that some derogable provisions can still be *ius cogens*, the remark that a detention which meets the criteria "in time of public emergency which threatens the life of the nation" and "to the extent strictly required by the exigencies of the situation" would presumably not be arbitrary can be criticised. Meron, for example, counters: "It is suggested that detentions occurring during a time of emergency and that comply with the requirements of Article 4 of the Political Covenant are not arbitrary. (…) But the requirements of Article 4 are addressed primarily to the conditions for the proclamation of an emergency, not the standards governing detention procedures (due process). The notion of arbitrariness must refer to the character of the procedures of detention themselves, rather than only to the legality of the state of emergency under which they are authorized." (Meron 1986, p. 15, n. 62.) Note that although the Restatement was still being drafted when Meron wrote his article, the above-mentioned reasoning of the Restatement is almost the same as in the draft. However, there is one important difference. Meron notes that the draft Restatement suggested that "detentions occurring during a time of emergency and that comply with the requirements of Article 4 of the Political Covenant are not arbitrary" whereas the Draft itself is more hesitant: "detentions that meet those standards *presumably* would not be arbitrary [emphasis added, ChP]."

[433] Knoops 2003, p. 220. See also Knoops 2002, p. 260: "The protection against forcible abduction and luring may figure as *jus cogens* arising from these international fundamental human rights norms."

violates peremptory human rights norms."[434] Finally, one could also refer to paragraph 11 of the above-mentioned HRC's General Comment No. 29:

> The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, *the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance* by taking hostages, by imposing collective punishments, *through arbitrary deprivations of liberty* or by deviating from fundamental principles of fair trial, including the presumption of innocence [emphasis added, ChP].[435]

Given these mixed views, one may argue that it is perhaps still too early to assert unequivocally that the right to liberty and security has attained *ius cogens* status, but the fact that this position has nevertheless been supported underlines the importance of this right, a right of which it was already established that it had customary international law/general international law status.

2.3 The rule of law

The rule of law is a rather abstract concept and is differently used in literature and case law. For example, in her article 'Establishing a Rule-of-Law International Criminal Justice System', Bhattacharyya stated that

> [t]he rule of law is traditionally defined by four maxims: (1) freedom from the fear of arbitrary punishment, (2) formal justice, (3) due process of law, and (4) at a

[434] See n. 261. For another opinion, see US Court of Appeals, Ninth Circuit, *United States v. Matta-Ballesteros*, 1 December 1995, No. 91-50336 (71 F.3d 754), p. 764, n. 5: "Kidnapping (…) does not qualify as a jus cogens norm, such that its commission would be justiciable in our courts even absent a domestic law. Jus cogens norms, which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty. (…) While Art. 9 of the Universal Declaration of Human Rights does state that no one "shall be subjected to arbitrary arrest, detention or exile," (...) kidnapping does not rise to the level of other jus cogens norms, such as torture, murder, genocide, and slavery."

[435] See also Paust 2003 pp. 13-14: "The Human Rights Committee has also recognized that freedom from arbitrary detention is a peremptory norm *jus cogens* and thus a right of customary, fundamental, and preemptive importance [original footnote omitted, ChP]."

> fundamental level, social existence *non sub homine sed sub Deo et lege*, that is, "not under men but under God and the law" [original footnote omitted, ChP].[436]

However, in the well-known *Bennett* case (which will be addressed in detail in Chapter V), Lord Bridge of Harwich wrote that there is

> no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participation in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance.[437]

Therefore, in this book, it will be used as a sort of safety net or residual category to assemble the arguments in *male captus* cases other than those specifically related to human rights and State sovereignty.

One could think here of the more general idea that the prosecuting authorities must respect (inter)national[438] (procedural) law/due process/fairness in general – such as respect for an applicable extradition treaty – and that the courts should respond in the case of non-compliance to ensure that the integrity of the executive and judicial process is not undermined.[439]

However, notwithstanding this 'delimitation', it is clear that one should not follow the different categories too strictly. After all, they have blurring boundaries; a certain violation can fit both the category of human rights and the more general category of the rule of law.[440]

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[436] Bhattacharyya 1996, p. 62.

[437] House of Lords, Lord Bridge of Harwich, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 155.

[438] For the international dimension of the rule of law, see also Costi 2003, p. 96: "[T]he rule of law should not be interpreted as being confined solely to domestic boundaries. (…) [T]here is increasing recognition that the rule of law permeates the international sphere."

[439] *Cf.* also Michell 1996, p. 387: "The rule of law (…) is used in this Article to describe three related concepts. The first is a traditional concern with the prevention of executive unlawfulness under domestic law. Simply put, the courts must be prepared to exercise judicial review to ensure that the domestic executive acts according to the ordinary law of the land. The second strand of the rule of law embodies a concern that the domestic authorities comply with international legal norms. This element of the rule of law is the one most directly connected with the proposal that domestic courts must take more seriously their rule as agents of the international legal system. The third component of the rule of law relates to the concern domestic courts should display in ensuring that the domestic executive does not violate individual human rights, derived as they are from both international and domestic law." See also Choo 1994 B, p. 629: "Central to the decision of the House of Lords was the notion that a criminal court should not be concerned solely with accurate fact-finding or, to put it another way, the determination of the 'truth'. A court also has a duty to protect the moral integrity of the criminal process. The judiciary must – in the words of Lord Griffiths [see also n. 282 of Chapter V and accompanying text, ChP] 'accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.'"

[440] See the previous footnote. *Cf.* also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9

Because of its linkage with the other values[441] and its rather vague scope, the rule of law (and possible exceptions to its violation) will not be further addressed in this chapter. Nevertheless, it will definitely be returned to in the remainder of the book.

3 WHO VIOLATES?

3.1 States/State officials

The duty to respect State sovereignty, human rights and the rule of law *prima facie* address States: it is up to States not to intervene in another State's sovereignty and up to the signatories of human rights treaties, namely States, to respect human rights of individuals under its control. In the previous pages, however, individuals did play a role in the different *male captus* situations. Recall in that respect, for example, the abduction of Nikolić by the individuals who handed him over to SFOR (see Subsection 1.1) and the roles of Jamal Hamdan and Köster in the luring cases of *Yunis* and *Stocké* respectively (see Subsections 1.4 and 2.2.4). This prompts two questions. The first and most controversial one is whether private individuals *themselves* can violate values such as State sovereignty and human rights (since these are the two clearest categories, the focus will be on them) (see Subsection 3.2) and the second is under which circumstances a State can be held responsible for conduct of private individuals more generally (see Subsection 3.3).

3.2 Private individuals

The question as to whether private individuals *themselves* can violate values like State sovereignty and human rights is not just some academic exercise. The above-mentioned *Nikolić* case illustrates this perfectly. In this case, part of the Defence's submissions was summarised by the Trial Chamber as follows:

> that the forcible removal of the Accused from the FRY [by the private individuals prior to the handing over to SFOR, ChP] entailed a breach of both the sovereignty of the FRY and the Accused's individual due process guarantees; and that although such breaches occurred *prior* to the delivery of the Accused into the custody of SFOR and the Tribunal, these breaches were of such magnitude that even absent the involvement of SFOR or Prosecution, the release of the Accused from the custody of this Tribunal and the dismissal of the indictment against him is the only appropriate remedy [emphasis in original and original footnote omitted, ChP].[442]

October 2002, para. 106: "The Defence also argues that the arrest and transfer of the Accused amounts to a violation of internationally recognised human rights and a violation of the fundamental principle of due process of law. (…) As both arguments are closely connected to each other, they will be discussed here together."

[441] See also Van der Wilt 2004, p. 282.

[442] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 25. It must be noted that the reference of the Trial Chamber (to para. 9 of the first Defence motion) is incorrect as that paragraph does not lead to these words. Notwithstanding this, one can indeed argue that the Defence

Thus, the Defence claimed that the kidnapping of Nikolić by the private individuals prior to the moment he was handed over to SFOR constituted not only a breach of the sovereignty of the FRY but also of Nikolić's personal (human) rights.[443] This may seem quite strange at first sight for it is normally believed that only States can violate such values. However, if the judge accepts the view that private individuals can indeed also violate them, then the consequences could be considerable. For example, and using the more specific example of the human right to liberty and security/the right not to be arrested or detained arbitrarily, it will be shown *infra* that one of the remedies in the case of a violation of this human right is release. It is clear that this is potentially a very interesting remedy for a suspect and that the latter will thus try to convince the judge that it is not so important *who* violated his human right but more *the fact that* his right was violated and thus that he is entitled to the remedy of release. However, the judge may also be of the opinion that the kidnappers of Nikolić, private individuals, *cannot* violate such a right and that what is involved here is 'merely' the domestic crime of kidnapping. Smeulers, in her

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was of the opinion that the acts of the private individuals constituted a violation of the FRY's sovereignty and of Nikolić's rights. With respect to the concept of State sovereignty, see the following words from the first Defence motion: "[T]he assumptive facts must amount to a violation of sovereignty". (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 11.) This was arguably confirmed in the Defence's second Motion, although it must be admitted that the following quotation is not very clear: "While evidence of direct or material complicity by a state in the abduction of an individual can, it is submitted, raise a legitimate action for the violation of state sovereignty, where the abduction has been perpetrated by private individuals, the law remains unsettled and thus, the remedy for (…) such a breach also remains unresolved." (ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 15.) However, taking into account the statement from the first Defence motion, it appears that the Defence is claiming that private individuals *can* violate the sovereignty of another State, but that it is unclear whether an abduction, executed by private individuals, can *raise a legitimate action* with respect to this violation. As a result, it is also unclear what kind of remedy for the violation of State sovereignty (the words "for (…) such a breach" also imply that private individuals can violate a State's sovereignty) should be granted. With respect to the concept of human rights, see, for example, the following passage from Nikolić's first Defence motion: "The central argument is that in this case, and any case involving, in effect, kidnapping, the taint of that degree of illegality and breach of fundamental human rights is so pernicious, and the dangers of the appearance of condoning it to any degree so much a hostage to unpredictable consequence and fortune, that a judicial body set up with, *inter alios*, the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 11.)

[443] Although the words 'human rights' are not explicitly mentioned in this excerpt ('only' the words "individual due process guarantees" are used (which seem to mean however the same)), it is clear that what is meant here is indeed human rights, see the previous footnote.

commentary to the ICTY Trial Chamber's decision in the *Nikolić* case, for example stated:

> [O]nly if violations can be attributed to State authorities can the infringements on a person's life and liberty be considered human rights violations. Infringements which cannot be attributed to State authorities should be considered ordinary criminal offences and not human rights violations.[444]

In that case (and assuming for a moment that the kidnapping could not be attributed to other entities possibly leading to a violation of the right to liberty and security/the right not to be arrested or detained arbitrarily), Nikolić would not be able to invoke the remedy of release as his right was not violated in the first place. Hence, it is clear that this question may have important practical ramifications and thus should be examined in more detail.

3.2.1 Human rights

Before trying to find an answer to the question as to whether private individuals themselves can violate human rights, it should be clearly understood that private individuals not only have international rights (think of all the human rights that can be found in documents such as the ICCPR) but also international duties. The clearest example of the latter idea can, of course, be found in the context of international criminal law.[445]

Now, it is true that human rights law has played and still does play an important role in this specific field of law, but the above-mentioned example of Nikolić's kidnapping (and the question of whether this operation is to be seen as a domestic crime or a human rights violation) has nothing to do with international criminal law but with human rights law in general.

What one should focus on here is whether private individuals can also violate provisions in the field of general human rights law (as can be found in, for example, the ICCPR).

As stated above, it is usually understood that such human rights provisions only operate in the relationship between State and individual (the vertical context) and thus that only States can violate human rights provisions.

This idea is founded on the assumption that the direct cause for the creation of these general human rights treaties (namely WW II in which millions of individuals suffered from mainly *State* action) implies that only States are their addressees.

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[444] Smeulers 2007, p. 110. See, however, Michell 1996, pp. 484-485: "Where a fugitive is abducted from one state and brought to another by private individuals acting without the knowledge of the latter state, (…) there may be (…), of course, a possible violation of international human rights law".

[445] See, for example, Cryer *et al*. 2007, p. 5: "[T]he subject matter of international criminal law, as we use it, deals with the liability of individuals, irrespective of whether or not they are agents of a State. In the definition of the crimes which we take as being constitutive of substantive international criminal law, the status of the perpetrator is irrelevant, with the exception of the crime of aggression [original footnote omitted, ChP]."

In that view, individuals are to be seen as the beneficiaries of the rights mentioned in these documents whereas States, the signatories, have to provide these rights. As a consequence, only States can violate human rights.

The opposite view is that provisions of general human rights law can also operate in the relationship between non-State actors (for example individuals and corporations) and thus that these actors can also violate human rights provisions. This is often referred to as third-party applicability (or *Drittwirkung*) of human rights.[446]

There are two main arguments which can be used in this context.

The first is a linguistic one. In his article 'The Other Side of Right: Private Duties Under Human Rights Law', Paust claims that many of these human treaties in fact contain language showing that the drafters may not have intended to limit human rights obligations to States:

> [H]uman rights instruments demonstrate the existence of private duties in at least two ways. First, provisions in various instruments explicitly affirm, or at least imply, that individuals can owe duties. Second, rights are generally set forth without any reference to those who owe a corresponding duty and can be understood to impose duties on individuals. Courts that limit the scope of application of human rights instruments by adding limiting words, such as "the state" or "state action," improperly insert terms that the treatymakers did not choose [original footnote omitted, ChP].[447]

To start with the last assertion, it is indeed true that some rights are so generally drafted that the addressees are not very clear and may encompass individuals as well.[448]

With respect to the first assertion, it is also true that some provisions could be read to mean that private individuals can violate them.[449] On the other hand, it must

[446] For more information on this topic, see, for example, Alkema 1988, Van Dijk and Van Hoof 1998, pp. 22-26 and Jägers 2002, pp. 36-44 (writing about human rights obligations for that other well-known non-State actor: the corporation). Note that in this subsection, *Drittwirkung* is only viewed as horizontal *applicability* (and not horizontal *enforceability*) of certain norms. It will not be examined here whether a private individual can enforce a human rights norm against another person. The goal of this subsection is merely to find out whether (certain) human rights norms can be applied in the horizontal context and thus whether a private person can, for example, violate another person's human right to liberty and security. (*Cf.* Van Dijk and Van Hoof 1998, p. 23.)

[447] Paust 1992, pp. 52-53.

[448] An example from the ICCPR is Art. 8: "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." An interesting quote in this respect to which Paust refers comes from Chen('s book *An Introduction to Contemporary International Law* (1989, p. 215)): "[M]ost [human rights prescriptions] are documented in terms of the right of persons and not in terms of participation in or protection from the state. They are, in the words of the International Court of Justice, *obligatio erga omnes* (owing by and to all humankind)." (Paust 1992, p. 53, n. 12.)

[449] See, for example, Art. 30 of the UDHR ("Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.") and comparable articles in, for example, the ICCPR (Art. 5, para. 1) and ECHR (Art. 17). Jägers, referring to Van Dijk and Van Hoof, has, however, her doubts with respect to this provision: "This article is intended to protect against the abuse

be stated as well that many human rights provisions are formulated in such a way that they are clearly *not* applicable to the horizontal context. An example is Article 13 of the ICCPR, a provision which deals with the expulsion of a lawfully present alien.[450] It is evident that this article only has a State as its addressee (for only States can expel a person). Here, *Drittwirkung* is not possible.

The second and probably stronger argument in favour of *Drittwirkung* has to do with the underlying purpose of these human rights treaties. One could argue that, even if the drafters of these treaties were probably not thinking about horizontal application of their provisions at all, this does not mean that, if one is confronted by an ambiguous provision, one may not take into account the purpose of human rights law when interpreting it. And looking at this purpose, which is arguably not limited to the fact that States should refrain from human rights violations but more that the individual is to be protected against human rights violations *in general*,[451] one could argue that it does not exclude the possibility of *Drittwirkung* for the simple reason

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of the right to complain. Prohibiting any abuse, however, cannot be equated with the general obligation for individuals to respect the rights of others in their private legal relations [original footnotes omitted, ChP]." (Jägers 2002, p. 44.) Attention may also be paid in this respect to the title of the American Declaration of the Rights and *Duties of Man* and a passage from the Preamble of the ICCPR: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". Paust writes about these words: "Such private duties and responsibilities cannot be fulfilled if an individual violates the rights of other individuals or groups, and the preamble to the Covenant clearly states that, with respect to human rights, individuals have "duties to other individuals." Thus, at a minimum, an individual must not deny or violate the human rights of others." (Paust 1992, p. 55.)

[450] "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[451] The fact that the importance of the statal concept is diminishing in today's world may be additional fuel for this assertion. That the present-day situation can be taken into account when interpreting a (human rights) treaty was confirmed by the ICJ in ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 'Advisory Opinion', 21 June 1971, when it wrote about the Covenant of the League of Nations: "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (*Ibid*., para. 53.) The word "moreover" shows that such a contemporary interpretation can thus also be used if the international instrument in question does not already contain non-static, evolutionary concepts such as "the modern world" and "development". See also Glashausser 2005, p. 1306 (n. 382).

that it will further enhance respect for human rights.[452] Van Dijk and Van Hoof, writing on the European Convention, state on this matter:

> It is beyond doubt that the problem of *Drittwirkung* was not taken into account when the Convention was drafted, if it played any part at all in the discussions. One can infer from the formulation of various provisions that they were not written with a view to relations between private parties. On the other hand, the subject-matter regulated by the Convention – the fundamental rights and freedoms – lends itself eminently to *Drittwirkung*. Precisely on account of the fundamental character of these rights it is difficult to appreciate why they should deserve protection in relation to the public authorities, but not in relation to private parties. It is submitted that it is not very relevant whether the drafters of the Convention had in mind *Drittwirkung*. Of greater importance is what conclusions may be drawn for the present situation from the principles set forth in the Convention, and specifically in its Preamble.[453]

If one concurs with that view, then one can interpret these provisions broadly, even if they originate from the above-mentioned statal context. In the words of Meron: "[B]road interpretations of rights are necessary for the effective protection of human dignity, which is the goal of human rights law."[454]

Other factors (alongside purpose and language) may also play a role here and it is clear that all these aspects should be looked at if one wants to find out whether a specific provision has *Drittwirkung* or not.[455]

What if these observations are applied to one of the most important human rights provisions for the context of this book, Article 9 of the ICCPR? Can this provision be violated by private individuals?[456] Whereas paragraphs 2,[457] 3,[458] 4[459] and 5[460] of

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[452] See also Jägers 2002, p. 51: "It is concluded that, in general, the object and purpose of the International Bill of Rights [the UDHR, the ICCPR and the ICESCR, ChP] is to promote the observance of and respect for human rights not only by States but also by non-State entities".

[453] Van Dijk and Van Hoof 1998, pp. 24-25.

[454] Meron 1989, p. 170. See also Alkema 1988, p. 33: "The principle of third-party effect is hardly controversial when human rights are considered as deriving from the law of nature. In that line of thought they are so fundamental and essential that they deserve protection against any encroachment, be it private or public."

[455] See Meron 1989, p. 169: "Whether a particular human right stated in an international human rights instrument must be respected not only by public but also by private actors depends on the interpretation of the provision, i.e. its language, context, purpose, and object."

[456] For an affirmative answer, see *ibid.*, p. 162, where Meron confers *Drittwirkung* on the right to liberty and security on the basis of the purpose behind human rights law: "Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, *human rights violations committed by one private person against another* (*e.g. deprivation of* life and *liberty* or the perpetration of acts of egregious discrimination) cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness [emphasis added, ChP]."

[457] "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

[458] "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

this article arguably address States/State organs (and hence cannot be violated by private individuals), paragraph 1 is less clear.

The first paragraph reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The first of the three sentences is a general statement and could be addressed to any entity. However, the two other sentences seem to bring in a more statal dimension. That is clear with respect to the last sentence ("except on such grounds and in accordance with such procedure as are established by law") but one can also wonder whether the second sentence ("[n]o one shall be subjected to arbitrary arrest or detention") can be applied to the horizontal context. After all, words like (non-arbitrary) "arrest" and "detention" appear to have a statal connotation. Nowak, for example, explains that if one looks at their ordinary meaning, both arrest and detention "refer only to acts of State officials".[461] That would then also mean that paragraphs 4[462] and 5[463] of Article 9 of the ICCPR only apply to deprivations of liberty effected by State officials, for these paragraphs only speak about arrest and detention. According to Nowak, however, that cannot be right:

> However, this logical-systematic interpretation leads to *absurd results*, which do not comport with the object and purpose of this provision. In the 3d Committee of the GA, the French delegate mentioned that kidnapping by private persons represented a case of deprivation of liberty that was neither arrest nor detention (…). In other words, should a State law expressly permit cases of kidnapping by private security companies, these would be cases of deprivation of liberty that – even though arbitrary – are expressly allowed by Art. 9 and to which the guarantees under Art. 9(4) and (5) are inapplicable. (…) Even though it may be grammatically, logically and

[459] "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

[460] "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Although one could argue that a private person can violate this provision as well, namely when he does not agree to pay compensation if he has unlawfully arrested or detained a person (whether this is possible in the first place will be addressed in a few moments). It seems, however, that this paragraph is far and foremost a procedural right. The word "enforceable" appears to be essential here. A victim of an unlawful arrest or detention (whoever committed it) has not just *any* right to compensation, it has an *enforceable* right to compensation, meaning that a victim has the right to go to court and demand that the responsible person will pay him compensation. In this view, para. 5 actually provides for a procedural mechanism. As this mechanism can only be made available by a State, the provision can arguably only be violated by a State (namely if the State does not provide a victim of an unlawful arrest or detention the mechanism to go to court and ask for compensation).

[461] Nowak 2005, p. 219. However, one can also argue that private individuals can also arrest and detain persons under certain circumstances, such as *in flagrante delicto*. Nevertheless, that would almost never be the case in the relevant case law of this book, in which the suspect is apprehended some time *after* (and not *during* the time) he allegedly committed the crimes. *Cf.* also Lamb 2000, p. 228, n. 218, writing on "citizen's arrest".

[462] See n. 459.

[463] See n. 460.

> systematically correct, such an interpretation is not compatible with the *object and purpose of the Covenant* in the sense of Art. 31(1) of the VCLT. It thus must be assumed that the narrow majority of 30 States (against 27) that voted in favour of the above-mentioned British motion in the 3d Committee of the GA supported a *broad interpretation of the terms "arrest" and "detention"* [emphasis in original and original footnote omitted, ChP].[464]

Hence, it may be that the words "arrest" and "detention" are the only possible deprivations of liberty according to Article 9 of the ICCPR, but then these words must include all sorts of deprivations of liberty, including kidnappings by private individuals:

> This means that Art. 9 does not recognize any other forms of deprivation of liberty beyond these two cases. Therefore, the holding of minors, mentally ill persons, alcohol or drug addicts or vagrants, as well as *deprivation of liberty by private persons*, *are to be understood as arrest or detention*, making the guarantees in paras. 1, 4 and 5 fully applicable. Only paras. 2 and 3 are of limited applicability. Any other interpretation would contradict the comprehensive protection afforded by the right to liberty and security of person in the first sentence of para. 1. The word "*arrest*" ("arrestation") refers to the act of depriving personal liberty and generally covers the period up to the point where the person is brought before the competent authority. The word "*detention*" ("détention"), on the other hand, refers to the state of deprivation of liberty, regardless of whether this follows from an arrest (custody, pre-trial detention), a conviction (imprisonment), kidnapping or some other act [first emphasis added and original footnotes omitted, ChP].[465]

Paust chooses a middle position when he writes: "It should also be stressed that although the word "arrest" implies action by State officials, officers, or agents, arbitrary "detention" of individuals in violation of relevant human rights norms could be perpetrated by private actors."[466]

Hence, unfortunately, it is rather difficult to give a definite answer to the question as to whether private individuals can violate a provision such as Article 9 of the ICCPR. Although the first-mentioned remark by Smeulers (namely that private individuals cannot violate human rights) is clear and does not lead to any potential problems related to the correlation between a human rights violation and a violation of domestic criminal law,[467] the above-mentioned information has also shown some arguments why a provision such as Article 9 of the ICCPR could, under certain circumstances, be violated by private individuals as well.

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[464] Nowak 2005, p. 220.
[465] *Ibid*., pp. 220-221.
[466] Paust 1993, p. 562, n. 48.
[467] Smeulers argues that a certain infringement is *either* a human rights violation (if the infringement can be attributed to the State) *or* a violation of domestic criminal law (if the infringement cannot be attributed to the State). If one believes that it is possible that a private individual violates a human right, then one has to sort out what this means for the domestic crime (which, after all, has not suddenly disappeared).

It appears that there is no clear-cut answer to this question and that much will also depend on one's view of the nature of these kinds of human rights provisions. Maybe both sides can use the above-mentioned information to sharpen their views on this difficult issue.

However, perhaps one does not need to take a certain stance. Focusing on the context of the tribunals now and the example that a suspect is kidnapped by private individuals before being handed over to the tribunal, one could also argue that, even if one is of the opinion that private individuals, in principle, cannot violate a person's right to liberty and security, it seems hard to view that abduction as purely private either. Because the abduction is the reason why the suspect is now standing before his judges, it has gained a certain public dimension, which is, for example, absent in the case of a father kidnapping his children, a situation in which the father has clearly only violated domestic criminal law and not human rights law. Thus, and without maintaining that the tribunal, in the above-mentioned example, has violated the person's right to liberty and security, one could argue that *a* violation of that person's right to liberty and security has nonetheless occurred, because he was not brought to justice as he should have been. If they want to avoid the above-mentioned and complicated discussion, the judges could also more generally argue that a wrong much akin to a violation of the right to liberty and security has occurred in the context of their case and that that should be taken into account. Before turning to the next subsection, it must be stressed that these observations, of course, do not mean that the judges cannot also take into account the fact that it was private individuals who abducted this person in the context of their case and that that may/should have an influence on the determination of the consequences of such a violation/wrong. This will be further discussed in Section 4.

3.2.2 State sovereignty

Another question, prompted by the earlier presented quotation from the ICTY *Nikolić* case, see footnote 442 and accompanying text, is whether private individuals can violate a State's sovereignty or whether this violation is 'reserved' for other States only.

Like the above-mentioned idea that human rights can be violated by private individuals, the idea that sovereignty can be violated by them is not uncontroversial either.[468] The standard view appears to be that the sovereignty of States can only be violated by other States. This may already have become clear in Subsection 2.1

[468] See also the doubt expressed by Smeulers: "[O]ne may doubt whether individuals acting on their own initiative can ever violate a State's sovereignty." (Smeulers 2007, p. 108.) Note that Michell, who was of the opinion that an abduction by private individuals could violate human rights (see n. 444), this time agrees with Smeulers that such an abduction would not violate the sovereignty of the 'injured' State, see Michell 1996, pp. 484-485: "Where a fugitive is abducted from one state and brought to another by private individuals acting without the knowledge of the latter state, there is no violation of customary international law. However, there may be a violation of the domestic law of the injured or abducting states, and, of course, a possible violation of international human rights law as well [original footnotes omitted, ChP]."

where the internal and external dimension of State sovereignty was discussed and in which it was explained that the internal dimension means that State A is the only one having authority over the territory of State A (meaning, for example, that it does not have to tolerate authority over its territory by State B) and that the external aspect signifies that State A must also respect the sovereignty of other States, meaning that it cannot intervene in the domestic affairs of State B. Likewise, Steinberger notes:

> Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law. [469]

Nevertheless, it has also been argued that violations of State sovereignty are not merely 'reserved' for States, but can also be committed by private individuals. Seaman, in his article on bounty hunters,[470] for examples asserts:

> The injury that results from an abduction on foreign soil is one to the sovereignty of the asylum State. This injury will be the same whether committed by a State agent or a bountyhunter. (…) The same injury principle was recognized by the Fifth Circuit Court of Appeals in *Villareal v. Hammond*. In this case, the court considered the extradition of a bountyhunter who had abducted a person on Mexican soil and returned him to the United States to stand trial for an alleged crime. The court held that the bountyhunter had violated Mexico's sovereignty and found it insignificant that the abductor was not a State agent. The Court recognized that injury to the sovereignty of the asylum State occurs regardless of the actor's status (…) [original footnotes omitted, ChP].[471]

Those in favour of that stance could perhaps use the same broad rationale which was also used in the human rights context: one could assert that the essence of sovereignty is not *per se* statal, but in essence means that State A has supreme/sovereign power over its territory and that, as a result of this, it more generally does not have to tolerate outside[472] interference in matters which are

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[469] Steinberger 1987, p. 408.

[470] Note, however, that there is an important public dimension in the nature of the bounty hunter's work as well. See Supernor 2001, p. 232: "In the United States, in order to be released after arrest, most defendants hire a bail bondsman to post a bond with the court. The State then delivers custody of the defendant to the bail bondsman who must return the defendant to the court to receive a refund of his bond. When the State transfers custody of the defendant to the bail bondsman, it also transfers powers to search for and arrest the defendant. To guarantee a defendant's presence in court, bail bondsmen hire bountyhunters who are fully vested with the bail bondsmen's broad powers over the defendant [original footnotes omitted, ChP]."

[471] Seaman 1985, pp. 408-409. See also *ibid*., p. 400, n. 35: "Private persons are capable of violating sovereignty."

[472] Note that this does not mean that the kidnappers themselves may not come from the State where the suspect is residing, see n. 444 in Chapter VI. It may very well be that foreign actors use local persons to execute the kidnapping. Nevertheless, the final source of the kidnapping must come from abroad. See

essentially that State's prerogative, whether that interference comes from a foreign State or from another foreign entity.[473] A kidnapping could then be seen as an outside interference into the executive prerogative of the State of residence to arrest and extradite a person according to the normal procedures. However, one could also counter this reasoning, arguing that "interference into the executive prerogative of the State of residence to arrest and extradite" implies that the interference itself is also of a public nature. See also in that respect the references in the previous footnotes to Steinberger and Kovac, who write about a certain *authority*.[474] This would mean that a truly private individual (not one backed up by some foreign authority), who kidnaps a person from another State, cannot violate that State's sovereignty (although his kidnapping can, of course, violate domestic law). In that view, there can only be a violation of State sovereignty if another State (or perhaps another entity with public force such as a tribunal)[475] is responsible for the kidnapping.

However, possibly, one could use the same solution here as presented in the human rights context. Recall in that respect the situation of the father kidnapping his children. If he were to kidnap his children in State B and bring them over to State A (a cross-border abduction), this would not be seen as a violation of State B's sovereignty but merely as a violation of domestic criminal law. However, and again focusing on the context of the tribunals, if private individuals kidnap a person from

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also Steinberger 1987, p. 397, writing on territorial sovereignty: "[J]urisdiction over a delimited territory to the exclusion of *foreign* authorities [emphasis added, ChP]."

[473] *Cf.* in that respect also the quite general definition of the term 'sovereignty' as introduced by Jean Bodin's famous book *Les Six Livres De La République* (1576). In the opening sentence of Book 1, Chapter 8, one can read: "La souveraineté est la puissance absoluë et perpetuelle d'une Republique". (Bodin 1986, p. 179.) ("Sovereignty is the absolute and perpetual power of a commonwealth". (Bodin 1992, p. 1.)) In the Latin translation of Bodin's book (entitled *De republica libri sex* (1586)) these words were translated as follows: "*Maiestas est summa in cives ac subditos legibusque soluta potestas*": "Sovereignty is supreme and absolute power over citizens and subjects". (Bodin 1992, p. 1.) See also Friedmann 1967, pp. 573-574: "Bodin, the founder of the modern doctrine of sovereignty, was mainly concerned with securing and consolidating the legislative power of the monarch in France against the rival claims of estates, corporations, and the Church." That would mean that the idea was created in order to enable a State to protect itself from *any* interference, whether it came from a statal or non-statal entity. (Note that the idea of sovereignty existed already before Bodin's famous book. See Steinberger 1987, p. 399: "The term "sovereign" and similar terms were already used in ancient times by Aristotle to identify the supreme authority within a community".) See further also Kovac 2002, p. 622: "As embodied in customary international law, the term "sovereignty" describes the power of a state to exercise supreme legal authority over all persons and activities within its borders, independent of *any other authority* [emphasis added and original footnote omitted, ChP]." *Cf.* finally Van der Wilt 2004, p. 293, writing that the effort of others – States or private individuals – to exercise coercive criminal law measures within a State's territory constitutes a violation of that State's territorial integrity.

[474] See Steinberger 1987, p. 397, writing on territorial sovereignty: "[J]urisdiction over a delimited territory to the exclusion of foreign *authorities* [emphasis added, ChP]." See Kovac 2002, p. 622: "As embodied in customary international law, the term "sovereignty" describes the power of a state to exercise supreme legal authority over all persons and activities within its borders, independent of any other *authority* [emphasis added and original footnote omitted, ChP]."

[475] One could also think here of terrorist organisations. (See in that respect also the discussion *supra* (n. 116) whether acts of terrorists can lead to an armed attack, as a result of which a State can exercise its right of self-defence.)

State B and bring him over to the jurisdiction of the tribunal, the abduction has arguably attained a certain public dimension. This is so even if the main reason for the abduction may have been private, for example, because the individuals were promised financial rewards.[476] Again stressing that this does not necessarily mean that the tribunal is responsible for the violation of State B's sovereignty, the judges could nevertheless argue that a violation of State sovereignty, or, if they want to play it safe, a wrong akin to a violation of State sovereignty, has occurred in the context of their case and that that should be taken into account. Likewise, it must be emphasised that the fact that such a violation/wrong has been perpetrated by private individuals may/should, of course, also be taken into account when determining the consequences of that violation/wrong, *cf*. the final words of Subsection 3.2.1.

Because this book will soon turn to the aftermath of Eichmann's kidnapping (in the context of explaining the matter of State responsibility for conduct of private individuals), it may be interesting to mention the following words from the *Eichmann* case, which also touch upon the issues addressed in this subsection.

During the discussions in the UNSC in the aftermath of Eichmann's abduction from Argentina, Israeli Foreign Minister Golda Meir stated, referring to the note of 3 June from the Israeli Ambassador in Argentina, Aryeh Levavi, to the Argentine Foreign Minister, Diogenes Taboada:

> I wish to say we recognize that the persons who took Eichmann from Argentina to Israel broke the laws of Argentina. For this the Israel Government has apologized to the Argentine Government in its note dated 3 June 1960 (…) stating: "If the volunteer group violated Argentine law or *interfered with matters within the sovereignty of Argentina*, the Government of Israel wishes to express its regret (…) [emphasis added, ChP]."[477]

This statement could be seen as evidence for the assertion that private individuals may indeed also violate a State's sovereignty,[478] but it could also be seen as a mere apology which does not prove anything, especially as it does not say that those volunteers *did* violate the sovereignty of Argentina, only that the Israeli Government

[476] See ns. 281-283 and accompanying text of Chapter VI (in the context of the *Todorović* case).

[477] UNSC OR, fifteenth year, 866th meeting, 22 June 1960, UN Doc. S/P.V. 866 (1960), para. 18 (p. 4), quoting from Levavi's note of 3 June.

[478] See also UNSC OR, fifteenth year, 865th meeting, 22 June 1960, UN Doc. S/P.V. 865 (1960), para. 24 (p. 5) where Mr Amadeo from Argentina (also in the aftermath of the Eichmann abduction) explained: "The State must punish and make reparation for violations of territorial sovereignty committed by its nationals abroad, even if they were acting for private reasons. For example, in the case of a girl who was kidnapped by her father, a Mr. His of Swiss nationality, in United States territory at the end of the nineteenth century, the United States Government protested to Switzerland and claimed that the kidnapping of the girl constituted a violation of the territorial sovereignty of the United States and that the United States was entitled to request the return of the child by the Swiss Government. The Swiss Government recognized the justice of the claim [original footnote omitted, ChP]." Although it must be noted that this may provide additional evidence for the idea that private individuals can violate another State's sovereignty, the point that a State must also make reparation for such a violation, not because it adopted or condoned the conduct but merely because it was a national of that State, is rather far-going.

wants to apologise for a *possible* violation. In addition, and to bring in a more Inspector Morse-like argument, it would not be that strange if the author of the note of 3 June 1960 (the Israeli Ambassador to Argentina, Aryeh Levavi) had been aware of the *Mossad* operation and hence was aware of the fact that those volunteers were not just private individuals with which the State of Israel had no connection, but were in fact agents of the State of Israel. That could mean that when Levavi wrote this note, he had the following information in the back of his head, namely that Eichmann's kidnappers were in fact agents of the State of Israel and that they had indeed, by kidnapping Eichmann from Buenos Aires, violated the sovereignty of Argentina. That may explain why Levavi did not stop where he, perhaps, should have stopped (namely after the words: "[i]f the volunteer group violated Argentine law" – private individuals can, of course, perfectly well violate the domestic laws of another State)[479] but (accidentally?) continued writing "or interfered with matters within the sovereignty of Argentina" – a violation which, according to many, is reserved for States only.

3.3 States through private individuals

In the previous subsection, the question as to whether private individuals, alongside States, could also violate values such as human rights and State sovereignty was addressed. In this subsection, a less controversial topic will be examined, namely how States can be held responsible for actions of private individuals. Although it is always possible that purely private persons resort to abduction (this may, for example, be the case when (family members of) victims of a suspect of international crimes feel that they must do something to bring that person to justice if the State of residence remains passive), one can assume that there will normally be a State behind those "private individuals". Nevertheless, it is also clear that this will very often be difficult to prove.[480]

[479] It may be interesting to note that Gold Meir herself *did* stop here, see Subsection 3.3.2 where the deliberations in the UNSC after the Eichmann abduction are discussed.

[480] *Cf.* also Townsend 1997, p. 661: "An "abducting" state may deny responsibility based on the apparent lack of a legal link between the abductor and the state, but in reality these are acts of de facto agents and attributable to the state. Often, de facto agents of the state abduct persons under the guise of being "volunteers," or private persons acting on their own initiative. Their true factual link to the state, should engage the state's responsibility. If the abductors, however, cover their tracks well enough, proving a factual link between them and the state may be nearly impossible, and the state may elude responsibility. Abductions are a particularly unclear area of state responsibility because of the obscure involvement of states' secret security agencies. The international community unfortunately cannot expect a state to reveal the involvement of its agents or organs safeguarding "national security." The state has a spurious alibi when its secret agents abduct enemies under the cloak of a "purely private" act." *Cf.* also Nsereko 2008, p. 61.

3.3.1 Draft articles on responsibility of States for internationally wrongful acts (Part I)

The central article of the DARS, Article 1, reads: "Every internationally wrongful act of a State entails the international responsibility of that State." What an internationally wrongful act is can be found in Article 2: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State." Such an international obligation can consist of, for example, the already-mentioned duties to refrain from exercising police authority on a State's territory or the duty to respect the human rights of individuals under the State's control. To establish the international responsibility of the State, it is thus necessary to attribute conduct that violates such international obligations to the State. How conduct can be attributed to the State (and is thus to be seen as an act of State) can be found in Chapter II of the DARS.

The most evident article here is Article 4, which explains that "[t]he conduct of any State organ shall be considered an act of that State under international law". Consequently, acts by, for example, (agents of) the secret service of a State are to be seen as acts of that State.

Nevertheless, under certain conditions, other conduct can be considered an act of State as well. This can include acts of private individuals – see in that respect, for example, Articles 8 (conduct directed or controlled by a State) and 11 (conduct acknowledged and adopted by a State as its own) of the DARS:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[481]

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.[482]

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[481] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 47. See in that respect also the well-known *Nicaragua* (ICJ) and *Tadić* (ICTY) cases in which the 'effective control' and the (less strict) 'overall control' test respectively, were addressed, see ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits), 'Judgment', 27 June 1986, para. 115 and ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, 'Judgement', Case No. IT-94-1-A, 15 July 1999, para. 145.

[482] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 52. A famous case in that respect is the *Tehran* case, which dealt with the seizure of the US Embassy, including its personnel, in Tehran, Iran, by militants. The ICJ stated: "The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the

Interestingly, but surprisingly, the *Eichmann* case is used in the ILC's commentary to the latter article to explain the meaning of the words 'acknowledges and adopts the conduct as its own'. This means that the commentary views the kidnapping as an act by private individuals,[483] which, as was shown *supra*, is not accurate.[484] One should not look at Article 11 here but rather at Article 4 of the DARS.[485]

Notwithstanding this inaccuracy, it is, of course, true that *at the time* of the affair, it was not clear/admitted yet that State agents of *Mossad* had kidnapped Eichmann from Argentina. As shown in footnote 477 and accompanying text, the Israeli Ambassador in Argentina, Aryeh Levavi, spoke about a "volunteer group". As promised in footnote 10 of Chapter I (and in the previous subsection), the aftermath of the Eichmann's abduction in Argentina will now be examined in more detail to clarify these issues.

3.3.2 Intermezzo: the *Eichmann* case revisited

As stated *supra*, at the time of the capture, it was not clear yet that Israeli agents had kidnapped Eichmann from Argentina.

Nevertheless, that Israel was involved *somehow* in the operation was soon unveiled: on 23 May 1960, Israeli Prime Minister Ben-Gurion informed the Knesset, the Israeli Parliament, that Eichmann "was found by the Israel Security Services".[486]

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hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible." (ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, 'Judgment', 24 May 1980, para. 74.

[483] See *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 53: "[T]he capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State."

[484] There are more errors in this commentary, for example, the fact that the kidnapping took place on 10 May 1960 (this must be: 11 May 1960) and the fact that Eichmann was held in captivity in Buenos Aires for some weeks (see also Fawcett 1964, p. 182) before being flown to Israel. This must be: for a little more than nine days (Eichmann was kidnapped on 11 May 1960, some time after 20:05 (see Harel 1975, pp. 165-166), and the El Al plane carrying Eichmann and the Israeli agents left Buenos Aires on 21 May 1960 at 00:05, see Harel 1975, p. 261. See also Baade 1961, p. 400.

[485] Even if (*quod non*) the agents had acted *ultra vires*, beyond their powers, that would not have had any influence on this matter. After all, Art. 7 of the DARS explicitly states: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." One could, of course, argue that the kidnappers were perhaps agents from the *Mossad* but not acting in that capacity when seizing Eichmann, but even the website of the *Mossad* (see n. 3 of Chapter I) is clear on this: the Eichmann kidnapping was performed by the *Mossad as such* and not by mere *Mossad* agents acting privately.

[486] UNSC OR, fifteenth year, 868th meeting, 23 June 1960, UN Doc. S/P.V. 868 (1960), para. 11 (p. 3) (where Claude Corea (of Ceylon) quotes Ben-Gurion (from the Israel Digest of 10 June 1960): "I have to inform the Knesset that a short time ago one of the greatest of the Nazi war criminals, Adolf Eichmann, who was responsible together with the Nazi leaders for what they called 'the final solution of the Jewish question', i.e. the extermination of six million of the Jews in Europe, was found by the Israel Security Services"). See also Liskofsky 1961, p. 199: "On the following day, Police Inspector-General Joseph Nahamias, the head of Israel's security service, stated at a news conference that Eichmann had been traced and captured by his agents alone."

In addition, on 27 May 1960, the Israeli newspaper *Davar* published a letter from Ben-Gurion to Galili, an Israeli politician. Here, one could read the following words:

> In my opinion, the importance of the capture of Adolf Eichmann and his trial in Israel lies not in the extraordinary resource and skill of the staff of the Security Services (though it would be difficult to exaggerate the praise they have earned), but in the privilege – which has been afforded through them – of having the entire story of the holocaust revealed in an Israeli court.[487]

It was, however, not clear by that time *where* the capture had taken place. When Argentina learned from reports in the media that "volunteer groups" had in fact captured Eichmann from Argentina, the latter's Government asked the Israeli Government for information on this issue.[488]

On 3 June, the Israeli Ambassador to Argentina, Aryeh Levavi, sent a note to Diogenes Taboada, Foreign Minister of Argentina.[489]

Levavi explained that after WW II, "Jewish volunteers, including some Israelis began the search for Eichmann"[490] and that "[a] few months ago, one of these volunteer groups engaged in the search received information that Eichmann was hiding in Argentina".[491]

The volunteers traced him to his home, made contact with him and asked him whether he would be prepared to face justice in Israel.[492]

After Eichmann had agreed to this,[493] "[t]he volunteer group (…) removed Eichmann from Argentina with his full consent and handed him over to the Israel security services."[494]

On 23 May, the security services informed the Israel Government that Eichmann was in their custody.[495]

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[487] O'Higgins 1961, p. 296.
[488] See 'Letter dated 15 June 1960 from the representative of Argentina to the President of the Security Council', UN Doc. S/4336, para. 1 of the Explanatory Memorandum.
[489] See *Note verbale* dated 3 June 1960 from the Embassy of Israel in Buenos Aires to the Ministry for Foreign Affairs and Religion of the Argentine Republic (in: UN Doc. S/4342: 'Letter dated 21 June 1960 from the representative of Israel to the President of the Security Council').
[490] *Ibid*., para. 1.
[491] *Ibid*., para. 3.
[492] See *ibid*., para. 4.
[493] See *ibid.* Eichmann's letter goes as follows: "I, the undersigned, Adolf Eichmann, declare of my own free will that, since my true identity has been discovered, I realize that it is futile for me to attempt to go on evading justice. I state that I am prepared to travel to Israel to stand trial in that country before a competent court. I understand that I shall receive legal aid, and I shall endeavour to give a straightforward account of the facts of my last years of service in Germany so that a true picture of the facts may be passed on to future generations. I make this declaration of my own free will. I have been promised nothing, nor have any threats been made against me. I wish at last to achieve inner peace. As I am unable to remember all the details and am confused about certain facts, I ask to be granted assistance in my endeavours to establish the truth by being given access to documents and evidence." (*Ibid*., para. 6.)
[494] *Ibid*., para. 5.
[495] See *ibid*., para. 6.

"Not until later was the Government informed that Eichmann had come from Argentina."[496]

Levavi concluded, referring to the monstrousness of Eichmann:

> If the volunteer group violated Argentine law or interfered with matters within the sovereignty of Argentina, the Government of Israel wishes to express its regret. The Government of Israel requests that the special significance of bringing to trial the man responsible for the murder of millions of persons belonging to the Jewish people be taken into account, and asks that due weight be given to the fact that the volunteers, who were themselves survivors of that massacre, placed this historic mission above all considerations. The Government of Israel is fully confident that the Argentine Government will show understanding of these historical and ethical factors.[497]

This above-mentioned (see Subsection 3.2.2) explanation,[498] including the personal letter written by Ben-Gurion to Argentine President Frondizi on 7 June (in which one can find similar formulations),[499] constituted enough evidence for Argentina to

[496] *Ibid.*

[497] *Ibid*., para. 7.

[498] In which one can find the words "interfered with matters within the sovereignty of Argentina" (the possible slip of Levavi's pen, see the end of Subsection 3.2.2), "regret" and "historic mission".

[499] See Letter dated 7 June 1960 from Mr Ben-Gurion, Prime Minister of Israel, to Mr Frondizi, President of Argentina (in: UN Doc. S/4342: 'Letter dated 21 June 1960 from the representative of Israel to the President of the Security Council'): "This man, Eichmann, was the person directly responsible during the years of the Second World War for the execution of Hitler's orders for the "final solution" of the Jewish problem in Europe, i.e., for the physical destruction of any Jew whom the Nazis were able to seize in the vast areas of Europe which they had conquered. Six millions of our people were massacred, and it was Eichmann who organized this mass extermination on a gigantic and unprecedented scale throughout the whole of Europe." (Para. 3.) "It is practically impossible to find anywhere a Jew whose family does not include its victims of the Nazis. Hundreds of thousands of the survivors are living among us, and there are hundreds of Jews in Israel and other countries who had known no peace since the end of the War until the moment when the man who had directed these horrible massacres was found. The aim of their lives was to bring the man responsible for these unparalleled crimes to trial before the Jewish people; and such a trial can take place only here in Israel." (Para. 4.) "I do not underestimate the seriousness of the formal violation of Argentine law committed by those who at last ended their long search with the capture of Eichmann; but I am confident that there can be very few people in the world who have failed to understand the profound motives and the supreme moral justification for this act. This incident cannot be judged solely from a purely formal angle. The obligation of all countries to respect scrupulously the laws of other countries is beyond all doubt; but one cannot, nevertheless, fail to appreciate the lofty motives underlying the imperative moral force by which those who found Eichmann and with his consent brought him to Israel were impelled, or the depth of the feelings which moved them." (Para. 5.) "I am convinced that you will understand the supreme moral force of these aspects of the problem. You yourself fought dictatorship untiringly, and have constantly displayed your profound respect for human values. I am sure that no one will understand better than yourself our true feelings; that you will accept the expression of our most sincere regret for any violation of the laws of the Argentine Republic which may have been committed at the bidding of an irresistible inner moral force; and that, together with all friends of justice throughout the world, who view the trial of Eichmann in Israel as an act of supreme historical justice, you will see to it that the friendly relations between the Argentine Republic and Israel suffer no harm." (Para. 6.) It may be interesting to note that Arendt touched upon the issue of presumption of innocence in the context of the *Eichmann* case as follows when she wrote, commenting on Ben-Gurion's words mentioned in para. 3: "In contrast to normal arrests in ordinary criminal cases, where suspicion of guilt must be proved to

hold Israel responsible for the operation, even if the men executing the operation were to be considered private individuals,[500] even if Eichmann had consented to his transportation to Israel (as both Levavi and Ben-Gurion had asserted)[501] and even if Eichmann was to be considered an illegal resident in Argentina.[502] As a result of this, Argentina, on 8 June

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be substantial and reasonable but not beyond reasonable doubt – that is the task of the ensuing trial – Eichmann's illegal arrest could be justified, and was justified in the eyes of the world, only by the fact that the outcome of the trial could be safely anticipated." (Arendt 1994, p. 210.) (*Cf.* also n. 25.)

[500] See UNSC OR, fifteenth year, 865th meeting, 22 June 1960, UN Doc. S/P.V. 865 (1960), para. 23 (p. 5) (Mr Amadeo from Argentina): "This justification of the incident and the need to apologize for it constitute a full confession of responsibility and make the production of further evidence unnecessary. No one feels obliged to apologize for an incident for which he does not consider himself responsible. This responsibility is not affected by the Government of Israel's contention that the act was done by private individuals who acted without prior consent." See also *ibid*., para. 25 (p. 5): As far as the present case is concerned, those involved had no doubt whatever about the illegality of the act, as is proved by the clandestine way they acted both in capturing Eichmann and in removing him from Argentine territory. Eichmann, once captured, was handed over to the Government of Israel, and from that moment – that is, the State of Israel's knowledge – of the illegal way in which he had been removed to Israel territory is incontestable. Thus, by accepting the act and by announcing its intention to try the prisoner, the Government of Israel ipso facto became an accessory to, and ultimately responsible for, the act itself. If we consider in addition the subsequent official expressions of approval of those who effected the capture, there is, we believe, no need for further proof."

[501] See *ibid*., paras. 26-27 (pp. 5-6): "Eichmann's supposed consent to his removal to Israel does not alter the fact that a violation of Argentine sovereignty was committed. I leave it to each of you to decide what weight is to be attached to the letter attributed to Eichmann giving his consent, and I cannot forbear from expressing my regret that such a document should have been included in a diplomatic note. But even if Eichmann gave his consent, it does not alter the fact that he was removed by force. In fact, Eichmann would have been taken to Israel whether he was willing or not. This is clear from Israel's attitude throughout the affair. Since he had no choice in the matter, the fact that he may have consented is completely irrelevant. This is the view taken by Professor Hambro, who has said that if Israel agents in fact seized Eichmann in Argentina, their action was in itself a violation of international law, since such a thing cannot be done without the consent of the other State. [It must be noted that Mr Amadeo here refers to a statement which assumes that Eichmann was kidnapped by agents of the State of Israel. However, from the previous footnote, it can be deduced that Mr Amadeo made the claim that Israel was responsible for the kidnapping, even if the kidnappers were private individuals. Because of that, one can wonder what the added value is of this reference to Professor Hambro's position. The same inconsistency is noted by Silving (1961, p. 315, n. 22) who writes: "Dr. Amadeo cites Professor Hambro's opinion "that if Israel agents in fact seized Eichmann in Argentina, their action was in itself a violation of international law, since such a thing cannot be done without the consent of the other State." (Doc S/P.V. 865, par. 26.) But how can this statement be taken to support Amadeo's contention, implied in the context in which the statement is used, that the same applies if the "abductors" were private citizens and not "Israeli agents."", ChP.] The Israel contention that Eichmann consented to his removal had therefore, in Professor's Hambro's opinion, no bearing on the question. It would therefore appear that the word "capture" was correctly used by Mr. Ben Gurion in his letter to President Frondizi [S/4342, sec. II] to refer to Eichmann's arrest, since it emphasizes the essentially coercive nature of the act. In fact, according to the dictionary definition, the word "capture" means the apprehension of a person who is, or is suspected to be, an offender. When an offender is apprehended, his consent – assuming that he gives his consent – is completely immaterial."

[502] See *ibid*., para. 28 (p. 6): "The fact that an inhabitant of the country may be living there in breach of its national laws is a purely domestic question which the Argentine authorities alone are empowered to investigate and adjudicate. No foreign Power has the right to take the place of the national authorities and to correct the situation by removing the illegal resident from the country. Any country that would

> made the most formal protest against the illegal act committed to the detriment of a fundamental right of the Argentine State, and requested appropriate reparation for the act, namely the return of Eichmann, for which it set a time-limit of one week, and the punishment of those guilty of violating Argentine territory. The Argentine Government stated that, failing compliance with this request, it would refer the matter to the United Nations.[503]

When Argentina felt that reparation was not forthcoming through direct negotiations with Israel,[504] the Permanent Representative of Argentina to the UN, Mario Amadeo, on the instructions of his Government, requested the President of the UNSC

> to call an urgent meeting of the Security Council to consider the violation of the sovereign rights of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the territory of the State of Israel, contrary to the rules of international law and the purposes and principles of the Charter of the United Nations and creating an atmosphere of insecurity and mistrust incompatible with the preservation of international peace.[505]

The UNSC discussions took place on 22 (meetings 865-866) and 23 (meetings 867-868) June 1960.

After having discussed the history of the affair and the reasons why it believed Israel was responsible for the abduction, Mr Amadeo submitted a draft resolution to the UNSC in which the violation of Argentina's sovereignty was recognised and in which Israel was requested to make appropriate reparation (but in which, importantly, the return of Eichmann was not explicitly mentioned).[506]

Then, it was time for Israel – in the person of its Foreign Minister Golda Meir – to react to Argentina's view on the case. Like Levavi's note of 3 June and Ben-Gurion's letter of 7 June, Meir defended the operation of the individuals, again referring to the monstrousness of Eichmann.

Some very illustrative examples of this reasoning can be found in the following excerpts:

> [M]y Government sincerely believes that this isolated violation of Argentine law must be seen in the light of the exceptional and unique character of the crimes attributed to Eichmann, on the one hand, and the motives of those that acted in this unusual

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tolerate such interference in its internal affairs would have ceased to be independent and worthy of respect."

[503] 'Letter dated 15 June 1960 from the representative of Argentina to the President of the Security Council', UN Doc. S/4336, para. 3 of the Explanatory Memorandum.

[504] See Baade 1961, p. 407.

[505] 'Letter dated 15 June 1960 from the representative of Argentina to the President of the Security Council', UN Doc. S/4336, para. 1.

[506] See UNSC OR, fifteenth year, 865th meeting, 22 June 1960, UN Doc. S/P.V. 865 (1960), paras. 46-47 (p. 10).

manner, on the other hand. These men belong, as do I, to a people whose tragedy in the Second World War is unmatched in history.[507]

This is 1960 – fifteen years after Nazi Germany was defeated. Is it not inconceivable that Eichmann has enjoyed freedom during all these years? That he has not been brought to trial? Is not this a violation of the sovereignty of the spirit of man and of humanity's conception of justice?[508]

What wonder that many Jews could find no rest until they ascertained whether he was alive and tracked him down.[509]

Jews, some of whom personally are the victims of his brutality, found no rest until they located him and brought him to Israel – to the country to whose shores hundreds of thousands of the survivors of the Eichmann horror have come home (…).[510]

Again I want to stress that if citizens of Israel broke the law of Argentina they broke it not in tracking down any ordinary criminal, but in tracking down Adolf Eichmann.[511]

The representative of Argentina expressed anxiety that this, if not dealt with by the Security Council, might constitute a precedent. But modern history knows of no such monster as Adolf Eichmann. The representative of Argentina has sought to contrast the norms of ordinary legal procedure, on the one hand, with resort to lynching and mob violence on the other. In so far as he sought, in the latter connexion, to draw an analogy to the apprehension of Eichmann, there is no analogy. Far from lynching Eichmann or hanging him on the nearest tree, those who pursued him over fifteen years and finally seized him have handed him over to the process and judgement of the courts of law. The reference to mob passions and lawless justice in this context, I must say, is unwarranted and provocative. This is not only my view and that of the Government of Israel; it is also shared by prominent people all over the world. In an article by a well-known Argentine publicist, Ernesto Sabato, published in the important newspaper El Mundo of 17 June, under the suggestive title "Sovereignty for Butchers", we read:

"How can we not admire a group of brave men who have, during the years, endangered their lives in searching throughout the world for this criminal and who had yet the honesty to deliver him up for trial by judicial tribunals instead of being impelled by an impulse of revenge to finish him off on the spot."[512]

Will not our Argentine friends see the exceptional nature and uniqueness of this case? I am sure that their conception of right and justice must place this isolated incident in its proper perspective. I again ask: is this a problem for the Security Council to deal with? This is a body that deals with threats to the peace. Is this a threat to peace –

[507] UNSC OR, fifteenth year, 866th meeting, 22 June 1960, UN Doc. S/P.V. 866 (1960), para. 19 (p. 4).
[508] *Ibid.*, para. 36 (p. 8).
[509] *Ibid.*, para. 39 (p. 8).
[510] *Ibid.*, para. 40 (p. 9).
[511] *Ibid.*, para. 42 (p. 9).
[512] *Ibid.*, para. 43 (pp. 9-10).

> Eichmann brought to trial by the very people to whose total physical annihilation he dedicated all his energies, even if the manner of his apprehension violated the laws of Argentina? Or did the threat to peace lie in Eichmann at large, Eichmann unpunished, Eichmann free to spread the poison of his twisted soul to a new generation?[513]

Notwithstanding this, she clearly refused to accept the idea that the State of Israel had violated the sovereignty of Argentina:

> A considerable part of the address we heard this morning was devoted to elaborating the charge that the State of Israel has violated the sovereignty of Argentina. I emphatically deny this charge. The State of Israel has not violated the sovereignty of Argentina in any manner whatsoever, and there is nothing in the record to enable the Security Council to make any such findings. The Government of Israel has made clear in official communications to the Argentine Government, which appear now on the record of the Security Council, that certain of its nationals in the course of their efforts to bring Eichmann to justice may have committed infringement of the law of Argentina, and it has already twice expressed its regret for this. I wish to repeat in all solemnity before this Council my Government's regrets at any infringement of the law of Argentina which may have been committed by any national of Israel. But with the greatest respect for the representative of Argentina, I think that he is in complete error, as a basic legal proposition, in confusing the illegal actions of individuals, for which regrets have been expressed, with the non-existent intentional violation of the sovereignty of one Member State by another. This distinction is so fundamental and so well established in international law that I am at a complete loss to understand how it could be expected that the Security Council should make so far-reaching a finding as is implicit in the statement we heard this morning, without any adequate basis in fact and in law.[514]

Hence, in contrast to the (possible) slip of Levavi's pen (see the final words of Subsection 3.2.2), Golda Meir was clear in her opinion that the kidnappers might have violated the laws of Argentina but not the sovereignty of Argentina as that requires statal involvement. After Israel's speech, the views of the other members of the UNSC, of which many referred to both the seriousness of the crimes with which Eichmann was charged and the importance of the concept of State sovereignty, were heard at this 866th meeting and the two meetings (867 and 868) the next day.[515]

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[513] *Ibid*., paras. 47-48 (p. 10).
[514] *Ibid*., para. 41 (p. 9).
[515] See, for example, the following words of Mr Sobolev (Union of Soviet Socialist Republics): "In order to understand the nature of the Argentine Government's complaint, the Security Council must, above all, bear in mind that this question is directly related to the case of one of the major Nazi war criminals who committed the most heinous crimes against humanity during the Second World War. (…) The peoples of the world, who have lived through the tragedy of the Second World War and have themselves felt the full weight of the Nazi crimes, have always vigorously demanded and continue to demand that all war criminals, without exception, be brought to justice. Obviously, this applies in full measure to the war criminal Eichmann, who has on his conscience the lives of some millions of human beings, including 6 million Jews. (…) As far for Argentina's complaint concerning the violation of its sovereignty by Israel, the Soviet delegation must make it clear that the Soviet Union has always stood for the strict observance of the universally recognized principle of sovereignty in relations between

Arguably one of the most interesting exposés on the matter was provided by Claude Corea of Ceylon,[516] who did not share Meir's view and who believed that Israel had violated the sovereignty of Argentina:

> The Foreign Minister of Israel has informed the Council that (...) Eichmann was in fact apprehended by "Jewish volunteers including some Israelis". We infer from that that these were not "agents" of the Israel Government. We concede that the acts of enthusiastic individual citizens cannot always properly be attributed to the Governments to whom they owe allegiance. We appreciate that sovereign Governments are seldom responsible for the conduct of isolated persons acting on their own accord, impelled by "the depth of the feelings which move them"; we understand the deep stirring in human souls which sometimes drives men to action regardless of the embarrassments they may cause to their Governments. These situations we understand and can even overlook. We cannot, however, completely overlook the express approval given by the Government of Israel to the actions of the individuals concerned in this case. The only reasonable inference we can draw from the statements of the various members of the Israel Government soon after the transfer of Eichmann is that the Government endorsed and condoned the act, thus adopting it more or less as its own. (...) It is a clear breach of international law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. We find it difficult to resist the logical inference from that proposition that it is just as much a breach of international law for a State to condone or endorse the acts of those who go into the territory of another State and there apprehend persons. For these reasons the Government of Ceylon cannot but subscribe to the view that there has been on the part of the Israel Government a violation of the sovereign rights of Argentina.[517]

States and deems inadmissible any action designed to violate this principle. On the question of sovereignty the Soviet Union shares the Argentine position, since the violation of State sovereignty is inadmissible under any circumstances and can in no way be justified." (*Ibid*., paras. 51, 62 and 68 (pp. 11, 12 and 13).) See also the following words of Mr Tsiang of China: "The case of Eichmann by itself may excuse to a certain extent the irregular methods of his captors, but here a great principle is involved, namely, the principle of respect for national sovereignty. If this principle should be weakened in any way, the consequences for international order would be very grave indeed. My delegation wishes to register its disapproval of the irregular methods used by the captors of Eichmann." (UNSC OR, fifteenth year, 868th meeting, 23 June 1960, UN Doc. S/P.V. 868 (1960), para. 28 (p. 7).)

[516] See *ibid*., paras. 2-23 (pp. 1-6).

[517] *Ibid*., paras. 10 and 12 (p. 3). With respect to the aspect of the seriousness of the suspect's alleged crimes, Corea warned (*ibid*., para. 18 (p. 5)): "[W]e hope we will be understood if we state definitely and categorically that we are not able to subscribe to a doctrine which would seek to justify a breach of a fundamental rule of law – a rule of law which is not a mere technicality but the very basis of the carefully constructed and delicate edifice of international order – on concepts as subjective and as indefinite as "historical justice" or "irresistible inner force". The case of Eichmann is of course so staggering in its wickedness and its criminality that it may furnish a strong case for the advocates of this doctrine. Yet cases which may follow, or indeed cases which have preceded this in the not-too-distant past, may not be so easy of classification in terms of moral imperatives. Could it not be argued that the "security" or "vital interests" of one State provide a moral justification for acts by it constituting a violation of another State's sovereign rights? Or that the kidnapping of a notorious traitor of one country who has escaped into another country, could be committed by patriotic citizens at the "bidding of an irresistible inner moral force"? Is this to be admitted? Who is to decide?"

After the USSR and US had battled out a small but typical cold-war fight on a completely different issue,[518] the Council adopted Resolution 138 of 23 June 1960. The UNSC declared that abductions, such as the one of Eichmann, violate the sovereignty of the suspect's State of residence. In addition, it requested Israel to make "appropriate reparation in accordance with the Charter of the United Nations and the rules of international law".[519] This implies that the abduction was indeed viewed as an internationally wrongful act from Israel. After all (and arguing *a contrario*): if Israel was not responsible, then reparation would, of course, not have been necessary.[520] Interestingly, even though the UNSC clearly condemned the abduction, it did not state that Eichmann had to be returned. The Council thus followed the draft Resolution suggested by Argentina, which did not ask for the return of Eichmann either. One can certainly assert that the seriousness of Eichmann's alleged crimes has played a role here, as evidenced by the following words from the Resolution's Preamble:

> *Mindful* of the universal condemnation of the persecution of the Jews under the Nazis, and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused, *Noting at the same time* that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused (...) [emphasis in original, ChP].

Thus, it could be argued that the UNSC took Eichmann's alleged crimes into account to, in a way, condone the fact that he was now going to face justice in Israel, even though he was irregularly brought there.[521]

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[518] Namely on the alleged occupation by ex-nazis of important positions in West Germany and NATO (according to the USSR) and Eastern Germany (according to the US). See *ibid*., paras. 69-88 (pp. 13-16).

[519] The entire resolution reads as follows: "*The Security Council*, *Having examined* the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic, *Considering* that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations, *Having regard* to the fact that reciprocal respect for and the mutual protection of the sovereign rights of States are an essential condition for their harmonious coexistence, *Noting* that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace, *Mindful* of the universal condemnation of the persecution of the Jews under the Nazis, and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused, *Noting at the same time* that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused, 1. *Declares* that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security; 2. *Requests* the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law; 3. *Expresses the hope* that the traditionally friendly relations between Argentina and Israel will be advanced [emphasis in original and original footnote omitted, ChP]."

[520] See also Subsection 1.1 of Chapter I.

[521] See also Kovac 2002, p. 643: "Since the resolution emphasized the heinous nature of Eichmann's crimes (it also warned of the possibly destabilizing effects of such sovereignty violations if repeated), the UN resolution arguably amounted to implied conditional approval of Israel's action, in spite of its

3.3.3 Draft articles on responsibility of States for internationally wrongful acts (Part II)

Hence, taking the perspective from the time of the affair, when it was not yet clear that Israeli agents had kidnapped Eichmann from Argentina, Article 4 of the DARS should indeed not be used. Returning to the commentary to Article 11 of the DARS, the drafters explain that

> Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State. [522]

The commentary continues by explaining that the phrase "acknowledges and adopts the conduct in question as its own" means more than mere support or endorsement.[523] What is required is "that the State identifies the conduct in question and makes it its own."[524] Nevertheless, this acknowledgment and adoption by a State does not need to be express; it may also be inferred from its conduct.[525]

This adoption theory seems to have been expanded by some legal writers. For example, Costi asserts that

> while the responsibility of the state is not prima facie engaged following a private kidnapping, continued custody of the abducted individual and the ensuing prosecution does in fact entail ratification of the abduction by the state and the latter assumes responsibility for the violation of the sovereignty and integrity of the state of refuge [original footnotes omitted, ChP].[526]

By the same token, Mann argues:

> [A] State can only act through agents. Even if their activity is not authorized *ab initio*, it is the State that acts as soon as it fails to return the abducted person, but arrests and prosecutes him and thus ratifies the originally unauthorized acts. (...) Even if the person acting in the foreign territory is not a police officer but a private one, subsequent adoption by the State entails its responsibility. For this reason the suggestion that the infamous Eichmann was abducted by private volunteers is

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carefully worded language to the contrary [original footnote omitted, ChP]." See also Lasok 1962, p. 355.

[522] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 53.

[523] See *ibid*.

[524] *Ibid*.

[525] See *ibid*., p. 54.

[526] Costi 2003, p. 63.

> irrelevant in law, for even if it had been factually correct (which it does not seem to have been), the essential fact is that Eichmann was imprisoned, prosecuted, convicted and executed by the State of Israel which thus endorsed the acts of any private person involved [original footnotes omitted, ChP].[527]

It appears as if the State of Ceylon's view on the idea of adoption within the context of State responsibility is more accurate than the views of Costi and Mann.[528] Ceylon explained that Israel was responsible for the 'private' abduction because it gave "express approval" to it. However, does a State also "acknowledge and adopt *as its own*" if it clearly rejects the abduction of a person by private individuals (but nevertheless continues the prosecution of the suspect because he is now in its custody)? This is arguably hard to accept.[529]

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[527] Mann 1989, p. 408. See also Hamid 2004, pp. 83-84.

[528] The Prosecution in the still-to-discuss *Nikolić* case before the ICTY, see Subsection 3.1.4, did not agree with Mann's interpretation of the concept of adoption, which is also supported by Shen (1994, p. 63), and which was relied upon by the Defence in *Nikolić* (see ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 15, n. 24) either, see ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, para. 36 or (the almost identical words in) ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 7: "Nor should the fact that the Prosecutor subsequently proceeds to place the Accused on trial be construed as amounting to the *de facto* "adoption and approval" of any prior unlawful acts committed by other bodies, on the grounds that in so doing, the Prosecution does not ratify or endorse any international illegality but instead, merely carries out its ordinary mandated functions of subjecting those accused of serious violations of international humanitarian law to trial." The Trial Chamber in the end agreed with the Prosecutor's reasoning based on the DARS that the conduct of SFOR/OTP could not be seen as an adoption or acknowledgement of the illegal conduct of the private individuals (see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, paras. 66-67), a point which was attacked by the Defence on appeal, see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 6: "The Defence asserts that the Trial Chamber's use of the International Law Commission's (…) Draft Articles on State Responsibility to determine whether the conduct of third parties can be attributed to SFOR or the OTP was inappropriate because the Draft Articles are not recognised as customary or treaty law. The Defence argues that the Appeals Chamber should apply a different test. The Defence contends that SFOR knew that the Accused had been the victim of an unlawful and violent abduction and that by taking the Accused into custody, SFOR colluded in the original crime [original footnote omitted, ChP]." (The Appeals Chamber itself did not go into this matter as it found that the violations, even if they could be attributed to SFOR (here, one could perhaps read: "SFOR/OTP", see *ibid*., paras. 3 and 18), did not warrant the requested remedy, see *ibid*., paras. 27 and 33.)

[529] *Cf.* also Cazala 2007, pp. 846-847.

3.3.4 Due diligence

Another important concept through which a State can be held responsible in connection with private conduct is 'due diligence' (or 'due care'),[530] a concept which was not addressed by the ILC in the DARS. Blomeyer-Bartenstein, writing on the codification of State responsibility after WW II, explains:

> In the new round of codification which began in 1963, the draft rules were no longer limited to the responsibility of States for injuries caused on their territory to aliens; the future convention was designed to define the general rules governing the international responsibility of the State. The ILC decided for that purpose to strictly limit the draft articles to secondary rules, i.e. rules determining the legal consequences of a failure to fulfil obligations established by primary rules, customary as well as conventional. Due diligence was considered as an element of an obligation, i.e. a primary rule, and therefore banned from the draft.[531]

Notwithstanding this, the commentary to the DARS sporadically refers to its existence and meaning. See, for example, the following words, where it refers to the *Tehran* case:[532]

> [A] State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it [original footnote omitted, ChP].[533]

A State may not only become responsible in connection with acts such as a seizure of an embassy by private individuals, it may also become responsible in connection with acts related to human rights violations.

The already briefly mentioned[534] *Velásquez Rodríguez* case, which concerned the role of the State of Honduras in the abduction and subsequent disappearance of

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[530] See generally Pisillo-Mazzeschi 1993, Hessbruegge 2004 and Barnidge, Jr. 2006.

[531] Blomeyer-Bartenstein 1987, pp. 141-142. See also *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 34: "Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation."

[532] Which was also used in Subsection 3.3.1 to explain the term 'conduct acknowledged and adopted by a State as its own'.

[533] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 39.

[534] See n. 205.

Honduran student leader Angel Manfredo Velásquez Rodríguez, may be illustrative here.

After having stated, as the HRC (see Subsection 2.2.2) and the ECmHR/ECtHR (see Subsection 2.2.4), that an abduction violates the human right to personal liberty,[535] the IACtHR examined whether it could be established in this particular case that Honduras had violated, among other things, this human right.[536] In its examination, the Court also turned to Article 1, paragraph 1 of the ACHR, the 'respect and ensure' provision,[537] and explained with regard to the 'ensure' part:

> The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[538]

The words "*any* violation of the rights recognized by the Convention [emphasis added, ChP]", of course, includes violations by State officials, but may not be limited to them. The State's due diligence obligation (to prevent, investigate and punish) also appears to apply to human rights violations caused by private actors:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[539]

A few remarks should be made here. First, it should be noted that this case might have a broader scope than just an American one. Meron explains:

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[535] IACtHR, *Velásquez Rodríguez*, 'Judgment', 29 July 1988, Ser. C., No. 4 (1988), available at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm, para. 155: "The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty".

[536] See *ibid*., paras. 159-160.

[537] "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[538] IACtHR, *Velásquez Rodríguez*, 'Judgment', 29 July 1988, Ser. C., No. 4 (1988), available at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm, para. 166.

[539] *Ibid*., para. 172.

> Because of the similarity of Article 1 of the American Convention to Article 2 of the Political Covenant and, in this context, to Article 1 of the European Convention, the jurisprudence of the American Court is of general importance for the international law of human rights.[540]

Secondly, it should be mentioned that in the last-quoted paragraph of the *Velásquez Rodríguez* case, one may find additional evidence for the view that private individuals can violate human rights (see Subsection 3.2.1).

The fact that the IACtHR talks about "[a]n illegal act which violates human rights" may be seen as such proof.[541] However, one may also disagree and argue that the IACtHR only states that the private individual can commit an illegal act (which in turns violates a human right) but that the private individual is not directly linked with the human rights violation itself. This notwithstanding, whether the private individual is directly or indirectly linked does not seem to matter. What matters is that because of an action from a private individual, a human right is violated.

In any case, it must be clearly understood that the State does not become responsible because of the initial human rights violation itself, but because of its inaction with respect to that violation; the State incurs responsibility because it breaches its own (due diligence) obligation to prevent or respond to the violation. Although in the *Velásquez Rodríguez* case, the IACtHR found that the disappearance of the Honduran student leader "was carried out by agents who acted under cover of public authority",[542] meaning that the State of Honduras itself violated, among other things, the human right to personal liberty,[543] it also clearly showed the difference between violating these specific human rights provisions and violating the general due diligence provision of Article 1, paragraph 1 of the American Convention:

> The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it

[540] Meron 1989, p. 164.

[541] See for another example also IACtHR, *Velásquez Rodríguez*, 'Judgment', 29 July 1988, Ser. C., No. 4 (1988), available at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm, para. 177: "Where the *acts of private parties that violate the Convention* are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane [emphasis added, ChP]." See in that respect also Meron 1989, pp. 163-164 (again referring to the underlying goal of human rights law): "Because the purpose of human rights law is to protect human dignity, and because some essential human rights are often breached by private persons, the obligation of states to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers but must extend to at least some private 'interferences' with human rights [original footnote omitted, ChP]."

[542] IACtHR, *Velásquez Rodríguez*, 'Judgment', 29 July 1988, Ser. C., No. 4 (1988), available at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm, para. 182.

[543] See *ibid*., para. 185.

> assumed under Article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.[544]

In conclusion, a State violates the right to liberty and security itself if, for example, its own agents kidnap a person or if the kidnapping by private individuals can be attributed to the State (for example, because the State directed or controlled the private conduct or because it acknowledged and adopted the conduct as its own). In these cases, the kidnapping/violation of the right to liberty and security is attributed to the State: it can be seen as an act of State. Conversely, if private individuals kidnap a person (and the State has, for instance, not directed or controlled this conduct or acknowledged and adopted it as its own) the kidnapping/violation of the right to liberty and security itself is not attributed to the State. Nevertheless, if such a (truly private) kidnapping does occur and a State has done nothing to prevent it, or does nothing to punish the private kidnappers, the State can be held responsible anyway. In that case, it does not violate the right to liberty and security itself; it violates a due diligence provision as can, for example, be found in Article 1, paragraph 1 of the ACHR.[545]

4 WHAT ARE THE CONSEQUENCES OF SUCH VIOLATIONS?

Before turning to Part 3 of this book, to the actual *male captus* case law of courts and tribunals other than the ICC, only one further point still needs to be addressed. In this chapter, *which male captus* situations exist (Section 1), *what* is violated by these *male captus* situations (Section 2) and *who* violates (Section 3) has been examined.[546]

It will now be sorted out what the *consequences* are of such violations.

4.1 Reparation

The second part of the already discussed DARS ('Content of the international responsibility of a State') is devoted to the legal consequences of an internationally wrongful act of a State.

Besides the fact that the responsible State is under an obligation to cease that act and to offer guarantees of non-repetition,[547] it must also make full reparation for the

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[544] *Ibid*., para. 182.

[545] See Wolfrum 1987, p. 275: "[W]hen there is a duty to exercise (...) due diligence in some particular respect, State responsibility may arise when the failure to exercise due diligence occurred in the context of violent acts by private individuals. Thus, the State is responsible only for the act or omission of its organs where they are guilty of not having done everything within their power to prevent the injurious act of the private individual or to punish it suitably if it has occurred. The State is responsible for having breached not the international obligation with which the individual's act might be in conflict, but the general or special obligation imposed on its organs to provide for protection."

[546] In addition, it was also explained (but not in a specific subsection) *why* these *male captus* situations may occur, see n. 25 and accompanying text.

[547] See Art. 30 of the DARS.

injury caused by the internationally wrongful act.[548] Article 33 explains in its first paragraph that the obligations of the responsible State arising from the second part of the DARS may be owed (only) to "another State, to several States, or to the international community as a whole". This entails, for example, that the obligation to make reparation is of a horizontal, inter-State nature[549] and that it cannot be invoked by a private individual. Nevertheless, paragraph 2 of Article 33 states that "[t]his Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State." The idea formulated in this last quote will be addressed in the next subsection where the issue of remedies in international human rights law will be examined. Thus, when addressing the horizontal context (between States), the term 'reparation' will be used,[550] whereas the term 'remedies' will be used for the vertical context (between an individual and the State).[551]

[548] See Art. 31, para. 1 of the DARS.

[549] The relationship between the international community as a whole (which can be seen as a collection of States) and a State will – for reasons of clarity – also be viewed as a horizontal relationship.

[550] Thus, the word reparation is here connected with the entity invoking its right and not so much with the sort of violation. For example, State B can very well ask State A for reparation because State A causes harm to a national of State B (for instance, because of acts from a State A official or because of private acts which State A cannot prevent). According to the traditional doctrine in the law on State responsibility for injury to aliens (which "can be viewed as a precursor to international human rights law" (Shelton 2005, p. 59)), "a state that injures an individual indirectly injures the state of nationality [original footnote omitted, ChP]." (*Ibid*.) However, international human rights law has changed this perspective as the purpose of human rights is "to guarantee the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States". (IACtHR, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*, 'Advisory Opinion OC-1/82', 24 September 1982, Ser. A., No. 1 (1982), available at: http://www1.umn.edu/humanrts/iachr/b_11_4a.htm, para. 24.) Shelton explains: "Traditional inter-state responsibility for breaches of international law, designed for reciprocal obligations, thus does not correspond exactly to the needs of the objective human rights regime. For example, when the state committing the breach does not directly injure another state, an issue arises of standing to make a claim. The International Law Commission has responded to this problem in its rules on state responsibility by expanding the concept of 'injured state' when the breach concerns a multilateral treaty or rule of customary international law created or established for the protection of human rights and fundamental freedoms. Every other state party to the convention or bound by the relevant rule is deemed affected by the interests protected by human rights provisions; hence all must be considered injured states in case of a breach of obligation [original footnote omitted, ChP]." (Shelton 2005, p. 98.) Shelton notes, however, that "it is rare to find inter-state human rights complaints invoking the law of state responsibility because states often view the political and economic costs of complaints as too high in the absence of a specific injury. In addition, accusations of human rights violations may be deemed unfriendly acts." (*Ibid*., pp. 98-99.)

[551] *Cf. ibid*., pp. 7-8: "In the law of state responsibility, 'reparation' is most frequently used in the context of inter-state claims, and it is maintained for that purpose in this volume. (...) In this book, the terms 'remedies' and 'redress' refer to the range of measures that may be taken in response to an actual or threatened violation of human rights." Note, however, that a term like reparation is also often used in the context of an individual claiming to be the victim of a human rights violation. See, for example, the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. (See the Annex to UNGA Res. 60/147 of 16 December 2005.) See also Art. 75 of the ICC Statute (entitled: 'Reparations to victims').

Returning to the subject of reparation, Article 34 of the DARS reads: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter." The very first form of reparation is restitution. In that case, the responsible State must

> re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[552]

The commentary to the DARS explains that restitution comes first among the forms of reparation because it "most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed".[553] This can also be derived from Article 36, paragraph 1 of the DARS which stipulates that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, *insofar as such damage is not made good by restitution* [emphasis added, ChP]." The last form of reparation (not only in order but also in importance)[554] is satisfaction. This "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[555] One could hereby also think of the extradition or punishment of the persons responsible for the violation.[556]

Even though restitution is thus in theory the most appropriate form of reparation, the attitude of the injured State, among other things, may also play a role in determining which form of reparation should be granted in a specific case.[557]

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[552] Art. 35 of the DARS.

[553] *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 96. (With reference to PCIJ, *Case Concerning The Factory at Chorzów* (Claim for Indemnity) (Merits), 'Judgment', 13 September 1928, *Publications of the Permanent Court of International Justice*, Series A. – No. 17, Judgment No. 13, p. 48.) Perhaps even more interesting is *ibid*., p. 47: "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

[554] See Art. 37, para. 1 of the DARS: "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act *insofar as it cannot be made good by restitution or compensation* [emphasis added, ChP]."

[555] Art. 37, para. 2 of the DARS.

[556] See Hamid 2004, pp. 82-83.

[557] See also the *Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 97: "[T]here are often situations where

Applying these considerations to the *male captus* technique which most clearly violates another State's sovereignty (abduction), this would mean that, in principle, a State which violates another State's territory by kidnapping a suspect therefrom should bring the situation back as it was before the kidnapping (the *status quo ante*)[558] implying that the suspect should be released[559] and returned to the State of residence.

This obligation to return is with the prosecuting State. Normally, the Executive will do what it is supposed to do and return the suspect. However, it can be argued that, if the Executive does not do so, the court now trying the case (which is, of course, also part of that prosecuting State) should take responsibility for the failures of its Executive, refuse jurisdiction and order the return of the suspect to the injured State.[560] In short, in such a situation, it appears that the court should issue a *male captus male detentus* decision. This point will be further discussed in the following chapters, when the actual *male captus* decisions will be addressed.

Although the obligation to return the abducted suspect would in principle thus be the most appropriate reaction of the prosecuting State, one must not forget that the attitude of the injured State should also be taken into account in determining which form of reparation is to be granted. One can assume that this means that the 'abducting' State would only be required to return the abducted suspect if the injured State protests the kidnapping and requests the return of the suspect.[561] Whether this assumption is correct will be examined in Chapter V in which the actual inter-State *male captus* decisions will be addressed.

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restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority."

[558] See *ibid*., p. 96. A restitution by which a situation is brought back to the *status quo ante* is called a *restitutio in integrum*. See Jennings and Watts 1992, p. 388, Costi 2003, p. 62 and Shelton 2005, p. 65.

[559] *Cf. Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 96: "In its simplest form, (...) [restitution] involves such conduct as the release of persons wrongly detained".

[560] See also Shen 1994, p. 63: "Since an abducting State has a duty to return illegally abducted individuals to their country of refuge or residence, courts of the abducting State must refrain from exercising jurisdiction on the merits."

[561] *A fortiori*, the return would not be necessary if there was no violation in the first place, for example, because the wrongfulness of the violation is precluded by exceptions like self-defence and consent. Furthermore, a return would not be necessary either in the case of an abduction executed by private individuals if one is of the opinion that private individuals cannot violate another State's sovereignty (because in that case, there is, of course, no violation in the first place either), see Preuss 1936, p. 507: "When a fugitive has been kidnaped by private persons, and, having been brought by force to the territory of a foreign state, is there arrested, there appears to be no obligation to release the prisoner. International responsibility is incurred only through official complicity. *A fortiori*, there is no obligation to surrender the prisoner when officials of the state of asylum have participated in the irregular seizure or arrest [original footnotes omitted, ChP]." For another opinion, see, for example, Hamid 2004. He believes that "[f]orcible abductions conducted by purely private individuals without government involvement give rise to no violation of international law" (Hamid 2004, p. 83), but nevertheless argues that "in both government-sponsored and non-government-sponsored abductions, the offending State has the duty to return the abducted individual or order his return." (*Ibid*., p. 84.)

Only one case may already be mentioned here; the discussions in the UNSC on Eichmann's abduction, for instance, have shown that 'lesser' forms of reparation than restitution may also be accepted.[562] In the Council's discussion on the meaning of the term 'appropriate reparation' (to be found in its draft resolution), the US and British representatives stated, for example, that the final adoption of the resolution by the UNSC, including the apology by Israeli Foreign Minister Meir, constituted enough reparation.[563] The representative of the Soviet Union clearly stated that, whatever these words meant exactly, they could never result in the return of Eichmann to Argentina.[564] Notwithstanding these views, Argentina reserved its right to interpret the meaning of 'appropriate reparation' at a later stage:

> [M]y delegation does not consider that either Argentina or any other member of the Council has a special obligation to supply an interpretation of the resolutions adopted by the Council. We may each have our own interpretation of the texts placed before us. They will be personal interpretations and have legal force only for those who make them. Once a resolution has been adopted by the Security Council, the parties concerned will have to consider the question and take the necessary steps to ensure that it is interpreted properly and applied in accordance with law.[565]

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[562] In her commentary to the ICTY Trial Chamber's decision in *Nikolić*, see n. 444 and accompanying text, Smeulers refers to the resolution of the Security Council in the aftermath of Eichmann's abduction to argue that "the return of the abducted person to the State whose rights have been violated (...) is (...) neither the most obvious [solution] nor a requirement under international law." (Smeulers 2007, p. 108.) See also *ibid*. where she states that the idea that the return of the person would be the only appropriate remedy in the case of a violation of State sovereignty "is not in line with national case law or State practice."

[563] UNSC, 15th Year, OR, 867th meeting, 23 June 1960, UN Doc. S/PV.867, para. 5 (pp. 1-2): "The United States considers that appropriate reparation will have been made by the expression of views by the Security Council in the pending resolution taken together with the statement of the Foreign Minister of Israel making apology on behalf of the Government of Israel. We therefore think that when we have adopted the pending resolution, appropriate resolution will have been made, and that the incident will then be closed. Normal, friendly relations between the two Governments can then progress." UNSC, 15th Year, OR, 868th meeting, 23 June 1960, UN Doc. S/PV.868, para. 36 (p. 8): "The representative of the United States has drawn attention to the important satisfaction which will be accorded to Argentina if this draft resolution is adopted by the Council. In addition, the regrets of the Government of Israel for any violation of Argentine laws are on the record. The United Kingdom delegation shares the view that these satisfactions can reasonably be regarded as appropriate reparation and should enable the incident before us to be terminated without danger to the relations, hitherto so amicable, between the two countries concerned."

[564] *Ibid*., para. 67 (p. 13): "I wish to make it quite clear that, like other members of the Council, we are entirely of the opinion that operative 2 of the Council's resolution can in no circumstances be interpreted as giving grounds for the submission of any claims for the return of Eichmann to the country in which for many years he has evaded just trial for the crimes he has committed. At the same time we cannot consider the deliberately vague wording of this paragraph satisfactory."

[565] *Ibid*., para. 42 (p. 9).

Although the diplomatic battle still raged 'behind the scenes' for quite some time, in the end – as was already mentioned above – Israel and Argentina declared the incident closed.[566]

It must be emphasised that although the discussions in the UNSC on the Eichmann abduction (and its aftermath) can indeed be seen as evidence for the fact that 'lesser' forms of reparation may be accepted in practice as well, one can argue that it does not seem to have imperilled the above-mentioned assumed rule that the suspect must be returned if the injured State protests and demands the return of the suspect; although Argentina did initially request "appropriate reparation for the act, *namely the return of Eichmann* [emphasis added, ChP]",[567] the specific demand for Eichmann's return was deleted in the context of the UNSC proceedings when Argentina, in its proposal for a UNSC resolution, asked merely for "appropriate reparation".[568] After the incident was closed and the case went to trial, the Israeli Judiciary no longer had, of course, an obligation to return Eichmann on the basis of the violation of Argentina's sovereignty because that matter had been settled.[569]

A final point must be made here and that is that the return of the suspect, especially if that suspect is charged with very serious crimes, should not be considered the same as impunity for that suspect. Hence, even though the Executive (or if that entity fails, the Judiciary) of the forum State is obliged to return the suspect after an abduction, the State of residence also has an obligation to prosecute suspects of international crimes. If that State is not willing or able to do so, his demand for return should fail.[570] However, that does not mean that the suspect

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[566] See Liskofsky 1961, p. 204: "On June 28 Argentina sent Israel a note asking for an official statement of intent regarding the council's recommendation for "adequate reparation." On July 5, Israel replied with a note citing the "understanding" of the major supporters of the council resolution and asking that Argentina consider the case closed. On July 22, Argentina declared Israeli Ambassador Levavi *persona non grata*. On July 23, Israel expressed official "regret" over the expulsion of its ambassador. On July 25, Shabbethai Rosenne, legal adviser to the Israel Foreign Ministry, arrived in Argentina to try to rectify relations between the countries. On August [3], both governments issued a joint statement announcing that the "incident" between them was closed. The statement said that the two governments had been "animated by the wish to comply with the resolution of the Security Council of June 23, in which the hope was expressed that the traditional friendly relations between the two countries will be advanced." The statement made no reference to the "adequate reparation" that Argentina had been demanding. On October 17, 1960, diplomatic relations between Argentina and Israel were officially resumed after a four-month break, with Joseph Avidar as Israel's new ambassador to Argentina, and Rogelio Iristany as the new Argentine ambassador to Israel."

[567] See n. 503 and accompanying text.

[568] See n. 506 and accompanying text. See also De Schutter 1965, p. 106: "[T]he Argentine waived the most logical reparation and declared itself satisfied with the official Israel apology. The Argentine had a right to claim liberation on the grounds of its sovereign liberty and independence; on the grounds of the same liberty it waived this privilege. Therefore, the Eichmann incident doesn't alter this rule [original footnote omitted, ChP]." Baade notes that after the UNSC deliberations (and before the incident was finally settled in August 1960), "Argentina nevertheless repeatedly demanded the return of Eichmann". (Baade 1961, p. 407, n. 28.)

[569] See also Michell 1996, p. 422 who categorises the *Eichmann* case under the heading "*The Injured State Does not Consent, But Does Not Request the Individual's Return*".

[570] *Cf.* in that respect Fawcett 1964, pp. 199-200: "[I]t might perhaps be said, in the case of irregular capture and removal for trial of a criminal *jure gentium*, that the State, from which he is taken, may only

should stay in the forum State because that jurisdiction, because of the *male captus*, has arguably forfeited its right to prosecute the suspect. It would be better in such a case to send the suspect to another jurisdiction which is willing and able to prosecute the suspect and which has nothing to do with the *male captus*.

Turning to that other *male captus* technique which may violate another State's sovereignty:[571] luring,[572] one could use the same arguments. If a luring operation violates another State's sovereignty, the injured State may protest and request the return of the suspect. In that case, one could argue, the 'luring' State (if not the Executive then the Judiciary) should also return the suspect to the injured State. However, even though this form of reparation has been supported,[573] it must also be recalled that luring is normally seen as a less serious violation of international law, which may perhaps have its effect on the exact form of reparation. This point should also be taken into account when looking at the luring cases of the following chapters.

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demand his reconduction if two conditions are satisfied: that that State is the *forum conveniens* for his trial, and that it declares an intention to put him on trial. If these conditions are not satisfied, then the State must accept reparation in another form, since otherwise the interest of justice would be defeated."

[571] See Subsection 2.1.

[572] It is not necessary to discuss the technique of disguised extradition here as that technique does not lead to a violation of State sovereignty, see Subsection 2.1. Notwithstanding this, one may, of course, be of the opinion that also in the case of a disguised extradition, the suspect should be returned to the State from where he was deported, see Michell 1996, p. 392.

[573] See, for example, Preuss 1935, pp. 505-506 (who also confirms the above-mentioned assumed rule that the 'abducting' State must return the suspect to the injured State if that latter State protests and requests the return of the abducted suspect): "The clearest case of state responsibility is found where state agents have seized the individual by violence upon the territory of the state of asylum. Such a violation of foreign territory undoubtedly engages the responsibility of the state of arrest, which is under a clear duty to restore the prisoner and to punish or extradite the offending officers. This obligation appears to have been almost uniformly acknowledged in cases where the injured state has made a diplomatic reclamation. (…) There likewise appears to be an obligation to restore to the state of asylum a fugitive who has been arrested on its territory, *or induced by fraud to leave its territory*, by individuals acting with the complicity of agents of the arresting state [emphasis added and original footnotes omitted, ChP]." See also the remaining words of the already partly quoted Resolution No. 9 relevant to the topic 'The Protection of Human Rights in International Cooperation in Criminal Matters' (unanimously approved at the closing session of the XV Congress of the International Association of Penal Law in Rio de Janeiro, 4-10 September 1994) (see n. 82 and accompanying text): "Abducting a person from a foreign country *or enticing a person under false pretences to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution* is contrary to public international law and should not be tolerated *and should be recognized as a bar to prosecution* [emphasis added, ChP]." (Schomburg 1995, p. 105.) Note that this quotation is rather far-reaching in that it views luring *in general* (whether agents from State A are operating on State B's territory or not) as a violation of State B's territory.

4.2 Remedies

Returning to the human rights context[574] and specifically the human right to liberty and security and the right not to be subjected to arbitrary arrest or detention, two remedies in the case of violations are discernible.[575]

The first is financial compensation and can be found in, for example, paragraph 5 of Article 9 of the ICCPR[576] and of Article 5 of the ECHR.[577] Looking at the language of these almost identical[578] provisions, it seems clear that in each and every case of an unlawful arrest/detention, compensation *must* be given (see the words: "shall").

The second is release and can be found in paragraphs 4 of both articles which are also virtually identical.[579] These paragraphs start with the right of a person to go to court. The words that follow are somewhat different, but they both stipulate the same, namely that that court 1) must decide on the lawfulness of (the arrest (see *infra*) and) the detention and 2) must release the person if (the arrest or) the detention is deemed unlawful.

These provisions regulate what is called in common law *habeas corpus*. This term was already briefly mentioned in footnote 42 of Chapter II and has been addressed earlier in the present chapter as well, see Subsection 2.2.5. Although the ICCPR paragraph speaks of "may" ("in order that that court may decide…"), it is clear that a person has not only the right to go to court but consequently that court

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[574] While not forgetting, however, that human rights violations can also fit in the inter-State 'tool' of reparation, see the previous subsection.

[575] Note also the more general right to an effective remedy, as can be found in, for example, Art. 2, para. 3 (a) of the ICCPR: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (…)." See also Art. 13 of the ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[576] "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[577] "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[578] The only difference is that para. 5 of Art. 9 of the ICCPR speaks of "[a]nyone who has been the victim of unlawful arrest or detention" whereas para. 5 of Art. 5 of the ECHR speaks of "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article". See Nowak 2005, p. 238: "Whereas the analogous provision in Art. 5(5) of the ECHR guarantees compensation only in the event of a violation of Art. 5, the claim set down in Art. 9(5) is available to every *victim of unlawful arrest or detention* ("victime d'arrestation ou de détentions illégales"). Arrest or detention is unlawful when it contradicts one of the provisions in Art. 9(1) to (4) and/or a provision of domestic law [emphasis in original and original footnote omitted, ChP]."

[579] Art. 9, para. 4 of the ICCPR reads: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Art. 5, para. 4 of the ECHR reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

has discretion as to whether or not to review the lawfulness of his (arrest or) detention. See in that respect also the description by Nowak, which confirms that the ICCPR states that a judge *must* review the lawfulness of the detention: "All persons who have been deprived of their liberty of person are – regardless of the reasons – entitled to a right *to have the detention reviewed* in court without delay [emphasis added, ChP]."[580] (It does not say: to possibly have the detention reviewed if the court deems this appropriate.) In that respect, the ECHR paragraph is much clearer: "proceedings by which the lawfulness of his detention *shall* be decided speedily by a court [emphasis added, ChP]". In any case, once the court reviews the lawfulness of the detention, it *must* release a person if his detention is found to be unlawful.[581] It is important to understand that this remedy is not discretionary in nature but part of the human right to liberty and security, a right which is applicable to *everyone*. This means that in principle,[582] any person, whether he is charged with fraud or genocide, must be released if the judge finds that that person's (arrest and) detention is unlawful.

To come back to all the brackets *supra* in which one could find the word "arrest" (see also the last sentence), it is submitted that the judge must not only decide on the lawfulness of the detention but also on the lawfulness of the arrest and, furthermore, that he must release a person not only if his detention is unlawful but also if his arrest is unlawful.[583] Such an interpretation is supported by the whole context of this article, in which not only the detention but in fact the deprivation of liberty in general, thus including the arrest, is considered.[584]

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[580] Nowak 2005, p. 235.

[581] See, for example, Rodley 1999, p. 338: "[I]n the event that the detention is found to be unlawful, the court *must* order release [emphasis added, ChP]." See also Swart 2001 pp. 204 ("Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 4 of the ECHR *require* that a court order the release of the person deprived of his liberty where that person's detention is not lawful [emphasis added, ChP].") and 206: "[B]oth Article 9 of the ICCPR and Article 5 of the ECHR make it imperative that a person be released if his detention was unlawful."

[582] Nevertheless, see Subsection 4.4 for problems surrounding this remedy and a proposal to evade them.

[583] Such an interpretation can also be found in a document preceding the ICCPR. In the 1964 UN Commission on Human Rights' 'Study of the Right to Everyone to be Free from Arbitrary Arrest, Detention and Exile' (see also n. 216), the Commission prepared so-called "Draft Articles" on the right to be free from arbitrary arrest and detention. These Draft Articles were sent to UN Member States for commentary. Quite some provisions were acceptable to all the 48 States submitting comments. One of these provisions was summarised by Maki as follows: "Anyone who is arrested or detained shall be entitled to initiate proceedings before an authority in order *to challenge the legality of his arrest or detention* and obtain his release from that authority without delay if it is unlawful [emphasis added, ChP]." (Maki 1980, p. 295.) Maki notes on the same page: "It is significant that none of the countries submitting comments to the Draft Articles suggested that the result of the proceeding be anything but the detainee's *release, if the arrest or detention is unlawful* [emphasis added, ChP]."

[584] Note, however, that old interpretations of the concept of *habeas corpus* indeed seemed to be focused on the legality of the detention alone. See in that respect also the already-mentioned (see Chapter II) *Scott* case from 1829 in which Brougham and Platt showed cause and argued: "On the return to a writ of habeas corpus, the gaoler [this is the jailer, ChP] is only bound to shew [this means to show, ChP] the warrant for the detention of the party, and not the caption." (Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), p. 447; 109 *English Reports* (1829), p. 166.).

In his commentary to the ICCPR provisions, Nowak arguably supports this view as well. In the context of the more general concept of deprivation of liberty (which covers both the arrest and detention),[585] he states:

> The decision in remand proceedings relates exclusively to the *lawfulness* of deprivation of liberty. If this is not the case [namely when the deprivation of liberty is unlawful, ChP], then the court must order the immediate release of the person concerned [emphasis in original, ChP].[586]

Indeed, in the ACHR's version of this article,[587] one can read: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the *lawfulness of his arrest* or detention and order his release *if the arrest* or detention is unlawful [emphasis added, ChP]".[588]

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[585] Although the word deprivation, in an earlier quotation, appears to be more linked with the concept of 'detention' (see Nowak 2005, p. 221: "The word "*arrest*" ("arrestation") refers to the act of depriving personal liberty (…). The word "*detention*" ("détention"), on the other hand, refers to the state of deprivation of liberty (…) [emphasis in original, ChP]."), it is clear that the deprivation of liberty also encompasses the arrest in the following quotation. When writing about Art. 9, para. 5 of the ICCPR (which stipulates that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"), Nowak (*ibid*., p. 237) refers to "[t]he claim to compensation for unlawful deprivation of liberty".

[586] Nowak 1993, p. 179. (This passage is arguably clearer than the one from Nowak's book in 2005. There, he states: "The decision in remand proceedings relates exclusively to the *lawfulness* of deprivation of liberty, i.e., the compatibility of the detention with domestic and international law. If the court finds that detention is unlawful, it is under an obligation to order the immediate release of the person concerned [emphasis in original, ChP]." (Nowak 2005, p. 236.) Although he writes here that a court must order the release of a person in the case of an unlawful detention (and not in the case of an unlawful deprivation of liberty), the word detention is linked in the previous sentence to the deprivation of liberty, which, in turn, encompasses not only the detention, but also the arrest, see the previous footnote.) See also Knoops 2003, p. 216, writing on the European provision: "Where someone has been deprived of his or her liberty, he or she is entitled by Article 5, paragraph 4, to a *speedy* decision by a national court as to whether the deprivation of liberty is lawful and to an order for his or her release if it [namely the deprivation of liberty, ChP] is not lawful [emphasis in original, ChP]." See, likewise, Dhont 2004, p. 350 (also writing on Art. 5, para. 4 of the ECHR): "If the judge is of the opinion that the deprivation of liberty [she uses the Dutch term *vrijheidsberoving* here, ChP] is not lawful, the person in question must be released immediately [own translation, ChP]." See finally also more generally (and writing about arbitrariness) De Zayas 2005, p. 22: "The above international norms [De Zayas refers here to international and regional human rights protecting the liberty and security of person, ChP] reflect a universal consensus that an individual cannot be deprived of liberty except pursuant to specific legislative authority and with respect for procedural safeguards. Nevertheless, the reality is that not only military dictatorships but also democracies detain political opponents, refugees and aliens, sometimes indefinitely, under a variety of pretexts. *It is for domestic and international tribunals* to test the legality of such detentions and *to ensure the release and compensation of persons who have suffered arbitrary arrest and detention* [emphasis added, ChP]."

[587] Note that "[t]he ACHR is substantially modelled on the ICCPR". (De Londras 2007, p. 239, n. 111.)

[588] Art. 7, para. 6 of the ACHR ('right to personal liberty'). For a concrete example, see IACtHR, *Castillo Páez*, 'Judgment', 3 November 1997, Ser. C., No. 34 (1997), available at: http://www1.umn.edu/humanrts/iachr/C/34-ing.html. El Zeidy (2006, p. 455, n. 28) explains that in this case, the Court "found violation of Art. 7 of the American Convention on Human Rights on several bases including unlawful arrest of the accused and consequently a violation of the domestic law which required the release of the accused in accordance with Art. 7(6)". See finally also Garner 2004, p. 728

Thus, what is arguably important is that the judge looks at the deprivation of liberty in general (arrest and detention)[589] and that he releases a person who is unlawfully deprived of his liberty. Articles 9 of the ICCPR and 5 of the ECHR probably only mention detention in the final words of their paragraphs 4[590] because it has to be seen as the most important part of the deprivation of liberty.[591] Now, it can very well be that there is nothing wrong with the arrest but that the detention is unlawful (in that case the person unlawfully detained must, of course, be released) but if the arrest is unlawful, then the detention should be automatically seen as unlawful as well (leading to a release).[592] In conclusion, a judge must review the lawfulness of a person's deprivation of liberty,[593] including the arrest,[594] and release that person if the arrest/detention/deprivation of liberty is deemed unlawful.

(writing about *habeas corpus*): "A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal (…). (…) In addition to being used *to test the legality of an arrest or commitment*, the writ may be used to obtain review of (…) [emphasis added, ChP]."

[589] *Cf.* in that respect also the view of ICTY Judge Robinson in his separate opinion to the still-to-discuss (see Subsection 3.1.2 of Chapter VI) *Todorović* case where he stated that "[i]t is immaterial whether SFOR's action is characterised (…) as a detention, rather than an arrest; its action resulted in a deprivation of liberty, and it is the legality of that deprivation which is being challenged." (ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, para. 5.)

[590] Note, however, that these paragraphs (and the same goes for their paras. 5) do mention the word "arrest" in the beginning.

[591] The arrest in that sense is only the act of deprivation of liberty whereas the detention is the state of deprivation of liberty immediately following the arrest. See Nowak 2005, p. 221 for the difference between an arrest and a detention in the context of the ICCPR. (See ns. 465 and 585.)

[592] Note that one could argue that this reasoning contravenes the idea of the maxim *male captus bene detentus*. After all, an unlawful arrest (*male captus*) does *not* automatically lead to an unlawful detention (*male detentus*). Two remarks should be made here. First, the above-mentioned definition of *male captus bene detentus* is much more literal than the one followed in this study. Arguably the 'real' meaning behind *male captus bene detentus* is that a judge can exercise jurisdiction over a suspect (*bene detentus*), even if that suspect was irregularly brought within the jurisdiction of the now prosecuting court (*male captus*). Hence, the *captus* can encompass in fact any pre-trial irregularity and is not limited to the arrest; it can also include an unlawful detention. (See also Subsection 1.1 of this chapter.) Thus, the remark that an unlawful arrest should automatically lead to an unlawful detention is not in any way denying the existence of the maxim *male captus bene detentus* for in some jurisdictions, a pre-trial irregularity (whether it is an unlawful arrest or detention) does indeed not lead to a refusal to exercise jurisdiction. Secondly, even if the person is released, one can wonder whether this is actually the same as the counterpart of *male captus bene detentus*: *ex iniuria ius non oritur* (or *male captus male detentus*). This important point will be further addressed in Subsection 4.4.

[593] See also ECtHR (Plenary), *Case of Brogan and Others v. the United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, 'Judgment', 29 November 1988, para. 65 (writing on Art. 5, para. 4 of the ECHR): "By virtue of paragraph 4 of Article 5 (art. 5-4), arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty."

[594] *Cf.* also ECtHR (Plenary), *Case of Van Droogenbroeck v. Belgium*, Application No. 7906/77, 'Judgment', 24 June 1982, para. 48: "[F]or the purposes of Article 5 par. 4 (art. 5-4), *the "lawfulness" of an "arrest* or detention" *has to be determined* in the light not only of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 par. 1 (art. 5-1) (…) [emphasis added, ChP]". See also ECtHR (Plenary), *Case of Brogan and Others v. the United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, 'Judgment',

It is hereby also submitted that the words arrest and detention should have extraterritorial effect, an interpretation which, as was shown earlier in *Celiberti de Casariego v. Uruguay* and *Sergio Ruben Lopez Burgos v. Uruguay*, see Subsection 2.2.2, has been supported by the HRC.[595]

A judge should not only release a person who has been unlawfully arrested or detained in his own State but also if the *male captus* occurred abroad. Any other interpretation would lead to the danger of a legal vacuum.[596] Suppose a person is unlawfully arrested or detained in State B by agents of State A (for example by kidnapping) and brought to State A, where he is officially/formally arrested and detained and brought to court. If a judge then finds the arrest and detention of this person to be lawful, he in a way profits from the fact that the deprivation of liberty was fragmented over two systems. The suspect should not become the victim of this fragmentation.

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29 November 1988, para. 65 (writing on Art. 5, para. 4 of the ECHR): "[*W*]*hether an "arrest"* or "detention" *can be regarded as "lawful"* has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (…) [emphasis added, ChP]."

[595] Although the ECtHR (in *Öcalan*) and the ECmHR (in *Stocké*) also held that the ECHR can have extraterritorial effect, the European institutions – it was already explained earlier (see n. 388) – nevertheless seem more focused on the national arrest and detention procedures, hereby providing room for the *male captus bene detentus* principle to flourish, see Trechsel 2005, p. 432 (referring to *Stocké*, *Öcalan* and *Barbie* cases): "Until now, the question whether a deprivation of liberty was 'in accordance with a procedure prescribed by law' was only examined with regard to the law of the Contracting State where the applicant had been deprived of his or her liberty. What if a person is detained in state B after having been apprehended in state A in a way which is not in accordance with the law of that state? In other words, does the Convention support the thesis of *male captus been detentus* (or *judicatus*)? It would seem that it does [original footnote omitted, ChP]."

[596] Nevertheless, in *male captus bene detentus* cases, courts which were confronted by a *habeas corpus* claim (see, for instance, the *Scott* and *Elliott* cases, see Subsection 1.1 of Chapter V) have argued that the (arrest and) detention in the State of the now prosecuting court was perfectly legal (and that they did not have to look into the manner as to how the suspect was brought into their jurisdiction). See also generally Kiss (1965, p. 936), commenting on the decision of the Court of State Security in the *Re Argoud* case (see Subsection 2.1 of Chapter V), where the same reasoning was followed, even though Argoud did not file a *habeas corpus* claim (a concept which, it is reminded, stems from the common law context): "La Cour (...) évoque la jurisprudence en Grande-Bretange où, dit-elle, malgré l'invocation de l'*habeas corpus* les juges décident que la capture à l'étranger d'un citoyen britannique ne les prive pas du droit et de la compétence de le juger, en citant à l'appui l'affaire Elliott de 1949. Cette jurisprudence, affirme la Cour, est encore constamment celle des Etats-Unis où les tribunaux la formulent sous l'adage *male captus, bene detentus*. (...) En définitive, la Cour constate que l'accusé a été trouvé sur le territoire français et mis en état d'arrestation au vu du mandat d'arrêt régulier dont il était l'objet. Cette arrestation sur le territoire français était donc légale et la Cour de sûreté de l'Etat est légalement saisie de la poursuite." See finally Cowling 1992, p. 244 (discussing some older *male captus* cases): "It would (...) appear that in the interests of international relations there is a tendency on the part of courts conveniently to turn a blind eye to blatant irregularities that might have been perpetrated in order to bring a fugitive offender before a criminal court. Arrest is interpreted extremely narrowly to embrace only the final act of the official taking into custody a fugitive once the latter has been returned to the territory of the requesting State (...). What went on before this is considered to be irrelevant [original footnote omitted, ChP]."

It is submitted that the judge should be mainly concerned with the way the *actual*, and not the official/formal deprivation of liberty by the State agents took place.[597]

Furthermore, it must also be clarified that the reviewing judge of paragraph 4 does not need to review every detail of a person's detention.[598]

For example, if the decision-making authority, in its discretion, has decided that the most appropriate place of detention for a certain person is facility A, then it is not up to the reviewing judge to query that discretionary decision.[599]

The "lawfulness" of paragraph 4 is in fact the same as the "lawfulness" of paragraph 1 (whose exact scope was already earlier examined).[600] Hence, the reviewing judge, on the basis of both national and international law (such as the ECHR[601] or the ICCPR)[602] must check the essential[603] points concerning the

[597] It is to be noted that this stance is not a rejection of the *male captus bene detentus* reasoning. As will be explained in Subsection 4.4, a release on the basis of *habeas corpus* does not preclude the re-arrest of a person (and is thus not the same as a *male detentus*: a refusal of jurisdiction).

[598] See ECtHR (Chamber), *Case of Ashingdane v. the United Kingdom*, Application No. 8225/78, 'Judgment', 28 May 1985, para. 52: "Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial control of the legality of all aspects or details of the detention (…)."

[599] See ECtHR (Chamber), *Case of X. v. the United Kingdom*, Application No. 7215/75, 'Judgment', 5 November 1981, para. 58 ("Article 5 par. 4 (art. 5-4) (…) does not embody a right to judicial control of such scope as to empower the court, on all aspects of the case, to substitute its own discretion for that of the decision-making authority.") and ECtHR (Plenary), *Case of Van Droogenbroeck v. Belgium*, Application No. 7906/77, 'Judgment', 24 June 1982, para. 49: "It is true that Article 5 par. 4 (art. 5-4) does not guarantee a right to judicial control of such scope as to empower the court, on all aspects of the case, including questions of pure expediency, to substitute its own discretion for that of the decision-making authority." See finally ECtHR (Chamber), *Case of Ashingdane v. the United Kingdom*, Application No. 8225/78, 'Judgment', 28 May 1985, para. 52: "[I]n his domestic litigation the applicant did not challenge the legal basis for his detention as a person of unsound mind under the 1959 Act or seek his release from the reality of detention: he was claiming an entitlement to accommodation and treatment in the more "appropriate" conditions of a different category of psychiatric hospital, a matter not covered by para. 1 (e) of Article 5 (art. 5-1-e) (…)."

[600] See *ibid*.: "The scheme of Article 5 (art. 5), when read as a whole as it must be, implies that in relation to one and the same deprivation of liberty the notion of "lawfulness" should have the same significance in paragraphs 1 (e) [this was the specific sub-paragraph under discussion in this part of the decision, ChP] and 4 (…)." See also ECtHR (Chamber), *Case of X. v. the United Kingdom*, Application No. 7215/75, 'Judgment', 5 November 1981, para. 57: "Article 5 (art. 5) must be read as a whole and there is no reason to suppose that in relation to one and the same deprivation of liberty the significance of "lawfulness" differs from paragraph 1 (e) (art. 5-1-e) [this was the specific sub-paragraph under discussion in this part of the decision, ChP] to paragraph 4 (art. 5-4)." See finally also ECtHR (Plenary), *Case of Brogan and Others v. the United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, 'Judgment', 29 November 1988, para. 65: "According to the Court's established case-law, the notion of "lawfulness" under paragraph 4 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1) (…)."

[601] See ECtHR (Chamber), *Case of X. v. the United Kingdom*, Application No. 7215/75, 'Judgment', 5 November 1981, para. 57: "Although X had access to a court which ruled that his detention was "lawful" in terms of English law, this cannot of itself be decisive as to whether there was a sufficient review of "lawfulness" for the purposes of Article 5 par. 4 (art. 5-4). In paragraph 1 (e) of Article 5 (art. 5-1-e) as interpreted by the Court (…), the Convention itself makes the "lawfulness" of the kind of deprivation of liberty undergone by X subject to certain requirements over and above conformity with domestic law." See also ECtHR (Plenary), *Case of Van Droogenbroeck v. Belgium*, Application No. 7906/77, 'Judgment', 24 June 1982, para. 48: "[F]or the purposes of Article 5 par. 4 (art. 5-4), the

lawfulness of the deprivation of liberty, namely 1) are there substantive grounds for the deprivation;[604] 2) is the deprivation in accordance with a procedure prescribed by law[605] and 3) is the deprivation non-arbitrary?[606]

"lawfulness" of an "arrest or detention" has to be determined in the light not only of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 par. 1 (art. 5-1) (…)." (See also n. 605.) See finally also ECtHR (Plenary), *Case of Brogan and Others v. the United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, 'Judgment', 29 November 1988, para. 65 (writing on Art. 5, para. 4 of the ECHR): "[W]hether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (…)." (See also n. 604.)

[602] See Nowak 2005, p. 236: "In a number of decisions, the [ICCPR's Human Rights] Committee has found a violation of Art. 9(4): "Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of a detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1 [original footnote omitted, ChP]."

[603] For example, a small technical error in the arrest warrant will not lead to an unlawful arrest. *Cf.* in that respect also the *Brima* case before the SCSL, where Judge Itoe clarified that "having been taken into custody, a mere technical flaw in the warrant of arrest neither renders the said arrest nor the detention based on that arrest, illegal." (SCSL, Trial Chamber, *The Prosecutor against Tamba Alex Brima*, 'Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant', Case No. SCSL-03-06-PT, 22 July 2003, p. 14.) *Cf.* also Van der Kruijs (in his practical book on pre-trial detention in the Netherlands), who explains that detention is not often labelled as unlawful in the first place: "The investigating/examining judge (*rechter-commissaris*) does not often feel inclined to qualify the detention as unlawful. Many irregularities are deemed to be too minor to meet that qualification. The criterion appears to be that one must have acted flagrantly in violation of (the meaning of) the law [own translation, ChP]." (Van der Kruijs 2004, p. 8.) Although one can understand that small technical flaws should not lead to the qualification 'unlawful arrest/detention', the test that one must have acted flagrantly in violation of (the meaning of) the law appears to be too strict. In fact, one can argue that if the prosecuting authorities have acted flagrantly in violation of (the meaning of) the law, the judge should not only qualify the detention as unlawful (leading to a mere release which does not preclude an immediate new arrest, see Subsection 4.4); it must in fact dismiss the case, leading to the real ending of the case. If the investigating/examining judge has no such power (the power to dismiss a case may be reserved for proper courts), then he should arguably advise the court to dismiss the case. See also n. 617.

[604] It is not very clear whether Knoops (2003, p. 217) is of the opinion that only this point should be examined by the reviewing judge when he states: "In the view of the European Court, Article 5, paragraph 4, only requires a review of the essential grounds of a detention."

[605] After the quotation of the *Van Droogenbroeck* case in n. 601, the ECtHR refers to para. 57 of the case *X. v. the United Kingdom*, to be read in conjunction with paras. 39 and 45 of the *Winterwerp* case. These paragraphs show 1) the already explained point that the word "lawfulness" in Art. 5, para. 4 of the ECHR is the same as the one in Art. 5, para. 1 of the ECHR (see the quotation in para. 57 of the case *X. v. the United Kingdom* as presented in n. 600 and 2) that "lawfulness" in Art. 5, para. 1 of the ECHR (and thus also the word "lawfulness" in Art. 5, para. 4 of the ECHR) includes both substantive and procedural lawfulness and non-arbitrariness: "The next issue to be examined is the "lawfulness" of the detention for the purposes of Article 5 para. 1 (e) (art. 5-1-e). [In this part of the decision, Art. 5, para. 1 (e) of the ECHR was being examined, ChP.] Such "lawfulness" presupposes conformity with the domestic law in the first place and also (…) conformity with the purpose of the restrictions permitted by Article 5 para. 1 (e) (art. 5-1-e); it is required in respect of both the ordering and the execution of the measures involving deprivation of liberty (…). As regards the conformity with the domestic law, the Court points out that the term "lawful" covers procedural as well as substantive rules. There thus exists a certain overlapping between this term and the general requirement stated at the beginning of Article 5 para. 1 (art. 5-1), namely observance of "a procedure prescribed by law" (…). Indeed, these two

For example, "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal",[607] which will thus lead to a release.[608]

4.3 Abuse of process

The exact contours of this concept, which originated from the common law context and which can also – *cf.* the concept of rule of law – be seen as a sort of residual category,[609] will be discussed in the following chapters. However, for now, it suffices to mention the often-used definition of Lord Lowry in the English *Bennett* case:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2)

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expressions reflect the importance of the aim underlying Article 5 para. 1 (art. 5-1) (…): in a democratic society subscribing to the rule of law (…), no detention that is arbitrary can ever be regarded as "lawful". The Commission likewise stresses that there must be no element of arbitrariness (…). The Court for its part considers that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary." (ECtHR (Chamber), *Case of Winterwerp v. The Netherlands*, Application No. 6301/73, 'Judgment', 24 October 1979, paras. 39 and 45.) See also ECtHR (Plenary), *Case of Brogan and Others v. the United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, 'Judgment', 29 November 1988, para. 65 (writing on Art. 5, para. 4 of the ECHR): "By virtue of paragraph 4 of Article 5 (art. 5-4), arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty."

[606] See the quotation of the *Winterwerp* case in the previous footnote. That the prohibition of arbitrariness falls under the concept of the lawfulness in the context of the ECHR (which does not contain an explicit reference to non-arbitrariness) was already established. At first sight, this may be different for the ICCPR which contains an explicit prohibition of non-arbitrariness. It could be asserted, now that paras. 4 and 5 of Art. 9 of the ICCPR only refer to "lawfulness", that a court does not need to release or compensate a person who has been the victim of an arbitrary (but lawful) arrest and detention. However, that view, of course, would contradict the whole purpose of Art. 9 of the ICCPR which is to fight not only unlawful, but also arbitrary arrests and detentions. Thus, the word "lawfulness" in paras. 4 and 5 of Art. 9 of the ICCPR arguably also includes non-arbitrariness. In the words of Nowak (writing on para. 5): "Arrest or detention is unlawful when it contradicts one of the provisions in Art. 9(1) [which encompasses the prohibition of arbitrariness, ChP] to (4) and/or a provision of domestic law. (…) [A]n arrest may be consistent with domestic laws but nevertheless *unlawful under international law*, regardless of whether this is arbitrary or in violation of the procedural guarantees in paras. 2 to 4 [emphasis in original and original footnote omitted, ChP]." (Nowak 2005, p. 238.) Hence, if a person is 'merely' arbitrarily arrested or detained, he can also seek his release or claim compensation under the ICCPR.

[607] Swart 2001, p. 204 (writing on both Art. 9, para. 4 of the ICCPR and Art. 5, para. 4 of the ECHR).

[608] See *ibid*.

[609] See also Van Sliedregt 2001 B, p. 78, connecting the concepts of rule of law and abuse of process.

> because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[610]

Hence, the – discretionary – abuse of process doctrine can be used by judges to stop the proceedings because continuing with the case would amount to an abuse of the judges' own process. That would be the case in two situations, namely 1) where the suspect can no longer receive a fair trial (in the strict sense of the word) or 2) where a fair trial (in the strict sense) would be possible, but where the judges are nevertheless of the opinion that to continue the case, considering certain circumstances, would offend the court's sense of justice and propriety/the concept of a fair trial more broadly perceived. Thus, in the latter situation, the situation on which this book will focus (as one can argue that a *male captus* will normally not jeopardise the fairness of the trial in the courtroom), some pre-trial irregularities, which may have violated any concept addressed in this chapter (State sovereignty/human rights/due process/the rule of law more generally), may have occurred which are deemed so serious that the judges cannot proceed with the case, even if the suspect can still receive a fair trial in court. In short, in such cases, the judges do not refuse jurisdiction because the suspect would be unfairly tried, but because it would be unfair to try the suspect in the first place.

4.4 The final outcome: *bene detentus* or *male detentus* (or something in between)?

Whether a *male captus* leads to either a *bene detentus* or a *male detentus* (or to something in between) depends on many aspects which cannot be addressed in one short subsection. The following chapters of this book will examine all the different observations from judges confronted by a *male captus* to find out the circumstances that made them choose *bene detentus*, *male detentus*, or something in between.

For now, it suffices to clarify the relationship between the different *male detentus*-like consequences which have been reviewed in this chapter (release (violation of the right to liberty and security), return (violation of State sovereignty) and a stay of the proceedings as a result of the abuse of process doctrine (violation of the rule of law)) and the real *male detentus* outcome, which means that, because of a serious *male captus*, a court lacks jurisdiction to try the case. It can be argued that the *male detentus* outcome entails the final ending of the case before the court in question (in that the Prosecutor cannot restart the case in the future). After all, it would be very strange if the judge would first decide, because of the serious *male captus* involved, that jurisdiction must be refused but that, after the suspect is released from custody, the case can be restarted anew.

Now, a release pursuant to Article 9, paragraph 4 of the ICCPR or Article 5, paragraph 4 of the ECHR may have a *male detentus* 'look' – this is also because a *male detentus* will always lead to a release because, of course, one cannot continue

[610] House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.

to detain a suspect if one has decided that jurisdiction cannot be exercised in the suspect's case – but such a release does not preclude a new arrest on the spot and a new exercise of jurisdiction by the court. This is because the provisions simply speak of a release (as such) and not of, for example, a release/dismissal of the case with prejudice to the Prosecutor (meaning that the Prosecutor is barred from starting a new trial against the suspect after the latter's release).[611]

A *male detentus*, however, *will* definitely lead to the ending of the case because the judge is of the opinion that jurisdiction in this case cannot be exercised (a statement which, it must be repeated, would become meaningless if the person were immediately re-arrested and brought to trial anew).[612] However, it is also true that

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[611] See, for example, the following discussion of the Prosecution in the still-to-discuss (see Subsection 3.2.2 of Chapter VI) *Semanza* case before the ICTR on this remedy: "In the Barayagwiza Decision, the Appeals Chamber cited Article 9 of the International Covenant on Civil and Political Rights (ICCPR) as a source of established international law. That article provides for three remedies: release, release with guarantees [for the remedy 'release with guarantees', see Article 9, para. 3 of the ICCPR: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but *release may be subject to guarantees to appear for trial*, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement [emphasis added, ChP].", ChP], and compensation, as the remedies available if a person is not tried within a reasonable time or if the detention is not lawful. Nowhere in the ICCPR is dismissal with prejudice mentioned as a remedy. (...) In the Barayagwiza Decision, the Appeals Chamber also cited Article 5 of the European Convention on Human Rights (ECHR), being a regional treaty, as a source of persuasive authority. The article provides for the same three remedies: release, release with guarantees, and compensation, as the remedies available if a person is not tried within a reasonable time or if the detention is not lawful. Nowhere in that convention is dismissal with prejudice mentioned as a remedy. (...) The Chamber also cited Article 7 of the American Convention on Human Rights (ACHR) in the Barayagwiza Decision. Paragraph 5 of that article provides for release and release with guarantees as the remedies available to a person who is not tried within a reasonable time. Paragraph 5 ["Any person detained shall be brought promptly before the judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.", ChP] *specifically negates dismissal with prejudice as a remedy*. Paragraph 6 provides that release is the remedy for unlawful arrest or detention. Nowhere in that convention is dismissal with prejudice provided as a remedy. (...) As can be seen from the above, dismissal with prejudice is not provided for, in fact is not even mentioned, in major sources of international law cited by the Chamber. Dismissal with prejudice is even *specifically prohibited* by the American Convention on Human Rights [emphasis in original, ChP]." (TPIR, Chambre d'Appel, *Le Procureur contre Laurent Semanza*, 'Réponse du Procureur au Mémoire Préalable [à] l'Appui de l'Acte d'Appel du 12 Octobre 1999 contre l'Ordonnance du 6 Octobre 1999 de la Chambre de Premi[è]re Instance III Relative [à] la Requête de la Défense en Annulation de la Procédure d'Arrestation et de Détention de Laurent Semanza pour Cause d'Illégalité', Affaire No. ICTR-97-20-I, 21 janvier 2000, pp. 22-25, 214*bis* – 211*bis*. (Section D ("Choice of Remedy") of this French response was written in English due to the short time available to the Prosecution, see also *ibid*., p. 19, 217*bis*.))

[612] *Cf*. for this difference also Zappalà 2003, pp. 71-72 (writing on the still-to-discuss ICTY cases of *Dokmanović*, *Todorović* and *Nikolić*): "Does *a violation of the rights of the defendant at the stage of arrest* imply that the Tribunals forfeit their jurisdiction? (...) In all instances the defendants sought the dismissal of their cases on the grounds that their rights had been violated. Their submissions were incorrect and inappropriate for two main reasons. First, none of those alleged violations was really imputable to the Tribunal, unless one proved that the order of the Tribunal implied the need to resort to unlawful methods. Secondly, from a procedural viewpoint, *the accused was at most entitled to release*

both consequences are related. Not only the above-mentioned fact that a *male detentus* decision will always lead to a release plays a role in that respect, but one can also assume that a judge may very well state that he will refuse jurisdiction (*male detentus*) because a serious[613] *male captus* has occurred and that that *male captus* may consist of a serious violation of the above-mentioned human rights provisions. Hence, although the release of Article 9, paragraph 4 of the ICCPR or Article 5, paragraph 4 of the ECHR does not preclude a re-arrest, a serious violation of these human rights provisions may nevertheless lead to a *male detentus* result, not because these provisions say so but because the judge may decide so in his discretion in finding the most appropriate remedy.[614]

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and/or, where applicable exclusion of the evidence collected in violation of fundamental rights; instead, he had *no right to dismissal of the proceedings* [emphasis added and original footnote omitted, ChP]."

[613] Here, the intent may also play a role, see Swart 2001, p. 206: "Dismissal of criminal cases as a result of official misconduct is a remedy accepted by the courts of many States. There is, of course, considerable variation in the way national legal systems make use of that remedy. Among other things, the choice will depend on the availability of other effective remedies for correcting the wrongs done to the accused. Usually, a relevant consideration is also whether unlawful conduct on the part of law officers shows an intent to prejudice the rights of the accused or instead constituted negligence."

[614] See also *ibid*: "To date, international human rights conventions and the subsequent case law of international bodies have had surprisingly little to say about the dismissal of criminal cases as a remedy for the violation of human rights. Meanwhile, both Article 9 of the ICCPR and Article 5 ECHR make it imperative that a person be released if his detention was unlawful. I take it for granted that, in the case of more serious violations of these Articles, the nature of this particular remedy rules out any possibility of re-arresting the suspect or the accused." In that respect, one cannot agree with Zappalà (see n. 612) that the submissions of the three ICTY suspects were incorrect and inappropriate. A judge may very well agree with the suspect filing the submission that the latter, if his right to liberty and security has been seriously violated (irrespective of who was responsible for these violations), should not only be released; the judge may also be of the opinion that jurisdiction in that case should be refused, thus leading to the real ending of the case. *Cf.* also Rayfuse 1993, p. 882, who argues that certain (serious) violations of these human rights must lead to a *male detentus* outcome (even though these human rights do not mention this outcome): "It will be argued that State-sponsored abductions are a violation of the internationally recognised fundamental human rights to liberty and security of the person and freedom from arbitrary arrest and detention and that courts lack jurisdiction to try defendants who are brought before them in violation of these rights." Rayfuse founds her arguments on an analogy to the "poison fruit" doctrine, see *ibid*., pp. 894*ff*. Although the word used is rather neutral ("liberate"), it appears that Frowein would also be of the opinion that an abduction would have to lead to a *male detentus* outcome, see Frowein 1997, p. 294: "There is no doubt that the abduction of a person from foreign territory by state organs is a violation of the right to personal liberty, since only the organs of that foreign state can lawfully deprive the person of his or her liberty. As soon as national courts are willing to enforce these rules of international law by reaching the only possible conclusion, namely to liberate the person, the practice of state-organized abduction will become less attractive." Note finally that Zappalà (2003, p. 72) also admits that refusal of jurisdiction may be appropriate, but only in the specific situation where the problem has become structural: "Of course, the problem would be far more serious if one could prove a consistent pattern of violations of the rights of individuals by State or international authorities performing arrests at the request of *ad hoc* Tribunals. In this case it could be argued that the Tribunals should react vigorously, for example by adopting a specific rule providing for the quashing of proceedings based on arrests inconsistent with individual rights [original footnotes omitted, ChP]."

It can be argued that the remedy of release pursuant to paragraph 4 of Articles 9 of the ICCPR and 5 of the ECHR is not without its problems; if a person has been the victim of an unlawful arrest/detention (but not one which is so serious that it leads to the ending of the case), he must, strictly speaking, be released. However, as explained, that does not preclude re-arrest on the spot and being brought to trial.[615] (This will especially be the case if the suspect is charged with serious crimes and prosecution is considered to be of utmost importance.) In such a case, the prosecuting authorities could assert that this 'remedy' (the 'release') has repaired the initial *iniuria* of the irregularity and that the trial can continue as normal. However, in that case, the suspect would only be granted a *pro forma* remedy which

[615] *Cf.* also the following words from Lord Lowry in the still-to-discuss *Bennett* case, seemingly writing about a 'normal' unlawful arrest: "A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 164.) This may be different when the judge in question does not only decide that the suspect, because of the human rights violations, has to be released, but also that he suspect must be permitted to leave the prosecuting State. In cases where the suspect is not charged with serious crimes or in cases where one can wonder whether there should have been a trial in the first place, this release will then constitute a *de facto male detentus* outcome, for one can imagine that this release will be the ending of the case, see, for example, the cases of *Celiberti de Casariego* and *Lopez Burgos* before the HRC, where the Committee stated that Uruguay, among other things, had to release Celiberti de Casariego and Lopez Burgos and to permit her/him to leave Uruguay.

does not comport with the idea that a remedy must be real and effective, see also Article 2, paragraph 3 (a) of the ICCPR and Article 13 of the ECHR.[616]

In addition, the *pro forma* release does not take account of the exact seriousness of the irregularity. In other words: it is not only a *pro forma* remedy but also an over-simplified remedy.

It would arguably be better if a judge would therefore avoid this problematic remedy of release and would, if he determines that a person's arrest/detention is unlawful, simply grant the most appropriate remedy which takes into account all the specifics of the case, not only the seriousness of the *male captus*, but also the

[616] See also the still-to-discuss (see Subsection 3.2.1 of Chapter VI) *Barayagwiza* case where the ICTR judges held: "[T]o order the release of the Appellant without prejudice – particularly in light of what we are certain would be his immediate re-arrest – could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention (...) on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 110.) *Cf.* also the following discussion in the still-to-discuss (see Subsection 3.1 of Chapter V) *Sinclair* case. In this case, the Lord Justice-Clerk (Lord MacDonald) argued: "I fail to see what benefit the complainer could obtain by being liberated. There is nothing to prevent him from being re-apprehended at once." (High Court of Justiciary, *Sinclair* v. *Her Majesty's Advocate and Another*, 20 March 1890, 17 *R. (Just. Cas.)* 42, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 8.) Lord Adam, however, replied: "I cannot say that I agree with your Lordship in thinking that the suspender would be no better if we granted this suspension. The same reasons which would have moved us to that course might be sufficient to prevent his re-apprehension, and so enable him to get off altogether. I think he would be entitled to have sufficient time allowed him to return to the place from which he had been illegally brought." (*Ibid*., p. 9.) Such a release and permission to leave the forum State is reminiscent of the HRC's position in the cases of *Celiberti de Casariego* and *Lopez Burgos* (see the previous footnote). (Note that Lord Adam, however, does not preclude that the suspect might be re-arrested if he stays in the forum State: "After a certain time, no doubt, he would be held to be staying here of his own free will, and so liable to be apprehended." (*Ibid*., p. 9.)) The third and final lord, Lord M'Laren argued: "I may say further that, as the Lord Advocate might have the suspender immediately re-apprehended, I should on this ground also be indisposed to sustain this bill, because the liberation obtained under it would not be effective. If the suspender were liberated now he would be in the same position as that of an accused person under an indictment that had been found irrelevant, or which had been deserted *pro loco et tempore*." (*Ibid*., p. 10.)

seriousness of the suspect's alleged crimes and the importance of having the case continued.[617] If one follows that route, then one can still satisfy the common sense

[617] *Cf.* in that respect the remarks of Groenhuijsen and Knigge 2004, writing more generally on the legal consequences of illegalities in the Dutch criminal investigation (in the context of their research project Criminal Procedure 2001). They state (at pp. 153-155 [the following is a(n unofficial) translation of the most important points from the original Dutch text, ChP]) that already because of the divergent aims of connecting consequences to the observation that certain rules have been violated (such as reparation, prevention and compensation), it is not obvious to create, in the law, an abstract balancing of interests and to apply fixed sanctions to the non-compliance of certain formal requirements. Moreover, there will also be several circumstances of the individual case which should play a role in determining the most appropriate reaction to such non-compliance. Groenhuijsen and Knigge then turn to the study written by Baaijens-van Geloven (see Baaijens-van Geloven 2004, p. 341*ff*) and note that it considered, among other things, the following factors to be of importance: - the nature of the formal requirement, the interest served by the requirement, the suspect's concrete defence interest, the nature and seriousness of the violation (which is determined by, among other things, the length and degree by which the principles of proper procedure have been infringed), the seriousness of the criminal offence (which is of importance in view of assessing the proportionality and subsidiarity of the investigative acts), the extent to which the investigative agency in question can be reproached (did one act intentionally or with gross negligence of official duty or did one act *bona fides*) and the causal connection between the unlawful act and the result of investigation. [The last factor specifically dealt with 'tainted' evidence and will hence not be mentioned here. Before returning to the words of Groenhuijsen and Knigge, it must be noted that they mention the factor 'seriousness of the criminal offence' here in the context of assessing the proportionality and subsidiarity of the investigative acts. However, that has to do with the question as to whether, in view of the seriousness of the alleged crimes, the investigative acts can be seen as lawful. That is, of course, a very important point (some far-going investigative acts can only be lawfully applied to suspects of serious crimes), but not the point in which this study is interested, namely whether one can take into account the seriousness of the alleged crimes when determining the consequences of (established) *unlawful* conduct. However, it can be argued that Groenhuijsen and Knigge take the seriousness of the alleged crimes also into account in the context of that second question. This can not only be deduced from the study by Baaijens-van Geloven, which mentions (see Baaijens-van Geloven 2004, pp. 358-359, see also n. 160 of Chapter VII) the factor in the context of both questions (when determining the consequences of established unlawful conduct and when determining whether the investigative acts can be seen as proportional/subsidiary/lawful), and to which Groenhuijsen and Knigge refer, but also from the remainder of their text, see the italicised words *infra*, ChP.] On the basis of these factors, it is to be assumed that the judge needs to determine, on a case-by-case-basis, the most appropriate sanction for an established illegality. However, Groenhuijsen and Knigge continue, this balancing of applicable interests must then be legally 'pre-structured'. In the system of the Dutch Code of Criminal Procedure, the judge needs to have a tool which ensures that the outcome of a concrete case is both predictable and understandable. According to Groenhuijsen and Knigge, this tool is included, in particular, in the so-called decision-scheme of Artt. 348 and 350 of the Dutch Code of Criminal Procedure. [For those proficient in Dutch, these articles read: "De rechtbank onderzoekt op den grondslag der telastlegging en naar aanleiding van het onderzoek op de terechtzitting de geldigheid der dagvaarding, hare bevoegdheid tot kennisneming van het telastegelegde feit en de ontvankelijkheid van den officier van justitie en of er redenen zijn voor schorsing der vervolging." (Art. 348.) "Indien het onderzoek in artikel 348 bedoeld, niet leidt tot toepassing van artikel 349, eerste lid [This provision reads (again in Dutch): "Indien het onderzoek in het voorgaande artikel bedoeld, daartoe aanleiding geeft, spreekt de rechtbank uit de nietigheid der dagvaarding, hare onbevoegdheid, de niet-ontvankelijkheid van den officier van justitie of de schorsing der vervolging." ChP.], beraadslaagt de rechtbank op den grondslag der telastlegging en naar aanleiding van het onderzoek op de terechtzitting over de vraag of bewezen is dat het feit door den verdachte is begaan, en, zoo ja, welk strafbaar feit het bewezen verklaarde volgens de wet oplevert; indien wordt aangenomen dat het feit bewezen en strafbaar is, dan beraadslaagt de rechtbank over de strafbaarheid van den verdachte en over de oplegging van straf of maatregel, bij de wet bepaald." (Art. 350.), ChP.] This leads to the following points of departure. The

idea behind the immediate re-arrest mentioned above, namely that suspects of serious crimes must be prosecuted if possible – although a *male detentus* must, of course, also not be excluded for these suspects – but one will also avoid the strange *pro forma* release and immediate re-arrest and replace it with *real* remedies, such as a reduction of the sentence and/or compensation. The judge can then take the exact seriousness of the irregularity into account – including, perhaps, the fact that it was

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inadmissibility of the Prosecution is especially then the appropriate answer when the non-compliance entails that one can no longer speak of a fair trial. Groenhuijsen and Knigge are of the opinion that the question is not whether the *non-compliance* seriously violates the principles of proper procedure but whether *initiating or continuing a prosecution* in spite of such non-compliance would violate fundamental principles of law. In this context, a suspect's right to a fair trial and the principle of fair balancing emerge as central criteria. [Groenhuijsen and Knigge then turn to the sanction of exclusion of evidence, but this is less interesting for the present study, ChP.] Another possibility is a reduction of the sentence, which can be seen as a sort of residual sanction and which can be applied if the rights of the suspect have been violated by illegality, but not to such an extent that one needs to resort to the inadmissibility of the Prosecution. This can, for example, be the case because the investigating authorities have acted *bona fides*, *or because the non-compliance of the legal requirements or the violation of the principles of proper procedure are of minor gravity in view of the criminal offence*. [See the argument made *supra* that Groenhuijsen and Knigge also take the seriousness of the alleged crimes into account when determining the consequences of unlawful conduct, ChP.] Finally, one must let in the possibility of connecting no concrete legal consequence whatsoever to a legal error in the pre-trial phase. Such a declaratory statement is not without importance, but as it does not bring about redress or reparation, the judge should acknowledge this option with some restraint. It must be clarified that the above-mentioned information from Groenhuijsen and Knigge, which applies to Dutch courts, will, in principle, not be used in the context of arrest (*aanhouding*) and police custody (*inverzekeringstelling*) as in the Netherlands, it is not the court, but the examining/investigating judge (*rechter-commissaris*) who is supervising the legality of those means of coercion. (See Baaijens-van Geloven 2004, p. 347. See also the critical remarks of Franken 2004, pp. 18-19 on this point.) The examining judge, if he is of the opinion that a person's detention is unlawful, can only release the suspect. (*Cf.* Art. 9, para. 4 of the ICCPR and Art. 5, para. 4 of the ECHR.) Nevertheless, as already stated, such a release does not preclude an immediate new arrest. It is submitted that if that happens, if the examining judge releases a suspect and that suspect is immediately re-arrested, or if the examining judge, after such an order for release has been ordered, nevertheless decides to continue to detain the suspect on the basis of another request from the Prosecution, for example, because of the seriousness of the alleged crimes, the court in the end trying the case should take into account the findings of the examining judge on the unlawful arrest/detention (which may include international, cross-border elements) and should grant an appropriate remedy. If the court would not do so, then irregularities are arguably not properly remedied. *Cf.* in that respect the following words (again unfortunately only in Dutch) from a rather recent (and purely domestic) case before the District Court of Rotterdam: "Gelet op het voorgaande en het feit dat de verdachte in laatstgenoemde belangen wel degelijk is geschaad dient de inverzekeringstelling onrechtmatig te worden geoordeeld en dient de verdachte (in formeel juridische zin) onmiddellijk in vrijheid te worden gesteld. Gezien het feit dat thans echter ook een vordering tot inbewaringstelling voorligt, de ernst van de in die vordering omschreven strafbare feiten, alsmede de daarin door de officier van justitie opgevoerde (onderzoeks)gronden wordt feitelijk van de invrijheidstelling van de verdachte afgezien en wordt overgegaan tot de (rauwelijkse) inbewaringstelling van de verdachte. Met vooromschreven gang van zaken wordt in strikt juridische zin door de volgens vaste jurisprudentie daartoe bij uitstek geschikt geachte functionaris, de rechter-commissaris, het juiste en enig mogelijke rechtsgevolg, de onmiddellijke invrijheidstelling, verbonden aan een verzuim dat kleeft aan een bevel tot toepassing van een vrijheidsbenemend dwangmiddel. Hierdoor ontstaat echter ook de op zichzelf genomen onwenselijke situatie dat het verzuim (thans) de facto zonder enig rechtsgevolg blijft." (District Court of Rotterdam, Section Criminal Law, 1 June 2007, LJN: BA6232, Rechtbank Rotterdam, 10/610093-07.)

perpetrated by private individuals (see the final words of Subsection 3.2.1) – in determining how much the sentence should be reduced or how much compensation one should accord the suspect. Such a solution would arguably be fairer to the suspect and more capable of putting flexibility into the system.

Furthermore, this solution also avoids the (justified) criticism one may expect from various actors if a suspect of serious crimes is released for an irregularity which is not so serious as to lead to the ending of the case (in such serious cases, the public must understand that the court has no option but to refuse jurisdiction and to release (but now in a 'real' way) the suspect), but which nevertheless ensures that the detention must be qualified as unlawful[618] and that, strictly speaking, the suspect must be released. Even if that suspect, given his alleged serious crimes, will probably be re-arrested on the spot, one can assume that the public/the international community/the victims will not grasp how, for example, a suspect of genocide can be released because he has not been promptly informed of the reasons for his arrest, especially if that person is *not* re-arrested and flees.[619]

As will be shown in the remainder of this book, these important points will often recur.

Returning to the second consequence (return in the case of a violation of State sovereignty) and its relationship with the *male detentus* outcome, a judge may order the return of the suspect to his State of residence if that State has protested the abduction[620] executed by agents of the forum State and has demanded the suspect's return and if the Executive of the forum State has not yet returned the person itself. This will normally lead to the ending of the case before that court of the forum State as one can imagine that the State which was injured by the abduction, the State of residence, will not readily cooperate with the forum State, the State which abducted the suspect without consent from the territory of the State of residence, in a new handover.[621] In addition, it may also be the case that extradition is not possible (this may have been the reason why the forum State had resorted to abduction in the first place). And even if that State had nevertheless been capable of handing the suspect over, had forgiven the forum State's actions and had transferred the suspect back to the forum State, the judges in the latter State may still be of the opinion that the

[618] Swart, for example, explains that "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal." (Swart 2001, p. 204.)

[619] Note that this does not mean, however, that such a suspect cannot be released in certain cases (besides the situation that he is released because the judge is of the opinion that the case must be stopped). If a judge reviewing a suspect's detention feels that the suspect will appear at trial, there is no longer a need to hold him in detention while awaiting trial. In such a case, the suspect can, of course, be provisionally released pending trial, with or without conditions.

[620] As explained, a judge may, of course, also order the return of the suspect who has been the victim of a luring operation, but one can imagine that judges will do so less often than in the case of an abduction as the violation of international law in the latter case can be seen as more serious than in the case of a luring operation (if there was a violation of State sovereignty at all).

[621] Nevertheless, it can, of course, be tried, see also Rayfuse 1993, p. 896 (writing on an individual whose presence has been secured in violation of international law): "Principle therefore suggests that the individual must be returned to the place from whence he came and from whence his presence before the courts of the "abducting" State can be sought by legal means."

return of the suspect to his State of residence may have healed the wrong against the State of residence, but not the violations of the suspect's human rights and the due process requirements, and that as a result of that, they must again refuse jurisdiction.

With respect to the third consequence: although the words stay/discontinue (the proceedings) strictly speaking may not mean a final end to the case, one can assume, if a court decides, for example, to stay the proceedings because of a serious *male captus*, for instance, a violent abduction executed by authorities from the forum State, that that stay is normally final and *does* mean the absolute ending of the case.[622] This may, however, be different with respect to other irregularities which are more easily reparable. In those cases, the stay of the proceedings can be conditional and may be lifted.[623]

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[622] See, for example, the following words from the still-to-discuss (see Subsection 1.2 of Chapter V) *Latif* case: "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." (House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996].) If the judges have established that a fair trial is impossible or that it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place, then a suspect cannot, of course, be tried anew after being released from custody. After all, that would arguably contradict the entire rationale why he was released in the first place. See also these words from the still-to-discuss (see also Subsection 1.2 of Chapter V) *Bennett* case: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.) (See also n. 610 and accompanying text.)

[623] *Cf.* also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"' (Public Document), ICC-01/04-01/06 OA 13, 21 October 2008, para. 75: "It is clear that the Trial Chamber intended to impose a stay that was conditional and therefore potentially only temporary: as set out above, the Trial Chamber imposed the stay of the proceedings because it had come to the conclusion that in the circumstances of the case, where a large number of potentially exculpatory information or information material to the preparation of the defence had neither been disclosed to the accused person nor to the Chamber, there was no prospect of a fair trial. The Trial Chamber acknowledged, however, that circumstances might change, in particular should the information providers alter their position and give their consent to the disclosure of the documents in question. At paragraph 91 of the Impugned Decision, the Trial Chamber underlined that "*on the information before the Chamber*, [there is no prospect] that the present deficiencies will be corrected" (emphasis added). At paragraph 94 of the Impugned Decision, the Trial Chamber referred to its "authority or legal competence" to lift the stay. The Trial Chamber also stated at paragraph 97 of the Impugned Decision that it would address certain other issues that had been pending "if the stay of the proceedings is lifted hereafter". Already at the status conference on 10 June 2008, the Presiding Judge of the Trial Chamber distinguished "a final decision halting the proceedings ... forever" from "imposing a stay ... which doesn't terminate the proceedings once and for all but which recognises [that] at present it is not possible for there to be a fair trial, but in due course, depending on changed circumstances, it may be possible for there to be a fair trial" (ICC-01/04-01/06-T-89-ENG, page 40, lines 8 to 13). Thus, the Trial Chamber envisaged that the stay it imposed may not be irreversible and absolute." Choo (1993, p. 7) writes on the nature of the stay: "A stay typically takes the form of an order that an indictment remain on file with the instruction that it not be proceeded with. A stay is not

A final point which must be stressed in this chapter is that a *male captus male detentus* outcome is indeed the ending of the case before the court of the forum State, but this is not the same as impunity for the suspect as he might be tried before a court in another State which has nothing to do with the *male captus*. Although a transfer to another jurisdiction would heal the problem that the State whose authorities were involved in the *male captus* takes advantage of their wrongdoing, it will probably not be of much help to the suspect, whose only 'remedy' for the *male captus* would be that he is tried by another court. One could therefore argue that in such cases, it would be appropriate if the new trying forum would also take into account the fact that the suspect had earlier been the victim of a *male captus*, even if the authorities of the State of that court had nothing to do with the *male captus*.

technically an acquittal, although for all practical purposes it may have the same effect. The revival of a stayed prosecution, without the leave of the court, is likely itself to be considered an abuse of process and to be stayed accordingly [original footnotes omitted, ChP]."

PART 3

MALE CAPTUS BENE DETENTUS IN PRACTICE

CHAPTER IV
INTRODUCTION

In contrast to the other parts of this book, Part 3 needs a separate introduction to explain in more detail how this part, the biggest part of the book,[1] is to be tackled

[1] Admittedly, the following two chapters contain many cases and the most important ones are very extensively examined, following the original texts of the decisions as often as possible. However, there is a reason for this. Overviews of *male captus* case law by national courts and tribunals are often criticised for being selective/not complete enough or simply incorrect(ly summarised). See in that respect, for example, Sloan (2006, p. 328), criticising the ICTY Appeals Chamber's decision in the *Nikolić* case (which will be discussed in Chapter VI): "It is, of course, perfectly appropriate for the ICTY to turn to national law where there are gaps in international criminal law – a relatively young part of international law – and it has done so many times in the past. But it must be acknowledged that this gap-filling process vests in the ICTY judges a tremendous discretion in deciding what national jurisdictions to consult (it would be impractical to consult the national jurisdictions of each and every state in the world), what the characteristics of national law in the jurisdictions consulted are and which particular aspects of this national law are applicable to the ICTY in view of its many differences from a national system. While this discretion is necessary and desirable, with it must come a duty on the part of the judges to be balanced and comprehensive (or at least relatively so) in their analysis of the national law and clear in their reasoning as to why the law of one national jurisdiction is apposite – and why that of another is not. Unfortunately, in the *Nikolić* decision the Appeals Chamber's treatment of national case law was flawed; it was neither comprehensive – giving the impression of selectivity – nor clearly reasoned, at times relying on cases that are either inappropriate or controversial, and at times failing to cite a source at all [original footnote omitted, ChP]." See also *ibid*., p. 338: "[T]he analysis of the Appeals Chamber regarding the impact on its jurisdiction of the violation of sovereignty and of human rights is inadequate. It leaves the impression of selectivity. Of course, an Appeals Chamber is not in a position to consult every jurisdiction of the world before filling the gaps that exist in international criminal law. But a more thoroughgoing approach is called for, particularly as regards such an important and controversial issue." See further the following comments of Sluiter with respect to the ICTY Trial Chamber's decision in the *Dokmanović* case (which will also be discussed in Chapter VI): "In terms of international law, the *ad hoc* Tribunals are bound by those domestic rules and practices which may be considered general principles of law recognized by civilized nations[.] If the Chamber wishes to establish the existence of such principles with respect to the arrest of indicted persons, it has not succeeded through this comparative legal exercise. The Trial Chamber believed that [s]trong support for a certain view could be derived from national systems. What followed, however, was a very rudimentary and selective analysis of domestic jurisprudence, in which the focus lay with jurisprudence from one particular jurisdiction, that of the United States." (Sluiter 2001, p. 155.) As will also be shown in the following pages, this study is often critical of such overviews as well. Nevertheless, it must also be understood that judges (and their staff) have many cases to decide and do not have as much time as the author of this study has had to delve into this topic. Because the aim of this study is not to criticise but to help judges struggling with the *male captus* problem, it is to be hoped that a very extensive and detailed

methodologically.[2] Part 3 is devoted to the question of how other courts than the ICC have dealt with the dilemmas *male captus* cases can engender. It is submitted that, on the basis of the material presented in this part, one should be able to make a comparative assessment of the ICC's current *male captus* position. However, which courts should be looked at here? As already stated in the first chapter of this study, the two main categories are courts dealing with inter-State cases and international and internationalised (or hybrid) criminal tribunals other than the ICC.

The second category is the least problematic: as their 'stock' of *male captus* cases appears to be limited, an analysis of all the 'real'[3] *male captus* cases from this context will be undertaken. This will be done in Chapter VI.

The first category is a different question, though, as there is a huge amount of case law discernible here. Hence, although it might be regrettable from the point of view of thoroughness, it is necessary from the point of practical feasibility to make a selection.[4] This study has chosen to look mainly at the (adversarial) common law system and the (inquisitorial) romano-germanic or civil law system.[5]

The prime reason for this choice is that the common and civil law systems are not only the main legal families in the world,[6] but they are arguably also (or perhaps *because* of the fact that they are the main legal families in the world?) the two legal

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overview of *male captus* case law from both the inter-State context and the context of the international(ised) criminal tribunals, following the original texts of the decisions as often as possible, may be useful for judges who do not have much time but who are nevertheless in need of more information on the *male captus* discussion. Although this study, of course, cannot guarantee that Chapter VII, which presents the principles distilled from Chapters V and VI, is faultless, it has in any case tried to minimize the risk of making mistakes by addressing many cases (in considerable detail).

[2] See also n. 55 of Chapter I.

[3] That is: the cases where the alleged *male captus* played an important role in the proceedings (whether or not the tribunal in question determined that there was a *male captus*). As will be shown in Chapter VI, however, a number of unlawful arrest/detention claims was withdrawn or immediately rejected and no longer paid attention to, see, for example, ns. 138, 801 and 1286 of that chapter. These cases cannot and thus will not be addressed in the same manner as the 'real' *male captus* cases, although some attention may nevertheless be paid to them.

[4] In the words of Zweigert, Kötz and Weir: "[A]lthough making a selection may be painful, it is unavoidable on practical grounds." (Zweigert, Kötz and Weir 1998, p. 42.) This remark was made in the context of their own field of research, namely comparative law (methodology).

[5] See Zappalà 2003, p. 16 for more information on these two models.

[6] See Raimondo 2008, pp. 179 and 194. See also Zappalà 2003, p. 17: "It is true that there are forms of criminal procedure other than those based on these two models. In this respect it may be admitted that the choice made is not necessarily acceptable. However, the main reasons for this choice are the belief and awareness that these are the most common paradigms in legal science. (…) At present the accusatorial-inquisitorial dichotomy still prevails [original footnote omitted, ChP]." Although this study has principally chosen for these systems, it is aware of the fact that such a categorisation may be viewed to be a little artificial as countries' legal systems nowadays are often a mix of common and civil law. See also Swart 2002 B, pp. 1598-1599: "*Simplifying matters considerably*, one may say that, in the present world, two models of conducting criminal proceedings dominate the international scene: the adversarial model of common-law systems of justice and the inquisitorial model of civil-law systems. (...) [C]ommon-law systems do not form a monolithic block, and the same is even more true for civil-law systems [emphasis added, ChP]." That is also the reason why this study does not want to look at cases which clearly derive from these two systems only; it will also look at interesting cases not clearly falling within one of these systems, see Section 3 of Chapter V.

systems most interesting for the purpose of comparison with the ICC.[7] See in that respect the following words of Schabas:

> The procedural regime of the International Criminal Court is largely a hybrid of two different systems: the adversarial approach of the English common law and the inquisitorial approach of the Napoleonic code and other European legislations of the Romano-Germanic tradition (often described as the 'civil law' system).[8]

The reviews of the common – in particular[9] – and civil law systems will not only look at more recent cases but also at some older ones in the hope of seeing more clearly whether the maxim is developing in a certain direction or not. In addition, attention will be paid to both 'ordinary' suspects and suspects of the more serious

[7] See also Zappalà 2003, p. 17: "[T]hese models have to an overwhelming extent dominated the debates in the relevant international *fora* in which the Statutes and Rules of the Tribunals and the Court were drafted."

[8] Schabas 2004, p. 117. See also Arsanjani 1999, p. 25 ("[T]he provisions dealing with general principles and procedural issues are a hybrid of the common and the civil law.") and Gallant 2003 B, p. 557, n. 16: "[T]he International Criminal Court will use a hybrid of common law and civil law processes". See in that respect also the Appeals Chamber's decision in the *Lubanga Dyilo* case (see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006) where the judges, after having discussed the common law concept of abuse of process, looked at the Romano-Germanic systems of law. Note finally that there are also writers such as Kress who do not believe that the ICC's procedural law is a hybrid of these two legal systems but that the former is a truly unique, *sui generis* system. Nevertheless, even in that case, Kress, in his efforts to grasp the nature of this unique system, still compares the ICC system with the common/adversarial and civil/inquisitorial law systems: "I would suggest that neither common law nor civil law can be seen as the main reference point for establishing the law governing the procedure before the ICC. Moreover, I would also argue that there actually is no other major point of reference outside the law of the ICC. The ICC negotiators neither copied any of the so-called mixed adversarial – inquisitorial systems that one increasingly finds all over the world, nor did they choose to follow the hybrid process that has evolved over time before the ICTY and ICTR. Taken as a whole, the procedural law of the ICC is, thus, not only new but also *truly unique*. (…) Where, then, on the sliding scale between the pure models of adversarial and inquisitorial proceedings can we locate ICC procedural law [emphasis in original and original footnote omitted, ChP]?" (Kress 2003, p. 605.)

[9] See Cassese 1999, p. 168: "Although the common law system has been basically adopted, a number of fundamental elements typical of the civil law approach have been incorporated." See also Stapleton 1999, p. 551. See further Swart 2002 B, p. 1601: "A comparison of the Rome Statute with the Statutes of the *ad hoc* Tribunals reveals that in the Statute, too, there is a mixture of adversarial and inquisitorial elements. Again, the adversarial elements largely prevail, although there is stronger contribution of the inquisitorial tradition, especially where the structure of pre-trial investigations is concerned." See also *ibid*., p. 1604: "[T]he Rome Statute has in common with the Statutes of the *ad hoc* Tribunals that proceedings are predominantly shaped after the example of adversarial systems." See further Zappalà 2002 B, p. 1320: "International criminal law has been deeply influenced by the adversarial system, which is generally considered the most appropriate system in terms of protection of the rights of defendants. The systems of the Nuremberg and Tokyo Tribunals, as well as the UN *ad hoc* Tribunals, essentially hinged on the adversarial model. The ICC model, although some elements of the inquisitorial model are present, is also essentially adversarial." See finally Sluiter 2006 C, p. 616 (and 2007, p. 8). The more practical reason that one will find much more cases and literature in the common law context than in the civil law context on the *male captus* problem has also played a role here.

international crimes such as torture, terrorism, war crimes and crimes against humanity. This will be done in order to see whether judges react differently when confronted by suspects of different 'qualities'.[10] Furthermore, addressing a considerable number of decisions from supreme courts will be attempted as those decisions have *de iure* and *de facto* the most legal authority (although important cases from the *male captus* discussion which were not decided by a supreme court (a good example is the *Toscanino* case) will, of course, also be examined). Moreover, with respect to the different *male captus* situations introduced in Chapter III, an attempt will be made to cover them all. Nevertheless, most attention will hereby be paid to the cases dealing with irregular arrests such as (alleged) kidnappings.

Although Chapter V will focus on cases from the common and civil law systems, it will also look, as a sort of safety net, at cases which do not clearly fall under both legal systems but which are nevertheless often mentioned in the *male captus* discussion (see also footnote 6).

Finally, it should be noted that Chapters V and VI, as well as describing and analysing the *male captus* decisions, will also discuss, where necessary for a better understanding of the problem, reactions from doctrine and from other States regarding these decisions.

After the review of these two categories – the cases from the inter-State context (whether decided by national or international institutions) and the cases from the context of the international and internationalised (or hybrid) criminal tribunals – the final chapter of this part, Chapter VII, will summarise and discuss the principles derived from these overviews.

[10] *Cf.* also Shaw 2003, p. 605: "A final distinction may be drawn as between cases depending upon the type of offences with which the offender is charged, so that the problem of the apprehension interfering with the prosecution may be seen as less crucial in cases where recognised international crimes are alleged [original footnote omitted, ChP]."

CHAPTER V
CASES BETWEEN STATES

1 CASES FROM THE COMMON LAW SYSTEM

1.1 Older cases

In Section 4 of Chapter II, the English case *Ex Parte Susannah Scott*[1] from 1829 was presented to the reader. When the English police officer Ruthven apprehended Scott, who was indicted for perjury, in Brussels, Scott vainly applied to the English Ambassador in that city for assistance. In England, Judge Tenterden of the Court of King's Bench refused her discharge (release), stating:

> The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, *or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.* If the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it [emphasis added, ChP].[2]

Thus, an irregular arrest abroad will not imperil the exercise of jurisdiction in another State for it is not within the power of the judges (see the word "cannot") to examine the circumstances of the apprehension. What one can see here is that the judge does not deny that something irregular may have happened abroad, but that this is not something this judge can look into. Perhaps the person who claims to have been unlawfully arrested can sue the arresting actor[3] and perhaps the State

[1] Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), pp. 446-448; 109 *English Reports* (1829), pp. 166-167.

[2] *Ibid.*, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), p. 448; 109 *English Reports* (1829), p. 167.

[3] A very interesting example of this reasoning can also be found in the following case. Although this decision should not be included in the overview itself because the suspect was not brought from one national jurisdiction to another, the more general (and 'international') quotation of the judge is very illustrative for the present discussion and hence deserves to be mentioned here. In the 1867 case *R. v. Nelson and Brand* (Facts from this case have been taken from Wood Renton 1898, pp. 403*ff.*), Lord

whose laws were breached by the arrest can demand the extradition of the arresting party, but these are separate proceedings with which *this* judge has nothing to do. One could call this the non-inquiry doctrine:[4] the judge will not look at the way in which a person came into the power of the now prosecuting State. The reason for this may be found in the fact that many judges in those days[5] were of the opinion that the judge should only focus on the regularity of the proceedings in the courtroom, hence adhering to an arguably rather restricted version of the concept of fair trial,[6] namely excluding entirely how the suspect came into the jurisdiction of

Chief Justice Sir Alexander Cockburn was asked to instruct the Grand Jury at the Central Criminal Court in London concerning the 1865 Morant Bay Rebellion in Jamaica. In reaction to this revolt, the Governor of Jamaica, John Edward Eyre, proclaimed the whole county in which the rebellion occurred under martial law, with the exception of its capital Kingston. One of the alleged leaders of the uprising was George William Gordon who normally lived just outside Kingston but stayed in the capital during the events. When warrants for his arrest were issued, he went to the house of the Governor in Kingston and gave himself up. After the Governor and the *Custos* (the principal magistrate of Kingston) had apprehended him (in a place where martial law was not declared), Gordon was put on a war steamer and brought to Morant Bay (where martial law was in force). There, by the orders of Colonel Nelson, he was tried before a court martial, presided over by Lieutenant Brand. Gordon was convicted, sentenced to death and hanged. This event and the cruelly way in which the revolt was suppressed aroused public opinion in England, where both Nelson and Brand were indicted for murder. Although Cockburn instructed the Jury to ignore the bill of indictment against Nelson and Brand ("[O]n the grounds that there was no evidence that they had acted from a corrupt and dishonest desire to get rid of an obnoxious individual, that the initiative had been taken by the Governor and the *Custos*, and that the sentence of death passed upon Gordon had received official ratification." (Wood Renton 1898, p. 405)), he sharply criticised the way in which the prosecution of Gordon had been conducted. Nevertheless, in the context of the issue whether a court martial has jurisdiction when the person tried is brought within its jurisdiction in violation of municipal law (see O'Higgins 1961, p. 285), Cockburn said: "Suppose a man were to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not got an extradition treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay his hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him before a magistrate, the magistrate could not refuse to commit him. *If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said, 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him*' [emphasis added, ChP]." (*Ibid*.) That such a remedy may not be very effective became clear in the extradition case of Xavier Auguste Parisot (Queen's Bench Division, *In re Parisot*, 9 March 1889, 5 *T.L.R.* 344-345, *British International Law Cases*, Vol. 5: the individual in international law (continued) aliens: extradition: fugitive offenders (1967), pp. 314-315.). In this case, in which the *Scott* reasoning was upheld with respect to extradition procedures, Baron Huddleston "mentioned a case in which he was counsel many years ago, in which the well-known officers, the Foresters, had illegally arrested criminals in Brussels without any extradition treaty, and they were tried at the Old Bailey, before Mr. Justice Maule, and were loud in their complaints of the illegality of their custody. But the judge said, "No doubt you may have a good action of trespass, and after the end of your 20 years' transportation, to which I propose to sentence you, you may bring your action."" (*Ibid*., 5 *T.L.R*. 344, *British International Law Cases*, Vol. 5: the individual in international law (continued) aliens: extradition: fugitive offenders (1967), p. 314.)

[4] *Cf.* also Sluiter 2003 C, pp. 645-646, Borreli 2004, p. 354 and Birkett 1991, pp. 609-610.

[5] See, however, the still-to-discuss *Jolis* case (from the civil law system).

[6] See also the first traditional rationale of the *male captus bene detentus* rule presented by Michell 1996, p. 392 (the other two will follow in a moment): "First, the rule satisfies domestic due process

the now prosecuting State in the first place.[7] The judges, in their opinion, could not sensibly comment on what happened abroad. As a result, they were also not to look into the violations which allegedly occurred there. They simply had to ensure that suspects of crimes were tried.[8]

On a more normative note: one can understand that judges cannot be experts in the laws of foreign States and thus cannot (and in fact, should not) pronounce on the question whether certain conduct indeed constituted a violation of a foreign law system.[9] However, in such cases, judges could, of course, invoke the help of foreign judges to determine these issues. It would then be up to the now prosecuting judge to decide whether or not certain irregularities abroad (if any) should have an effect on the proceedings in the forum State.[10] Nevertheless, besides this question of foreign law, there is, of course, also the question of international law. One can argue that every judge should know that if a police officer of the forum State arrests a suspect on the territory of another State without that latter State's consent, a violation of international law has occurred. The judge in *Scott* can be criticised for not having looked into the international law violation which seemed[11] to have occurred in his case.[12] (Note, however, that this does not necessarily mean that the

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guarantees. According to this view, a criminal defendant is entitled only to a fair trial, and forcible abduction does not affect the fairness of the trial itself." See also Rayfuse 1993, p. 883.

[7] Nevertheless, this focus does not exclude that the judge will not look at pre-trial irregularities *at all* and that the judge is hence only concerned about what happens in the courtroom. The *Scott* reasoning does not exclude the possibility that a judge may look at pre-trial irregularities in England itself. It only states that a judge will not look at the way a person was brought into the State which is now prosecuting the case: "The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here [namely "into this country", ChP]." (Court of King's Bench, Lord Chief Justice Tenterden, *Ex parte Susannah Scott*, 19 May 1829, 9 *Barnewall & Cresswell's King's Bench Reports* (1829), p. 448; 109 *English Reports* (1829), p. 167.) See also the still-to-discuss (see Subsection 3.2) *Vervuren* case where it was stated that "the approach adopted by the United Kingdom courts in the past was that it was irrelevant how a person arrived on the airport tarmac: all that mattered was, once the person was in the United Kingdom, was he subject to due process, to fair proceedings. All the courts had been concerned about was the propriety of the domestic procedure." (High Court of Justiciary, *HM Advocate v. Vervuren*, 12 April 2002, 2002 *S.L.T.* 558.)

[8] See also the second traditional rationale of the *male captus bene detentus* rule presented by Michell 1996, p. 392 (the first was already mentioned in n. 6): "Second, there is a strong public interest in the prosecution of crime. The rule ensures that alleged offenders are brought to trial."

[9] See also n. 149 and accompanying text.

[10] See also n. 150 and accompanying text.

[11] It may, of course, be the case that there was consent from the Netherlands (which was by that time in charge of the State now known as Belgium, see also n. 46 of Chapter II), with the result, see Chapter III, that there was no violation of international law, but this cannot be derived from the (short) report of this case, see also Morgenstern 1953, p. 273, n. 2.

[12] See also *ibid*., p. 273: "[T]here is a residue of cases in which there has been a seizure of a fugitive by authorized officials of the pursuing state on the territory of the state of refuge in clear violation of one of the most fundamental rules of customary international law. The fact that some courts have in this connexion also refused to consider the manner in which an accused individual was brought before them has sometimes been due to an imperfect appreciation of the implications of the exercise of jurisdiction after an illegal seizure. In the early English case *Ex parte Susannah Scott* the accused had been arrested in Brussels by a British police officer. The alleged illegality of the seizure was raised at the trial. Lord

judge should also refuse jurisdiction and return the suspect to the injured State. As explained in Chapter III, it is assumed that a judge must only return the suspect to the injured State if that latter State protests and requests the return of the suspect (and the Executive does not do what it should do).[13] If there is no protest, the violation of State sovereignty would not hinder the trial. Nevertheless, in that case, the judge can, of course, still refuse jurisdiction on other grounds not related to the violation of State sovereignty, for example on grounds related to due process/human rights considerations.) Perhaps, the judge in *Scott* was of the opinion that matters related to alleged violations of another State's sovereignty had to be resolved at the political level, between the Executives of the two States,[14] or that, now that there did not appear to be any protest from the Netherlands, this issue had become insignificant.[15]

The non-inquiry rule from *Scott* was also upheld (albeit for other reasons) in the next *male captus bene detentus* decision, that of *Ker v. Illinois*, which was decided by the US Supreme Court in 1886.[16]

In this case, a US citizen, Frederick M. Ker, fled to Lima, Peru, after he had been charged in the Criminal Court of Cook County, Illinois, with larceny and embezzlement from a Chicago bank. The following is what Ker argued happened subsequently. After Ker's flight, Governor Hamilton of Illinois made a requisition to

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Tenterden held that the Court could not inquire into the circumstances of the arrest. It is significant, however, that the learned Judge seems to have thought only in terms of a violation of Belgian law, not of international law [original footnotes omitted, ChP]." Note again that in 1829, the State of Belgium did not exist yet (but was part of the Netherlands).

[13] See ns. 560-561 and accompanying text of Chapter III.

[14] See also the third and last traditional rationale of the *male captus bene detentus* rule presented by Michell 1996, p. 392 (the first two were already mentioned in ns. 6 and 8, respectively): "Finally, the judiciary traditionally has held the view that courts are not the appropriate forum to adjudicate alleged violations of public international law by the executive. Instead, courts have adopted the position that any difficulties arising from an irregular arrest are best resolved diplomatically."

[15] And, as already explained, it could also be the case that there was no violation of international law *at all* (because of a possible consent from the Netherlands, see n. 11).

[16] US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436). This case is part of the so-called *Ker-Frisbie* doctrine which, at least until the still-to-discuss *Alvarez-Machain* case of 1992, was seen as the US version of the *male captus bene detentus* rule. (*Cf*., for example, Cherif Bassiouni 1999, p. 253 and Wilske 2000, p. 261.) Note that the other case of the *Ker-Frisbie* doctrine, the 1952 case *Frisbie v. Collins* (US Supreme Court, *Frisbie v. Collins*, 10 March 1952, No. 331 (342 US 519)), will not be discussed here in detail as it concerned a case within one and the same country (namely the US). Be that as it may, the most famous words of this case (from Justice Black, delivering the opinion of the Court) go as follows: "This Court has never departed from the rule announced in Ker v. Illinois (…) that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will [original footnote omitted, ChP]." (*Ibid*., p. 522.) Reading the text, one cannot escape the conclusion that *Frisbie* adheres to a very restricted idea of a fair trial/due process, namely a fair trial *in the courtroom*. Nevertheless, it has also been argued that *Frisbie*'s view of the concept of due process may, in fact, also encompass a pre-trial dimension, see n. 23.

the US Secretary of State for an extradition warrant.[17] The latter agreed and on 1 March 1883, US President Arthur issued the warrant which was directed to Henry G. Julian, an agent from the Pinkerton Detective Agency hired by the Chicago bank,[18] "to receive the defendant from the authorities of Peru, upon a charge of larceny, in compliance with the treaty between the United States and Peru on that subject".[19] Probably because of the chaotic situation in Peru caused by the War of the Pacific,[20] Julian,

> without presenting [the necessary papers] to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him, placed him on board the United States vessel Essex (…), kept him a close prisoner until the arrival of that vessel at Honolulu, where after some detention, he was transferred in the same forcible manner on board another vessel (…) to San Francisco, in the State of California.[21]

From California, he was extradited to Illinois where he was tried in Cook County for embezzlement and larceny. Ker protested, of course, to what had happened and brought forward, among other things, the following objections.

The first was that his arrest in Peru and subsequent extradition were not in accordance with due process of law.[22] The Supreme Court assumed that Ker hereby implicitly referred to Section 1 of Amendment XIV of the US Constitution, which states:

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[17] See US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 438.
[18] See Lowenfeld 1990, p. 460.
[19] US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 438.
[20] See DiMento and Geis 2006, p. 50. This war, also called the Saltpeter War, was fought between Chile on the one hand and Bolivia and Peru on the other hand between 1879 and 1884. See also Fairman 1953, p. 685, quoting Hunt, the Attorney General of the State of Illinois: "At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipa, back in the mountains, eighty-five miles from Lima, but General Lynch, of the Chilian forces, was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the best thing, applied to General Lynch. This officer, doubtless thinking that security to criminals was no part of his mission in Peru, dispatched an officer to aid the detective in putting Ker on his way back to the United States." Fairman argues that, if this account is indeed true, the apprehension of Ker was actually not breaching the sovereignty of Peru at all: ""The authority of the legitimate power having in fact passed into the hands of the occupant," the military governor was indeed the authority competent to surrender a fugitive present in the occupied territory. It is obvious that to obtain custody of a fugitive one deals with the power that can put its hands upon him. If that power is willing to make delivery, it is immaterial whether there is a treaty obligation to do so, or whether the receiving government would be in a position to reciprocate. Accepting as accurate the factual recital of the Attorney General, there was no invasion of Peruvian sovereignty or other breach of international law [original footnotes omitted, ChP]." (Fairman 1953, pp. 685-686.) See also n. 102 and accompanying text of Chapter III where it was explained that no sovereignty can be violated if there is no effective government present in the country where the alleged kidnapping took place.
[21] US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 438.
[22] See *ibid*., p. 439.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any state deprive any person of* life*, liberty*, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws [emphasis added, ChP].

Justice Miller, who delivered the opinion of the Supreme Court, pointed out that this section may indeed have a pre-trial dimension,[23] but that a suspect could not argue that, because of "mere irregularities in the manner in which he may be brought into the custody of the law"[24] (which thus includes the forcible abduction of this case), he should not be tried at all.[25]

Hence, even though judges *can* look at pre-trial irregularities abroad (in that sense, this case is different from the *Scott* case), they will not look at them within the context of the question as to whether the forcible abduction should lead to a *male detentus*, for this is futile. After all, such an abduction will never lead to a *male detentus*. Interestingly, Justice Miller also referred to the seriousness of the charge,

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[23] In that respect, this case seems to be different from the *Frisbie v. Collins* case, see n. 16. However, it has also been noted in the same footnote that it has been argued that *Frisbie* may also be viewed as a case recognising that the concept of due process encompasses a pre-trial dimension, see Anonymous 1975, p. 816: "*Ker* and *Frisbie* reflect a judgment not that due process is limited to the guarantee of a fair trial, but that interstate or international abduction is not misconduct sufficiently egregious to justify releasing the defendant [original footnote omitted, ChP]." The author explains with respect to *Frisbie* (*ibid*., p. 817, n. 22): "In *Frisbie* the Court did use language to the effect that due process is satisfied by a fair trial, 342 U.S. at 522, but that language was immediately followed by the assertion that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* That the broad language in *Frisbie* limiting the scope of due process should be read in light of the specific factual situation before the Court in that case is supported by the fact that the Court had advanced a very different view of due process some months earlier in Rochin v. California, 342 U.S. 165 (1952) (due process requires exclusion of evidence derived from police misconduct which shocks the conscience)."

[24] US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 440.

[25] See *ibid*.: "The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provision of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offence by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be "without due process of law." But it would hardly be claimed, that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested "without due process of law." So here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there "without due process of law," within the meaning of the constitutional provision."

hereby implicitly suggesting that this reasoning is especially relevant for suspects charged with serious crimes (who should thus in any case be tried).[26]

The second objection of Ker was that he could only have been forcibly removed from Peru in accordance with the provisions of the 1870-1874 Extradition Treaty between Peru and the US,[27] thereby asserting a right (of asylum)[28] under this treaty.[29]

The Supreme Court, however, deemed this argument to be absurd as the treaty was not drafted to provide a safe haven for fugitives from justice.[30]

It thereby made a clear distinction with the *United States v. Rauscher* case,[31] decided on the very same day (6 December 1886), in which the fugitive Rauscher could rely on a right deriving from an extradition treaty (in this case the 1842 Ashburton Treaty between Great Britain and the US), namely the right not be tried for offences other than those for which extradition was sought (this is an articulation of the well-known speciality rule in extradition proceedings).[32]

If formal extradition proceedings had been instigated to deliver Ker to the US, he might have used the *Rauscher* argument.[33] However, in this case, the extradition

[26] See also Anonymous 1975, pp. 816-817, n. 23: "The Court warned in *Ker* that it did "not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner … [the due process clause]; but for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all …" 119 U.S. at 440. *This warning* hardly suggests that the Court considered due process to be limited to the guarantee of a fair trial; it *does suggest that the Court doubted the wisdom of allowing one who has committed a serious offense to avoid trial altogether because his arrest was constitutionally defective* [emphasis added, ChP]."

[27] The treaty was negotiated in 1870 but only proclaimed by the US President in 1874, see US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 439.

[28] The use of the word asylum is rather odd and may have helped the US Supreme Court in quashing Ker's argument. See also Fairman 1953, p. 681.

[29] See US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 441.

[30] See *ibid.*, p. 442: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. (…) The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom." See, however, the Spanish *Fiscal v. Samper* case, to be discussed in Subsection 2.1.

[31] US Supreme Court, *United States v. Rauscher*, 6 December 1886 (119 US 407). Rauscher was extradited for murder but tried for cruel and unusual punishment. See Rogers 1887 for more information on his case.

[32] See US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 443. See, however, Michell 1996, pp. 395-396, who is of the opinion that *Ker* contradicts the reasoning of *Rauscher*.

[33] See US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 443: "If Ker had been brought to this country by proceedings under the treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited

treaty was not to be looked at at all. This was because Julian acted not under the authority of the US Government and its treaty with Peru, but in fact on his own accord.[34]

Turning to the abduction itself, the Supreme Court made the following *male captus bene detentus* statement, referring, among other things, to *Scott*:

> The question of how far his forcible seizure in another country, and transfer by violence, force, of fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court.[35]

As already shown above, one can see here that judges *can* perhaps look at pre-trial irregularities abroad, but that they will not consider the question as to what extent such pre-trial irregularities can bar the trial altogether as a *male captus* will never lead to a *male detentus*.

Like Judge Tenterden in *Scott*, the Supreme Court emphasised, however, that this did not mean that Ker or Peru did not have any remedy at all, for Ker could sue

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for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition."

[34] See *ibid*., pp. 442-443: "In the case before us, the plea shows, that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." The exact status of Julian himself is unclear. He was a private detective, hired by a Chicago bank, and is as such often characterised as a private kidnapper. (See, for example, the dissenting opinion of Justice Stevens in the *Alvarez-Machain* case, to be discussed *infra*: US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), pp. 670*ff*, see n. 213 and accompanying text.) However, it should also be mentioned that Julian received the arrest warrant for Ker from US President Arthur and that Wilske argues that Julian, in light of modern international law, can in fact be seen as a *de facto* State organ: "Als „*de facto* Staatsorgan" müßte nach heutigem Völkerrechtsverständnis auch der Pinkteron-Detektiv Julian verstanden werden, der von der US-Bundesregierung 1883 beauftragt wurde, die Auslieferung von Frederick Ker aus Peru zu bewirken. Bei der Detektivagentur Pinkerton handelte es sich um ein privates Unternehmen, das als Vorläufer des US-amerikanischen Geheimdienstes verstanden werden kann. Die Agentur hatte ein weitgespanntes Tätigkeitsfeld, das von militärischer Aufklärungsarbeit im Sezessionskrieg, über die Bekämpfung von Streiks, Schutz von Politikern, der Mafiabekämpfung bis hin zur Verfolgung legendärer Eisenbahnräuber wie der James-Younger Gang und den „Wild Bunch Riders" um Butch Cassidy und Sundance Kid reichte [original footnotes omitted, ChP]." (Wilske 2000, p. 73.)

[35] US Supreme Court, *Ker v. Illinois*, 6 December 1886 (119 US 436), p. 444.

Julian for trespass and false imprisonment and Peru could demand the extradition of Julian to have him tried in Peruvian courts for kidnapping.[36]

This case shows very clearly that an irregular arrest abroad, even though it may have *some* influence on the court, is no sufficient reason for the suspect not to be tried at all, for the court to opt for a refusal of jurisdiction, a *male detentus*. In this case, the judges did not argue, as Tenterden did in *Scott*, that they *could* not look at the pre-trial irregularities. They could (and these irregularities may even have some influence on the court), but they were also convinced that such irregularities would never lead to a refusal of jurisdiction. Hence, the question as to whether such irregularities should lead to a *male detentus* was irrelevant. As a consequence, they did not find it useful to consider it.[37]

Hence, the non-inquiry rule is founded on (at least) two rationales. A judge may state that he will not look at pre-trial irregularities abroad because he *cannot* look at them or because he may have the power to do so but does not want to examine them, for example, because he deems this to be a futile exercise.[38]

In contrast to the *Scott* case, where one could argue, although that is not certain either,[39] that a violation of the injured State's sovereignty had occurred (and thus that one could criticise Lord Tenterden for not having looked into that matter), there does not seem to have been a violation of Peru's sovereignty in this case.

This was not only because one can have one's doubts as to whether there was actually a Peru at that time,[40] but also because one could argue, although that is – again – not certain either, that Julian must be considered a private individual (an entity which is normally not viewed as being able to violate a State's sovereignty)[41] and not a State organ.[42]

Hence, it is uncertain how the Supreme Court would have reacted if there had been such a violation (and a protest and request for the return of Ker).[43]

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[36] See *ibid*.

[37] See the words "which we do not feel called upon to decide". (See n. 35 and accompanying text.) *Cf.* also Pearlman 1963, pp. 108-109.

[38] See also Lord M'Laren's judgment in the still-to-discuss, see Subsection 3.1, 1890 Scottish *Sinclair* case, where he seemingly combined the two rationales, stating: "With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and *we have neither title nor interest* to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody [emphasis added, ChP]." (High Court of Justiciary, *Sinclair* v. *Her Majesty's Advocate and Another*, 20 March 1890, 17 *R. (Just. Cas.)* 43, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 9.)

[39] See n. 11.

[40] See n. 20.

[41] See Subsection 3.2.2 of Chapter III.

[42] See n. 34.

[43] See also Sheely 2003, p. 432: "[T]he common law basis for the *Ker* opinion, and the *Ker* opinion itself, left open the question of valid jurisdiction in the face of a violation of international law [original footnote omitted, ChP]."

Nevertheless, it may very well be possible that in such a situation, the judges would have also adhered to the non-inquiry rule and would have stated that this was not something they were going to look into as these matters should be resolved at the political level, between the Executives of the two States concerned.

Another old well-known *male captus bene detentus* case which should be discussed here is the 1949 case *R.* v. *O./C. Depot Battalion, R.A.S.C., Colchester,* Ex parte *Elliott*.

This case is about the British deserter Richard Arthur Elliott, who was arrested in Antwerp, Belgium, by British officers accompanied by Belgian policemen.

> On Dec. 22, 1948, the applicant applied for a writ of *habeas corpus*, alleging that he was not the person subject to military law and that he was wrongfully held in custody. The writ issued, and on the return it was submitted that the arrest and subsequent detention of the applicant by the military authorities was illegal because (i) he was arrested in Belgium contrary to Belgian law and (ii) his arrest was not in compliance with the provisions of s. 154 of the Army Act. It was also contended that the delay in bringing the applicant to trial was oppressive.[44]

Chief Justice Lord Goddard of the King's Bench Division, after having confirmed the *Scott* case and the *Sinclair* case,[45] which will be discussed in Subsection 3.1, stated that although the unlawful arrest abroad may not lead to a release,[46] it may nevertheless have *some* influence on the court:

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[44] King's Bench Division, *R.* v. *O./C. Depot Battalion, R.A.S.C., Colchester,* Ex parte *Elliott*, 18 and 19 January 1949, [1949] 1 *All England Law Reports* 373.

[45] "It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court." (*Ibid.*, pp. 377-378.) Note, however, that there is a tiny difference discernible between the views of the English and Scottish judges in this respect. In the *Scott* case, Chief Justice Lord Tenterden stated that judges *cannot* investigate these pre-trial irregularities. As will be shown in the discussion of the *Sinclair* case, this reasoning was followed by Lord MacDonald ("[W]e cannot be the judges of the wrongdoing of the Government of Portugal" (High Court of Justiciary, *Sinclair* v. *Her Majesty's Advocate and Another*, 20 March 1890, 17 *R. (Just. Cas.)* 41, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 8)) and Lord Adam ("I am of opinion with your Lordship that we cannot go behind the perfectly regular warrant under which the suspender was apprehended and brought before a competent court. If there was anything irregular and illegal in the mode in which the suspender was brought here, he will have his remedy against the wrongdoer" (*Ibid*., 17 *R. (Just. Cas.)* 42-43, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 9)). However, another Lord in the *Sinclair* case, Lord M'Laren, stated that the judges had neither title *nor interest* to inquire into the way a person came into the power of the court. (See also n. 38.)

[46] See King's Bench Division, *R.* v. *O./C. Depot Battalion, R.A.S.C., Colchester,* Ex parte *Elliott*, 18 and 19 January 1949, [1949] 1 *All England Law Reports* 376: "If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested." He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case."

> If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, *though it may influence the court if they think there was something irregular or improper in the arrest* [emphasis added, ChP].[47]

Nevertheless, also here, the exact scope of this quotation is not clear as Lord Goddard also stated in a more straightforward way a few sentences later:

> [W]e have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court.[48]

It is quite difficult to deduce clear conclusions from these three cases as they appear to send out different signals, but generally speaking, one could possibly assert that judges felt that they either had no power or simply were not interested in an examination of the way in which a person was brought from one jurisdiction to another. Perhaps the court could provide some redress but whether this would also encompass a *male detentus* outcome is not entirely clear (and arguably not very likely). It is also important to stress that *Ker* (and the same goes for *Elliott*) cannot be seen as evidence for the idea that courts can try suspects captured in violation of the injured State's sovereignty because in these cases, no such violation appears to have occurred.[49] (As already explained, this point is not entirely clear with respect to the *Scott* case, see footnote 11 and accompanying text.) Thus, it is uncertain how the judges would have reacted in the case of a clear international law violation. Nevertheless, as already explained, given their preference for the non-inquiry rule, it would not be very surprising if they had refused to look into these matters as well and had stated that these are to be resolved by the Executives of the two States involved.[50]

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[47] *Ibid*. One could hereby think of a *provisional* release pending trial. The quotation is namely followed by the following sentence (*ibid*.): "Once he is before the court, it can hold him to bail until his trial and conviction." See also *ibid*., p. 373: "[I]f, in military proceedings, there had been such delay in bringing a man to trial as to amount to oppression the High Court could interfere, and admit him to bail."

[48] *Ibid*., pp. 377-378.

[49] *Cf.* also Morgenstern 1953, pp. 269-270 and 273 (making this point with respect to the *Ker* case). In that respect, one cannot agree with, for example, Lamb when she writes, referring, among other things, to "*Eliot*[*t*]" (Lamb 2000, p. 230, n. 230), that "[t]he courts of some States have been willing to exercise jurisdiction over a defendant who has been forcibly abducted by agents of the forum State from the territory of another State, in violation of the sovereignty of that State." (*Ibid*., p. 230.)

[50] *Cf.* also Michell 1996, p. 450 (writing on the *Scott*, *Sattler* (see for more information on this case the end of this footnote), *Sinclair* (this case will be discussed in Subsection 3.1) and *Elliott* cases): "[I]n all four cases, there was little awareness or discussion of the international law dimension to the abductions at issue. No effort was made to determine whether the foreign state had protested, although in each case the fact that the abduction had been made in concert with local police [it must be noted that this is unclear with respect to the *Scott* case, ChP] suggests that the abductions were made with the consent of the respective foreign states. Certainly, there was no mention of a protest by the foreign state in any of

1.2 More recent cases

In the 1974 *United States v. Toscanino* case,[51] the first real crack in the fundament of the US version of the *male captus bene detentus* rule (the *Ker-Frisbie* doctrine)[52] seemed to appear. Francisco Toscanino, an Italian citizen, alleged that US agents were responsible for the fact that he was kidnapped in Uruguay, brought to Brazil (where he was detained, interrogated and tortured for nearly three weeks) and again abducted to the US.[53] In America, he was charged with conspiracy to import

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them. There would thus seem to have been no violation of international law. [As explained, this is not entirely sure with respect to the *Scott* case, ChP.] Moreover, the cases echo the American approach in their view that resolution of any international conflict was best achieved at the diplomatic level. A very different result might have obtained had one of the arrests been followed by a protest and demand for the return of the abducted individual. It is also important to note that none of the cases provide support for *Alvarez-Machain* [a case which will be discussed in Subsection 1.2, ChP]; not one affirms a court's jurisdiction to try the defendant in the face of a foreign protest." To provide some information on the *Sattler* case: in this case (Court for Crown Cases Reserved, *Regina* v. *Christian Sattler*, 23 January 1858, *Dears. & Bell* 525 and 539-547, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 576 and pp. 582-586), the foreigner Christian Sattler committed larceny in England and fled to Hamburg. "The owner of the property gave information to the London police, and the deceased [the remainder of the case will clarify this word, ChP], who was a detective officer of that force and an English subject, proceeded to Hamburgh and there, with the assistance of the Hamburgh police, arrested the prisoner and brought him against his will on board an English steamer trading between Hamburgh and London in order that he might be tried for larceny." (*Ibid*., *Dears. & Bell* 539, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 582.) The Court for Crown Cases Reserved held: "[W]here a foreigner, who was arrested in a foreign town and forced on board an English ship, while kept in custody in such ship on the high seas, killed the officer who arrested him out of *malice prepense* and not with a view to escape, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder, and was properly tried for such offence at the Central Criminal Court within whose jurisdiction he was brought." (*Ibid*., *Dears. & Bell* 525, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 576.) Note, however, that it was not discussed in this case whether the potentially illegal arrest and detention had any effect on the exercise of jurisdiction with respect to the original charge of larceny. See in that respect also Michell 1996, p. 449: "The court did not determine whether Sattler could be tried for larceny; indeed, it is arguable that his illegal arrest would prevent his trial on the count of larceny." One can wonder whether Michell's words after the semicolon are correct. In the question presented by Baron Samuel Martin to the Court for Crown Cases Reserved, one can namely read: "The question which I desire to be answered is, whether there was any jurisdiction to try the prisoner at the Old Bailey Sessions. If the answer be in the affirmative, the judgment which has been already given is to be affirmed. If in the negative, the judgment is to be reserved; but the prisoner is to remain in custody to be tried on the indictment which has been found by the grand jury for the larceny." (Court for Crown Cases Reserved, *Regina* v. *Christian Sattler*, 23 January 1858, *Dears. & Bell* 539, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 582.)

[51] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267).

[52] See n. 16. One could add the (still-to-discuss) *Alvarez-Machain* case here, see also Knoops 2002, p. 247.

[53] See US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), pp. 268-270. As will be shown *infra*, the alleged involvement of US agents in the operation is quite important in this case. The Court of Appeals summarised Toscanino's allegations in that respect as follows: "He contends that the court acquired jurisdiction over him unlawfully *through the conduct of American agents who kidnapped him in Uruguay, used illegal electronic surveillance, tortured him and abducted him* to the United States for the purpose of prosecuting him here [emphasis added, ChP]." (*Ibid*., p. 268.) Here are some examples of Toscanino's own allegations with respect to

narcotics into the US[54] and sentenced to, among other things, 20 years' imprisonment.[55] Judge Mansfield, writing the opinion of the Court of Appeals for the Second Circuit, compared the due process concept under the old *Ker-Frisbie* doctrine[56] with the new concept[57] and concluded, after having stated that "[s]ociety

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the US role in his abduction and torture: ""On or about January 6, 1973 Francisco Toscanino was lured from his home in Montevideo, Uruguay by a telephone call. This call had been placed by or at the direction of Hugo Campos Hermedia. Hermedia was at that time and still is a member of the police in Montevideo, Uruguay. In this effort, however, and those that will follow in this offer, Hermedia was acting ultra vires in that he was the *paid agent of the United States government* (...) [emphasis added, ChP]."" (*Ibid*., p. 269.) (As explained in n. 101 and accompanying text of Chapter III, such a situation (in which local officials cooperate (*ultra vires*) in the abduction can arguably not lead to valid consent from the State where the abduction took place.) ""Toscanino was placed in another vehicle and whisked to the border. There by pre-arrangement and *again at the connivance of the United States government*, the car was met by a group of Brazilians who took custody of the body of Francisco Toscanino [emphasis added, ChP]."" (*Ibid*., pp. 269-270.) ""Later that same day Toscanino was brought to Brasilia (...). For seventeen days Toscanino was incessantly tortured and interrogated. *Throughout this entire period the United States government and the United States Attorney for the Eastern District of New York prosecuting this case was aware of the interrogation and did in fact receive reports as to its progress. Furthermore, during this period of torture and interrogation a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs was present at one or more intervals and actually participated in portions of the interrogation* (...) [emphasis added, ChP]."" (*Ibid*., p. 270.) ""Incredibly, *these agents of the United States government* attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars. Finally on or about January 25, 1973 Toscanino was brought to Rio de Janeiro where he was *drugged by Brazilian-American agents* and placed on Pan American Airways Flight #202 destined for the waiting arms of the United States government. (...) At no time during *the government's seizure of Toscanino* did it ever attempt to accomplish its goal through any lawful channels whatever. From start to finish *the government* unlawfully, willingly and deliberately embarked upon a beazenly [this should probably be "brazenly", ChP] criminal scheme violating the laws of three separate countries [emphasis added, ChP]."" (*Ibid*., p. 270.)

[54] See *ibid*., p. 268.

[55] See *ibid*.

[56] See *ibid*., p. 272: "Thus, under the [s]o-called "*Ker-Frisbie*" rule, due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. Jurisdiction gained through an indisputably illegal act might still be exercised, even though the effect could be to reward police brutality and lawlessness in some cases."

[57] See *ibid*.: "Since *Frisbie* the Supreme Court, in what one distinguished legal luminary describes as a "constitutional revolution," (…) has expanded the interpretation of "due process." No longer is it limited to the guarantee of "fair" procedure at trial. In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial." Judge Mansfield hereby also referred to the very famous words of Justice Brandeis in his dissenting opinion in the case *Olmstead v. United States* (US Supreme Court, *Olmstead et al. v. United States* (No. 493), *Green et al. v. Same* (No. 532) and *McInnis v. Same* (No. 533), 4 June 1928 (277 US 438). As the words are quite generally drafted, it may be good to reproduce them here as well, although it should also be noted that this case was not about an unlawful arrest but about unlawfully obtained evidence: "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government

is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law":[58]

> Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[59]

Although it must be stressed that the judges in *Ker* (and the same may be argued for *Frisbie*) in fact recognised that the concept of due process also had a pre-trial dimension,[60] the quotation from *Toscanino*, of course, goes much further in that it argues that such pre-trial irregularities may lead to the ending of the case.

Reading the decision, one can argue that this new concept of due process does not mean that a court can only refuse jurisdiction if a person is kidnapped by the government and, in the course of that kidnapping, was seriously mistreated (as was the case here). The threshold is that jurisdiction must be refused "where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights". That appears also to be the case when a person has been the victim of a 'normal' abduction (without any serious mistreatment). See in that respect the following words of the Court of Appeals just before it presented its new concept of due process:

> [W]e are satisfied that the *Ker-Frisbie* rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. (…) [W]e must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct (…) and when an accused is kidnapped and forcibly brought

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may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." (US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 274, referring to Justice Brandeis in *Olmstead v. United States*.)

[58] *Ibid*. This famous phrase is sometimes said to stem from the case *United States v. Archer* (US Court of Appeals, Second Circuit, *United States v. Archer*, 12 July 1973, Nos. 1039, 1040, 1041, Dockets 73-1527, 73-1528, 73-1711 (486 F.2d 670)), see, for example, the still-to-discuss (see Subsection 3.2) case: Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 129. However, this is incorrect. It was Judge Mansfield from the *Toscanino* case himself who expressed these words, words which will not be found in *United States v. Archer*.

[59] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 275.

[60] See n. 23 and accompanying text.

> within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees "the right of the people to be secure in their persons . . . against unreasonable . . . seizures," the government should as a matter of fundamental fairness be obligated to return him to his status quo ante [original footnote omitted, ChP].[61]

Thus, even though Toscanino was the victim of an abduction involving serious mistreatment, the *male detentus* test stemming from this decision does not seem to require such a high standard.

This can be welcomed for it would be rather strange to demand from a suspect who has been abducted by authorities which can be linked to the prosecuting forum that he also needs to prove that he was seriously mistreated in the course of that abduction. The fact that these authorities resorted to the method of abduction (whether or not that abduction included serious mistreatment) should alone be enough for the judge to refuse jurisdiction if he still cares about, for example, the integrity of his court, which arguably demands such illegal practices should not be condoned by continuing the case.

Alongside this (on constitutional law/due process/rights of the accused focused) reason for refusing jurisdiction, the Court of Appeals also stated more generally that it could rely on its "supervisory power over the administration of criminal justice in the district courts within our jurisdiction",[62] holding that "a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here."[63] This quotation shows that the facts of this case would *in any case* lead to the ending of the case, but it is unclear whether this would also go for a 'normal' abduction (without serious mistreatment). However, given the above-mentioned words in the context of the concept of due process, one might think that the Court of Appeals would also refuse jurisdiction on this abuse of process basis in the case of a 'normal' abduction.

The third reason to dismiss jurisdiction would also point in that direction. This third reason was linked to international law[64] and here, the case can be clearly discerned from the older above-mentioned cases.

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[61] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 275.

[62] *Ibid*., p. 276: "In any event, since Ker and Frisbie involved state court convictions only, the views expressed in those cases would not necessarily apply to the present case, which is an appeal from a judgment entered by a federal district court. Here we possess powers not available to a federal court reviewing a state tribunal's resolution of constitutional issues. In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction."

[63] *Ibid*.

[64] See also Anonymous 1975, pp. 814-815: "The decision that the district court was bound to dismiss the case for lack of jurisdiction if defendant's allegations of kidnapping and torture [one can wonder, given the remarks mentioned in the main text and the (correct) explanation of the three reasons to dismiss jurisdiction mentioned in the remainder of this quotation from the anonymous author, whether

Judge Mansfield explained that "international kidnappings such as the one alleged here violate the U.N. Charter".[65]

He hereby referred to the *Eichmann* case, stating that the UNSC Resolution 138 of 23 June 1960, discussed in Chapter III, "merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped."[66]

This is correct; 'normal' abductions violating international law, not necessarily those accompanied by serious mistreatment, can lead to the ending of the case. However, it must be repeated (see also Chapter III) that it would seem that a return would only be necessary if the injured State protests and requests the return of the suspect.

The *Eichmann* case does not contradict this view as in that case, Argentina, ultimately (in the context of the UNSC proceedings) did not request the return of Eichmann.

As there was apparently no protest and request for the return of Toscanino in this case, the Court of Appeals would not have been required to dismiss the case from the standpoint of the violation of State sovereignty.[67]

Nevertheless, as already explained, that does not mean that there are not reasons enough to refuse jurisdiction on the basis of other considerations, such as those related to due process, a concept which this decision seemingly considers to be already violated in the case of a 'normal' abduction.[68]

Toscanino also had to proof the torture part, ChP] were substantiated was based on three alternative holdings: that due process requires dismissal where jurisdiction has been acquired as a result of a "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights," that federal courts should, as a matter of proper administration of criminal justice, decline to accept jurisdiction that is the fruit of illegal government action, and that American courts may not accept jurisdiction obtained as a result of the Government's violation of a treaty guaranteeing the sovereignty of another nation [original footnotes omitted, ChP]."

[65] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 277. Assuming that Toscanino's allegations were in fact true (see, however, *infra*), one could argue that Toscanino's abduction indeed violated Uruguayan sovereignty (and hence the UN Charter). For example, Toscanino argued that the central Government of Uruguay did not consent to the operation. (See *ibid*., pp. 269-270.) Although consent from local officials (even acting *ultra vires*) may be enough, it was explained in n. 101 and accompanying text of Chapter III (see also n. 53 of the present chapter) that this would not be the case in a situation where a local official cooperated *ultra vires* in the operation for, for example, financial reasons. In such a case, the local official is not acting with the idea on his mind that he is operating on behalf of *his* State. In fact, he knows that he is operating on behalf of *another* State.

[66] *Ibid*., p. 278.

[67] See also Anonymous 1975, p. 823: "Because Uruguay did not request Toscanino's return, there was no reason to refuse jurisdiction in the interest of international harmony."

[68] See also the concurring opinion of Judge Anderson, who argues that a violation of the standards laid down in the US-Uruguay Extradition Treaty or the Charters of the OAS and the UN is "indicative of the denial of due process". (US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), pp. 281-282.)

In the end, the Court of Appeals remanded the case to the District Court "for further proceedings not inconsistent with this opinion".[69] More specifically, it stated:

> Our remand should be construed as requiring an evidentiary hearing with respect to Toscanino's allegations of forcible abduction only if, in response to the government's denial, he offers some credible supporting evidence, including specifically evidence that the action was taken by or at the direction of United States officials. Upon his failure to make such an offer the district court may, in its discretion, decline to hold an evidentiary hearing.[70]

This is exactly what happened. The District Court for the Eastern District of New York refused to hold a hearing as it was not convinced that there was enough evidence to believe that US officials participated in the abduction of Toscanino.[71]

Although this ruling was welcomed by, for example, the still-to-discuss *Ebrahim* case as one supporting principles which "testify to a healthy legal system of high standard",[72] its scope has been seriously narrowed down by, for instance, the case *United States ex rel. Lujan v. Gengler*,[73] also decided by the (differently constituted) US Court of Appeals, Second Circuit. The facts of this case, which, according to Chief Judge Kaufman, "present elements one might expect to encounter in a grade-B film scenario",[74] centred around the Argentine citizen Julio Juventino Lujan, who was charged "with conspiracy to import and distribute a large quantity of heroin".[75]

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[69] *Ibid*., p. 281.
[70] *Ibid*.
[71] Strangely, the summary by the District Court of the allegations in the affidavit of Toscanino is quite different than Toscanino's allegations in the decision of the Court of Appeals (and indeed may not evidence the participation of US agents in the abduction and mistreatment of Toscanino), see US District Court, Eastern District of New York, *United States v. Toscanino*, 10 July 1975, No. 73 CR 194 (398 F.Supp. 916), p. 917: "In his affidavit, defendant alleges that he was abducted from his home in Montevideo, Uruguay on January 6, 1973, by members of the [Uruguayan] police, who were disguised as guerilla fighters. It is then alleged that this group crossed the Brazilian border. Defendant says he was lodged in a prison cell in the City of Porto Alegre, and apparently turned over to the Brazilian police. The affidavit alleges that he was then taken to a prison in Brazilia where he was alternately interrogated and tortured. The affidavit relates that [he] was then taken to an office where 'high police or army officials' were present, and he was then told that they had made a mistake. According to defendant, these officials advised him that he could not return to Uruguay, but that he could return to Italy. He claims that he was sedated and flown to the United States in the company of two Brazilian policemen. When he arrived in the United States, he was placed in the custody of special agents of the Drug Enforcement Administration. Assuming all the allegations of the affidavit to be true, there is no claim of participation by United States officials in the abduction of torture of the defendant. The defendant has not submitted any credible evidence which would indicate any participation on the part of United States officials prior to the time the defendant arrived in this country. Nor is there any evidence which shows that the abduction was carried out at the direction of United State officials. The court declines to hold an evidentiary hearing."
[72] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896.
[73] US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62).
[74] *Ibid*., p. 63.
[75] *Ibid*.

An arrest warrant for him was issued but enforced in a rather "unconventional manner"[76] as he was lured from Argentina to Bolivia from where he was abducted to the US.[77] After the Court of Appeals had decided the above-mentioned *Toscanino* case, Lujan saw his chance and challenged the way he was brought to the US as well.[78] The Court of Appeals, however, dismissed his motion after having concluded that the alleged facts in *Toscanino* were very different and much more serious[79] than the alleged facts in *Lujan*. The Court clarified:

[76] *Ibid.*

[77] See *ibid*. for more factual information: "Accepting, as we must for purposes of this appeal, that Lujan's allegations are true, the arrest warrant was enforced in an unconventional manner. Lujan, a licensed pilot, was hired in Argentina by one Duran to fly him to Bolivia. Although Duran represented that he had business to transact there with American interests in Bolivian mines, he in fact had been hired by American agents to lure Lujan to Bolivia. When Lujan landed in Bolivia on October 26, 1973, he was promptly taken into custody by Bolivian police who were not acting at the direction of their own superiors or government, but as paid agents of the United States. Lujan was not permitted to communicate with the Argentine embassy, an attorney, or any member of his family. On the following day the Bolivian police, commanded by Police Major Guido Lopez, took Lujan from Santa Cruz to La Paz, where he was held until November 1, 1973. On that date a Lieutenant Terrazas and other Bolivian police, acting together with American agents, brought Lujan to the airport and placed him on a plane bound for New York. Upon his arrival at Kennedy Airport Lujan was formally arrested by federal agents."

[78] See *ibid*.

[79] A part of the alleged mistreatment of Toscanino has already been mentioned earlier (see n. 53) but this is the entire story of what Toscanino alleged to have happened to him, see US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), pp. 269-270: "On or about January 6, 1973 Francisco Toscanino was lured from his home in Montevideo, Uruguay by a telephone call. This call had been placed by or at the direction of Hugo Campos Hermedia. Hermedia was at that time and still is a member of the police in Montevideo, Uruguay. In this effort, however, and those that will follow in this offer, Hermedia was acting ultra vires in that he was the paid agent of the United States government. (...) The telephone call ruse succeeded in bringing Toscanino and his wife, seven months pregnant at the time, to an area near a deserted bowling alley in the City of Montevideo. Upon their arrival there Hermedia together with six associates abducted Toscanino. This was accomplished in full view of Toscanino's terrified wife by knocking him unconscious with a gun and throwing him into the rear seat of Hermedia's car. Thereupon Toscanino, bound and blindfolded, was driven to the Uruguayan-Brazilian border by a circuitous route. (...) At one point during the long trip to the Brazilian border discussion was had among Toscanino's captors as to changing the license plates of the abductor's car in order to avoid detection by the Uruguayan authorities. At another point the abductor's car was abruptly brought to a halt, and Toscanino was ordered to get out. He was brought to an apparently secluded place and told to lie perfectly still or he would be shot then and there. Although his blindfold prevented him from seeing, Toscanino could feel the barrel of the gun against his head and could hear the rumbling noises of what appeared to be an Uruguayan military convoy. A short time after the noise of the convoy had died away, Toscanino was placed in another vehicle and whisked to the border. There by pre-arrangement and again at the connivance of the United States government, the car was met by a group of Brazilians who took custody of the body of Francisco Toscanino. (...) Once in the custody of Brazilians, Toscanino was brought to Porto Alegre where he was held incommunicado for eleven hours. His requests to consult with counsel, the Italian Consulate, and his family were all denied. During this time he was denied all food and water. Later that same day Toscanino was brought to Brasilia. (...) For seventeen days Toscanino was incessantly tortured and interrogated. (...) (Toscanino's) captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight

> [I]n recognizing that Ker and Frisbie no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court.[80]

The Court in *Lujan* then[81] referred to passages from the cases *Rochin v. California* and *United States v. Russell*,[82] which were also used by the Court in *Toscanino* (namely in its presentation of the first reason why a court could refuse jurisdiction) and in which one can indeed find words which may be seen as requiring a higher threshold to refuse jurisdiction than the words "the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights"[83] may suggest: "conduct that shocks the conscience"[84] (*Rochin*) and "conduct so

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hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids (...) were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars. Finally on or about January 25, 1973 Toscanino was brought to Rio de Janeiro where he was drugged by Brazilian-American agents and placed on Pan American Airways Flight #202 destined for the waiting arms of the United States government. On or about January 26, 1973 he woke in the United States, was arrested on the aircraft, and was brought immediately to Thomas Puccio, Assistant United States Attorney."

[80] US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 65.

[81] See *ibid*.

[82] The 1952 case *Rochin v. California* (US Supreme Court, *Rochin v. California*, 2 January 1952, No. 83 (342 US 165) was a case about illegally obtained evidence: "[S]tate police officers had frustrated a defendant's efforts to swallow two morphine capsules in his possession by taking the defendant, handcuffed, to a hospital where a doctor was induced to force "an emetic solution through a tube into (the defendant's) stomach against his will." When the solution produced vomiting the capsules were recovered and subsequently introduced at defendant's trial." (US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 273.) Here, the Supreme Court, in the words of Justice Frankfurter stated: "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience." (US Supreme Court, *Rochin v. California*, 2 January 1952, No. 83 (342 US 165), pp. 169 and 172.) In the 1973 case *United States v. Russell* (US Supreme Court, *United States v. Russell*, 24 April 1973, No. 71-1585 (411 US 423)), the Supreme Court approved alleged entrapment activities by the US Government, explaining: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California (…), the instant case is distinctly not of that breed." (*Ibid*., pp. 431-432.)

[83] See n. 59 and accompanying text.

[84] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 273 (referring to the *Rochin* case). See also US Court of Appeals, Second

outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"[85] (*Russell*). However, it must be noted that *Toscanino* also referred in this context to the 1973 case *United States v. Archer*: "In *United States v. Archer* (…), while basing our decision on other grounds, we referred to Olmstead and Rochin for the proposition that due process principles might be invoked to *bar prosecution altogether where it resulted from flagrantly illegal law enforcement practices* [emphasis added, ChP]."[86] In addition, less extreme words were also used in the *Rochin* case, see the following words of Justice Frankfurter in that case: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'"[87] Hence, even though the words "shocking" and "outrageous" may be seen as requiring a higher threshold than the words "the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights" may suggest, one can find support in the *Toscanino* case that serious illegal enforcement practices, such as a 'normal' forcible abduction (not necessarily one accompanied by serious mistreatment)[88] falls within its *male detentus* test.

However, the Court in *Lujan* clearly restricted this *male detentus* test by focusing on the specifics of the *Toscanino* case, which, as was shown, allegedly involved serious mistreatment:

> The cruel, inhuman and outrageous treatment allegedly suffered by Toscanino brought his case within the Rochin principle (…). But the same cannot be said of Lujan. It requires little argument to show that the government conduct of which he complains pales by comparison with that alleged by Toscanino. Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process. Unlike Toscanino, Lujan does not allege that a gun blow knocked him unconscious when he was first taken into captivity, nor does he claim that drugs were administered to subdue him for the flight to the United States. Neither is there any assertion that the United States Attorney was aware of his abduction, or of any interrogation. Indeed, Lujan disclaims any acts of torture, terror, or custodial interrogation of any kind. (…) We scarcely intend to convey approval of illegal government conduct. But we are forced to recognize that, absent a set of incidents like that in Toscanino, not every violation by prosecution or police is so egregious

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Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 65.

[85] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 274 (referring to the *Russell* case). See also US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 65.

[86] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 274.

[87] *Ibid*., p. 273 (quoting Justice Frankfurter in the *Rochin* case).

[88] See n. 59 and accompanying text.

> that Rochin and its progeny requires nullification of the indictment [original footnote omitted, ChP].[89]

Hence, the Court in *Lujan* restricted the *male detentus* test from *Toscanino* (which, reading its decision, could include a 'normal' abduction, without serious mistreatment) to a test which would demand an abduction *with* serious mistreatment.

The Court in *Lujan* also looked at another reason for the *Toscanino* Court to dismiss the case, namely the violation of international law. However, after it had stated that the Court in *Toscanino* had suggested that "a defendant might be able to interpose the violations of those charters [the Charters of the OAS and of the UN, ChP] as a defense to a criminal prosecution",[90] it opined that "unlike Toscanino, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction [original footnote omitted, ChP]."[91] As explained earlier, one must clearly differentiate between a violation of State sovereignty/a violation of international law and the idea that a State must return the suspect to the injured State in the case of a protest and request for the return of the suspect. That Argentina or Bolivia did not protest/object to the abduction does not mean that there was no violation of international law in this case. Whether there was a violation of State sovereignty here depends on the question as to whether it can be said that the operation took place without the consent of these two States. If there was no valid consent, one must assume a violation of international law, whether or not the injured States protested/objected to the operation. However, it is true that a State would only be required to return the suspect (and thus to dismiss the case) on the basis of the violation of another State's sovereignty if there had been a protest and request for the return of the abducted suspect (which does not seem to have occurred in this case), although the fact that there might, nevertheless, have been a violation of international law may influence the judge in arguing that other concepts, such as due process, have been violated[92] and hence that a dismissal of the case is in order.

Of course, one can wonder how the Court would have reacted if it had been of the opinion that there was a violation of international law. Would that, in itself, have been enough to divest jurisdiction, even if Lujan was not the victim of serious mistreatment?

As stated before, there is support in the *Toscanino* decision for a 'normal' abduction, not accompanied by serious mistreatment which violates international law[93] – and in fact, also one which does not violate international law[94] – to lead to

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[89] US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 66.
[90] *Ibid.*, p. 67.
[91] *Ibid.*
[92] See n. 68.
[93] See the *Toscanino* Court's third reason to dismiss jurisdiction.
[94] See the *Toscanino* Court's first reason to dismiss jurisdiction. It is very well be possible that the prosecuting authorities execute an abduction without violating traditional (inter-State) international law. As explained in Chapter III, although this book focused on the traditional abduction without the consent of the State of residence, the latter State could also cooperate in an abduction operation, circumventing

the ending of the case. Even though one can argue that a violation of international law as such (without a protest and request for the return of the suspect) would not require a judge to refuse jurisdiction, the fact that the prosecuting authorities resorted to a method which violated another State's sovereignty may convince the judge that the authorities have brought this case to trial without due process of law and hence that jurisdiction must be refused. However, the Court in *Lujan* did not want to pronounce on this matter:

> We do not have to decide here whether, in the absence of a claim of torture or of similar reprehensible conduct, the violation of international law alone would require dismissal of an indictment. We hold only that given Lujan's failure to allege that Argentina or Bolivia protested his abduction or that the abduction involved abuse of the type we condemned in Toscanino, there is no justification for ordering the district court to divest itself of jurisdiction over him [original footnote omitted, ChP].[95]

Hence, *Lujan* did not overrule the idea which can arguably be found in the *Toscanino* decision, namely that an abduction violating international law (but not one involving serious mistreatment) may also lead to the ending of the case, for it simply did not look into that matter. However, it did not agree with the idea, not taking into account the international law dimension now,[96] that resort to the method of abduction as such (without serious mistreatment) would already be enough to violate a concept such as due process to such an extent that jurisdiction must be refused. This stance of *Lujan* – and it has, in fact, been asserted that this was also the stance of the judges in *Toscanino* itself[97] – can be criticised for it basically means

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all the legal procedures but not violating traditional (inter-State) international law, see the term official abduction and ns. 21 and 63 of that chapter. See also n. 782 of the present chapter.

[95] US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 68.

[96] See n. 94: authorities may also resort to the method of abduction without violating (traditional inter-State) international law.

[97] See the concurring opinion of Circuit Judge Anderson in the *Lujan* case: "The discussion in the majority opinion in Toscanino of the due process issue, as well as the mention of this court's supervisory power over the administration of criminal justice in this Circuit read, in my opinion, as if the kidnapping from his own country and the forcible delivery into the United States of a non-fugitive foreign national, standing alone, would be sufficient to deprive the district court of jurisdiction (…). After Toscanino was decided, however, a motion was made for a hearing in banc. A majority of the active members of the court voted to deny the petition for a hearing in banc, three judges dissenting. In so doing the majority obviously interpreted the decision in Toscanino as resting solely and exclusively upon the use of torture and other cruel and inhumane treatment of Toscanino in effecting his kidnapping and it rejected the proposition that a kidnapping of a foreign national from his own or another nation and his forcible delivery into the United States against his will, but without torture, would itself violate due process." (US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), pp. 68-69.) That may, of course, very well be the case, but then the judges in *Toscanino* can be criticised for having written their decision in such a general way that it can easily be interpreted as holding that a normal abduction (not necessarily one accompanied by serious mistreatment) might also lead to the ending of the case. However, even if Judge Anderson is right, it must not be forgotten that *Lujan* has not overruled *Toscanino* with respect to the international law argument. Hence, an abduction violating international law (which the 'normal' abductions will do) may still lead to the ending of the case.

that a court cannot refuse jurisdiction in the case of an abduction, which 1) does not violate international law (because the State of residence consented to the operation); 2) does not involve serious mistreatment but 3) nevertheless flouts all the regular procedures in obtaining custody over a person.[98] It can be argued that a judge should also be able to refuse jurisdiction in 'normal' abduction cases (not necessarily those in which serious mistreatment has taken place) if it wants, for example, to deter the prosecuting authorities from resorting to illegal methods and to protect the integrity of its own proceedings.[99]

Whatever may be the true meaning and scope of *Toscanino*, Michell explains that

> [s]ubsequent decisions held that a fugitive must establish three elements for the *Toscanino* prohibition against the exercise of jurisdiction to apply. First, the governmental conduct in question, *i.e.*, the abduction, must amount to "grossly cruel and unusual barbarities" or "shock the conscience." Second, the abduction must have been the work of state agents.[[100]] Third, there must be a protest by the injured state[[101]] [original footnotes omitted, ChP].[102]

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[98] See also the following words of Circuit Judge Anderson (concurring with the outcome of *Lujan*): "[W]henever a foreign national is abducted or kidnapped from outside of the United States and is forcibly brought into this Country by United States agents by means of torture, brutality or similar physical abuse the federal court acquires no jurisdiction over him because of a violation of due process. Otherwise the holdings of the Supreme Court in Ker v. Illinois (…) and Frisbie v. Collins (…) govern." (*Ibid*., p. 69.)

[99] It may be interesting to note that Mann (1989, p. 409) believed that the *Lujan* opinion "is likely to count among the least ingenuous judicial pronouncements ever made."

[100] See in that respect, for example, the *Yousef* case. In this terrorism case, one of the suspects of, among other things, the first attack on the World Trade Center in New York City (on 26 February 1993), Ramzi Ahmed Yousef, claimed in an affidavit dated 15 January 1996 that he was kidnapped in Pakistan in November 1994, that he was tortured during his detention before being turned over to US officials in Islamabad in February 1995 and that this torture could be attributed to the US "because the Pakistanis who captured and tortured him were acting as agents to the United States or, in the alternative, because the United States and Pakistan were engaged in a joint venture to "track and trap" him." (US Court of Appeals, Second Circuit, *United States v. Yousef*, 4 April 2003, Docket Nos. 98-1041L, 98-1197, 98-1355, 99-1544, 99-1554 (327 F.3d 56), p. 138.) According to Yousef, as a result of this *Toscanino*/'shock the conscience' exception, his indictment had to be dismissed. (See *ibid*.) However, the District Court and the Court of Appeals rejected the torture allegations as incredible. Furthermore, the Court of Appeals found that there was no error in the District Court's conclusion that "even taking Yousef's factual assertions as true, Yousef had failed to allege United States involvement in his kidnapping, captivity, or torture sufficient to make them attributable to the United States." (*Ibid*., p. 139.) See also the still-to-discuss *Yunis* case (see n. 104 and n. 176 and accompanying text).

[101] Note that *Toscanino* did not appear to request a protest, see the discussion in that case of the Court's third reason to dismiss jurisdiction. See also Michell 1996, p. 403, n. 99: "Some commentators suggest that this requirement is difficult to find in *Toscanino* itself." See finally also Shen 1994, p. 76: "[A] fair reading of the *Toscanino* case does not lead to the conclusion that the court intended to divest itself of jurisdiction *only* where the offended State had lodged a protest [emphasis in original and original footnote omitted, ChP]."

[102] Michell 1996, pp. 402-403. See also the still-to-discuss (see Subsection 3.1.4 of Chapter VI) ICTY Trial Chamber's decision of 9 October 2002 in the *Nikolić* case: "The *Toscanino* rule therefore appears to apply only when (i) the abduction itself amounts to "grossly cruel and unusual barbarities" or "shock the conscience", (ii) the abduction was the work of State agents, and (iii) there was a protest by the

Although it is true that the aftermath of *Toscanino* can be summarised by the rule that, if there is no abduction by State agents accompanied by serious mistreatment, and no protest from the injured State (one could call this the *Toscanino* exception), the trial can go ahead, it is arguably not so that the suspect, if there *were* a protest from the injured State, would *also* have to prove that he was seriously mistreated (by State agents) during the abduction (as the presentation of these three requirements seem to suggest). After the third requirement, Michell refers to cases such as *Lujan*, but these cases only support the idea that, as there was no protest from the alleged injured State, the international law dimension did not have to be looked at.[103] However, those cases can arguably not be used to assert that, if there *were* a protest from the injured State, the suspect would also have to prove that he was seriously mistreated during his abduction (by State agents).[104]

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injured State [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 81.)

[103] See Michell 1996, p. 403, n. 99. Another case referred to by Michell is *Reed*, but also in that case, the *Lujan* test was applied, meaning that international law did not *have* to be looked at because there was no protest from the Bahamas (from where Reed was allegedly abducted). See US Court of Appeals, Second Circuit, *United States v. Reed*, 27 January 1981, Nos. 224, 227 and 228, Docket 80-1236, 80-1240 and 80-1264 (639 F.2d 896), p. 902: "The Bahamian government has not sought his return or made any protest nor is it likely to, since Reed is an American citizen. As we pointed out in Lujan, absent protest or objection by the offended sovereign, Reed has no standing to raise violation of international law as an issue."

[104] However, Michell (1996, p. 403) also notes that "several cases have suggested in *dicta* that evidence of a protest by a foreign state would preclude application of the *Ker-Frisbie* rule [original footnote omitted, ChP]." That would mean that a protest alone would be enough to divest jurisdiction, even if the suspect was not seriously mistreated. He refers here to US Court of Appeals, Ninth Circuit, *United States v. Verdugo-Urquidez*, 22 July 1991, No. 88-5462 (939 F.2d 1341), where it was decided (see *ibid*., pp. 1342-1343): "This case presents the question whether the United States breaches its obligations under its extradition treaty with Mexico if it authorizes or sponsors the forcible taking of a Mexican national from that country without the consent of the Mexican government. We hold that it does. We further hold that if the Mexican government formally objects to the treaty breach and a defendant timely raises that breach in a pending criminal proceeding the courts of the United States may not exercise personal jurisdiction over that defendant, provided the Mexican government is willing to accept repatriation. In short, under such circumstances a district court may not subject the defendant to trial, and a conviction obtained must be vacated." See also *ibid*., pp. 1346 ("[N]umerous cases have suggested that were the government of the country from which an individual was kidnapped to lodge a formal protest with the United States, that protest might defeat jurisdiction") and 1349: "[T]he (...) view of Ker does not apply to cases in which the government of the nation from which a defendant has been kidnapped protests the kidnapping [original footnote omitted, ChP]." See finally also the still-to-discuss *Yunis* case for a presentation of the *Toscanino* threshold not mentioning the third requirement: "Although most circuits have acknowledged the exception carved out by *Toscanino,* it is highly significant that *no* court has ever applied it to dismiss an indictment. They have uniformly treated *Toscanino* as a very narrow exception to *Ker-Frisbie*. (...) Two distinct grounds have been relied upon in refusing to dismiss an indictment under the *Toscanino* exception: either courts conclude that the torturous activity did not rise to the level of outrageousness warranting dismissal, or conclude that United States officials were not directly involved in the torturous activity. (...) Several of the above cases involved serious allegations of torture and abuse. The fact that not *one* of the courts relied on *Toscanino* to dismiss the indictment highlights the extreme narrowness of that exception and underscores the force of the *Ker-Frisbie* doctrine [emphasis in original, ChP]." (US District Court,

Be that as it may and not looking at the international law question for now, it can be repeated that it is arguably strange (and, perhaps,[105] also in violation of some reasonings in the *Toscanino* decision) that a suspect would have to prove that he was seriously mistreated during his abduction.[106] It is submitted that resorting to the reprehensible method of abduction alone should already be enough to divest jurisdiction. In addition, it may also be possible that a court may want to refuse jurisdiction if a suspect had been seriously mistreated before being brought into the jurisdiction of the court, whether this serious mistreatment was committed by State agents or other entities. To again quote Michell (after his presentation of the three requirements):

> [T]hese later interpretations suggest incorrectly that *Toscanino* was primarily a "torture" case rather than a "forcible abduction" case. This view imposes a virtually insuperable evidentiary burden upon the fugitive, as he will rarely be able to advance conclusive evidence of torture, or to demonstrate that government agents were directly responsible for his abduction. More importantly, it is entirely unclear why a fugitive should have to demonstrate that he was tortured [original footnotes omitted, ChP].[107]

One can wonder how a court, on the one hand, can accept the *Lujan* outcome and, on the other hand, assert that it wishes to deter illegal governmental conduct.[108] The outcome of *Lujan* might very well encourage enforcement agents not to use regular extradition proceedings but to use other, less burdensome/costly/complicated ways to bring a suspect into the jurisdiction of another State (as long as they do not seriously mistreat that suspect). This is arguably to be avoided as these ways still circumvent the normal procedures. The Court could have brought in more flexibility by stating that illegal pre-trial conduct would not be tolerated and be remedied via another route if the illegality was not so serious as to refuse jurisdiction. However, as stated, one can even wonder if the sole fact that US agents kidnap a person from abroad (even if there is no serious mistreatment of the abductee and even if there is no protest from the State where the arrest took place) is not already serious enough for a court to refuse jurisdiction. After all, the person was not brought into the jurisdiction of the now prosecuting State through the official channels available.

District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), pp. 919-920.)

[105] See, however, n. 97.

[106] See also US Court of Appeals, Ninth Circuit, *United States v. Lovato*, 14 July 1975, No. 74-3088 (520 F.2d 1270), p. 1271: "The Lujan case makes it clear that even in the light of Toscanino, the Second Circuit continues to follow the Ker-Frisbie line of cases unless the person claiming that he was kidnapped makes a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States."

[107] Michell 1996, p. 403.

[108] See US Court of Appeals, Second Circuit, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62), p. 66: "We scarcely intend to convey approval of illegal government conduct."

A couple of years after the US *Toscanino* and *Lujan* cases, another common law Court of Appeal(s) was confronted by a *male captus* situation. In the 1977 New Zealand *R v. Hartley* case,[109] a certain Hartley was charged with murder. In the context of this case, the police of New Zealand interviewed a man called Bennett (not to be confused with the suspect from the 1993 English case, see *infra*),[110] whom they believed was an accomplice of Hartley.[111] However, during the interview, the policemen "learned nothing from him and agreed that there was no reason why he should not proceed with plans he had made to leave the Auckland district with his wife for a short holiday."[112] After his holiday and his return to Auckland, he went to Melbourne, Australia, to stay with his wife's sister and to "think things out" until his return to New Zealand – he claimed that he wished to recommence his work some two weeks after his stay in Australia.[113] However, within two days of his arrival in Australia, he was apprehended by local Australian policemen who were instructed by their colleagues in New Zealand to put him aboard the first flight back to New Zealand.[114] He was taken into custody in Wellington and interrogated at length.[115] After that, he was tried by a trial chamber and convicted for murder. Bennett appealed his conviction and presented the following two claims:

> First, that by reason of his arbitrary and unlawful detention in Australia and removal from that country back to New Zealand the Courts did not have, or should have declined, jurisdiction to accept the indictment and have him brought forward for trial. This was supplemented at the hearing by adopting the suggestion that, assuming there was jurisdiction, nevertheless the Court should have discharged the accused in the exercise of a discretion to prevent abuse of its own process. Second, that in any event the oral and written statements made by him to the police in New Zealand after his return should have been excluded in terms of fairness and justice either because of

[109] Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 199 (*International Law Reports*, Vol. 77 (1988), pp. 330-335).
[110] See *ibid*., [1978] 2 *N.Z.L.R.* 213 (*International Law Reports*, Vol. 77 (1988), p. 331).
[111] See Court of Appeal, *R* v. *Hartley*, 5 August 1977, *International Law Reports*, Vol. 77 (1988), p. 330.
[112] Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 213 (*International Law Reports*, Vol. 77 (1988), p. 331).
[113] See *ibid*.
[114] See *ibid*. See also *ibid*., [1978] 2 *N.Z.L.R.* 214 (*International Law Reports*, Vol. 77 (1988), p. 332): "Concerning the method and manner adopted by the police to remove him from Australia and have him returned to New Zealand there is evidence by a detective inspector who appears to have been in charge of the police inquiries. He said quite plainly that he "was instrumental in having Bennett returned to this country from Australia". He said that on Tuesday 6 January he had become aware that Bennett had left New Zealand and was then in Melbourne; that he had telephoned the criminal investigation branch at Melbourne to tell officers there "of our interest in him"; and that as a result of his discussions action was taken by the Australian police to ensure that Bennett would be returned to New Zealand. He also said that after those arrangements were made he gave instructions for Bennett to be met by police officers at the Wellington airport."
[115] See *ibid*., [1978] 2 *N.Z.L.R.* 213 (*International Law Reports*, Vol. 77 (1988), p. 331). For more information on this point, see *ibid*., [1978] 2 *N.Z.L.R.* 213-214 (*International Law Reports*, Vol. 77 (1988), pp. 331-332).

> breach of the Judges' Rules or because of the illegality in bringing him back to New Zealand and thus obtaining evidence; or for both reasons in combination.[116]

The Court of Appeal, whose judgment was delivered by Judge Woodhouse, disapproved of the way in which Bennett was brought into the jurisdiction of New Zealand.

After having explained the regular proceedings through which a person is to be brought from one Commonwealth country to another,[117] it criticised the "illegal transaction"[118] in this specific case, stating:

> [O]n the present occasion all the relevant statutory precautions were blithely disregarded by the police in both countries. Not a move was made to get lawful authority for what was contemplated. Indeed in the absence of any direct admission by Bennett before he had left for Melbourne it is probable that the police in New Zealand could not have obtained the warrant which alone could initiate any lawful proceedings for his extradition from Victoria. So a telephone call to Melbourne was used instead. And as a result the man was removed from his bed and bustled back to the New Zealand police on the next flight.[119]

Notwithstanding the unlawful way in which Bennett was brought into the jurisdiction of the now prosecuting Court, the latter was also of the opinion that Bennett was lawfully arrested in New Zealand and thus that the Court had jurisdiction to try him, hereby referring to the already-discussed observations of Lord Goddard (in the *Elliott* case)[120] and the still-to-discuss[121] observations of Lord M'Laren (in the *Sinclair* case).[122]

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[116] *Ibid*., [1978] 2 *N.Z.L.R.* 214-215 (*International Law Reports*, Vol. 77 (1988), p. 333).

[117] See *ibid*., [1978] 2 *N.Z.L.R.* 214 (*International Law Reports*, Vol. 77 (1988), p. 332: "The lawful means by which a person may be extradited or delivered from one Commonwealth country to another is provided by the Fugitive Offenders Act 1881 (UK). (As to which see now the Fugitive Offenders Amendment Act 1976 enacted in New Zealand on 15 July 1976.) The statute permits a rather simpler procedure than is usually applicable in the case of extradition to or from a foreign State; but as one would expect it specifically provides safeguards that are intended to give ample protection to individual citizens against any possible risk of arbitrary arrest or any unwarrantable interference by officials or others with their right to liberty and to move about freely. If for the purposes of extradition a man is to be lawfully arrested or detained or surrendered there must be the sanction of an endorsed or provisional warrant; and every step taken in the one country or the other must have the authority of processes recognised by the Courts".

[118] *Ibid*.

[119] *Ibid*.

[120] See n. 46.

[121] See Subsection 3.1 (but see also n. 45 and accompanying text).

[122] See Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 215 (*International Law Reports*, Vol. 77 (1988), pp. 333-334): "[W]e are of the opinion that if a person is found within New Zealand and is then lawfully arrested and brought before the Court it must follow, considering the matter merely in terms of jurisdiction, that he can certainly be tried. (…) As to the bare question of jurisdiction, we think that the observations of Lord Goddard and of Lord M'Laren must be accepted as applicable to this country. It is the presence within the territorial boundaries that is the answer to the initial question of jurisdiction. In the present case, although Bennett was brought here unlawfully, he

Thus, this case seems to repeat the old *male captus bene detentus* rule.

However, the New Zealand Court was not finished yet. It noted that Lord MacDonald, in the *Sinclair* case, had focused on alleged irregularities committed by foreigners, for example, when he stated that "[t]here has been no improper dealing with the complainer by the authorities in this country, or by their officer".[123] Woodhouse explained: "It may be implicit in those last remarks that if there had been evidence of improper dealings by the authorities in Scotland then the Court might well have take some appropriate action in regard to the matter."[124]

One can wonder whether this is correct as it will be shown *infra* that Lord MacDonald also argued that the Court should continue to exercise jurisdiction, even if there was something irregular about the proceedings in Scotland.[125]

Be that as it may, it is obvious that Woodhouse wanted to emphasise that in the *Hartley* case, it was clearly the New Zealand's own Executive that had done something wrong and that that had to be the focus of this case.[126]

After having referred, among other things, to the consideration of Lord Devlin in the English case *Connelly v Director of Public Prosecutions*[127] about the "inherent jurisdiction of the Court to prevent abuse of its own process",[128] Woodhouse stated:

> There are explicit statutory directions that surround the extradition procedure. (…) And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society.[129]

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was eventually lawfully arrested within the country and then by due process of law he was brought before the Court. The Court was accordingly in a position to exercise jurisdiction in respect of him."

[123] *Ibid*., [1978] 2 *N.Z.L.R.* 216 (*International Law Reports*, Vol. 77 (1988), p. 334). See also n. 615.

[124] *Ibid*.

[125] See n. 616.

[126] See Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 216 (*International Law Reports*, Vol. 77 (1988), p. 334: "[I]f the Courts are faced, as in this case, by a deliberate decision of one of the executive arms of Government to promote in a direct way the very illegality that has had a person returned to this country, then the question does arise as to what might be done." See also Cowling 1992, p. 250 (commenting on the *Hartley* case): "[I]t appears that the discretion not to exercise jurisdiction will not apply in regard to irregularities and illegalities on the part of authorities in the surrendering state (...). Thus the enquiry is restricted to the actions of the receiving state".

[127] See Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 216 (*International Law Reports*, Vol. 77 (1988), p. 334: "Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused".

[128] *Ibid*.

[129] *Ibid*., [1978] 2 *N.Z.L.R.* 216-217 (*International Law Reports*, Vol. 77 (1988), p. 335).

It is clear that this *male detentus* test is much broader than, for example, the one accepted in the aftermath of the *Toscanino* case and can therefore be applauded. Woodhouse concluded that "if application had been made at the trial on this ground (…) the Judge would probably have been justified in exercising his discretion (…) to direct that the accused be discharged."[130]

However, as that was not the case,[131] the Court proceeded to the other claim of Bennett (the one related to the admissibility of evidence) and finally quashed his conviction for that reason.[132] However, because of that, it is not sure whether the Court of Appeal would also have nullified the conviction on the discretionary ground alone.[133]

Nine years after this case, New Zealand's neighbouring State Australia was confronted by the *male captus* case *Levinge v Director of Custodial Services, Department of Corrective Services*.[134]

In this case, Walter Alexander Levinge, who was facing "a large number of charges for crimes of dishonesty"[135] in Australia, was apprehended in Mexico by Mexican officers, deported to the US, where he was arrested by FBI agents, and from there extradited to Australia.[136] Although Levinge also claimed that his extradition from the US to Australia was unlawful,[137] his main argument focused on the role of the Australian officials in his unlawful removal from Mexico to the US. He argued that "the relevant Australian authorities were aware of, connived in and at the very least took the fruits of"[138] the illegal operation in Mexico, during which he was also submitted to "extreme physical and mental trauma".[139] As a result of this, he

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[130] *Ibid*., [1978] 2 *N.Z.L.R.* 217 (*International Law Reports*, Vol. 77 (1988), p. 335).
[131] See *ibid*.
[132] See *ibid*.
[133] See *ibid*. In that respect, the following views of the ICTY Trial Chamber in *Nikolić* ("The Court used its discretionary power to stay the case as it considered the conduct of the police to be an abuse of power", ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 88) and the ICTR Appeals Chamber in *Barayagwiza* ("In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed [emphasis in original and original footnote omitted, ChP].", ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', 3 November 1999, para. 75) are incorrect. Who *is* correct, however, is Schabas (2000, p. 567), when he writes in his commentary to the *Barayagwiza* case that "contrary to what the appeals chamber contends, a conviction was not quashed based on abuse of process. Although the Court of Appeal of Wellington was harsh in its criticism of an illegal rendition, the court explicitly refrained from ordering a stay for abuse of process, and overturned the conviction because of an illegally obtained confession [original footnote omitted, ChP]."
[134] New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 133.
[135] *Ibid*., p. 134.
[136] See *ibid*., p. 133.
[137] See *ibid*., p. 134.
[138] *Ibid*., p. 138.
[139] *Ibid*., p. 137.

> sought an order from the Court (…) that he be immediately released from custody and permitted to leave the jurisdiction. Alternatively, he sought an order prohibiting the continuance of the proceedings against him on the ground that they were an abuse of process of the Court.[140]

President Kirby of the New South Wales Court of Appeal first examined the two versions of exactly what had happened in Mexico (besides the uncontested facts)[141] and concluded that he did not believe Levinge's "inherently improbable"[142] account.[143] With respect to the alleged Australian involvement in the operation, Kirby noted that, although it was likely that the Australian inspector in charge of returning Levinge to Australia (Detective Chief Inspector Adams) "would have been in the closest contact"[144] with the FBI agents, a cablegram from the US to Australia on which Levinge relied[145] in no way showed that Australian officials knew of the

[140] *Ibid*., p. 134.

[141] See *ibid*., p. 135: "This much appears clear. The appellant was resident in Mexico on 25 January 1985. At about 11.00 am on that day he was taken into custody by Mexican police. Soon thereafter three persons identified as FBI agents, one of whom was Mr W [Lamar], arrived at the police station in Mexico where the appellant was being held. Thereafter the appellant was taken in one car driven by the Mexican officers, the FBI agents following in another car. It seems that the border was a very short distance from the police station. At the border, the appellant was handed over to the custody of the FBI agents."

[142] *Ibid*., p. 137.

[143] See for the account of FBI agent Lamar *ibid*., p. 136: "Mr Lamar's declaration asserted that the Mexican State judicial police had advised him that they were going to take the appellant and his daughter to the international border crossing at San Ysidro, California "and deport him from Mexico as an undesirable citizen" (sic). Mr Lamar denied that any instructions or directions were given by himself or other FBI agents to Mexican police. He stated that he and other United States federal agents had simply followed the car carrying the Mexican police, the appellant and his daughter, in a separate vehicle. He concluded: "[At no stage] during the period when Levinge was subject to observation by United States Federal agents while in Mexican custody, was there any indication of mistreatment by Mexican authorities. Furthermore, no United States Federal agent spoke with Levinge during this period. Special agents of the FBI neither directed nor ordered the Mexican officials to conduct any type of activity. The actions of the Mexican police, including Levinge's deportation, were initiated by them with United States involvement."" See for the account of Levinge himself, *ibid*., p. 137: "The appellant claimed that, following his arrest, he was denied contact with a legal representative. He stated that his amparo known as a "writ of protection" (apparently an internal passport) was torn up by the Mexican Chief of Police. (...) He also stated that he observed Mr Lamar go to the boot of the FBI car. From it he saw him take an attach[é] case which he opened and passed to a named Mexican official a sum of money claimed to be $40,000 United States currency. Immediately thereafter the appellant stated that he was taken to his car, again denied access to lawyers, submitted to "extreme physical and mental trauma" and delivered across the United States border against his will. He stated that he was refused inspection of any warrant and specifically refused extradition procedure under Mexican law or the protection of the Mexican Constitution whose protection he claimed by reference to his amparo."

[144] *Ibid*., p. 139.

[145] See *ibid*., p. 137: "Most important is a cable apparently issued from Los Angeles on 21 [this should probably be 25, see n. 146 ("cable, sent on the very day of the appellant's arrest") and n. 141 (which clarifies that the arrest was on 25 January 1985), ChP] January 1985 and directed for action to the federal police in Australia. The relevant parts of this cable read: "Further to refcable of 23 January 1985 Detective Inspector Adams met with case officers handling the inquiry into the whereabouts of Levinge ... at the San Diego office of the FBI. It has now been established that Levinge is identical with the person Roessler. The likelihood of Roessler (Levinge) being in Mexico presents some foreseen

operation itself.[146] Kirby admitted that this did not dismiss the fact that the removal of Levinge from Mexico to the US was in contravention of the regular extradition procedures[147] but this was only interesting for the question as to whether the arrest and detention of Levinge in the US was lawful. As the courts in the US, now that the *Toscanino* exception did not apply (in that there was no abduction by State agents accompanied by serious mistreatment, and no protest from the 'injured' State),[148] could rely on the *Ker-Frisbie* doctrine (and as it was not up to the Australian courts to review whether the US courts were in fact justified to do so),[149] this problem was now taken care of. Nevertheless, what happened in Mexico and the US was not totally irrelevant in the courts of Australia either.[150] As a result, Kirby examined more generally whether an irregularity in the process of bringing a suspect to court had any impact on the court's exercise of jurisdiction. After a review of case law from common law countries other than the US,[151] showing both views of how to react to an irregularity in the process of bringing a suspect to justice,[152] Kirby concluded:

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difficulties on the question of extradition, however it is considered probable by the FBI agents that he commutes regularly across the Mexican border through Tijuana into San Diego where he is known to have a number of associates and therefore a decision has been taken at this time to allow inquiries to proceed along the present lines of attempting to secure their [his] arrest in the United States."" (*Ibid*.)

[146] See *ibid*., p. 139: "So far as the cable is concerned, it will be remembered that it simply indicated that the FBI had reported that the appellant crossed the border into the United States from time to time so that the decision was made to secure his arrest at some time when he was in the United States. Nothing in the terms of the cable, sent on the very day of the appellant's arrest, indicates that the dramatic delivery of the appellant was imminent. On the contrary, the cable is entirely consistent with a decision by Detective Chief Inspector Adams to wait patiently until the appellant came across the Mexican border into the United States. As this could be anticipated from time to time, because of the clear connections the appellant had with the United States, why would the Australian authorities promote, participate in or condone the telescoping of the procedures which were readily available?"

[147] See *ibid*., p. 139.

[148] See the discussion of the aftermath of the *Toscanino* case.

[149] See New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 140: "It would be absurd for this Court to decide that, notwithstanding the considered judgment of the United States appellate judges, who have so much closer knowledge and understanding of the relevant United States law, that the appellant had been denied due process of law in the United States, anterior to his extradition here. That is not a question with which we are legitimately concerned. Our only concern is whether relief will be granted in this Court according to the law applicable in this jurisdiction. It is true that what has occurred in Mexico and the United States forms the factual background against which the application of our law will be considered. But it is erroneous to suggest that we have some function to reconsider the reasoned conclusions of the United States courts in the application of their law. No reason being shown as to why we should do so, we should not tread that uncertain path. For it leads to no relevant destination." See also n. 9 and accompanying text.

[150] See the previous footnote: "It is true that what has occurred in Mexico and the United States forms the factual background against which the application of our law will be considered." See also n. 10 and accompanying text.

[151] See New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 140-143.

[152] See *ibid*., pp. 140-141: "Some such decisions suggest that, once a person is within the jurisdiction, a court should not be troubled to examine how he came there; but should proceed to the substance of the matters before the Court. (...) On the other hand there is another line of authority, in several common

> Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. Such an abuse may arise by reason of delay on the part of prosecuting authorities. But delay is only one variety of unfair or wrongful conduct on the part of those authorities. Other such conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another.[153]

Kirby, also explaining the two possible rationales behind this abuse of process doctrine,[154] decided that in this particular instance, the judge first dealing with Levinge's arguments was justified in having decided not to refuse jurisdiction.[155] Nevertheless, it is clear that his *male detentus* test is much broader than the one accepted in the aftermath of the *Toscanino* case.

Kirby's colleagues, Judge of Appeal McHugh[156] and Acting Judge of Appeal McLelland,[157] also dismissed the appeal. Interestingly, McHugh, in his examination

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law jurisdictions which suggests that courts will assume the obligation, when asked, to scrutinise the circumstances by which a person was brought into the jurisdiction and, where appropriate, offer relief if it is shown that the means used to get him there were unlawful or otherwise wrongful."

[153] *Ibid*., p. 142.

[154] See *ibid*., pp. 142-143: "It still remains to be determined whether the conceptual basis of the relief (...) is to prevent prosecuting authorities from taking or securing advantage from their own misconduct or that of their servants or agents or is to assert the entitlement of the courts to protect the integrity of their own process and to uphold that integrity and the perception of it in the eyes of the parties, of the community and of the judges themselves. The first view has, as its conceptual basis, a principle akin to estoppel. The second view is grounded more fundamentally in a conception of the necessary purity of the "temples of justice" and the undesirability that the administration of justice itself should become contaminated by involvement (or the perception of involvement) in unlawful or wrongful activities on the part of the authorities (...). Most of the case law appears to be expressed in terms of the former justification. For my own part, I incline towards a preference for the latter. Perhaps the two concepts are simply dual aspects of the one consideration. However that may be, it is not necessary to resolve that controversy in this case."

[155] See *ibid*., p. 143: "It is sufficient to dispose of the appeal by saying that, whilst the Court has jurisdiction over the appellant and may provide him with relief of the kind he has sought, no proper basis has been shown to indicate that Smart J erred in declining to exercise that relief in this case. Upon the same facts I would reach the same conclusion as his Honour did."

[156] Who also stressed the fact that the prosecuting authorities had to be, in some way or another, involved in the alleged *male captus*, see *ibid*., p. 151: "[T]he Court has the power in an appropriate case to stay proceedings on the ground that the accused has been brought unlawfully into the jurisdiction. However, before a stay can be granted the prosecution must have been either a party to the unlawful conduct or connived at it." See also *ibid*.: "In the present case there is no evidence that the Australian police were involved in or connived at the expulsion of the plaintiff from Mexico. His Honour found that, shortly after the plaintiff's arrest in the United States, the Australian police officers became aware of the fact that he had been expelled from Mexico as a consequence of the FBI informing Mexican officials that he was wanted in the United States for extradition to Australia. But there is no evidence that before his arrest by the FBI the Australian officers knew that the expulsion of the plaintiff from the United States was the result of the payment of bribes by FBI officers or that his expulsion was unlawful." (See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 89: "The Court held that it has a right to stay proceedings in order to prevent an abuse of

of the case, looked at the role of the seriousness of the charges in the context of the abuse of process doctrine. He hereby made a distinction between cases in which delay had prejudiced the fairness of the trial itself and irregularities not necessarily prejudicing the fairness of the trial (strictly viewed).

> [I]n the "delay" cases there is not in my opinion any question of weighing up competing aspects of the public interest. If by reason of the conduct of the prosecution or complainant the fair trial of the defendant is prejudiced by delay to the extent that it constitutes an abuse of the process of the court, it is irrelevant that there is a strong case against the accused or that he is the subject of a serious charge or complaint. However, in the case of a "forcible abduction" there is no unfairness in the trial itself. So it is necessary to balance the public interest in preventing the unlawful conduct against the public interest in having the charge or complaint determined. This is not to say that the end can justify the means and that the more serious the charge the greater is the scope for the prosecution to engage in unlawful conduct. But conduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter.[158]

One can indeed agree with this reasoning. In principle, the abuse of process doctrine is a discretionary remedy, meaning that the judges can take every element of the case into account (including the seriousness of the alleged crimes) when deciding whether or not jurisdiction should be refused.[159] However, this discretion is relative in certain cases. For example, when it is clear that the suspect can no longer receive a fair trial in the strict sense of the word (this is the first situation as explained in Subsection 4.3 of Chapter III), a judge should refuse jurisdiction, whether the person tried is charged with very serious crimes or not. After all, a trial which is not fair is

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process by the executive or to protect the integrity of the court processes. This, however, according to the Court, should be done only where the executive had been a direct or indirect party to the unlawful conduct. As an involvement of the Australian executive could not be identified, the Court decided not to stay the proceedings against him.")

[157] Who, like his colleagues, also emphasised the importance of the involvement of the prosecuting authorities in the *male captus*, see New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 153: "It is impossible to conclude from the evidence in this case that any New South Wales or Federal police officer was involved in any illegality or irregularity which may have occurred in the means by which the appellant was taken from Mexico to the United States. In these circumstances there is in my opinion no factual basis for the invocation of the proposition for which R v Hartley; R v Bow Street Magistrates; Ex parte Mackeson and R v Guildford Magistrates' Court; Ex parte Healy are relied on, to the effect that improper activities on the part of the prosecuting authorities in procuring an alleged offender to be brought within the jurisdiction to answer criminal charges could be the basis of a finding that continuation of the prosecution is an abuse of process."

[158] *Ibid*., p. 151.

[159] This is in principle different for the context of the *habeas corpus* human rights provisions – applicable to *anyone* – which *dictate* the remedy of release in the case of an unlawful arrest/detention. However, it was explained in Subsection 4.4 of Chapter III that this remedy is problematic and that because of that, it would be better if the judge avoids it and simply grants the most appropriate remedy, taking every single aspect of the case into account (comparable with the abuse of process doctrine).

not a proper trial and only proper trials can be held in a society based on law. However, there is more room to weigh the seriousness of the alleged crimes in the second situation (see again Subsection 4.3 of Chapter III), the situation in which this book is mostly interested. If a suspect is the victim of a *male captus* situation, this fact does normally not affect the fairness of the trial in the strict sense (in court). After all, the *male captus* only has to do with how that suspect arrived in the court, not with the proceedings in the courtroom themselves. As a result, the judges must determine, taking all the elements of the case into account (including the seriousness of the alleged crimes), whether it would undermine the court's integrity/the judges' sense of justice/the concept of a fair trial broadly perceived to continue the case notwithstanding that *male captus*. Nevertheless, also here, the abuse of process doctrine can be relative. This is because it can be argued that if the prosecuting forum's own authorities are involved in a serious *male captus*, such as an abduction, the judges should refuse jurisdiction, even if the suspect is charged with serious crimes and even if the fairness of his trial in the courtroom is not jeopardised by this abduction. This argument will be returned to *infra*.

A *male captus* situation that has not so far been mentioned very often in this overview is the method of luring. The *Yunis* case,[160] decided by the US District Court in the District of Columbia one year after *Levinge*, is an interesting example of (the position of a US court towards) this technique. In Subsection 1.4 of Chapter III, the luring operation of Yunis was briefly addressed, but it will be repeated here as an introduction to the more substantive issues of the case.

In *Yunis*, the US Government sought to arrest and bring to justice the leader of a group of men who hijacked and later blew up a Jordanian aircraft in Beirut.[161] After months of investigation, the US identified Lebanese citizen Fawaz Yunis as the leader of this group.[162] It was with help of a former friend of Yunis and now US informant, Jamal Hamdan, that this identification was made possible.[163] A detailed plan was made to lure Yunis, under the promise of a lucrative narcotics deal, from Lebanon to a location in international waters off the coast of Cyprus.[164] On 13 September 1987, the FBI-led operation 'Goldenrod' began: that morning, Hamdan and Yunis boarded a small motor boat off the coast of Cyprus which brought the men to a motor yacht anchored in international waters.[165]

> Immediately upon boarding the yacht, defendant was greeted, given a routine pat down and then offered a beer by one of the FBI agents. S.A. [Special Agent, ChP] George Gast, who assumed the role of one of the narcotic contacts, escorted Yunis to the stern of the boat where he and Yunis joined S.A. Donald Glasser. At a prearranged signal – a slight nod – the two agents, who were then positioned

[160] US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909).
[161] See *ibid.*, p. 912.
[162] See *ibid.*
[163] See *ibid.*
[164] See *ibid.*
[165] See *ibid.* pp. 912-913.

> alongside Yunis, engaged in a "*take down*". Together, they grasped the defendant's arms, "kick[ed] his feet out from underneath him, and [took] him down to the deck and put handcuffs on him [original footnote omitted, ChP]."[166]

This 'taking down' caused fractures to Yunis' wrists.[167] Yunis' counsel argued, among other things, that the indictment against Yunis, who was charged with hostage taking and aircraft piracy,[168] had to be dismissed on two grounds: "first, the government's actions contravened its extradition treaty obligations with Lebanon and Cyprus, and second, the government used excessive and outrageous force when arresting defendant in violation of his fifth amendment rights to due process."[169] The Court held that individuals alone are not empowered to enforce extradition treaties (neither Lebanon nor Cyprus objected to the operation).[170] As a result, the issue of the possible extradition treaty violations did not have to be looked at.[171] With respect to Yunis' claims regarding his fifth amendment rights, the Court concluded that the Constitution indeed does apply abroad to aliens. However, it then examined, among other things, the (now probably well-known) *Ker-Frisbie* doctrine and the serious mistreatment exception of *Toscanino*.[172] In doing so, it gave some very interesting examples of cases where this exception had not been applied.[173] From

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[166] *Ibid.*, p. 913.
[167] See *ibid*., p. 913.
[168] See *ibid*., p. 911.
[169] *Ibid*., p. 915.
[170] See *ibid*., p. 916.
[171] See *ibid*., p. 915. It must be noted that if Lebanon and Cyprus had objected to the operation, this would not necessarily have led to a refusal of jurisdiction (as is arguably the only appropriate form of reparation in the case of an abduction followed by a protest and request for the return of the abducted suspect). Although the sovereignty of Lebanon might indeed have been violated by this luring operation, it was stated in Chapter III that a luring operation is normally viewed as a less serious violation of international law than, for example, an abduction. This may also have its effect on the exact form of reparation.
[172] The Court hereby noted that "[a]lthough most circuits have acknowledged the exception carved out by *Toscanino*, it is highly significant that *no* court has ever applied it to dismiss an indictment [emphasis in original, ChP]." (*Ibid*., p. 919.) (See also n. 104.)
[173] See *ibid*., p. 919: "*U.S. v. Rosenthal,* 793 F.2d 1214, 1232 (11th Cir.1986), *cert. denied,* --- U.S. ----, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987) (defendant abducted from Bahamas on narcotic charges, the court declined to adopt the *Toscanino* exception but even if applicable, found no evidence of conduct which shocked the conscience); *U.S. v. Darby,* 744 F.2d 1508 (11th Cir.1984), *cert. denied,* 471 U.S. 1004, 105 S.Ct. 2322, 2323, 85 L.Ed.2d 841 (1985) (Honduran citizen abducted from Honduras, driven at gunpoint to airport, and forced on plane for trial in United States; court held that defendant had not "alleged the sort of cruel, inhuman and outrageous treatment" to warrant dismissal); *U.S. v. Reed,* 639 F.2d 896 (2d Cir.1981) (Bahamian defendant, residing in the Bahamas, deceitfully enticed by CIA agents to board a plane bound for Bimini; agents placed cocked gun at his head and forced him to lie on aircraft floor for the duration of the flight and then twisted his arm as he exited plane; court found that use of revolver and threatening language not "gross mistreatment" warranting dismissal) [this case was already briefly mentioned earlier, see n. 103, ChP]; *U.S. v. Cordero,* 668 F.2d 32 (1st Cir.1981) (defendants arrested, abducted in Venezuela to face drug charges in Puerto Rico. In refusing to dismiss the indictment, the court concluded that although defendants were subjected to poor treatment, insulted and slapped when abducted and while in jail were poorly fed and forced to sleep on the floor, those conditions "are a far cry from deliberate torture warranting dismissal") [emphasis in original, ChP]."

these cases, one can conclude that what is apparently needed before the indictment can be dismissed is actual torture, in other words severe mistreatment intentionally inflicted upon the person. 'Normal' abductions in which, for example, the suspect is poorly treated or slapped are not serious enough to dismiss the indictment. Luring cases as such, in which no violence but only tricks are used to bring a suspect from one jurisdiction to another, are even less troublesome.[174] Nevertheless, *Yunis* also appears to show that *if* a luring case were accompanied by *Toscanino*-like serious mistreatment, a court may also refuse jurisdiction. In that respect, even though this exception, because of the facts of the *Toscanino* case, was linked in the previous pages with the *male captus* situation abduction, it could be argued that other *male captus* situations (such as luring and disguised extradition), accompanied by serious, *Toscanino*-like mistreatment, may also lead to the ending of the case.[175] This can also be derived from the following, rather generally formulated, test in *Yunis*:

> Two distinct grounds have been relied upon in refusing to dismiss an indictment under the *Toscanino* exception: either courts conclude that the torturous activity did not rise to the level of outrageousness warranting dismissal, or conclude that United States officials were not directly involved in the torturous activity.[176]

In the end, the Court concluded that the arrest of Yunis did not warrant the dismissal of the case:

> In this action, there is no dispute that United States law enforcement officers were fully involved in the planning and execution of defendant's arrest. However, defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction. The record in this proceeding has been reviewed with care and the Court fails to find the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino.*[177]

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[174] See *ibid*., p. 920: "In cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction."

[175] The other *Toscanino* exception (violation of State sovereignty followed by a protest and request for the return of the suspect) will probably not so easily lead to a *male detentus*. This is because a disguised extradition cannot lead to a violation of the sovereignty of the State of residence and because a luring operation, even if it can (it was argued in Chapter III that this might be possible under certain circumstances), is often seen as a less serious violation of international law, which may also have its effect on the exact form of reparation.

[176] US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 919. The Court also explained the reason behind the latter requirement, see *ibid*., p. 920: "The purpose underlying the *Toscanino* rule is to deter police misconduct by barring the government from using the fruits of its deliberate lawlessness. When the United States is not involved in the torturous activity, no purpose would be served by dismissing the indictment." See also ns. 100 and 104.

[177] *Ibid*., p. 920.

The Court hereby noted that the fact that Yunis' arrest may have involved too much force, that Yunis may not have received the best or even adequate medical attention for his broken wrists and that the way in which Yunis was transported to the US was in extreme confinement did not change that conclusion.[178] Notwithstanding this, the Court concluded that the operation had been executed in a far from perfect manner. It concluded that "the FBI failed to comply fully with constitutional restraints and precedential Supreme Court decisions."[179] As a result of this, Yunis' confession made after his arrest had to be suppressed.[180]

The most important *male captus* case in the US[181] came four years later, when the US Supreme Court decided the (in)famous *Alvarez-Machain* case.[182] In this case, the respondent, a Mexican citizen called Humberto Alvarez-Machain, was indicted

> for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar. The DEA believes that the respondent, a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him [original footnote omitted, ChP].[183]

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[178] See *ibid*., pp. 920-921: "That is not to say that the Court accepts the government's representations in its December 1, 1987 response to defendant's pretrial motion that Yunis "was treated with the greatest care and with due deference to whatever personal requests he made during the voyage from the Mediterranean to the United States." Even the government has admitted that "there may well have been in hindsight too much force brought upon Mr. Yunis' wrists" when he was forced down and thrown to the deck during the course of his arrest. (…) Indeed, the two agents immediately involved believed that the amount of force and method used in effectuating the arrest were necessary to ensure that the defendant did not attempt to jump overboard. Similarly, although the defendant may not have been given the best or even adequate medical care, the treatment provided was not so poor as to be "cruel and inhumane." (…) Finally, even if the procedure employed in transporting the defendant by airplane from the Saratoga [this is the carrier from which Yunis was flown to the US, ChP] to the United States was extremely confining, it did not rise to the level of outrageousness that shocks the conscience. S.A. David Johnson, who was primarily responsible for the hostage rescue team, testified that it was necessary to tranquilize the defendant and place him in the Stokes litter [See *ibid*., p. 912, n. 4: "A Stokes litter is commonly used by the Navy to carry injured personnel. Occupants are strapped into the litter and immobilized in a prone position.", ChP.] due to the size of the plane and the need to protect the aircraft and the personnel on board. (…) Even if the Court were to accept each and every allegation of excessiveness made by the defendant, taken together, they simply do not rise to the deliberate torture and abuse alleged in *Toscanino*."

[179] *Ibid*., p. 929.

[180] See *ibid*.

[181] See also Michell (1996, p. 404), who called it "the leading U.S. case on forcible abduction by government agents". See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 82 (referring to Michell).

[182] US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655).

[183] *Ibid*., p. 657.

On 2 April 1990, Alvarez-Machain was abducted from Mexico by six armed men[184] and, after being held in a motel for one night, flown to El Paso, Texas, where he was arrested by DEA officials.[185] Although the latter were not involved in the actual kidnapping, the District Court concluded that they were nevertheless responsible for it.[186] Mexico protested the violation of its sovereignty and demanded that Alvarez-Machain be returned to Mexico.[187] This element was not present in the *Lujan* case. As a result, it is interesting to see how the Court coped with this international law issue and how it might affect the US *male captus* discussion.

Alvarez-Machain himself argued that his indictment had to be dismissed, claiming that the abduction constituted outrageous governmental conduct and that the District Court had no jurisdiction to try him because the abduction was a violation of the extradition treaty between the US and Mexico.[188]

Although Alvarez-Machain's former point was rejected by the District Court, the latter was accepted.[189] Hence, the Court discharged Alvarez-Machain and ordered his repatriation to Mexico.[190]

The Court of Appeals concurred with this reasoning, hereby relying on its decision in the already briefly mentioned (see footnote 104) case *United States v. Verdugo-Urquidez*.[191] This is arguably the proper interpretation of the *Lujan* case: even though Alvarez-Machain was not seriously mistreated during his abduction, the exercise of jurisdiction could still be refused because of a violation of international law.

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[184] One of these was a man called Sosa, a former Mexican policeman who was hired by the DEA. (The name Sosa can be found back in the civil suit filed by Alvarez-Machain after the criminal case, see *infra*).

[185] See US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), p. 657.

[186] See *ibid*.

[187] See *ibid*., pp. 670-671: "Mexico has formally demanded on at least two separate occasions that he be returned to Mexico, and has represented that he will be prosecuted and, if convicted, punished for his offense [original footnote omitted, ChP]." In addition, Mexico requested the extradition of two of Alvarez-Machain's alleged kidnappers, see *ibid*., p. 669, n. 16.

[188] See *ibid*., p. 658.

[189] See *ibid*.

[190] See *ibid*.

[191] See *ibid*. See also *ibid*., pp. 658-659 for information on the *Verdugo* case: "United States v. Verdugo-Urquidez, 939 F.2d 1341 (CA9 1991), cert. pending, No. 91-670. 946 F.2d 1466 (1991). In Verdugo, the Court of Appeals held that the forcible abduction of a Mexican national [who was also indicted for the murder of Camarena, see US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), p. 658, n. 3, ChP] with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico. Although the Treaty does not expressly prohibit such abductions, the Court of Appeals held that the "purpose" of the Treaty was violated by a forcible abduction, 939 F.2d, at 1350, which, along with a formal protest by the offended nation, would give a defendant the right to invoke the Treaty violation to defeat jurisdiction of the District Court to try him. The Court of Appeals further held that the proper remedy for such a violation would be dismissal of the indictment and repatriation of the defendant to Mexico [original footnotes omitted, ChP]."

Chief Justice Rehnquist, delivering the "surprisingly curt judgment"[192] of the majority of the Supreme Court Justices, discussed, among other things, the *Ker* case[193] and noted that

> [t]he only differences between Ker and the present case are that Ker was decided on the premise that there was no governmental involvement in the abduction (…) and Peru, from which Ker was abducted, did not object to his prosecution [original footnote omitted, ChP].[194]

Rehnquist observed that Alvarez-Machain (like the Court of Appeals in the case *United States v. Verdugo-Urquidez*) found these differences dispositive as they showed that his prosecution violated the implied terms of a valid extradition treaty.[195]

Hence, Rehnquist continued,

> our first inquiry must be whether the abduction of respondent from Mexico violated the Extradition Treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in Ker applies, and the court need not inquire as to how respondent came before it.[196]

This appears to contradict earlier cases discussed, for if the Supreme Court were not to find the abduction to constitute a violation of the extradition treaty (which would arguably be very strange), one could still assert that the Court would have to examine whether the abduction violated (customary) international law (namely through the violation of the sovereignty of Mexico) and if not, that it would still have to determine whether Alvarez-Machain was the victim of serious mistreatment during his abduction, see *Lujan*. (The fact that the District Court and the Court of Appeals did not believe that Alvarez-Machain was the victim of outrageous governmental conduct does not mean that the Supreme Court could not have a different opinion on this.)[197]

Be that as it may, Rehnquist first noted that: 1) "[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the

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[192] Rayfuse 1993, p. 886.
[193] See US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), pp. 660-661.
[194] *Ibid*., p. 662.
[195] See *ibid*.
[196] *Ibid*.
[197] With respect to the alleged physical abuse of Alvarez-Machain, see, for example, Aceves 1996, pp. 107-108: "During his capture and detention, Alvarez was physically and verbally abused. Alvarez testified that he was "shocked six or seven times through the soles of his shoes with 'an electric shock apparatus'" and "injected twice with a substance that made him feel 'light-headed and dizzy'" [original footnote omitted, ChP]."

Treaty if such an abduction occurs";[198] 2) the mechanism in the extradition treaty "does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution"[199] and 3) "[t]he history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty."[200]

He then turned to the question of "whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty"[201] and examined the argument of Alvarez-Machain "that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are "so clearly prohibited in international law" that there was no reason to include such a clause in the Treaty itself."[202]

Although this seems obvious, the majority of the Court, amazingly, did not agree:

> [T]o imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.[203]

Thus, even though the judges focused on the treaty, they also indirectly looked at international law more generally, namely to find out whether it was so strong on this particular topic that it had to be read into the treaty. That was not the case, although that did not mean that international law was not violated at all. That could very well have been the case:

> Respondent and his amici may be correct that respondent's abduction was "shocking," (...), and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes (...), and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of Ker v. Illinois is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States [original footnote omitted, ChP].[204]

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[198] US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), p. 663.
[199] *Ibid*., p. 664.
[200] *Ibid*., p. 665.
[201] *Ibid*., p. 666.
[202] *Ibid*.
[203] *Ibid*., p. 669.
[204] *Ibid*., pp. 669-670.

Hence, because the abduction did not violate the extradition treaty, the Supreme Court did not find it necessary to look further into the international law dimension. It held that the violation of international law, if there was any – this is, of course, obvious, given the fact that Mexico did not consent to the abduction for which the US was responsible – had to be solved at the political level. Furthermore, the other element of the *Toscanino* exception *prima facie* did not appear relevant at all. After all, the Court issued a *male captus bene detentus* decision while holding that "[r]espondent and his amici may be correct that respondent's abduction was "shocking"". This is also the reason why some commentators believe that *Alvarez-Machain* effectively quashed the *Toscanino* exception.[205] If this is indeed true (which, however, can be seriously doubted),[206] then this would be very alarming for

[205] See, for example, Rayfuse 1993, p. 893 (focusing on the mistreatment element): "[T]he Supreme Court ruled in *Machain* that regardless of the "shocking" nature of the government's acts, Machain was subject to the jurisdiction of the US courts and any relief to be afforded was at the discretion of the executive branch only. The "shocking and outrageous" exception thus appears to have been put to rest by the Supreme Court, once and for all." See also *ibid*., p. 896. See also Sheely 2003, p. 439: "The Supreme Court in *Alvarez-Machain* reaffirmed the application of the *Ker-Frisbie* doctrine to an abduction that was, arguably, both "shocking" and in violation of international law, seemingly disavowing the "*Toscanino* Exception." Later, in *United States v. Matta-Ballesteros*, the United States Court of Appeals for the Ninth Circuit commented upon both the applicability of the *Ker-Frisbie* doctrine to cases in which the manner a defendant is brought before the court is questioned and upon the very limited holding and questionable precedential value of *Toscanino*. In *Matta-Ballesteros*, a Honduran national was kidnapped from his home [by the 'Cobras' (Honduran special troops) and US Marshals, see US Court of Appeals, Ninth Circuit, *United States v. Matta-Ballesteros*, 1 December 1995, No. 91-50336 (71 F.3d 754), p. 761, ChP] and flown to Illinois where he was subsequently tried and convicted on narcotic charges. One of Matta-Ballesteros' challenges to his conviction was that his abduction was "shocking," invoking the "*Toscanino* Exception." ["Matta-Ballesteros claims that while being transported bound and hooded to the United States Air Force Base he was beaten and burned with a stun gun at the direction of the Marshals. He claims that during his flight he was once again beaten and tortured by a stun gun applied to various parts of his body, including his feet and genitals." (*Ibid*.), ChP.] The court dismissed this allegation, noting that "[i]n the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino* (…), have been cut short." (*Ibid*., p. 763.) It may finally be interesting to note that Matta-Ballesteros, like Alvarez-Machain, was also charged with being involved in the Camarena case. In fact, many more were charged in connection with the case of the murdered DEA agent: 22 persons were charged, of whom seven were tried in federal court. Three of those seven (namely Alvarez-Machain, Matta-Ballesteros and the already discussed Verdugo-Urquidez) were abducted from their home countries and brought to the US. (See US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 623, n. 23.) The *Alvarez-Machain* and the *Matta-Ballesteros* cases differ in at least two important points and that is that 1) the Mexican Government did protest the abduction of Alvarez-Machain, whereas the Honduran Government did not protest the abduction of Matta-Ballesteros and 2) the US had not sought extradition from Mexico whereas the US had tried to have Matta-Ballesteros extradited from Honduras to the US before it abducted him. (For this last point, see US Court of Appeals, Ninth Circuit, *United States v. Matta-Ballesteros*, 1 December 1995, No. 91-50336 (71 F.3d 754), p. 761 and Nadelmann 1993, p. 871.) For more information on the *Matta-Ballesteros* case, see, for example, Michell 1996, pp. 430-434.

[206] Although the words from *Matta-Ballesteros* mentioned in n. 205 ("In the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino* (…), have been cut short.") do not support this assertion, the judges in *Matta-Ballesteros* seemed to be of the opinion that jurisdiction can be refused in *Toscanino*-

it would mean that a court in the US could continue a case, even if that abduction may have been accompanied by serious mistreatment and even if that abduction was in violation of the sovereignty of another State which protested and requested the return of the suspect. The only avenues leading to the ending of the case would then be if the Extradition Treaty/or another treaty signed between the two States were to explicitly forbid an abduction[207] or if the Executives of the two States are of the

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like circumstances nonetheless, namely in the context of another concept (the concept of supervisory powers), see US Court of Appeals, Ninth Circuit, *United States v. Matta-Ballesteros*, 1 December 1995, No. 91-50336 (71 F.3d 754), p. 764: "The only way we could exercise our supervisory powers in this particular case is if the defendant could demonstrate governmental misconduct "of the most shocking and outrageous kind," so as to warrant dismissal. (…) Matta-Ballesteros has not. His alleged treatment, even if taken as true, does not meet this rigorous standard, and the acts alleged were not nearly as egregious as those committed in Toscanino." Thus, one can assert that US courts, in *Toscanino*-like circumstances, would still refuse jurisdiction, even after *Alvarez-Machain*. See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 83: "The Court [in *Matta-Ballesteros*, ChP] did not exclude the possible application of the *Toscanino* rule but held that the circumstances of the accused's abduction did not meet the level of seriousness required." Note finally that the *Toscanino* exception thus appears to be extremely high. After all, in *Matta-Ballesteros*, the judges stated that the suspect's treatment, "even if taken as true" (it is reminded, see n. 205, that Matta-Ballesteros claimed that he was beaten and tortured by a stun gun), does not meet the required standard.

[207] See Sheely 2003, p. 438. See also *ibid.*, p. 437: "The majority opinion of *Alvarez-Machain* was later cited as standing for the proposition that, in order for a defendant to successfully rely upon an extradition treaty to divest jurisdiction, the treaty must affirmatively state that citizens of a signator country will not be seized by another signator country [original footnote omitted, ChP]." Sheely hereby refers to the *Noriega* case, where Judge Kravitch wrote: "Under Alvarez-Machain, to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner." (US Court of Appeals, Eleventh Circuit, *United States v. Noriega*, 7 July 1997, Nos. 92-4687, 96-4471 (117 F.3d 1206), p. 1213.) *Noriega* was a special *male captus* case because General Noriega, the commander of the Panamanian Defence Forces, was brought to the US after that latter State had intervened militarily in Panama. This military invasion was triggered by Noriega's declaration on 15 December 1989 that a state of war existed between Panama and the US. Less than a week later, on 20 December 1989, "President Bush ordered U.S. troops into combat in Panama City on a mission whose stated goals were to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges in the United States." (US District Court, Southern District of Florida, *United States v. Noriega*, 8 June 1990, No. 88-79-CR (746 F.Supp. 1506), p. 1511.) In the US, Noriega was subsequently tried and convicted for involvement in cocaine trafficking. An important dictum of the *Noriega* case which should be mentioned here is that it followed the already discussed *Eichmann* and still-to-discuss *Argoud* cases in arguing that a person cannot plead a violation of classical international law, see *ibid.*, p. 1533: "As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." Returning to the *Alvarez-Machain* case and the point made *supra*, it may finally be interesting to note (see also n. 187 of Chapter III) that after the *Alvarez-Machain* case, a treaty on transborder abductions was, in fact, drafted, see Baker 2004, pp. 1389-1390: "[N]egotiations between the United States and Mexico led to the signing of the Transborder Abduction Treaty in 1994, which suggests an effort by both countries towards improvement in extradition policies. Most importantly, the remedy for a violation of the Treaty is repatriation of the abductee [original footnotes omitted, ChP]." This Treaty Between the Government of the United Mexican States and the Government of the United States of America to Prohibit Transborder Abductions (which can be found in Abbell 2001, at A-303-A-306) stipulates (in Art. 5, para. 2) that there is no obligation to repatriate "if (a) the Requesting Party does not make an explicit request for

opinion that international law demands that the suspect must be returned to the injured State, in which case, of course, the judge cannot exercise jurisdiction.

As expected, the decision attracted a lot of criticism from around the world. The first reaction came, however, from the US itself, through the dissenting opinion of Justice Stevens (writing for the minority). He stated that "[t]he Government's claim [upheld by the Supreme Court, ChP] that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform (…) provisions [of the extradition treaty, ChP] into little more than verbiage."[208] To clarify this, Justice Stevens ridiculed the Court's *a contrario* reasoning that because the treaty does not say that kidnapping is not allowed, it is in fact allowed to kidnap:

> If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available, because they, too, were not explicitly prohibited by the Treaty [original footnote omitted, ChP].[209]

According to Stevens, "[i]t is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory [original footnote omitted, ChP]."[210]

He used the same word when referring to the Court's "disdain for customary and conventional international law principles",[211] which, as was shown already in Chapter III, stipulate that it is a breach of international law to perform acts of sovereignty on a State's territory without the latter's consent and that the forum State must repatriate the abductee if the injured State protests and requests his return.[212]

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repatriation, or (b) the abducted person opposes repatriation." (*Ibid*., A-305.) As explained earlier, although both Mexico and the US signed the treaty on 23 November 1994, it was never submitted to the US Senate for advice and consent to ratification. As a result, it has never entered into force.

[208] US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712 (504 US 655), p. 673. See also *ibid*., pp. 673-674: "For example, provisions requiring "sufficient" evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested Country discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8), would serve little purpose if the requesting country could simply kidnap the person. As the Court of Appeals for the Ninth Circuit recognized in a related case, "[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 (1991). In addition, all of these provisions "only make sense if they are understood as requiring each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." Id., at 1351."

[209] *Ibid*., p. 674.

[210] *Ibid*., pp. 678-679.

[211] *Ibid*., pp. 685-686: "The Court's admittedly "shocking" disdain for customary and conventional international law principles (…) is (…) entirely unsupported by case law and commentary."

[212] See *ibid*., pp. 680-681. Stevens hereby referred, among other things, to *Oppenheim's International Law* ("A State must not perform acts of sovereignty in the territory of another State. ..… It is … a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the

Stevens, distinguishing *Alvarez-Machain* from *Ker*[213] and explaining that a feeling of vengeance should not lead to a misinterpretation of the law,[214] even used stronger words in the following passage, which have now become famous:

> I suspect most courts throughout the civilized world (…) will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character [original footnote omitted, ChP].[215]

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offending State is to hand over the person in question to the State in whose territory he was apprehended.") and to a quotation by the chief reporter for the American Law Institute's Third Restatement of the Foreign Relations Law of the United States: "When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states)."

[213] See *ibid*., p. 682: "A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law, and in my opinion, also constitutes a breach of our treaty obligations. Thus, at the outset of its opinion, the Court states the issue as "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." (…) That, of course, is the question decided in Ker v. Illinois (…); it is not, however, the question presented for decision today [original footnote omitted, ChP]." See also *ibid*., pp. 684-685: "The arresting officer in Ker did not pretend to be acting in any official capacity when he kidnaped Ker. As Justice Miller noted, "the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." (…) The exact opposite is true in this case". See also n. 34.

[214] See *ibid*., pp. 686-688: "As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts. Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold. That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation. Indeed, the desire for revenge exerts "a kind of hydraulic pressure . . . before which even well settled principles of law will bend," (…), but it is precisely at such moments that we should remember and be guided by our duty "to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it." (…) As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws." To counter that tendency, he reminds us: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself" [original footnotes omitted, ChP]."

[215] *Ibid*., pp. 687-688.

Alongside the dissent of the minority, "[t]he judgement was criticised in legal literature,[216] condemned by most states and denounced by international human rights organizations[217] [original footnotes omitted, ChP]."[218]

[216] See, for example, the following articles with the much-saying titles: 'The Supreme Court Sanctions Transborder Kidnapping in *United States v. Alvarez-Machain*: Does International Law Still Matter?' (Schneebaum 1992), 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns' (Rayfuse 1993), 'Monstrous Decision. Kidnapping is Legal' (Ruiz-Bravo 1993), '"The Treaty Doesn't Say We Can't Kidnap Anyone" – Government Sponsored Kidnapping as a Means of Circumventing Extradition Treaties' (Ré 1993) and 'A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in *Alvarez-Machain*' (Strauss 1994). For another sound, see, for example, the article 'In Defense of the Supreme Court Decision in *Alvarez-Machain*' (Halberstam 1992).

[217] For a good overview of the reactions from foreign governments and international organisations (and also from within the US), see Zaid 1997. To give three examples of positions from international organisations, the Inter-American Juridical Committee of the OAS noted, among other things: "a) By upholding the jurisdiction of United States courts to try the Mexican citizen, Humberto Alvarez Machain, forcibly abducted from his country of origin, the United States is ignoring its obligation to return him to the country from whose jurisdiction he was abducted. b) By maintaining that it is free to try persons abducted by the action of its government in the territory of another state, unless this is expressly prohibited by a treaty in effect between the United States and the country in question, the United States is ignoring a fundamental principle of international law which is respect for the territorial sovereignty of states." (OAS, Inter-American Juridical Committee, 'Legal Opinion on the Decision of the Supreme Court of the United States', 15 August 1992, Rio de Janeiro, 4 *Criminal Law Forum* (1993), pp. 119-134, at p. 125.) Interesting for this study is also the following remark of the Juridical Committee (not mentioned, for example, by Zaid, who also refers to the above-mentioned words from the Juridical Committee, see Zaid 1997, pp. 845-855, n. 133): "The Committee should likewise underscore the incompatibility of the practice of abduction with the right of due process to which every person is entitled, *no matter how serious the crime they are accused of*, a right protected by international law [emphasis added, ChP]." (OAS, Inter-American Juridical Committee, 'Legal Opinion on the Decision of the Supreme Court of the United States', 15 August 1992, Rio de Janeiro, 4 *Criminal Law Forum* (1993), pp. 119-134, at p. 125.) See in that respect also the 'Explanation of Concurring Vote of Doctor Jorge Reinaldo A. Vanossi', who tries to offer a solution for the problems by suggesting the establishment of an "international or regional criminal court with full jurisdiction to take up and rule on criminal cases involving extremely serious crimes against humanity, such as terrorism and drug trafficking (furthermore, crimes that are closely interrelated)". (*Ibid*., p. 129.) He then writes (*ibid*., p. 130): "[T]he end does not justify the means. Accordingly, the struggle for justice against these crimes against humanity should unfold through law, developing and perfecting existing mechanisms (such as extradition treaties) and creating others with both imagination and decisiveness (for example, an inter-American or an international court for criminal matters). Once again, we adduce as truth the overwhelming fact that this warning about the ends and the means contains. In the struggle against cannibals, we are not allowed to eat the cannibals! In effect, if cannibalism were fought with cannibalism, we would lose the moral legitimacy for our struggle against this crime." In the second international organisation to be mentioned here, the UNGA, it was agreed, among other things, that: "(1) international law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has given its consent; (2) the use of unilateral measures, such as the abduction of a suspected criminal from another state for trial before the national courts of the abducting state, undermines existing mechanisms for international cooperation in the apprehension and prosecution of criminal offenders, as well as treaty obligations to prosecute or extradite such offenders". (Morris and Bourloyannis-Vrailas 1994, p. 357.) The third organisation which could be mentioned here is the UN Working Group on Arbitrary Detention, which concluded that Alvarez-Machain's deprivation of liberty was arbitrary because it was in violation of the extradition treaty between the US and Mexico (see Commission on Human Rights, Fiftieth session, Item 10 of the provisional agenda, Question of the Human Rights of All Persons

This means that not only was the fact that US authorities had resorted to the tool of abduction criticised, but also the fact that the Supreme Court, by upholding jurisdiction in these circumstances, legally 'approved' this technique.[219]

This implies that many States are thus seemingly of the opinion that the Supreme Court should not have stated that the exercise of jurisdiction be continued in the case of a situation in which it was clear that there was an abduction followed by a protest and request for the return of the suspect by the injured State.

Subjected to Any Form of Detention or Imprisonment, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1994/27, 17 December 1993, Decision No. 48/1993 (United States of America), p. 138) and because it was in violation of customary international law (see *ibid*., p. 139 and n. 74 of Chapter III). Next to these inter-State considerations, the Working Group also looked at the human rights dimension (see *ibid*., pp. 139-140) and concluded that Alvarez-Machain's detention was arbitrary. Note that the Working Group, in its decision, also made the following intriguing statement. After having addressed the two (inter-State) elements which had to be taken into account in determining whether Alvarez-Machain's deprivation of liberty was to be considered arbitrary or not (namely "(1) Whether international treaty law governing relations between the United States of America and Mexico permits or prohibits the abduction of one person from the territory of one country to the territory of another, in order for him to be tried; (2) If the matter is not resolved in treaty law, whether customary international law permits or prohibits abduction of this kind." (*Ibid*., pp. 136-137.)), the Working Group stated: "It should however be noted that those two issues arise only in the context of acts of abduction of persons accused of common crimes and not when such acts are committed against persons accused of crimes against humanity, as accepted by the international community." (*Ibid*., p. 137.) What this means is not very clear. It appears that the UN Working Group is of the opinion that in the case of suspects of crimes against humanity, other elements play a role in determining whether a deprivation of liberty is arbitrary or not. This is very much reminiscent of the statement of Paust, as presented in Chapter III (see n. 224 and accompanying text of that chapter), that "[w]hat is "arbitrary," otherwise "unlawful," or "unjust" will have to be considered in context and with reference to other legal policies at stake. (…) [I]t may not be incompatible with principles of justice, "unjust," "unlawful" or otherwise "arbitrary" to abduct or capture an international criminal in a context when action is reasonably necessary to assure adequate sanctions against egregious international criminal activity [original footnote omitted, ChP]". However, as also argued in that chapter, although one can imagine that the same legal arrest is non-arbitrary in one case and arbitrary in the other, it is allegedly not so that an operation, which is so often labelled as unlawful and arbitrary that one may assert that it is *always*, in every case, unlawful or arbitrary (such as an abduction) may become less unlawful or arbitrary under certain circumstances. With respect to the inter-State context (in which context this statement of the Working Group was made), one can argue the same, namely that an abduction violating another State's sovereignty does not become less arbitrary because one is dealing with suspects of crimes against humanity. The Working Group should not forget its own reference to the *Eichmann* case (which involved a suspect who was charged, among other things, with crimes against humanity) that "intervention by one Power in the territory of another is not only a breach of international law but, in addition, if it is repeated, it may "endanger international peace and security" (United Nations Security Council, Claim by Argentina in the Eichmann case, resolution 138 (1960))." (*Ibid*., p. 139, see also n. 74 of Chapter III.) Thus, an abduction of a suspect charged with crimes against humanity is not less arbitrary than an abduction of a suspect charged with ordinary crimes, although the 'quality' of the suspect may influence the question as to how the arbitrariness must be repaired.

[218] Costi 2003, pp. 86-87. Bush (1993, p. 941) notes that only "[f]ar-right columnists and a handful of major papers supported the decision [original footnote omitted, ChP]."

[219] See also Loan 2005, p. 281: "The abduction of Alvarez-Machain by the United States *and the subsequent decision by the Supreme Court in 1992* received international condemnation [emphasis added, ChP]."

One could assert the same with respect to the idea expressed above that *Alvarez-Machain* may have meant the end of the mistreatment exception of *Toscanino*, but one can seriously doubt whether *Alvarez-Machain* quashed that *male detentus* situation in the first place, see footnote 206.

In other words, one can assert that the mistreatment exception of *Toscanino* is probably still valid in US courts, but to the extent that States are of the opinion that *Alvarez-Machain* has quashed both *male detentus* situations, one can argue that the immense criticism towards this decision in general is proof of the idea that many States are of the opinion that in those two situations (an abduction followed by a protest and request for the return of the suspect and an abduction accompanied by serious mistreatment), jurisdiction must be refused.[220] See in that respect also Baker, who writes that "most of the criticisms revolved around the fact that the United States domestic legal system should have provided a defensive remedy for Alvarez-Machain by dismissing the indictment."[221]

Notwithstanding this criticism, the *Alvarez-Machain* case is still to be considered "the leading U.S. case on forcible abduction by government agents".[222]

Following the Supreme Court's decision, the case proceeded to trial, but after the Government's case was heard, Alvarez-Machain was acquitted due to a lack of sufficient evidence to support a guilty verdict.[223]

Back in his homeland Mexico, and contemplating the words of the Justices of the Supreme Court that "[r]espondent and his amici may be correct that respondent's

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[220] Although much criticism was general in nature (meaning that the decision in its totality was attacked, including the possible quashing of the mistreatment exception of *Toscanino*), it must be noted that most criticism was directed towards the situation most clearly present in that case, namely an abduction followed by a protest and request for the return of the suspect by the injured State, see Canada's *amicus curiae* brief in the *Alvarez-Machain* case: "Canada and its component governments do not hold to a policy of abductions from American territory, and if abductions occur, they could not reasonably expect the United States to acquiesce in Canadian courts' disrespect of U.S. sovereignty through exercise of jurisdiction over abducted individuals. The Government of Canada would, upon protest, cooperate to obtain the return of an abducted fugitive." (US Supreme Court: Brief of the Government of Canada as Amicus Curiae in Support of Respondent in United States v. Alvarez-Machain, 4 March 1992, 31 *International Legal Materials* (1992), pp. 923-924.) See also *ibid*., p. 924: "[H]ereafter, we set forth the law, customs and usages of civilized nations which suggest that official abductions [note that the term 'official abduction' is used differently in this study, see ns. 21 and 63 of Chapter III and ns. 94 and 782 of the present chapter, ChP] are unlawful and require restitution of the *status quo ante*. (...) Hereafter, Canada sets forth a survey of some of the incidents and expressions of policy which show the understanding in international law that abducted persons must be returned to a nation when it protests the infringement of its sovereignty." See also *ibid*., p. 925: "[T]he Canadian Department of External Affairs queried competent officials of other nations and requested their comments concerning official transborder abductions. (…) If an abducted person were returned to their territory, and brought before their courts, Austria, Finland, The Netherlands, Norway, Sweden and Switzerland would consider that the abducted person should be returned."

[221] Baker 2004, p. 1375.

[222] Michell 1996, p. 404.

[223] US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 610. See *ibid*.: "The court concluded that the case against Alvarez was based on "suspicion and ... hunches but ... no proof," and that the government's theories were "whole cloth, the wildest speculation.""

abduction was "shocking," (...), and that it may be in violation of general international law principles", Alvarez-Machain decided to file a civil suit against his abductors (among whom was a man called Sosa, whose name is now used to refer to the civil case of Alvarez-Machain), the responsible DEA agents and the US Government.

Although this study focuses on criminal cases, the civil case of Alvarez-Machain may nevertheless be interesting to examine in greater detail as it addressed, in contrast to its criminal counterpart, the international law dimension of a phenomenon central in this study: kidnapping.

In addition, it has already been mentioned earlier that *male captus bene detentus* courts have claimed that the remedy of setting aside jurisdiction may not be appropriate but that the suspect could always sue his kidnappers in a civil case. For once, it may be interesting to look into these matters in more detail.

Alvarez based his civil suit on the Federal Tort Claims Act (FTCA)[224] and the Alien Tort Claims Act (ATCA), and alleged a number of conventional and constitutional torts claims such as kidnapping, torture and false arrest.[225]

Because of its international law dimension, the ATCA (which was enacted as early as 1789) is the most interesting one for this study. It reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[226] The exact scope of this provision (including the words "the law of nations") was an important issue in this case.

The District Court entered summary judgment against Sosa with respect to Alvarez-Machain's ATCA claims for kidnapping and arbitrary detention,[227] thereby

[224] The FTCA consists of US Code, Title 28, Section 1346(b)(1) ("Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.") and Chapter 171 (Sections 2671-2080) of the same title (explaining the Tort Claims Procedure), see US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 608.

[225] *Ibid*., p. 610. See *ibid*., n. 1: "Specifically, Alvarez alleged the following conventional tort claims: (1) kidnapping; (2) torture; (3) cruel, inhuman, and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; and (10) negligent infliction of emotional distress. Alvarez alleged constitutional torts under the Fourth, Fifth, and Eighth Amendments for the acts of kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention."

[226] US Code, Title 28, Section 1350. See *ibid*., p. 608.

[227] See *ibid*., p. 610.

holding "that both state-sponsored, transborder abductions and arbitrary detentions violated customary international law [original footnote omitted, ChP]."[228]

The reasoning behind this holding was that Alvarez-Machain's kidnapping violated the sovereignty of Mexico, that this was a violation of "the law of nations" and finally that Alvarez-Machain could personally invoke this violation of sovereignty under the ATCA.[229]

The other ATCA claims, for example, those related to the physical abuse, were, however, rejected.

In addition to this, Alvarez-Machain's FTCA claims were dismissed; the Court concluded "that Alvarez's apprehension was privileged and was not a false arrest under California law."[230]

The Court of Appeals, which saw the term 'customary international law' (and not the more restrictive term used by Sosa: *ius cogens*)[231] as a direct descendent of the term 'law of nations'[232] and which recalled that it had earlier limited "actionable violations to those international norms that are "specific, universal, and obligatory"",[233] first looked at the approved (by the District Court) contention of Alvarez-Machain that his kidnapping violated the sovereignty of Mexico, that it was a violation of "the law of nations" under the ATCA and hence that he was entitled to a remedy.[234] The Court of Appeals disagreed. Although Alvarez-Machain's kidnapping indeed might have been a violation of the well-known international law principle that a State cannot perform acts of sovereignty on the territory of another State without the latter's consent, Alvarez-Machain himself had no standing to invoke this matter.[235] Although this may seem logical, it should be stressed that it is not always the case that an individual does not have *ius standi* to make such a claim,

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[228] *Ibid*. The Court also held "that Alvarez could recover damages under the ATCA only for his detention in Mexico prior to his arrival in the United States." (*Ibid*., p. 611.)

[229] See *ibid*., p. 615: "Alvarez claims that his arrest violated Mexico's sovereign rights because Mexico had not granted the United States permission to exercise police power on its soil. Because such an encroachment on Mexico's sovereignty violates "the law of nations" within the meaning of the ATCA, Alvarez reasons, he is entitled to relief under that statute. The district court agreed and rejected Sosa's objection that Alvarez lacks standing to invoke Mexico's sovereignty rights."

[230] *Ibid*., p. 611.

[231] See *ibid*., pp. 612-614.

[232] See *ibid*., p. 613.

[233] *Ibid*., p. 612, referring to p. 1475 of the case "Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig.) ("Marcos II"), 25 F.3d 1467 (9th Cir.1994)". (*Ibid*.)

[234] See US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 615.

[235] See *ibid*., pp. 616-617: "The legal rights on which Alvarez bases his claim, and which the ATCA recognizes, are those that protect the individual from tortious conduct. By its terms, the ATCA provides only for suits by individual aliens; it does not allow for an individual to vindicate the rights of a foreign government. To allow state-on-state injuries like the one Alvarez alleges here to be vindicated by a third party not only would read too much into the ATCA, but would lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch. Although international human rights litigation under the ATCA inevitably raises issues implicating foreign relations, sovereigns' prerogatives are ordinarily and traditionally handled through diplomatic channels. The right of a nation to invoke its territorial integrity does not translate into the right of an individual to invoke such interests in the name of the law of nations [original footnote omitted, ChP]."

although the success of this claim, of course, depends on the reaction of the State whose sovereignty was violated.[236] Secondly, the Court of Appeals looked at Alvarez-Machain's alternative theory,

> that, notwithstanding any infringements upon Mexico's sovereignty, the act of transborder kidnapping was, in itself, a violation of customary international human rights law. This norm, as defined by Alvarez, creates a personal right under the law of nations.[237]

That argument was also unsuccessful. The Court of Appeals found that there was no clear and universally recognised norm prohibiting transborder abduction under customary international human rights law.[238] Nevertheless, the third point of Alvarez-Machain was accepted: according to the Court of Appeals, there *was* such a norm with respect to the prohibition of arbitrary arrest and detention[239] and "[t]he unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA."[240]

Thus, the Court of Appeals affirmed Sosa's liability under the ATCA, but on other grounds.[241]

Although the Court of Appeals may have been correct in stating that, in contrast to the right not to be arrested or detained arbitrarily, there is no *explicit* human right in customary international law which prohibits a transborder abduction and which

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[236] See also n. 186 and accompanying text of Chapter III.

[237] US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 617.

[238] See *ibid*., pp. 619-620: "[O]ur review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from transborder kidnapping. Nor can we say that there is a "universal" consensus in the sense that we use that term to describe well-entrenched customs of international law. (…) Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it "obligatory" or "universal," it cannot qualify as an actionable norm under the ATCA. This is a case where aspiration has not yet ripened into obligation [original footnote omitted, ChP]."

[239] See *ibid*., p. 620: "Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions." This statement, of course, constitutes additional evidence for the assertion made in Chapter III of this book that the prohibition of arbitrary arrest/detention has attained customary international law status. The fact that this norm has also been included in such a great number of constitutions shows that the norm might be seen as a general principle of law as well.

[240] *Ibid*. See also *ibid*., p. 631: "Wishful thinking is no substitute for clear congressional authority. Congress surely knows how and when to expand the reach of its laws beyond our borders. There is little doubt that Congress has the authority to do so; there is also little doubt that it has not done so here. Thus, although we recognize that the kidnapping and murder of DEA agents abroad necessitates the exercise of extraterritorial criminal jurisdiction, absent a clear directive, we cannot conclude that Congress has given the DEA unlimited enforcement powers abroad. Finding no basis in law for the DEA's actions, and left only with a warrant issued by a United States court, we conclude that Alvarez's arrest, and hence his detention, were arbitrary because they were not "pursuant to law." Consequently, Alvarez established a tort committed in violation of the law of nations."

[241] See *ibid*., p. 641.

may be of use in ATCA litigation,[242] one can argue more generally that there is an *implicit* human right with customary international law status prohibiting transborder kidnapping.[243]

A short explanation for this assertion: there is a general human right to liberty and security/a right not to be arrested or detained arbitrarily.[244] That right has arguably customary international law/general international law status (see also Chapter III, where some authorities were presented which even qualified this right as a *ius cogens* norm). Any violation of that right is hence, at least, a violation of customary international law. There are many ways to violate this right, but one of the possibilities is to kidnap a person from the territory of another State without the latter's consent. (Here, one can see the connection between inter-State law and human rights law:[245] because of a violation of the inter-State norm against non-intervention, an arrest is deemed to be unlawful or arbitrary under human rights law.) As already shown, the HRC has qualified an abduction, even *irrespective of* the attitude of the 'injured' State, as an arbitrary arrest and detention, violating Article 9, paragraph 1 of the ICCPR.[246] Hence, such kidnappings constitute violations of customary international law. This arguably means that it is not necessary to look if there exists an *additional* right in customary international law not to be kidnapped for this right is already *part of* the human right to liberty and security/the right not to be arrested or detained arbitrarily.

With respect to Alvarez-Machain's FTCA claims, the Court of Appeals, in contrast to the District Court, ruled that Alvarez-Machain could seek a remedy pursuant to the FTCA because DEA agents had authorised a false arrest against Alvarez-Machain.[247] Although the FTCA has a so-called 'foreign activities'

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[242] See also *ibid*., p. 618: "[N]o authority cited by Alvarez recognizes an explicit prohibition against forcible abduction [original footnote omitted, ChP]."

[243] *Cf.* also Loan (2005, p. 255), arguing that individuals have a customary international law right to be free from extraterritorial abduction. See also *ibid*., p. 282: "While the international denunciation of forcible abductions will often focus on any breach of state sovereignty, there is sufficient state practice and opinio juris to suggest that a customary norm exists whereby the human rights of an individual require states to refrain from extraterritorial abduction. Cumulatively, the decisions by the Human Rights Committee and the European Court of Human Rights, the recognition of international human rights instruments, and the practice of states provide enough evidence of consistent state practice and opinio juris to establish a customary norm protecting individuals from extraterritorial abduction." *Cf.* also n. 188 and accompanying text of Chapter III.

[244] See also US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 618, where the right to freedom of movement is mentioned as well.

[245] *Cf.* also Loan (2005, p. 269): "[T]he international law prohibition on violating state sovereignty through the use [of] extraterritorial abduction is relevant to the issue of whether individuals possess an international right to be free from abductions."

[246] See also Michell 1996, p. 442: "The Committee reinforced the customary international law rule prohibiting forcible abduction and transplanted the rule into the human rights context, protecting individuals *qua* individuals." See also n. 261 and accompanying text of Chapter III.

[247] See US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), pp. 640-641: "Our earlier discussion of liability under the ATCA applies with equal force to our analysis of the FTCA claims against the United States. (…) [A]s we have discussed, the DEA agents here had no authority, statutory

exception, which "bars recovery for "[a]ny claim arising in a foreign country"",[248] the Court of Appeals held that "a claim can still proceed under the headquarters doctrine if harm occurring in a foreign country was proximately caused by acts in the United States."[249] According to the Court of Appeals, that was the case here.[250]

Then, it was again up to the Supreme Court.[251]

Twelve years after its decision in the criminal case, it reversed the decision of the Court of Appeals[252] on both the ATCA (the Supreme Court used another abbreviation here: ATS (Alien Tort Statute)) and FTCA points.[253]

The FTCA point was dismissed because the Supreme Court overruled the headquarters doctrine,[254] holding that the "FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[255]

With respect to the ATS point, the Justices of the Supreme Court first delved into the past.

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or otherwise, to effect an extraterritorial arrest. Nor did their minions across the border, who could no more claim a lawful privilege to arrest Alvarez than could the DEA agents themselves under the same circumstances. The district court that issued Alvarez's arrest warrant had no jurisdiction to issue a warrant for an arrest in Mexico. (…) Accordingly, the DEA agents authorized a false arrest against Alvarez."

[248] *Ibid*., p. 638.

[249] *Ibid*.

[250] See *ibid*., pp. 638-639: "Alvarez's abduction fits the headquarters doctrine like a glove. Working out of DEA offices in Los Angeles, Berellez and his superiors made the decision to kidnap Alvarez and, through Garate, gave Barragan precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D.C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico." With respect to another FTCA exception, the 'intentional tort' exception, the Court found: "Although the waiver of sovereign immunity under the FTCA excludes intentional torts such as false arrest, this exclusion (…) does not apply if the intentional tort is committed by an "investigative or law enforcement officer." (*Ibid*., p. 639.) That was also the case here, see *ibid*., p. 640: "The DEA agents who orchestrated Alvarez's arrest are law enforcement officers as defined by the FTCA because they are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." (…) Because the primary tortious act was the initiation and planning of Alvarez's abduction by the DEA agents, his claim falls squarely within this law enforcement proviso, and thus the intentional tort exclusion does not apply."

[251] See US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692).

[252] According to Loan (2005, p. 254), "the decision was substantially influenced by the current war on terrorism." See also *ibid*., pp. 290*ff*.

[253] Arguably, the duration of these proceedings also shows that the civil remedy (which is often referred to by those who are in favour of the *male captus bene detentus* rule) may not always be very easy to pursue. See also n. 3 of this chapter (and the reference to the *Parisot* case).

[254] See US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692), p. 710, where the Court stated that the "headquarters analysis should have no part in applying the foreign country exception".

[255] *Ibid*., p. 712.

After having referred to the three 'Blackstone crimes', the sort of violations that were probably on minds of those who drafted the ATS in the 18th century,[256] the Supreme Court stated:

> [W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.[257]

Recalling the previously mentioned formula that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory",[258] and focusing on customary international law,[259] the Supreme Court refused to look at the norm against transborder abduction altogether[260] and rejected Alvarez-

[256] See *ibid*., p. 715: "There was, finally, a sphere in which (…) rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. (…) It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort."

[257] *Ibid*., p. 725.

[258] *Ibid*., p. 732. See also n. 233 and accompanying text. It is worth mentioning that the Supreme Court thus seems to agree, with the Court of Appeals, that the ATS, in contrast to what is often argued (see, for example, the arguments of Sosa (and the rejection of these arguments by the Court of Appeals) at the end of this footnote), is hence not restricted to *ius cogens* norms. See Steinhardt 2004, pp. 2265-2267: "The Supreme Court's analysis in *Alvarez-Machain II* forecloses (…) the argument that the category of actionable claims under the ATS is limited to violations of *jus cogens*, or peremptory norms of international law from which no derogation is permitted. (…) The very language of the ATS, with its reference to "the law of nations or a treaty of the United States" shows that Congress adopted a high, but not the highest and most controversial, jurisdictional threshold. No court that has been offered the *jus cogens* gloss on the statute has adopted it, other than to observe that a *jus cogens* violation may be sufficient to satisfy the "specific, universal, and obligatory" standard, but is not a necessary precondition for the actionability of the norm. To the contrary, the "specific, universal, and obligatory" standard enables courts to distinguish genuinely customary norms from merely idiosyncratic or aspirational norms, and the first courts to articulate that test did so precisely to guide these sometimes difficult judgments [original footnotes omitted, ChP." For Sosa's arguments (and the rejection of these arguments by the Court of Appeals), see US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), pp. 612-613: "Sosa urges a narrow reading of the "law of nations" and a correspondingly strict interpretation of the "specific, universal, and obligatory" requirement. He argues that only violations of jus cogens norms, as distinguished from violations of customary international law, are sufficiently "universal" and "obligatory" to be actionable as violations of "the law of nations" under the ATCA. We decline to embrace this restrictive reading, as we are guided by the language of the statute, not an imported restriction."

[259] Alvarez-Machain also relied on international instruments (such as the UDHR and the ICCPR) but that part of Alvarez-Machain's argument was quickly disposed of, see US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692), pp. 734-735.

[260] See *ibid*., p. 734: "Here, it is useful to examine Alvarez's complaint in greater detail. As he presently argues it, the claim does not rest on the cross-border feature of his abduction [original footnote omitted, ChP]." The omitted footnote (24) reads: "Alvarez's brief contains one footnote seeking to incorporate

Machain's claim with respect to the prohibition of arbitrary arrest and (non-prolonged) arbitrary detention.[261] Warning that the practical implications of an acceptance of such a prohibition would be far-reaching[262] and relying on the words of the Third Restatement of the Foreign Relations Law of the United States,[263] the Court held:

> Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. (…) Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it

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by reference his arguments on cross-border abductions before the Court of Appeals. (…) That is not enough to raise the question fairly, and we do not consider it."

[261] See *ibid*., p. 736: "Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. (…) Alvarez cites little authority that a rule so broad has the status of a binding customary norm today [original footnote omitted, ChP]." For criticism on this presentation of Alvarez's claim, see Steinhardt 2004, p. 2253: "Nor was the Court convinced that the prohibition of arbitrary arrest as applied to Alvarez-Machain had attained the status of customary international law. To arrive at this conclusion it had to deploy a strategic recharacterization of Alvarez-Machain's claim, viewing it as the assertion that the arrest was arbitrary solely because no applicable law authorized it and not because it infringed the sovereignty of Mexico".

[262] See US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692), pp. 736-737: "Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. (…) He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment (…). It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest." See also *ibid*., pp. 732-733: "[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts [original footnotes omitted, ChP]."

[263] See *ibid*., p. 737: "Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (198[7]), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones ... prolonged arbitrary detention." (…) Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear." See on this point also n. 432 and accompanying text of Chapter III.

> appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy [original footnotes omitted, ChP].[264]

It is not entirely clear what the Supreme Court means here. On the one hand, it asserts that a relatively brief illegal detention cannot be seen as a violation of the principle against arbitrary detention that the civilised world accepts as binding customary international law. However, on the other hand, it makes the remark that such a detention cannot be seen as a violation of customary international law *so well defined that* it can be used in the context of the ATS. It may indeed be true that a brief illegal detention does not reach the threshold of the ATS (although the latter speaks of "the law of nations", the exact scope of the act appears to be primarily a matter of domestic law) but to the extent that the Supreme Court claims that a brief illegal arrest or detention does not violate customary international law, the Court (and the same goes for the Restatement)[265] is arguably incorrect. After all, the right to liberty and security/the right not to be arrested or detained arbitrarily – a right with customary international law status – does not require a temporal element.[266] Hence, *any* – and not only a prolonged – violation of this right (whether this is caused by a simple illegal/arbitrary arrest within a State or through a crossborder abduction violating the international law principle that a State cannot violate another State's sovereignty without the latter's consent) constitutes a violation of customary international (human rights) law.

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[264] *Ibid*., pp. 737-738.

[265] See American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 702 ('Customary International Law of Human Rights'), comment under 'b' ('State policy as violation of customary law'): "The violations of human rights cited in this section (...) [which includes prolonged arbitrary detention, ChP] are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy." See also *ibid*., comment under 'h' ('Prolonged arbitrary detention'): "A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary law if it is prolonged and practiced as state policy."

[266] See also US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 621: "Sosa acknowledges the prohibition against arbitrary arrest and detention, but he contends that for ATCA liability to attach, Alvarez's detention must be "prolonged" in addition to being arbitrary. We can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against "arbitrary" detention and does not include a temporal element. Other authorities reflect this understanding." See also *ibid*., p. 622: "We simply hold, consistent with international law, that there is no freestanding temporal requirement nor any magical time period that triggers the norm." See finally also Paust 1993, p. 563: ""Prolonged arbitrary detention" is the curious phrase found in the Restatement, but, as recognized in federal court opinions, both customary and treaty-based human rights law prohibit "arbitrary detention" as such [original footnotes omitted, ChP]." Note, however, that the prolonged period *can* be of influence but then in another context: a legal detention can become arbitrary if it is unduly prolonged, see De Zayas 2005, pp. 16-17: "In its jurisprudence the United Nations Human Rights Committee, the body responsible for monitoring compliance by States party to the ICCPR, has made it clear that detention which may be initially legal may become "arbitrary" if it is unduly prolonged or not subject to periodic review [original footnote omitted, ChP]."

To give a few examples: as already shown earlier, the HRC has held that the act of abduction as such (which may take less than a day) constitutes an arbitrary arrest and detention and a violation of Article 9, paragraph 1 of the ICCPR, arguably (a provision with) customary international law (status).[267]

The UN Working Group on Arbitrary Detention has also examined Alvarez-Machain's deprivation of freedom from a human rights perspective, see also footnote 217.

Although it looked at the total amount of time involved in the case (987 days), starting with Alvarez-Machain's abduction on 8 April 1990[268] and ending with his release on 14 December 1992,[269] it stated that

> *no legal basis whatsoever can be found to justify the deprivation of freedom from the date of the abduction – 2 April 1990* – until his release on 14 December 1992 since this deprivation of freedom took place without the orders of any authority whatsoever and, indeed, both the District Court and the Court of Appeals declared it unlawful. In the circumstances, the deprivation of freedom is a breach of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Accordingly, the detention is arbitrary (...) [emphasis added, ChP].[270]

Hence, even though the Working Group is of the opinion that Alvarez-Machain's entire deprivation of freedom was arbitrary, it also notes that it was already arbitrary on day one ("from the date of the abduction – 2 April 1990").[271]

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[267] See, for example, the cases of *Lopez Burgos* and *Celiberti de Casariego*. Although in these cases, the victims were detained for longer periods before and after the cross-border abduction, the HRC qualified "the act of abduction into Uruguayan territory" (thus arguably irrespective of its duration) as an arbitrary arrest and detention and hence as a violation of Art. 9, para. 1 of the ICCPR (see para. 13 of the *Lopez Burgos* communication and para. 11 of the *Celiberti de Casariego* communication).

[268] The reference to 8 April 1990 as the starting point of this period is a little odd. Although this reference may be explained by the fact that the UN Working Group on Arbitrary Detention refers to Alvarez-Machain's complaint that his abduction took place on 7 April (however, in that case, one can wonder why the period did not start on that day and only on the day after), the UN Working Group on Arbitrary Detention itself uses another date, see Commission on Human Rights, Fiftieth session, Item 10 of the provisional agenda, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1994/27, 17 December 1993, Decision No. 48/1993 (United States of America), p. 135, where the Working Group writes that Alvarez-Machain was abducted "on 2 April 1990 (the complaint says 7 April), at his medical office in Guadalajara, Mexico, and forcibly taken to the United States". (See also *ibid*., p. 139.)

[269] See *ibid*., p. 136. See also *ibid*., p. 139.

[270] *Ibid*.

[271] The Supreme Court was, however, not impressed: "Alvarez also cites (…) a finding by a United Nations working group that his detention was arbitrary under the Declaration, the Covenant, and customary international law. See Report of the United Nations Working Group on Arbitrary Detention, UN Doc. E/CN.4/1994/27, pp. 139-140 (Dec. 17, 1993). That finding is not addressed, however, to our demanding standard of definition, which must be met to raise even the possibility of a private cause of action. If Alvarez wishes to seek compensation on the basis of the working group's finding, he must

In the past, the ATS has been accepted to cover such serious violations as torture, genocide and war crimes.[272]

It is clear that a simple illegal detention (for example, caused by a "reckless policeman who botches his warrant", to use the words of the Supreme Court) is not as serious as those violations.

Nevertheless, if the Supreme Court wants the ATS to be restricted to these kinds of violations, it should clearly say so. Conversely, if it argues more broadly that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory", then it should not be surprised that norms with customary international law status (such as the right to liberty and security/the right not to be arrested or detained arbitrarily) may enter the ATS nevertheless.[273]

Returning to the criminal law context and crossing the Atlantic: after some lack of clarity with respect to the modern position of the law of England towards *male captus bene detentus*,[274] the law was (somewhat) illuminated by the House of Lords in *Bennett v Horseferry Road Magistrates' Court and another*.[275]

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address his request to Congress." (US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692), p. 738, n. 30.)

[272] See, for example, US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 611: "Although enacted in 1789 as part of the first Judiciary Act, the ATCA received little attention until 1980 when the Second Circuit, in a comprehensive analysis of the statute, held that the ATCA provided subject matter jurisdiction over an action brought by Paraguayan citizens for torture – a violation of the law of nations – committed in Paraguay. See Filartiga v. Pena-Irala (Filartiga I), 630 F.2d 876 (2d Cir.1980). Since the Filartiga I decision, the ATCA has been invoked in a variety of actions alleging human rights violations. See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir.1996) (affirming judgment under ATCA against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATCA) [original footnote omitted, ChP]".

[273] See also Roth 2004, p. 803: "The *Sosa* decision seems to have been calculated to bring a sharp halt to the expansion of the scope of ATS-enabled claims. It nonetheless appears to confirm the main current of ATS jurisprudence that has been allowed to develop without Supreme Court review in the lower courts over the course of twenty-four years. The precise consequences of *Sosa* for future *Filártiga* litigation are unclear. The Court emphasized that any norm actionable under the ATS must have levels of specificity and acceptance comparable to norms that were understood to be actionable in the eighteenth century. The decision might thus be read as repudiating human-rights-era innovations in international law methodology that have given more weight to the rhetorical practice of international organisations. Nonetheless, the Court cast no aspersions on the overall pattern of *Filártiga*-inspired human rights decisions that have issued from the lower federal courts. Indeed, Justice Scalia complained that the Court's endorsement of "the very formula that led the Ninth Circuit to its result" – the requirement that actionable norms be "specific, universal, and obligatory" – "hardly seems to be a recipe for restraint in the future" [original footnote omitted, ChP]."

[274] In the 1981 case *Mackeson* (Court of Appeal, Divisional Court, *R* v. *Bow Street Magistrates ex parte Mackeson*, 25 June 1981 (1982) 75 *Cr. App. R.* 24, see generally Choo 1994 B, p. 627), the Court applied *Elliott* (that the Court had in principle jurisdiction) and *Hartley* (that the Court had a discretion not to exercise this jurisdiction) and granted the application of the suspect (a UK citizen sought for fraud charges) to stop the hearing of the committal proceedings against him because his return from Zimbabwe-Rhodesia to the UK had to be seen as an "extradition by the back door" (Court of Appeal, Divisional Court, *R* v. *Bow Street Magistrates ex parte Mackeson*, 25 June 1981 (1982) 75 *Cr. App. R.* 24, p. 30). (It is interesting to note that the Court held that the police had acted "due to an excess of

Paul James Bennett, a New Zealand citizen, was accused of having purchased a helicopter by a series of false pretences in England in 1989 and of having defaulted on the repayments.[276]

The English police traced Bennett and his helicopter to South Africa but as there were no formal extradition provisions in force between the two countries, no proceedings for his extradition were initiated, even though special extradition arrangements could have been made under Section 15 of the Extradition Act 1989:[277] "It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will."[278]

Lord Griffiths first noted that this account was indeed to be assumed in this case.[279] He then recapitulated the lack of clarity in present-day English law[280] and noted the position of the English authorities concerning the role of the judge in the criminal process, namely that he should only focus on the forensic process, and concerning the concept of abuse of process, namely that a judge must only ensure

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enthusiasm, certainly not due to any conscious intent to do wrong". (*Ibid*., p. 33.) This shows that even the non-intentional circumvention of regular extradition procedures may lead to the ending of the case.) This case was followed by the Divisional Court in the case *R* v *Guilford Magistrates' Court, ex p Healy* [1983] 1 *WLR* 108. In this case, the Court accepted the idea in *Mackeson* that a court has a discretion not to exercise its jurisdiction. Nevertheless, the fact of the case did not warrant this outcome as "there had been no attempt in *Healy* to circumvent the provisions of the relevant extradition treaty." (Choo 1994 B, p. 627.) Thus, the aspect 'intention' (to circumvent the procedures) became important again: "Following *Healy*, therefore, where extradition had been deliberately avoided at the instigation of British authorities, the courts could exercise their discretion, but not otherwise." (Gilbert 1998, p. 356.) The authority of *Mackeson* and *Healy* was, however, broken down by the decision of the Queen's Bench Division in *R. v Plymouth Magistrates' Court and others, ex parte Driver* (see generally Choo 1994 B, p. 628). In this case, the Queen's Bench Division followed *Scott*, *Sinclair* and *Elliott* and concluded "that the court has no power to inquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him." (Queen's Bench Division, *R. v Plymouth Magistrates' Court and others, ex parte Driver*, 3 April 1985 [1985] 2 *All England Law Reports* 697.) The Court was of the opinion that *Mackeson* and *Healy* had been decided *per incuriam* (a decision which a subsequent court finds to be a mistake, and therefore not of binding precedent). See for more information on these cases, for example, Michell 1996, p. 462-464 and Gilbert 1998, pp. 354-356.

[275] See House of Lords, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 138*ff*.

[276] See House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 141.

[277] See *ibid*.

[278] *Ibid*.

[279] See *ibid*., p. 142: "It is not for your Lordships to pass judgment on where truth lies at this stage of the proceedings, but for the purpose of testing the submission of the respondents that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989. I shall also assume that the Crown Prosecution Service were consulted and approved of the behaviour of the police."

[280] See n. 274.

that the process of the court is not abused such that the trial itself is unfair.[281] After that, he presented the position of Bennett, with which he agreed:

> Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. (...) [I]f it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.[282]

[281] See House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 148: "Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of its submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair; but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process."

[282] *Ibid*., p. 150. Note that Lord Griffiths' position is different with respect to magistrates (who deal with small cases and who may not even have had a legal training): "I would (…) affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. (…) [I]f a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court, which I regard as the proper forum in which such a decision should be taken." (*Ibid*., p. 152.) *Cf.* also House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 169: "It would (…) be convenient (as well as correct, in my view) if the examining magistrates *could not* stay for abuse of process [emphasis in original, ChP]". See for criticism on this view, Choo 1994 B, pp. 634-635: "It is submitted that, contrary to the view of Lord Griffiths, magistrates (whether sitting in committal proceedings or summary proceedings) should have the power to stay proceedings even if no 'fair trial' issue is involved. The distinction which Lord Griffiths attempts to draw between situations in which stays are ordered because a fair trial is impossible, and other cases, is not as clear-cut as might first appear. Lord Griffiths appears to have assumed, for example, that the sole reason for staying proceedings on account of delay is to ensure that the accused is afforded a fair trial. Yet, as I have argued elsewhere, proceedings brought after a delay may be stayed to ensure a fair trial *and/or* to protect the moral integrity of the criminal process. Thus, even if there is no danger of wrongful conviction, the delay may, by causing the accused to suffer oppression, anxiety and concern, have compromised the moral integrity of the criminal process to such an extent that a stay of the proceedings is justified. (…) To put an accused through the delay of applying to the Divisional Court for a stay, rather than allowing the accused the simple expedient of seeking a stay from the magistrates, ignores the fact that 'a plea of abuse should be open to the accused subject at the earlier opportunity' [emphasis in original and original footnotes omitted, ChP]."

After having detailed on the specific context of extradition,[283] he concluded as follows:

> The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution. In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.[284]

Although the threshold presented here by Lord Griffiths seems quite clear[285] (if the Executive had been a knowing party to a process which disregards the proper extradition proceedings, the courts would refuse jurisdiction), the automatism captured in the words "*will* refuse" is replaced by a discretion a couple of sentence later[286] (showing that judges should arguably try harder to write in such a way that the message they want to get across also *gets* across).

Lord Bridge of Harwich agreed with Lord Griffiths. However, it can be argued that his test is a little stricter, as, in his view, the domestic authorities really have to *do* something irregular (and not only be a knowing party to the irregular conduct by, for example, foreign authorities).[287]

After having stressed the importance of the Judiciary protecting the law,[288] he wrote the following (and now oft-quoted) words:

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[283] See House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 150-151: "Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. (...) If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by".

[284] *Ibid*., p. 151.

[285] It is, however, not clear from these words whether the non-use of the extradition procedures has to be intentional or not. It seems however that it has. See, for example, the words "serious abuse of power" (see the final sentence of n. 282 and accompanying text) and the words "deliberate abuse of extradition procedures" (see n. 282).

[286] See House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 152: "The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it *may* stay the prosecution and order the release of the accused [emphasis added, ChP]."

[287] See also Arnell 2004, p. 257: "The position in England and Wales (...) appears to be that the courts will inquire into renditions where UK authorities have participated in wrongdoing and, perhaps, where they had knowledge of it."

[288] See House of Lords, Lord Bridge of Harwich, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 155: "In the *Connelly* case [*Connelly v DPP* [1964] 2 ALL ER [*All England Law Reports*, ChP] 401 at 442, [1964] AC 1254 at 1353] Lord Devlin

> There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law[289] and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. (…) It is apt, in my view, to describe these circumstances (…) as an 'abuse of the criminal jurisdiction in general' or indeed (…) as a 'degradation' of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.[290]

The third Lord, Lord Oliver of Aylmerton, disagreed with the first two.

He was of the opinion that a person whose rights were violated by executive action has a civil remedy, and that this remedy, even though it may not be an ideal one, an easy available one or an adequate one, is the one provided by the law.[291] The way of repairing these wrongs proposed by Bennett, namely by refusing jurisdiction, would in his eyes lead to undesirable results.[292]

(…) said that "the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused" … Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is "the process of law", to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general." (See for the *Connelly* case also n. 127 and accompanying text.)

[289] Michell notes that Lord Bridge of Harwich's point concerning the violation of international law "suggests an international human rights dimension to the case [original footnote omitted, ChP]" (Michell 1996. p. 472) because the case itself "involved no violations of either customary international law or of a treaty". (*Ibid.*)

[290] House of Lords, Lord Bridge of Harwich, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 155-156. See also n. 437 and accompanying text of Chapter III.

[291] See *ibid*., p. 156.

[292] See *ibid*.: "The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person

He thereby specifically focused on the public interest in the prosecution and punishment of crime, a point which is reminiscent of Judge Schermers' dissenting opinion in the *Bozano* case, see Subsection 2.2.4 of Chapter III.[293]

The *exact* position of this Lord, like Lord Griffiths, is not clear, however.

On the one hand, he seems to indicate that, notwithstanding the above-mentioned arguments, there may be a cogent reason that justifies a refusal of jurisdiction (but that only in this case, such a reason was not present).[294] On the other hand, however, he makes a general remark which undermines that thought:

> I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.[295]

As this idea is expressed in other words elsewhere in his opinion,[296] one can assume (although it is, due to the 'cogent reason' statement mentioned above, not entirely

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charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and thirdly, the public interest in the prosecution and punishment of crime will have been defeated not by a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval. It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime."

[293] See also Michell 1996, p. 444.

[294] See House of Lords, Lord Oliver of Aylmerton, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 156: "Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (…), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason. Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case."

[295] *Ibid*.

[296] See *ibid*., pp. 157-160: "It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively (…). (…) Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged, he is tried fairly

clear) that this is in fact his opinion on these matters, namely that a judge should not look at alleged pre-trial irregularities which have nothing to do with the fairness of the trial itself.

The next Lord, Lord Lowry, began his opinion with the words:

> I accept the conclusion of my noble and learned friends, Lord Griffiths and Lord Bridge of Harwich, that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities.[297]

Although one can wonder whether that was indeed the conclusion reached by Lord Griffiths,[298] it is immediately clear what Lord Lowry's position is.

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according to law. (…) Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. (…) So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what degree of outrage is the criminal court to undertake an inquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case? (…) [T]he arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try."

[297] House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 160. It is because of these words that Arnell (see n. 287) argues that *Bennett* probably supports the idea that the authorities in the UK must actually have *done* something improper themselves: "The term "knowing party" [see the quotation of Lord Griffiths at n. 284 and accompanying text, ChP] can be construed as referring to only the situation where the authorities participated in the wrongdoing or where they merely knew of wrongdoing as well. Lending weight to the former interpretation is the slightly different formulation suggested by Lord Lowry (...) "that the court has a discretion to stay as an abuse of process criminal proceedings brought before the court by abduction in a foreign country participated in or encouraged by British authorities"." (Arnell 2004, p. 257, n. 31.)

[298] As mentioned *supra*, Lord Griffiths does not only refer to a discretion (House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 152: "The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it *may* stay the prosecution and order the release of the accused [emphasis added, ChP].") but also to an automatism, see *ibid*., p. 151: "In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts *will* refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party [emphasis added, ChP]." The summary of Lord Lowry is, however, in conformity with the conclusion reached by Lord Bridge of Harwich, who indeed

Lord Lowry, who first explained that abuse of process means "abuse of the process of the court which is to try the accused",[299] proposed the following, and indeed already presented (see footnote 610 and accompanying text of Chapter III), test:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[300]

Lord Lowry hereby noted, however, that this discretion must be sparingly exercised – and that he is confident that this will happen[301] – and that it should not be relied upon to disapprove of certain executive misconduct.[302] (Nevertheless, one can understand that certain misconduct may offend the court's sense of justice to be

only referred to a discretion: "To hold that in these circumstances the court *may* decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one [emphasis added, ChP]." (House of Lords, Lord Bridge of Harwich, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 155-156.) See also Michell 1996, p. 471: "[T]he Law Lords were ambiguous as to whether there is a duty to refuse to exercise jurisdiction over an individual who has been brought unlawfully before a court, or merely a discretion to do so."

[299] House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 160.

[300] *Ibid*., p. 161.

[301] See also *ibid*., p. 163: "I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty [*cf*. the words of Lord Oliver of Aylmerton in n. 296, ChP], the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting." Note, however, that Lord Lowry also makes a remark which implicitly accepts that the possibility that judicial refusals to exercise jurisdiction may occur more often than his expectations reflect here (but that it is entirely up to the Executive to stop these by acting correctly): "No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety." (*Ibid*.) Finally, it is worth mentioning that Michell (1996, p. 499), writing about the for this study very interesting factor 'seriousness of the charges' (in deciding whether or not there is an abuse of process) notes that this factor "might be implied from Lord Lowry's suggestion that not every "venial irregularity" should result in a stay [original footnote omitted, ChP]." Although that might indeed be the case, it seems, however, that Lord Lowry is not focusing here on the seriousness of the suspect's charges but rather on the seriousness of the irregularity itself.

[302] See House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161: "I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'." See also Choo 1994 B, p. 629.

asked to try the accused and furthermore that a stay of the proceedings will be seen as a disapproval of such misconduct.)[303]

Hence, if the judges feel that to continue to exercise jurisdiction, even if there has been some executive misconduct, does not amount to an abuse of the court's own process (for example, because a fair trial is still possible or because it does not offend the court's sense of justice to be asked to try the accused in these circumstances), the judges can indeed continue to exercise jurisdiction.

A final point of Lord Lowry's opinion which should be mentioned here is that he, after having repeated the rationale behind the idea that a court has a discretion to refuse jurisdiction in certain cases,[304] stressed the protection of international law in this matter.[305]

Because this case involved neither a violation of an extradition treaty (although it could be seen as a circumvention of extradition arrangements) nor a violation of State sovereignty, this reasoning has to be viewed generally and not related to the specifics of this case. Nevertheless, one could argue that it could perhaps be seen as evidence for the idea that their Lordships are thinking about international human rights law here.[306]

The last Lord, Lord Slynn of Hadley, was very concise and simply agreed

> with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within the

[303] See House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 163: "If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice."

[304] See *ibid*., pp. 162-163: "[T]he court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial."

[305] See *ibid*., p. 163: "The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed. It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law." From ns. 289-290 and accompanying text, it became already clear that Lord Bridge of Harwich referred to the importance of respect for international law (through the concept of 'rule of law').

[306] *Cf.* also Michell 1996, pp. 472-473 (see also n. 289).

> jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, that the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial.[307]

As a result, the appeal of Bennett was allowed and the case was remitted to the Divisional Court for further consideration (it should be remembered that their Lordships decided this case on the basis of *assumed* facts only).[308]

Although the opinions of the concurring Lords are not entirely identical – as was shown above, Lord Griffiths also suggested a mandatory sanction in that the courts *must* refuse jurisdiction in circumstances comparable to those of this case[309] – it can be asserted that Lord Lowry's statement that

> a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[310]

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[307] House of Lords, Lord Slynn of Hadley, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 169.

[308] See n. 279. Michell (1996, p. 469) notes that "[i]n in the Divisional Court, the fugitive's allegations were subsequently made out, although the court's decision is rather unsatisfactory [original footnote omitted, ChP]." Hence, the *male captus* in this case – a deliberate circumvention of the extradition procedures in which the authorities which can be connected to the prosecuting forum were involved – led to the refusal of jurisdiction. As a result, it can be argued that even though the decision quite often speaks of a discretion, a situation like the one here will, probably, normally lead to the ending of the case. See also Jones and Doobay 2004, p. 95: "Although the majority use the framework of the abuse of process doctrine, in which the word "discretion", rightly or wrongly, is frequently employed, the trenchant words of Lord Griffiths and Lord Bridge, and to a lesser extent Lord Lowry, appear to leave little or no room for the operation of a discretion or balancing exercise, where an abduction abroad in breach of extradition procedures has been found." (It must be emphasised that the observations in the *Bennett* case leave room for the view that this is so, even if one cannot speak of a proper abduction (without the consent of the injured State), which did not occur here.) Be that as it may, because Bennett also faced fraud charges in Scotland, a Scottish arrest warrant was issued against him and remained outstanding "after it was determined that the finding of the English divisional court on the merits of Bennett's allegations did not bind a Scottish court. The Scottish court, while acknowledging the weakness of the *male captus bene detentus* rule after *Bennett* (…), interpreted the facts of the case differently than the English divisional court [original footnote omitted, ChP]." (Michell 1996, p. 470.) Hence, it did not believe that there had been collusion between the English and the South African authorities. "Moreover, even had the English authorities acted improperly, there was no evidence that the Scottish authorities had also acted improperly. The unlawfulness of the actions of the English police under English law could not affect Scottish proceedings. Bennett's jurisdictional challenge was dismissed." (*Ibid*., p. 471.) This last position affirms that the prosecuting State's *own* authorities must have done something irregular, see also n. 313 and accompanying text.

[309] See House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 151. See also Choo 1994 B, p. 631.

[310] House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.

may come close to the core of the *Bennett* case.[311]

However, this statement is still rather generally formulated. A summary of the *Bennett* case[312] showing more concretely what is needed was formulated in the 1998 *Westfallen* case, discussed by Warbrick:

> The question is … whether it appears that the police or the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign States or abused their powers in a way that should lead this court to stay the proceedings against the applicants [original footnote omitted, ChP].[313]

According to the ICTY Trial Chamber in the 2002 *Nikolić* case (see Subsection 3.1.4 of the next chapter), which used the summary of the *All England Law Reports* to clarify what their Lordships decided in this case,[314] the *Bennett* approach "is now generally considered to be the ruling principle for cases where representatives of a State have been involved in a violation of international law and which amount to a violation of the rule of law."[315] That may indeed be the case, but it is arguably only a small part of what *Bennett* stands for (see the summary from the *Westfallen* case).

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[311] See, for example, ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 49. (See Subsection 3.1.3 of the next chapter for the discussion of this case.)

[312] Note, however, that this summary takes into account not only the English *Bennett* case but also the Scottish *Bennett* case, see n. 308.

[313] Warbrick 2000, p. 492, referring to the words of the Lord Chief Justice in this case. See also *ibid*., p. 493: "In his concurring judgment [to the *Westfallen* case, ChP], Hooper J suggested that collusion between national authorities to circumvent extradition proceedings was the *minimum* threshold for a successful application under the *Bennett* principle [original footnote omitted, ChP]." See, however, Currie 2007, pp. 357-358: "The Law Lords concluded that by way of the abuse of process doctrine, courts may inquire into the manner in which an accused was brought before them and may stay the prosecution if the circumstances warrant. In this case, the authorities' deliberate flouting of the extradition arrangements, *inter alia*, rendered such a remedy appropriate. It seems clear, however, that it was not the subverting of extradition procedures itself that was so offensive to the court; rather, the matter was one of respect for the rule of law in the global sense [original footnote omitted, ChP]".

[314] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 87 or House of Lords, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 138-139: "[t]he maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the prosecuting authority had secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him or having him abducted from within the jurisdiction of some other state in violation of international law, the law of the state from which he had been abducted and his rights under the laws of that state and in disregard of available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing. It was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom … [original footnote omitted, ChP]."

[315] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 87. The statement of Lord Lowry is rather broad and can arguably encompass more situations than mere circumventions of extradition procedures (as was the case in this specific situation). See also Sloan 2003 A, p. 101, n. 119.

However, the following words of the Trial Chamber, namely that "[t]he rule of law is clearly interpreted here [namely in the *Bennett* case, ChP] as demanding only a fair trial for an accused",[316] are arguably incorrect as the rule of law may also be violated when the accused can still enjoy a fair trial but when "it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case", see the above-mentioned quotation of Lord Lowry at footnote 310 and accompanying text.

One point in this case still needs to be discussed. Although their Lordships state that judges may stay the proceedings if certain misconduct amounts to an abuse of process, they do not really clarify which aspects will probably be taken into account by the judges in their balancing exercise whether or not to stay the proceedings.

In literature however, such forecasts have been made. Choo, in his commentary of the case, for example, predicts:

> If a stay were discretionary, the court would, in deciding whether to order a stay, presumably take into account considerations such as: (i) whether the illegal extradition of the accused was accompanied by physical violence (if so, this would weigh heavily in favour of a stay); (ii) whether the police were acting in circumstances of urgency (if so, this would weigh against a stay); and (iii) the seriousness of the offence with which the accused is charged (the more serious the offence, the less likely the court would be to stay the proceedings).[317]

It is clear that this last argument, which Choo repeats when discussing the possible position of Lord Griffiths that a stay should always be ordered when a person has been illegally extradited,[318] is, of course, very interesting for the context of the international criminal tribunals (see the next chapter) which have to deal with suspects of very serious crimes.

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[316] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 87. As will be shown in the next chapter, the ICTY Trial Chamber itself followed the correct test, recognising that jurisdiction can also be refused, even if the suspect can still enjoy a fair trial, see *ibid*., para. 111 and n. 528 and accompanying text of Chapter VI.

[317] Choo 1994 B, p. 631.

[318] See *ibid*., p. 632: "It is possible, of course, that what Lord Griffiths meant to suggest in *Bennett* was that circumvention by the police of proper extradition procedures is such heinous misconduct that there are no circumstances in which it should ever be excused. Illegal extradition, it may be argued, can never be considered a venial irregularity. Thus, while in a normal case all relevant considerations ought to be weighed up to determine whether the proceedings should be stayed on account of the pre-trial executive impropriety, cases involving illegal extradition are *sui generis*. This is an attractive argument, but it is not entirely clear that there can never be situations where the heinousness of illegal extradition appears insignificant when viewed against the heinousness of the offence with which the accused is charged. We have seen that the Crown case against Bennett was that he had raised the finance to purchase a helicopter by a series of false pretences and had defaulted on the repayments. One wonders how willing a court would be to stay a prosecution for mass murder on the basis that the English police circumvented the relevant extradition procedures in securing the return of the accused to England. Yet a stay is precisely what Lord Griffiths would seem to require even in this situation [original footnote omitted, ChP]."

Indeed, one should not forget that Bennett was merely charged with fraud. Would their Lordships have come to the same conclusion if Bennett was, for example, charged with mass murder or genocide?[319] Choo believes that it is inappropriate "to hold that a mandatory stay should be ordered in *every* case where a prosecution has been commenced in consequence of an illegal extradition [emphasis in original, ChP]",[320] that a discretionary approach in which all the relevant considerations can be weighed is hence to be preferred[321] and that two considerations in particular may lead to a *bene detentus* outcome:

> (i) the offence charged may be an especially heinous one; and (ii) it may be possible to excuse the illegal extradition of suspects whose continued freedom was considered to pose 'a grave threat to national security (the foreign leader plotting for war against us, or the active terrorist).' [original footnotes omitted, ChP][322]

However, that this view can be found in literature is one thing, but does it also appear in actual case law? It seems that it does.

In the 1995 *male captus bene deditus* case *In Re Schmidt*,[323] the way in which Norbert Schmidt was brought to England was the subject of proceedings. This German national, who was charged by the German authorities with serious drug offences,[324] was lured from Ireland to England before being extradited to Germany to stand trial there. Schmidt, of course, protested, arguing that

> the ruse adopted by D.S. Jones [the English Detective Sergeant who set up the luring operation, ChP] to persuade him to come to the United Kingdom was an abuse of power by the executive and an abuse if process of the courts of England and Wales which vitiated the whole extradition proceedings.[325]

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[319] See the previous footnote (where Choo speculates about the position of Lord Griffiths in such a case). See also D. Baragwanath, 'Liberty and Justice in the Face of Terrorist Threats to Society', Address to Alumni, University of Auckland, 4 March 2006, available at: http://www.law.auckland.ac.nz/uoa/fms/default/law/news/docs/Terrorism_March%2006.pdf, p. 4: "But should the *Horseferry Road* case, which concerned simple dishonesty over acquiring a helicopter, be applied to an Eichmann?" See finally also McNeal and Field 2007, pp. 516-517.

[320] Choo 1994 B, p. 633.

[321] See *ibid*.

[322] *Ibid*.

[323] House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 339*ff*. (Decision of the Divisional Court of the Queen's Bench Division: pp. 342-362. Decision of the House of Lords: pp. 362*ff*.)

[324] See House of Lords, Lord Jauncey of Tullichettle, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 380: "The 58 German charges outstanding against the applicant suggest that he may be a substantial international dealer in drugs."

[325] *Ibid*., p. 369. See *ibid*., pp. 368-369 for more information on the operation: "The appellant applicant, who is a German national, is accused by the prosecuting authorities in Mannheim of having on some 58 occasions in Germany supplied and possessed cannabis which he had imported from Holland to a total of more than 386 kilograms between 1987 and 1991. Having moved his place of abode from Germany to Ireland he was arrested in the latter country on 12 August 1991 and charged with being in possession of drugs. On 13 August 1991 an international warrant of arrest was issued by the court in Mannheim and the German authorities proceeded to set in motion procedure in Ireland for extradition. On 24 September 1991 the applicant was convicted of the drugs charge and later released. On 29 October 1991 the Irish

Lord Jauncey of Tullichettle, with whom all the other Lords concurred, first stated that the *Bennett* principle was not valid in the circumstances of this case in which a person was not brought to England to stand trial but merely to be held there before being extradited to a third country. Although Schmidt argued that the House of Lords had to be aware not to create "an anomaly between a person who is kidnapped and brought into the country to be tried here and a person who is brought here not to be tried here",[326] Lord Jauncey of Tullichettle, following the reasoning of the respondents,[327] stated:

> My Lords, I am satisfied that Bennett has no such general application as the applicant contends. The issue in that case was whether the English courts should decline to try the accused by staying the prosecution. That the power to intervene, which was held to exist in the High Court, was related only to a trial is abundantly clear from the passages in the speeches to which I have referred. Indeed, there was no reason in that case to consider the power in any other context. (...) In my view the position in relation to a pending trial in England is wholly different to that in relation to pending proceedings for extradition from England. In the former case the High Court in its supervisory jurisdiction is the only bulwark against any abuse of process resulting in injustice or oppression which may have resulted in the accused being brought to trial in England. In the latter case, not only has the Secretary of State power to refuse to surrender the accused in such circumstances but the courts of the requesting authority are likely to have powers similar to those held to exist in Reg. v. Horseferry Road

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authorities informed the German authorities that the extradition warrant was not in order. No further steps towards extradition were thereafter taken by the German authorities. During 1992 New Scotland Yard received information that the applicant was living in Waterford and was making frequent visits to the United Kingdom using false British and E.E.C. passports to conceal his true identity. There was also information that he had visited Italy and Belgium using such passports. In September 1992 Detective Sergeant Jones, an officer of the extradition squad of the International and Organised Crime Branch of the Metropolitan Police, decided to investigate whether the applicant might be involved in terrorist activities and had committed offences in connection with forged passports. It is accepted that there was no evidence to connect the applicant with terrorist activities. D.S. Jones also obtained the authority of a senior officer to pass himself off as an officer investigating cheque fraud in the hope that he could thereby persuade the applicant to meet him in England, where the applicant could be arrested on a provisional warrant if the German Government were to request his extradition. Thereafter D.S. Jones telephoned the applicant and his solicitor in Ireland and explained that he was investigating a cheque fraud allegedly committed by a Mr. N. Schmidt and that he was anxious to exclude the applicant from his inquiries. He invited the applicant to come to England to be interviewed and on being asked by his solicitor what would happen if the applicant did not attend the interview he said that it would be the normal practice to circulate his name as that of a suspect and that he would be arrested when his presence in the United Kingdom next came to the notice of the authorities. The respondents accept that there was no truth in the cheque fraud suggestion and that this was simply a device to persuade the applicant to enter the United Kingdom. On 17 November 1992 D.S. Jones met the applicant's solicitor by arrangement in Green Park and shortly thereafter he met the applicant who accompanied him to Charing Cross Police Station where he was arrested on a provisional warrant issued that morning."

[326] House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 364. Schmidt hereby referred to an older decision, which, according to him, their Lordships were not to follow.

[327] Who argued that "[t]here is (...) nothing anomalous in the submission that Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42 does not apply to extradition proceedings, where, unlike domestic criminal proceedings, the courts are not called on to make any final determination of guilt or innocence." (*Ibid*., p. 366.)

> Magistrates' Court, Ex parte Bennett.[328] An accused fugitive is thus likely to have not one but two safeguards against injustice and oppression before being brought to trial in the requesting state. It must also be remembered that the extradition procedures to which this appeal relates flow from the European Convention on Extradition and are designed to facilitate the return of accused or convicted persons from one contracting state to another. The removal of the requirement that the requesting state should provide prima facie evidence of the alleged crime demonstrates that extradition proceedings between contracting states were intended to be simple and speedy, each state accepting that it could rely upon the genuineness and bona fides of a request made by another one.[329] (...) To confer on the High Court a power such as the applicant contends for would be to inhibit the carrying out of this intention.[330]

Although one will understand that a trial court is not the same as an 'extraditing' court, one can wonder whether the idea behind the above-mentioned passage may not lead to unfair situations. One can agree with Justice Sedley (of the Divisional Court in this case) that all courts (whether trial courts or 'extraditing' courts) have an obligation to prevent abuse of their process.[331] If that were not the case, then a court would be powerless to stop the extradition of a person who was clearly abducted from another country before being brought before the 'extraditing' court. It can be argued that these situations need to be avoided.[332]

Even though the above-mentioned conclusion of Lord Jauncey of Tullichettle was in itself enough to dismiss Schmidt's appeal, Lord Jauncey of Tullichettle also looked at the hypothetical situation that the Court would have a *Bennett*-like discretion. In other words: would the luring operation in this case call for a stay of

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[328] One can seriously wonder whether that would then lead to a dismissal of the case. It is not hard to agree with Michell when he writes: "Lord Jauncey's argument that a court of the requesting state would take into account the manner in which the fugitive came before it is (...) open to some doubt. In *Schmidt II*, it would seem unlikely that a German court would stay the proceedings against the fugitive in Germany unless he could show that the German authorities had been responsible for his allegedly unlawful return to England." (Michell 1996, p. 480.) See also Choo 1995, p. 874.

[329] This makes Michell wonder whether this means that judges should have more power to investigate these issues in cases where there is no such a system (of trust): "It may be (...) that *Schmidt II* is limited in its application to extradition proceedings under the European Convention on Extradition. In a case where extradition is sought by a non-Convention state there may be less room for the trust in the quality of foreign justice expressed in *Schmidt*. As a corollary, there should be a greater willingness on the part of the extraditing court to consider the circumstances by which the fugitive came before it [original footnotes omitted, ChP]." (Michell 1996, p. 478.)

[330] House of Lords, Lord Jauncey of Tullichettle, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 377-378. Note that the Supreme Court of Ireland had earlier ruled in the case *The State (Trimbole) v. The Governor of Mountjoy Prison* (Supreme Court of Ireland, *The State (Trimbole) v. The Governor of Mountjoy Prison*, 26 March 1985 [1985] *I.R.* 550) that the illegal arrest of an Australian citizen had tainted (and stopped) the subsequent extradition process to Australia. ("[T]he Irish authorities had arrested him before they had established a legal basis to extradite him [original footnote omitted, ChP]." (Michell 1996, p. 481).) See for more information on this case and its relationship with *In Re Schmidt*: Michell 1996, pp. 480-481.

[331] See House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 359 (Decision of the Divisional Court of the Queen's Bench Division, Justice Sedley).

[332] See also Michell 1996, p. 479.

the proceedings if the Court had that discretionary power? Lord Jauncey of Tullichettle first examined the opinions of Lord Justice Roch and Justice Sedley (of the Divisional Court in this case) on this issue.

Although Lord Justice Roch stated that "a serious or grave abuse of power by the executive" fell under the *Bennett* principle and that this could even include a technique in which no force is used (for example, if threats or inducements of a serious and grave nature have been made),[333] the technique adopted in this case did not meet that threshold.[334] Before reaching that conclusion, however, Roch clearly referred to the seriousness of Schmidt's charges:

> If there has to be a balancing between the gravity of the alleged offences for which the applicant is wanted by the German authorities and the improper conduct of the police, then the smuggling of substantial quantities of drugs across borders is a serious matter indeed.[335]

Justice Sedley was of the opinion that subterfuge, even if that technique as such was possible in view of "the reality of police work in a dangerous and complex

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[333] See House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 353 (Decision of the Divisional Court of the Queen's Bench Division, Lord Justice Roch): "In my opinion what has to exist before the court will intervene on the grounds of abuse of process is a serious or grave abuse of power by the executive as typified by kidnapping or forcible abduction in the territory of the foreign state as a means of circumventing extradition procedures which the executive could and should have used. The principle will not be confined to cases where there has been an application of physical force to the person of the detainee in the foreign country, but will embrace cases where there have been threats or inducements of a serious and grave nature." (It is arguably not clear from these words whether Lord Justice Roch would only refuse jurisdiction in case an agent would, for example, visit the suspect and, while holding him at gunpoint, order him to come with him to the forum State – this would amount to an abduction – or also in case an agent from another State, for example, over the telephone, would seriously threaten him in an effort to induce him to come to the forum State – this can more likely be seen as a luring operation.) *Cf.* also House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 357 (Decision of the Divisional Court of the Queen's Bench Division, Justice Sedley): "I do not accept his argument [the argument of the respondents' QC, ChP] that only the use of physical force passes the threshold. Lawlessness can take many forms. In my judgment what the doctrine of Bennett's case strikes at is an act on the part of the executive government of the United Kingdom: (a) which violates the laws of the foreign state, international law or the legal rights of the individual within that state, and thus offends against the principle of comity; (b) which circumvents extradition arrangements made with that state; (c) which instead brings the suspect by coercion into the jurisdiction of the United Kingdom's courts; and (d) but for which the domestic proceedings could not have been initiated. (…) In total, the decision of the House of Lords enlarges the concept of abuse of process to embrace serious abuses of power where it is only by the abuse of power that legal process has become possible. It articulates the supervisory obligation of the High Court to maintain the rule of law as something different from and greater than the maintenance of individual rules of law." (This quotation could arguably more easily include a luring operation from abroad (a violation of international law is not necessarily required), although the luring operation would then have to be accompanied by coercion, see also the main text. This point is reminiscent of the discussion in the context of the *Stocké* case where it was wondered whether a luring operation can be seen as an operation against the will of the suspect, see Subsection 2.2.4 of Chapter III.)

[334] See House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 354 (Decision of the Divisional Court of the Queen's Bench Division, Lord Justice Roch).

[335] *Ibid*. See also Michell 1996, p. 499 (n. 569). See also *ibid*., pp. 475-478.

world",[336] should not amount to coercion. That, according to him, had occurred in this case.[337] Lord Jauncey of Tullichettle, however, did not agree:

[336] House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 359 (Decision of the Divisional Court of the Queen's Bench Division, Justice Sedley).

[337] As Justice Sedley's opinion may be interesting for one's views concerning the (il)legality of certain luring operations, it is worth displaying it here in its entirety, see *ibid*., pp. 358-359: "In my view the way in which the applicant was induced to come to England (...) is within the mischief to which the principle in Bennett's case is directed. But for the deception practised on him, the applicant would not have come to England and so made his arrest and extradition possible. This deception amounted to more than temptation (to use D.S. Jones' word) or inducement: it amounted to coercion, because it deliberately led the applicant to believe that D.S. Jones had sufficient evidence to justify his arrest for cheque frauds if and when he next entered the United Kingdom, but that by coming here voluntarily and surrendering himself to D.S. Jones he could clear himself. Since Jones knew that the whole cheque fraud story was bogus, he knew too that this was an offer that the applicant could not refuse: either he could come and establish what both he and Jones knew was his innocence of cheque frauds, or he could (so Jones led him to believe) face the prospect of arrest and possible trial for the frauds whenever he next chose to come to the United Kingdom, as he periodically did. To offer an ostensible choice between a serious limitation on movement (whether by having to stay away from the United Kingdom or by facing arrest for cheque frauds on entry) and a simple and certain way of removing that bogus limitation was in my judgment coercive both in intention and in effect. It was a baited trap, but it was a trap into which the applicant was driven by a mendacious threat of adverse consequences if he did not take the bait. To change the metaphor, without the use of the stick the carrot would have been of no help. The subterfuge was intended precisely to ensure that the applicant believed he had no worthwhile choice but to come to the United Kingdom and deliver himself to D.S. Jones, and that is what he did. (...) What is objectionable about fraud, actual or constructive, is that it robs the victim of the power of autonomous decision and action as surely as does physical coercion. In my judgment a fraud practised in and contrary to the law of a sovereign state, as this fraud was, and but for which the applicant would not and could not have been arrested on a provisional warrant as and when he was, would entitle this court to intervene to stay consequent criminal proceedings by parity of reasoning with Bennett's case. Comparably, if the applicant were to have been present in the United Kingdom for another reason (including an invitation, true or false, from D.S. Jones to meet him in order, say, to discuss kites [In Ireland, Schmidt had a business in kites and model aeroplanes, ChP]) the objection would fall away because the element of coercion would be absent. Whatever the moral objections to the use of pure subterfuge, they have to be matched against the reality of police work in a dangerous and complex world (...). But the limit placed upon this by the House of Lords in Bennett's case [1994] 1 A.C. 42, on grounds of constitutional principle, is that the use of subterfuge must not be such as to violate the rule of law by substituting coercion for established extradition procedures." With respect to this last part, the circumvention of extradition procedures, it must be noted that the Detective Sergeant in charge of the operation stated that he did not intend to circumvent the extradition procedures between Ireland, Germany and the UK. (A possible circumvention could perhaps be deduced from the fact that Schmidt had been earlier arrested in Ireland for being in possession of drugs but that an attempt of the German authorities to have Schmidt extradited from Ireland to Germany was unsuccessful because the Irish authorities found that the extradition warrant was not in order, see House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 345 (Decision of the Divisional Court of the Queen's Bench Division, Lord Justice Roch): "D.S. Jones adds that he did not believe that the ruse he was suggesting would circumvent any extradition arrangements between the Republic of Eire, Germany and the United Kingdom as he was not intending to tempt the applicant to enter the United Kingdom in circumstances where he would never otherwise have come here. He was simply trying to persuade the applicant to get in touch with him when he came to the United Kingdom for his own purposes." Note that "[n]o legal process existed by which the applicant could have been brought from Eire within the jurisdiction of this court for the purpose of being extradited to Germany", see *ibid*., p. 354.)

> The only sanction attached to the ruse was that the applicant, if he did not attend a meeting with D.S. Jones in England, would be arrested when his presence in England was next detected by the authorities. In these circumstances to suggest that he had no alternative but to come to this country and was thereby coerced seems to me to be unrealistic. Had he chosen to remain in Ireland, there was nothing that the authorities here could have done about it. At the very worst, he was tricked into coming to England but not coerced.[338]

Lord Jauncey of Tullichettle also looked, although perhaps not as clearly as Lord Justice Roch of the Divisional Court (who used the word "balancing"), at the seriousness of the crimes with which Schmidt was charged before condoning the police conduct. After having referred to the findings of Lord Griffiths in another drug case (*Somchai Liangsiriprasert v. Government of the United States of America*),[339] he concluded:

> The 58 German charges outstanding against the applicant suggest that he may be a substantial international dealer in drugs. As such, his frequent visits to England are unlikely to be in the public interest. To bring such a person to justice the police and other drug enforcement agencies may from time to time have to tempt him to enter their fief. In my view, what was done by D.S. Jones was far more akin to the enticement of the drug enforcement agent in Liangsiriprasert than to the [forcible] abduction in Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42. I agree with Roch L.J. that the detective sergeant's conduct was not so grave or serious as would have warranted the intervention of the High Court had it possessed such a power.[340]

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[338] House of Lords, Lord Jauncey of Tullichettle, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 379.

[339] *Ibid*., pp. 379-380: "In Somchai Liangsiriprasert v. Government of the United States of America [1991] 1 A.C. 225, a drug dealer was persuaded by a United States drug enforcement agent to travel from Thailand to Hong Kong in order to receive payment for drugs exported from Thailand to the United States. There was no extradition between the two countries for drug offences. On arrival in Hong Kong the applicant was arrested and proceedings for his extradition to the United States were commenced. He submitted, inter alia, that it would be oppressive and an abuse of process for a government agency to entice a criminal to a jurisdiction from which extradition was available. In answer to this submission Lord Griffiths said, at pp. 242-243: "As to the suggestion that it was oppressive or an abuse of process the short answer is that international crime has to be fought by international co-operation between law enforcement agencies. It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for the drug barons.... In the present case the applicant and S.C. [Sutham Chokvanitphong, the cousin of Somchai Liangsiriprasert, ChP] came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not because of any unlawful conduct of the authorities but because of their own criminality and greed. The proper extradition procedures have been observed and their Lordships reject without hesitation that it is in the circumstances of this case oppressive or an abuse of the judicial process for the United States to seek their extradition.""

[340] *Ibid*., p. 380.

As a result of this, Schmidt's appeal was dismissed. Reading his words, it is not entirely clear whether Lord Jauncey of Tullichettle was of the opinion that *every* luring operation cannot lead to the ending of the case, or whether *this specific* luring operation (in which, according to him, no coercion had been used) could not lead to the ending of the case. After all, although he stated that the conduct was not so grave or serious as to warrant intervention (implying that the conduct may have been irregular, but not irregular enough to activate a stay), Lord Jauncey of Tullichettle also found the conduct in *In Re Schmidt* to be more akin to the enticement operation in *Somchai Liangsiriprasert v. Government of the United States of America* than to the *captus* of Bennett – and it should be remembered that in *Somchai Liangsiriprasert v. Government of the United States of America*, Lord Griffiths stated that the suspects came to the jurisdiction of the arresting officers "not because of any unlawful conduct of the authorities".[341] In addition, and given the fact that it seems (although this is, in contrast to the position of Lord Justice Roch, not that clear) that Lord Jauncey of Tullichettle looked at the seriousness of Schmidt's charges before concluding that the conduct was not so grave or serious as to warrant intervention, it is not plain either whether their Lordships would approve a luring operation (such as the ones executed in *In Re Schmidt* and *Somchai Liangsiriprasert v. Government of the United States of America*) in any case brought before them or only if the 'lured' suspect is charged with serious crimes (such as in the two above-mentioned cases).[342]

Before turning to the civil law context, it may be worth pointing out that also in English cases after *Schmidt*, the seriousness of the suspects' alleged crimes were taken into consideration in the balancing exercise of the judges confronted by a *male captus* situation. Two such cases are the 1996 case *R. v. Latif* and the 1999 case *R. v. Mullen*.[343] It is not necessary to examine these cases in detail, but a few interesting quotations certainly deserve to be mentioned here. In the first case, *R. v. Latif*,[344] where a person suspected of serious drug offences was lured from Pakistan to the United Kingdom, Lord Steyn (providing the opinion of the House of Lords) very clearly spelled out why the strict application of both the *male captus bene detentus* and the *male captus male detentus* maxims in the context of entrapment (luring) would be undesirable:

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[341] *Ibid.*, p. 379, referring to Lord Griffiths in the case *Somchai Liangsiriprasert v. Government of the United States of America*. See also n. 339.

[342] Note that Michell (1996, pp. 475-476) makes the general statement – not only focused on suspects of serious crimes – that "[i]n *Schmidt II*, the House of Lords determined that an individual who has been lured into England from abroad by the police under false pretenses may be lawfully extradited to face criminal charges in a third state. *Schmidt II* is also significant because Lord Jauncey left little doubt that the position he adopted in that case would also apply to the propriety of a criminal trial where an individual has been lured into the jurisdiction by fraud [original footnote omitted, ChP]." However, he concedes that Lord Justice Roch, in the first *Schmidt* case (at the Divisional Court) did consider the seriousness of the suspect's charges to constitute a factor to be taken into account, see Michell 1996, p. 499.

[343] See also Warbrick 2000.

[344] House of Lords, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 104-117 [1996].

> If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weakness of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader consideration of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42.[345] *Ex parte Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.[346]

Applying these considerations to the facts of the case, Lord Steyn found that the allegations of the suspect had to be rejected.[347] However, the balancing exercise may also turn out in favour of the suspect.

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[345] See also Shaw 2003, p. 606, who notes that the approach in *Bennett* was extended in *Latif* to cover entrapment. Note that the term 'entrapment' is often used for the national context only. However, in that case, entrapment must be discerned from luring, a real *male captus* situation involving how a person came from one jurisdiction to the other.

[346] House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996].

[347] See *ibid*., p. 113: "In my view the judge took into consideration the relevant considerations placed before him. He performed the balancing exercise. He was entitled to take the view that Shahzad was an organiser in the heroin trade, who took the initiative in proposing the importation. It is true that he did not deal with arguments about the criminal behaviour of the customs officer. That was understandable since that was not argued before him. If such arguments had been put before him, I am satisfied that he would still have come to the same conclusion. And I think he would have been right. The conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed. Realistically, any criminal behaviour of the customs officer was venial compared to that of Shahzad. In these circumstances I would reject the submission that the judge erred in refusing to stay the proceedings."

The 1999 decision of *R. v. Mullen*[348] involved the disguised extradition of a suspect accused of (IRA) terrorism from Zimbabwe to England. In this case, Lord Justice Rose, referring to *Latif*, mentioned a few elements to be taken into account here, starting with the seriousness of the Mullen's crimes (Mullen had already been convicted and sentenced to 30 years' imprisonment for his crimes when he appealed his conviction on the basis of his pre-trial disguised extradition from Zimbabwe to England).[349] Another important element Rose took into account was "the nature of the conduct of those involved in the deportation on behalf of the British Government".[350] Rose was clearly very critical of this conduct:

> [T]he British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.[351]

However, was this conduct to be seen as conduct – to use the words of Lord Steyn, quoted above in the *Latif* case, see footnote 347 – "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed"?[352] Lord Justice Rose, balancing these two above-mentioned elements, ultimately concluded that it was:

> This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42 and Reg. v. Latif [1996] 1 W.L.R. 104, very considerable weight must be attached. (…) In these circumstances, we have no doubt that the discretionary

[348] Court of Appeal, Criminal Division, *Regina v. Mullen*, 4 February 1999, [2000] *Q.B.* 520*ff.*
[349] See Court of Appeal, Criminal Division, Lord Justice Rose, *Regina v. Mullen*, 4 February 1999, [2000] *Q.B.* 534: "As a primary consideration, it is necessary for the court to take into account the gravity of the offence in question. In the present case, the substance of the offence was the facilitating of a bombing campaign in the United Kingdom, which, but for the discovery by the police of the Battersea explosives and armaments cache, might well have caused loss of life and injury to members of the public and, more probably, substantial damage to property in this country. The sentence of 30 years' imprisonment reflects the gravity of the offence. Although it was not at the very top of the range of seriousness of criminal activity, it was undeniably at a very high level in that range."
[350] *Ibid.*
[351] *Ibid.*, p. 535.
[352] *Ibid.*

> balance comes down decisively against the prosecution of this offence. This trial was preceded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceedings then being stayed.[353]

As a result, the Court concluded that "the prosecution and therefore the conviction of the defendant were unlawful".[354] In doing so, it emphasised, however, that the balancing exercise may turn out differently in other cases as everything depends on the exact circumstances.[355]

2 CASES FROM THE CIVIL LAW SYSTEM

2.1 Older cases

In a number of old French cases, the judges held that the *male captus* in question could not lead to a trial. For example, the Court of Appeal of Douai decided on 15 April 1891 in the *Nollet* case that the arrest of a certain Nollet, executed by French gendarmes on Belgian territory, was deemed not to have occurred.[356]

Likewise, in the 1904 *Jabouille* case, where an accused, who had taken refuge in Spain, was expelled to France before he could be extradited, the Court of Appeal of Bordeaux held that "Jabouille could lawfully be apprehended only following extradition requested and obtained in the terms provided for by international agreements or after his voluntary return to the country."[357]

One case which is often mentioned in the *male captus* discussion is the 1933 *In re Jolis* case.[358]

On 9 July 1933, a thirsty Belgian citizen, Pierre Jolis, visited a bar in the French town of Louvroil.[359] However, Jolis was perhaps more than thirsty for after he left, it was discovered that 2200 francs were missing.[360] The owner of the bar called two

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[353] *Ibid*., pp. 535-536.
[354] *Ibid*., p. 536.
[355] See *ibid*., pp. 536-537: "In arriving at this conclusion we strongly emphasise that nothing in this judgment should be taken to suggest that there may not be cases, such as Reg. v. Latif [1996] 1 W.L.R. 104, in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within the jurisdiction. In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged."
[356] See Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 106 (Report of M. le Conseiller Comte).
[357] *Ibid*.
[358] See Tribunal Correctionnel d'Avesnes, *In re Jolis*, 22 July 1933, *Annual Digest and Reports of Public International Law Cases*, Vol. 7 (1933-1934), Case No. 77, pp. 191-192.
[359] See *ibid*., p. 191.
[360] See *ibid*.

gardes-champêtres, French village constables,[361] and accompanied them to Mons (Belgium) where Jolis had apparently gone.[362] It was there that the three arrested him on 10 July 1933.[363] After having him brought back to France, he was imprisoned in Avesnes and charged with theft.[364]

The Belgian Government, however, protested and demanded the return of Jolis because he had been illegally arrested on Belgian territory by French officers.[365]

The Tribunal Correctionnel d'Avesnes (a criminal court of first instance)[366] concurred with this view; on 22 July 1933, it stated: "The Court (…) declares null and void the whole of the proceedings of July 10, 1933, especially the commitment to prison and the remand order; and orders the immediate release of Jolis, unless detained for any other matter."[367]

Although it is not clear from the report in the *Annual Digest* itself whether the French Court hereby relied on international law considerations,[368] the fact that the French Court followed the (international law) view of the Belgian Government points to the fact that it did.[369] In addition, one may also refer to the note of Professor Rousseau to this case who explained that "[t]he exercise by a State of any of its coercive powers in foreign territory, unless based on international convention, is prohibited by the law of nations."[370]

However, this *male captus male detentus* stance was not followed in the famous 1964 *re Argoud* case by the French Supreme Court, a case which will now be addressed in more detail.[371]

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[361] See District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 48 (36 *International Law Reports* 1968, p. 68).

[362] See Tribunal Correctionnel d'Avesnes, *In re Jolis*, 22 July 1933, *Annual Digest and Reports of Public International Law Cases*, Vol. 7 (1933-1934), Case No. 77, p. 191.

[363] See *ibid*.

[364] See *ibid*.

[365] See *ibid*.

[366] See District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 48 (36 *International Law Reports* 1968, p. 68).

[367] Tribunal Correctionnel d'Avesnes, *In re Jolis*, 22 July 1933, *Annual Digest and Reports of Public International Law Cases*, Vol. 7 (1933-1934), Case No. 77, pp. 191-192.

[368] See, however, ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 91: "The Court considered that this was a violation of international law and released the person [original footnote omitted, ChP]."

[369] See also Wilske 2000, p. 327: "Nicht ausdrücklich angesprochen wurde dabei die Frage, ob diese Rechtsfolge dem Völkerrecht oder dem nationalem Recht entnommen wurde. Es liegt aber nahe anzunehmen, daß die Rechtsfolge unmittelbar dem Völkerrecht entnommen wurde, da ein entsprechender Rechtssatz der nationalen Rechtsordnung nicht zitiert wurde und wohl auch nicht existiert. In früher entschiedenen Fällen [and here, Wilske refers to *Nollet* and *Jabouille*, ChP] war auch wegen Umgehung des Auflieferungsverfahrens die französische Gerichtsbarkeit verneint worden [original footnote omitted, ChP]."

[370] Tribunal Correctionnel d'Avesnes, *In re Jolis*, 22 July 1933, *Annual Digest and Reports of Public International Law Cases*, Vol. 7 (1933-1934), Case No. 77, p. 192.

[371] This book has chosen to follow – as much as possible – a chronological order in this chapter, but as one will see, after the discussion of the *Re Argoud* case, one older case of the civil law context will be

Antoine Argoud was an ex-colonel in the French Army who had been sentenced to death *in absentia* by the French High Military Court on 11 July 1961 for illegal political activities.[372] As the convicted Argoud continued his activities, a new investigation was opened "for conspiracy against the authority of the State and complicity, by provocation and by giving instructions, in attempts against that authority."[373] In the context of this investigation, an arrest warrant was issued on 9 December 1961. However, Argoud could not be apprehended.[374]

> Then, on 26 February 1963, the police, alerted by an anonymous telephone call, discovered Argoud in a motor-van parked on Quai de l'Archevêché, Paris. His face was swollen and his hands were handcuffed. According to his statements – which the judgment under appeal appears to find correct – he had been abducted during the course of the previous night, by some unidentified persons,[[375]] from a hotel in Munich, the city where he was living under a false name, and transported by force into France.[376]

Argoud was subsequently brought before the Court of State Security where he argued that the Court was without jurisdiction because of his *male captus*.[377] The Court, however, rejected his arguments; in an incidental decision of 28 December 1963, the Court of State Security found that it had jurisdiction for a number of reasons, one of them being that Argoud "lacks the right or capacity to plead in judicial proceedings a violation of international law, *a fortiori when the State*

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addressed. The reason for the fact that *Re Argoud* is mentioned already now is that the *In re Jolis* and *Re Argoud* cases are often mentioned together in (legal) comparisons.

[372] See Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 90 (summary) and p. 98 (Report of M. le Conseiller Comte). Argoud was member of the OAS (Organisation de l'Armée Secrète), an insurrectional movement which tried to prevent the independence of Algeria and, in this context, attempted to assassinate, for example, the French President Charles De Gaulle.

[373] *Ibid*.

[374] See *ibid.*

[375] Wilske and Schiller explain that "there was no evidence that the French government participated in the abduction." (Wilske and Schiller 1998, p. 227.) That may be the case, but there are, nevertheless, also signs that French officials might have been involved in the operation. For example, Lucchini (1964, p. 190), writes first that "*le Procureur général de Munich a, dès le mois de mars, rendu publics les noms de cinq Français soupçonnés d'être les auteurs de l'enlèvement* [emphasis in original, ChP]." Then, he turns to a letter written by Argoud himself, addressed to Chancellor Erhard: "[L]'enquête menée avec beaucoup de zèle dès ses premiers jours par les services fédéraux, a permis de préciser l'identité et les adresses de mes agresseurs. Des renseignements recueillis par la suite ont confirmé la participation à l'opération des services de la sécurité militaire française de Baden et de Strasbourg". (*Ibid*.) See also Doehring 1965, pp. 209-210. See further De Schutter 1965, p. 101: "[T]he German authorities officially mentioned the name of Bernard Germès as the leader of the kidnapping. According to some papers the man in question was a member of the French Security Service. The intervention of the so-called "barbouzes" [French special intelligence agents used in the fight against the OAS, see n. 372, ChP] has also been mentioned, whereas Argoud, in his message to Chancellor Erhard, cites the French military security service of Baden and Strasbourg as co-responsible [original footnotes omitted, ChP]."

[376] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 98 (Report of M. le Conseiller Comte).

[377] See *ibid*., p. 90 (summary).

concerned [this is the Federal Republic of Germany, ChP] *makes no claim* [emphasis in original, ChP]."[378] On 30 December 1963, the Court of State Security sentenced Argoud to life imprisonment "for the direction and organization of an insurrectional movement, conspiracy against the authority of the State and complicity in attempts against that authority."[379] Argoud appealed his case so the French *Cour de Cassation* ultimately had to consider the matter.[380]

The French Supreme Court agreed with the above-mentioned finding of the Court of State Security, stressing that

> [i]n the circumstances, on the plane of international law Argoud is still less well-founded in complaining since he was living in Germany under a false name. The right of asylum pleaded by him is debatable, and '*formal assurance has been given* [*today*] *by the* Ministère public *that the Minister for Foreign Affairs has received no note from the Government of the Federal Republic of Germany asking for the return to the German authorities of ex-Colonel Argoud, although he has been detained in France for more than ten months* [emphasis in original, ChP].'[381]

However, the italicised quotation to which the Supreme Court refers (these are the words of the Court of State Security from its incidental decision of 28 December

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[378] *Ibid*., p. 94.

[379] *Ibid*., p. 91. It is recalled that Argoud was a member of the OAS, see n. 372.

[380] It must be remarked that in one of the submissions of Argoud, the latter explains the (in his eyes incorrect) *male captus bene detentus* view of the Court of State Security as follows: "The final ground [of the Court of State Security, ChP] was that the capture of a citizen abroad did not deprive the courts of his country of the right and competence to judge him." (Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 95.) It can be argued that these words from Argoud, explaining the reasoning of the Court of State Security, have, however, been incorrectly presented by the ICTY Trial Chamber's decision in *Nikolić* (see Subsection 3.1.4 of the following chapter) as the words of the Supreme Court itself, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 91: "In *re Argoud*, (…) the Court (…) held that "[l]a capture à l'étranger d'un citoyen ne priverait pas les tribunaux de son pays du droit et de la compétence de le juger [original footnote omitted, ChP]."

[381] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 94. Lucchini (1964, pp. 190-191) explains that there had been some demands for clarification from the Government and protests from the Parliament but no formal (written) protests and demands for the return of Argoud from the Government: "*En dépit de quelques timides demandes d'explications, le Gouvernement allemand n'a pas présenté aux autorités françaises de demande de restitution d'Antoine Argoud. Pourtant le Procureur général de Munich a, dès le mois de mars, rendu publics les noms de cinq Français soupçonnés d'être les auteurs de l'enlèvement. Plus tard, le Parlement allemand a exprimé le 6 novembre 1963, la volonté qu'Argoud soit restitué aux autorités allemandes. Cette résolution adoptée à l'unanimité a été renvoyée à la Commission des Affaires étrangères et à celle de l'Intérieur. Mais cette manisfestation de volonté était tempérée par la déclaration faite le 18 novembre par le Ministre ouest allemand de la Justice, selon laquelle, si Argoud était renvoyé en Allemagne,* "La République aurait à le rendre à la France" (*Le Monde*, 24 nov. 1963). (…) *Au cours du procès, s'est produit un événement d'importance, qui menaçait de ruiner la thèse française. Le Gouvernement allemand s'était-il décidé à faire une demande officielle de restitution? La demande avait bien été formulée, mais* verbalement *et non pas selon la procédure diplomatique classique, qui aurait exigé la remise d'une note écrite du Ministère des Affaires étrangères allemand acheminée au Quai d'Orsay par les soins de l'ambassadeur de France à Bonn, M. de Margerie* [emphasis in orginal, ChP]."

1963), were attacked by the Defence in a hearing of 30 December 1963 (the day the Court of State Security sentenced Argoud to life imprisonment); it argued that "evidence [would be] given today of official representations made by the Government of the Federal Republic contrary to the statements of the Minister of Foreign Affairs".[382] Nevertheless, these submissions were rejected by the Court of State Security. Although the Supreme Court did not agree with the reasons as to why the Court of State Security rejected these submissions,[383] this would not help Argoud in his appeal

> since, in their previous decision, the judges fundamentally based themselves in justifying the regularity of the submission of the case to them, on other grounds (…) and which, in any case, would retain their validity even if the Court had decided to withdraw all or part of its first statements on the issue of fact in dispute.[384]

Hence, this means that the Supreme Court was of the opinion that, even if it could be established that the Germans had officially protested the abduction and requested the return of Argoud, this would not have helped Argoud.[385]

Although this point is not clearly[386] addressed in the text of the decision itself, the report of rapporteur Comte[387] does examine it in more detail.

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[382] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 94. De Schutter (1965, p. 90, n. 7) notes that on 30 December 1963, the German Government brought the matter to the attention of the French Government via a written note. On p. 106 of his article, he clarifies that this note contained a request for restitution and on p. 107, he writes about "Germany's request for returning Argoud". See also Doehring 1965, p. 210, who remarks that the note consisted of a request to *Rückführung* (return). The French Government, however, refused: "[D]e Gaulle has clearly implied that handing back the accused has never been considered". (De Schutter 1965, p. 102.) "This is shown in the answer to the note of Bonn, December 30 and received in Paris on December 31, the day after the conviction of Argoud." (*Ibid*., p. 102, n. 61.)

[383] See Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), pp. 94-95: "It was not correct for the judges, in rejecting those submissions, to declare that their preceding decisions 'could not be revoked, since the State Security Court is not an appellate jurisdiction in respect of its own decisions. A supervening new fact cannot be examined by the criminal jurisdiction which rendered the decision complained of, and it is only capable, under Article 622 of the Code of Criminal Procedure, of permitting an action for revision'. In fact, the Security Court was not bound by the considerations of pure fact which were given in the decision rendered previously. It retained full power until the hearings had been terminated to revise, in the light of such new information as might be produced, its statements of the material circumstances in question, which, moreover, did not imply any finding on the existence of the elements of the offence in law or as to the guilt of the accused. Secondly, the reference made in the judgment to Article 622 of the Code of Criminal Procedure and to the possible institution of a later action for revision, was clearly without any bearing on the question at issue."

[384] *Ibid*., p. 95.

[385] See also US Supreme Court: Brief of the Government of Canada as Amicus Curiae in Support of Respondent in United States v. Alvarez-Machain, 4 March 1992, 31 *International Legal Materials* (1992), p. 925: "French courts also subscribe to the principle that official transborder abductions must be judicially rectified. (...) But see *Re Argoud* (...)."

[386] Nevertheless, the Supreme Court did argue that "whatever be the decision which the Court will be led to pronounce with regard to Argoud, such as deprivation of liberty, that sentence could not be an obstacle to a future agreement between the Governments concerned on the fate of the accused." (Court

However, before going into that issue, it is appropriate to first consider the Supreme Court's explicit considerations with respect to the rejection of Argoud's *male captus* claim.

The Supreme Court looked at Argoud's complaint from two perspectives, one focusing on international law and one focusing on domestic French law.[388] With respect to international law, the Court observed that

> the State which is entitled to complain of damage suffered by one of its nationals or protected persons in violation of its territorial sovereignty exercises its own right when it claims reparation. Individuals have no capacity to plead in judicial proceedings a contravention of international law. The putting in issue of international responsibilities concerns only relations between State and State, without individuals being entitled to intervene.[389]

Hence, Argoud could not complain about a possible violation of the sovereignty of the Federal Republic of Germany.

This stance was defended earlier (see *Eichmann*)[390] and later (see *Noriega*)[391] but was not accepted, see also the next chapter, in the context of the international criminal tribunals.[392]

However, with respect to internal law, the Court found that the domestic law violations involved in the *male captus* of Argoud[393] may indeed have consequences.[394] Nevertheless, "[s]uch an irregularity (…) is not of such a character as of itself to involve the nullity of the prosecution."[395] It hereby also referred to the

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of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 95.) This means that States may agree whatever they would like to agree with respect to the fate of Argoud, but it also implies that the Court can do its task without having to look at protests from foreign States; this is something those foreign States should solve with the Executive of the State under whose jurisdiction this court operates, see also *ibid*.: "The putting in issue of international responsibilities concerns only relations between State and State".

[387] This is the man who made the remark that *male captus bene detentus* "is certainly not from Virgil", see n. 7 and accompanying text of Chapter II.

[388] See also Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 102 (Report of M. le Conseiller Comte).

[389] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 96.

[390] See n. 178 and accompanying text of Chapter III.

[391] See n. 207 of this chapter.

[392] See n. 178 of Chapter III.

[393] The Court noted that "[t]he acts of force of which the accused complains and which consisted in seizing his person and taking him, under constraint, across the frontier, are characterized as a violation of Article 124 of the Code of Criminal Procedure concerning the execution of warrants of the investigating magistrate." (Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 97.)

[394] See *ibid*.: "Such an irregularity, which is penalized by Article 136 (…) engages the responsibility – even the criminal responsibility – of those who have committed it".

[395] *Ibid*. In addition, "none of the other provisions of that Code, which provide for the nullity of investigatory proceedings pursued in violation of the requirements which it decrees, is applicable to this case." (*Ibid*.) M. le Conseiller Comte also emphasises that the irregularity involved here cannot lead to a *male detentus* and then states rather sweepingly about the penal prosecution that it is "always possible in

fact that the proceedings themselves (in court) were not seriously hampered by the *male captus*, thus paying tribute to the restricted notion of a fair trial.[396] As a result of these considerations, Argoud's appeal was dismissed.

It is now worth returning to the report of rapporteur Comte and the kind of effect a protest from the Federal Republic of Germany would have had.

In his report, in which it is made clear, incidentally, that the French judges also referred to *male captus bene detentus* case law such as *Scott*,[397] *R. v. Nelson and Brand*,[398] *Elliott*[399] and *Eichmann*,[400] Comte explains that that would also have been irrelevant:

> [T]he Court of State Security, when the defence asked it to recognise the existence of the alleged official communications of the German Government regarding the Argoud case (…) could have limited itself to replying in the following terms: 'Perhaps, but that changes nothing in the problem. For that would involve a purely diplomatic act which concerns the French Government and which is for it, and it alone, to envisage the consequences. The Court is here to judge a man, and for nothing but that, in accordance with the rules of French criminal law, which the protests of a foreign Government can neither change nor sway. The difference which has arisen between the two States arose outside our competence; it will be settled without our intervention. It cannot require, directly or indirectly, our decision any more than our responsibility.'[401]

This indeed confirms more clearly what the Supreme Court appears to argue when it states that "[t]he putting in issue of international responsibilities concerns only relations between State and State"; perhaps a foreign State can complain, but it is not up to the court now trying the case to consider these international issues.[402] (However, the other side of the coin is also accepted by the Court: if the two Governments/Executives want to make an agreement on the fate of Argoud, the Court can do nothing about that either.)[403]

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the case of acts of violence, infringements of liberty or abuse of authority…." (*Ibid*., p. 104 (Report of M. le Conseiller Comte).)

[396] See Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 98: "[T]he circumstances in which an accused person who is the subject of a lawful prosecution (…) has been apprehended on a lawful warrant for arrest and handed over to justice, even if they constituted an infringement of the criminal law or the traditional principles of our law, are not of a character – however deplorable they may appear – to entail of themselves the nullity of the prosecution. For the investigation and the establishment of the truth are not fundamentally vitiated, nor is the defence placed in a position in which it is impossible for it to exercise its rights before the jurisdictions of investigation and judgment."

[397] See Subsection 1.1 of this chapter.

[398] See n. 3 of this chapter.

[399] See Subsection 1.1 of this chapter.

[400] See Subsection 3.1 of this chapter.

[401] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 104 (Report of M. le Conseiller Comte).

[402] See also De Sanctis 2004, p. 537.

[403] See n. 386.

This stance, that the Court can continue its case even if the Federal Republic of Germany had made an official protest and request for the return of Argoud, is reminiscent of the *Alvarez-Machain* case and arguably represents the position of the old-fashioned and 'provincial' court which does not want to be involved in international law issues, even if it profits from the origin of these problems.

It is submitted that a court, as a part of one of the many States which form the international community, should take up its responsibility as one of the many guardians of the fragile international legal order based on the equality of States and should indeed take into account international law.[404]

This also means that a court, if 1) it is clear that the prosecuting State has violated another State's sovereignty and thus international law,[405] 2) the injured State has protested and requested the return of the suspect[406] and 3) the Executive of the prosecuting State has not done what it should have done (namely return the suspect to the injured State),[407] should refuse jurisdiction and order the return of the

[404] These international law elements, of course, also include international human rights law but that concept, important as it is, has nothing to do with the concept under discussion here: the equality of States. (Note, by the way, that the concept of human rights law had not yet been developed to such an extent that it could play a role in *Re Argoud*.) See on the role of domestic courts as guardians of the international legal order Michell 1996, pp. 386-387. (See also n. 560 and accompanying text of Chapter III.)

[405] Note that this is not clear in this case given the fact that it was uncertain whether the kidnapping could be attributed to France, see n. 375.

[406] Although in this case, this only happened after the case was decided by the Court of State Security (see n. 382), the Supreme Court was arguably of the opinion that even if it could be established that the Germans had officially protested the abduction and requested the return of Argoud, this would not have helped Argoud either.

[407] There is another old and famous case from the civil law context which should be mentioned here in that respect, but as it did not lead to a decision of a judicial body, it will not be addressed in the overview itself, but merely here, in this footnote. In this 1935 *Jacob-Salomon* case, "an ex-German citizen, Herr Jacob-Salomon, was kidnaped on Swiss territory and taken to Germany, where he was held for trial on a charge of treason." (Preuss 1936, p. 123.) In an article written one year earlier, Preuss gives a detailed account of the spectacular kidnapping: "According to the Swiss version of the case, Herr Jacob-Salomon, an ex-German political *émigré*, on March 9, 1935, came to Basel upon the invitation of one Dr. Hans Wesemann, a German national, who had gained his confidence through taking some of his articles for the English journals. At Basel, Jacob met Wesemann and another German national, who induced him to enter an automobile with them for the ostensible purpose of driving to the home of the latter at Riehen, Switzerland. As they approached the frontier at Petit-Huningue, the chauffeur, disregarding the order of the Swiss customs guards to stop, accelerated his speed to seventy kilometers per hour and dashed over the line into German territory. The barriers on the German side were open, although they were customarily closed before the hour (8:50 p.m.) at which the car crossed. Two hundred meters beyond the frontier, Jacob was arrested by German functionaries who had been awaiting his arrival [original footnotes omitted, ChP]." (Preuss 1935, p. 503.) The Swiss Government protested this alleged violation of its sovereignty, arguing "that German secret agents had participated in the seizure and that the police officers who made the arrest had been forewarned of the plan to kidnap Jacob [original footnote omitted, ChP]." (Preuss 1936, p. 123.) Furthermore, the Swiss Government "demanded the immediate return of Jacob, the punishment of the guilty functionaries, and the taking of steps necessary to prevent the recurrence of like incidents." (Preuss 1935, p. 503.) However, the Germans refused to return the suspect, denying official complicity in the case. (See *ibid.*, p. 504.) One could argue that this implies that the Germans were also of the opinion that they would have to return the suspect if they were officially involved in the kidnapping (see also the assumed rule derived from

suspect.[408] One can assume (or, at least, hope) that such a harsh consequence may perhaps make the government in question think twice before it tries to undermine the fragile international legal order again.

In that respect, the (genuinely provincial!) Court in *In re Jolis*, a 'mere' court of first instance in a small commune of Avesnes in northern France, has arguably acted less provincially than the metropolitan Supreme Court of France.[409]

However, it must not be forgotten that, perhaps also here, the seriousness of Argoud's charges (even if this point is not mentioned by the Supreme Court) may

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Chapter III that the 'abducting' State (if not the Executive then the Judiciary) must return the abducted person to the injured State if that State protests and requests the return of the suspect). The Swiss Government subsequently "re-affirmed its position and requested arbitration of the dispute". (Preuss 1935, p. 504.) Germany agreed with the request of the Swiss to have the case arbitrated (See Preuss 1936, p. 123), as a result of which an arbitral tribunal was established, consisting of two national judges and three neutral judges. (See *ibid*.) Its mandate was to establish the exact circumstances of Jacob's *male captus* and to determine whether the territorial sovereignty of Switzerland had indeed been violated by Germany. (See *ibid*.) If so, then it could also address the question of reparation. (See *ibid*.) However, when the proceedings began and Germany had received the (probably irrefutable) *mémoire* of the Swiss, it started to get anxious about the whole undertaking. (See *ibid*.) In any case, it proposed to abandon the arbitral procedure and to settle the case among the two States themselves. (See *ibid*.) On 18 September 1935, the Swiss issued a communiqué whose last words read that the *mémoires* of the Swiss and the German Governments "have established the regrettable fact that a German functionary has acted in an inadmissible manner in this case, for which he was punished disciplinary some time ago. In these circumstances the two Governments are in accord in terminating the arbitral procedure by an agreement. Jacob has been surrendered to Swiss authorities [original footnote omitted, ChP]." (Preuss 1936, pp. 123-124.) It must be stressed that the "German functionary" referred to above was not one of the actual kidnappers; Preuss notes that, because Germany apparently refused to acknowledge that the actual kidnappers where German agents, "[t]he agreement may be construed only as an admission of responsibility for acts of complicity by State agents within their own territory in illegal seizures by private individuals on foreign soil." (*Ibid*., p. 124.)

[408] *Cf*. also (the more general) statement of Shen 1994, p. 45: "This article advises that all domestic courts, being a part of the government of the State, should take judicial notice of and give effect to the rules and principles of both customary and conventional international law, and should refrain from exercising jurisdiction over individuals seized or abducted by means in violation of international law." See also *ibid*., pp. 83-84.

[409] It may be interesting to note that Morgenstern (1953, p. 267) submitted that the *In re Jolis* case "is the only attitude consonant both with the requirements of international law and with the principles of the municipal law of most states regarding the enforcement of international law in municipal courts." See also *ibid*., p. 279: "Principle demands that municipal courts should decline to exercise jurisdiction over persons or property which have been seized in violation of international law. In acting thus the courts would enforce the rule of international law prohibiting the seizure, and give effect to the general jurisprudential maxim *ex injuria jus non oritur*." See further Garcia-Mora 1957, pp. 447-448. See also the criticism of Kiss (1965, pp. 937-938) towards the *Argoud* case: "Les vues qu'exprime cet arrêt semblent être contraires à la pratique française qui a toujours nié la validité des arrestations opérées en territoire étranger, même en l'absence de toute protestation émanant de l'Etat dont la compétence territoriale a été lésée. Elle sont aussi contraires à la conception de la supériorité du droit international sur le droit interne, conception pourtant affirmée par la Constitution de 1958 – à moins d'admettre que le droit international ne contient que des règles conventionnelles. Une infraction aux règles du droit international public existe indépendamment de la qualité de celui qui la dénonce – ou ne la dénonce pas. La circonstance qu'elle ne sera peut-être pas sanctionnée ou qu'aucune réclamation n'en naîtra sur le plan international est indifférente à ce point de vue. La violation du droit est là et il est curieux de vouloir prétendre fonder une situation de droit sur l'infraction à une règle [original footnote omitted, ChP]."

have played a role; it should be remembered that Pierre Jolis was only suspected of having stolen 2200 francs whereas an investigation was opened against Argoud "for conspiracy against the authority of the State and complicity, by provocation and by giving instructions, in attempts against that authority." This point is also reflected in the following words of Comte, where he, arguably in contrast to his earlier observation that international law problems will be settled without the intervention of the judges, asserts that courts must recognise the sovereignty of States:

> Rarely – perhaps never – has a problem more difficult, more complex, more disturbing, been put before the conscience of the judiciary. Account must be taken of the need for repression which the exceptional gravity of the crimes makes in the highest degree imperative; the maintenance of the principles sanctifying the rights of the human person and the liberty of the individual, of which the courts are the guardians and the guarantors, must be safeguarded; the sovereignty of States must be recognized and the nature and the limits of the sanctions which it postulates must be made explicit. Above all, it is necessary (…) *to preserve the independence and the dignity of French justice* [emphasis in original, ChP].[410]

Wilske and Schiller also argue that there is another difference discernible, namely the fact that in *In re Jolis*, French officials undoubtedly played a role in the *male captus*, whereas this was not clear in the case of Argoud.[411]

> While it might be argued that *Argoud* stands for the proposition that a defendant cannot point to the circumstances of his apprehension to defend against the exercise of jurisdiction unless the State from which he was abducted makes an objection, it has not been interpreted that way. French legal authorities cite *Argoud* primarily as an example of a case in which jurisdiction was exercised over a defendant who was abducted by *private parties* and hold that the rule pronounced in *Jolis* regarding abductions by agents of the state is good law in France. This would mean that no jurisdiction may be exercised over a person abducted from abroad [emphasis in original and original footnote omitted, ChP].[412]

However, one can doubt whether this is in fact true (besides the fact, of course, that it was indeed not very clear whether French agents were involved in the *male captus*, which was obviously the case in *In re Jolis*). After all, the Supreme Court argued that international law issues are the concern of States. Hence, even if there were a clear-cut violation of international law (for example, because it was established without a doubt that Argoud's kidnappers were indeed agents of France, acting in that capacity,[413] and violating the sovereignty of the Federal Republic of

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[410] Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 107 (Report of M. le Conseiller Comte).
[411] See ns. 375 and 405.
[412] Wilske and Schiller 1998, p. 227.
[413] As already explained earlier (see n. 485 of Chapter III), only conduct of agents *acting in that capacity* shall be considered an act of State which may lead to State responsibility. See also the following words of the Court of State Security: "Attendu (...) que les ravisseurs d'Argoud seraient-ils

Germany), this would, according to the Supreme Court, have to be resolved by the Governments of the two States involved.[414] Argoud cannot intervene in this and the same goes for the Court, which should only be concerned with applying French law.[415] In fact, as was explained a few moments ago, it appears to be the opinion of the Supreme Court that even if the Federal Republic of Germany had made a formal protest, this would not have changed the matter either; it would be up to the French Executive (and not the French Judiciary) to solve the international law problem.

Another older case from the civil law context which should be mentioned here is the case *Fiscal v. Samper*, decided by the Spanish Supreme Court in 1934.[416] Although this case appears to be a normal rule of speciality decision in the context of extradition (comparable with the already-mentioned (see Subsection 1.1 of this chapter) *Rauscher* case), the Supreme Court's reasoning seems to go a little further than merely holding that Samper's conviction had to be overturned because he was tried for offences other than those for which extradition was sought.

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des ressortissants français ou même, comme l'accusé le soutient, des agents soumis à l'autorité de l'Etat français, ce ne sont pas leurs actes mais seulement le fait que les organes étatiques n'auraient pas dans ce cas fonctionné conformément au droit des gens qui entraînerait la responsabilité de cet Etat". (Lucchini 1964, p. 191.) Nevertheless, as was also explained in Chapter III of this book, acts of private individuals can lead to the responsibility of a State as well. According to De Schutter (1965, pp. 101-102), that was the case here: "[E]ven if the intervention of agents of the State or officers or nationals acting on order or with permission of their government is not fully evident, there is not the slightest doubt about the responsibility of the French Government. The conduct of these individuals is approved by the French authorities, no attempt has been made to find the culprits or to grant reparation. Moreover, de Gaulle has clearly implied that handing back the accused has never been considered, which is a public and manifest approval of the breach; and for its part the Court evades the question. France thereby assumed full responsibility towards Germany for the kidnapping of Antoine Argoud [original footnote omitted, ChP]."

[414] See Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 97: "[E]ven accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty [which would be the case if French agents had been involved in the operation, ChP], it would be for the Government of the injured State alone to complain and demand reparation."

[415] *Cf.* in that respect Lucchini (1964, p. 192), commenting on the 28 December decision of the Court of State Security (which, like the Supreme Court, was also of the opinion that international law issues had to be resolved at the level of States): "*Ainsi la Cour fonde essentiellement son raisonnement sur le fait que si toute mesure de contrainte d'un Etat sur le territoire d'un autre Etat présente un caractère d'illicéite, c'est à l'Etat victime de cette mesure d'apprécier en toute liberté s'il doit ou non présenter une réclamation. Autrement dit, l'enlèvement d'Argoud, même s'il a été accompli par des agents des services secrets français, constitue une violation de la souveraineté territoriale de la République fédérale, mais l'absence par l'Allemagne de toute plainte ou de toute demande officielle de restitution ôte toute qualité à un individu pour faire valoir ce manquement à une règle du droit de gens* [emphasis in original, ChP]." See also Court of Cassation (Criminal Chamber), *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45 (1972), p. 102 (Report of M. le Conseiller Comte): "Following the defence up to a point and accepting for the purposes of discussion that Argoud had been abducted by French agents, the situation would remain the same. The responsibility of the French State could then be examined, but only at the request of the Government of the Federal Republic of Germany, in the name of a nation whose sovereignty had been infringed and which was entitled to plead the violation of a traditional principle governing relations between States."

[416] Supreme Court, *Fiscal* v. *Samper*, 22 June 1934, *Annual Digest and Reports of Public International Law Cases*, Vol. 9 (1938-1940), Case No. 152, pp. 402-405.

In this case, Samper, the manager of the *Federación Catòlica Agraria*, a Madrid company in financial problems,

> drew eleven bills of exchange for a total of 327,635 pesetas payable to the Federation, with forged signatures and acceptances of persons who owed nothing to the Federation. He deposited them in the bank account of the Federation and entered them as assets in its books in order to make it appear in good financial condition so that he might continue as its manager.[417]

Samper subsequently fled to Portugal where he was detained. When Spain requested his extradition for falsification of bills of exchange, Portugal refused, but when Spain asked for his extradition for falsification of a private document as a mean of swindling, extradition was granted.[418] In Spain, "Samper was tried and found guilty by a Spanish Court in 1933 for the crime of falsification of a mercantile document which did not cause property loss to anyone and sentenced to imprisonment for two years."[419] Samper appealed to the Supreme Court, arguing, among other things, "that he had been convicted of a crime different from that for which he had been extradited."[420] The Supreme Court agreed with this point and discharged Samper, reasoning that

> [t]his is so because delinquents who take refuge in a foreign country relying on a legislation which promises them protection have acquired a true right, disregard of which would tend to weaken the law of nations and to introduce lack of confidence into international relations.[421]

Selleck notes that this reasoning "rejects the traditional Anglo-American rule that jurisdiction is not impaired by the circumstances attending a defendant's arrest and capture on foreign territory."[422] Furthermore, "the court discarded the idea that individuals cannot plead a right of asylum or protection under an extradition treaty [original footnote omitted, ChP]."[423] It should be remembered that this 'right of asylum' was also asserted by Ker in *Ker v. Illinois*, but was found to be absurd by the US Supreme Court.[424]

The final decision which should be mentioned here is that of the Zurich Higher Court (*Obergericht*) of 11 April 1967 described by Wilske.[425] In this case, a Swiss businessman who was suspected of forgery of documents and who was living abroad was lured by private individuals into Switzerland where he was subsequently

[417] *Ibid*., p. 403.
[418] See *ibid*.
[419] *Ibid*.
[420] *Ibid*.
[421] *Ibid*., p. 405.
[422] Selleck 1985, p. 259.
[423] *Ibid*.
[424] See ns. 28-30.
[425] See Wilske 2000, pp. 323-324. See also Wilske and Schiller 1998, p. 228.

arrested by the (in the meantime informed) Swiss authorities.[426] The *Obergericht*, following the opinion of Professor Hans Schultz,[427] refused to exercise jurisdiction over the person, finding "that the defendant's apprehension violated national due process and principles of extradition law under which apprehension of a person by means of force or ruse was prohibited."[428] The Court found a limited form of cooperation by the Swiss authorities already enough to attribute the conduct of the private individuals to the State of Switzerland: "Ausreichend sei bereits, wenn die Strafverfolgungsorgane von dem Vorgehen der Privatpersonen Kenntnis gehabt und die so geschaffene Gelegenheit, den Angeklagten zu verhaften, ausgenützt hätten [original footnote omitted, ChP]."[429] It is, therefore, already enough if the

[426] See Wilske 2000, p. 323.
[427] See Schultz 1967.
[428] Wilske and Schiller 1998, p. 228. See also Wilske 2000, p. 323: "[D]er Zugriff auf eine Person [kann] nur statthaft sein (…), wenn dieser sich aus völlig freien, nicht durch Drohung oder List beeinflusstem Willen in den Bereich der hiesigen Gerichtsgewalt begeben hat." (Referring to "*Zürcher Obergericht*, II. Strafkammer, App., 11 April 1967, Blätter für Zürcherische Rechtsprechung 65 (1967), Nr. 119, 248, 250.") It may be interesting to note that Schultz, who defends the idea that judges cannot continue to exercise jurisdiction in the case of a serious *male captus* case violating international law (see Schultz 1967, p. 81: "Daraus folgt, daß die schweizerischen Gerichte eine Verletzung grundlegender Regeln des Völkergewohnheitsrechtes, wie das Gebot, Eingriffe in die Gebietshoheit eines fremden Staates durch Behörden zu unterlassen, berücksichtigen und diesen Grundsätzen widersprechende Handlungen schweizerischer Behörden als rechtswidrig betrachten müssen. Infolgedessen kann der Angeschuldigte in dem gegen ihn eingeleiteten Verfahren eine das allgemeine Völkerrecht verletzende Prozeßhandlung rügen und das gericht hat von Amtes wegen zu prüfen, ob ein solcher Mangel vorliegt. Gilt das allgemeine Völkerrecht als Teil der eigenen Rechtsordung, so ist damit unvereinbar, wenn ein in krasser Verletzung dieser Regeln begründetes Strafverfahren unbekümmert um diesen Mangel weitergeführt wird.") and who defends the *ex iniuria ius non oritur* rule (see *ibid*., p. 83: "Gerade wenn der Staat Recht sprechen und demjenigen Strafe auferlegen will, der gegen das Recht verstieß, so muß er sich davor hüten, daß seinem Verfahren Unrecht anhafte. Nicht der Grundsatz, daß auf welche Weise auch immer jeder möglicherweise Schuldige zur Rechenschaft gezogen werden kann, ist die oberste Maxime wirklicher Strafrechtspflege, sondern der richtige Leitsatz lautet, daß die strafrechtliche Verantwortung nur den Grundsätzen des Rechts folgend geltend gemacht werden soll. *Ex iniuria ius non oritur*. Dies ist so wahr, daß, welche Ziele der Strafrechtspflege auch gesetzt werden, eine nicht selber streng das Recht achtende Strafjustiz diese Ziele nie erreichen wird.") wondered whether another rule would be applicable in the context of more serious suspects such as perpetrators of crimes against humanity. However, unfortunately, he did not find this necessary to examine in further detail as this case did not deal with such a suspect, see *ibid*., p. 82: "Ob für die Urheber von Verbrechen gegen die Menschheit andere Regelen zu gelten haben, welche sich aus der völkerrechtlichen Eigenart dieser Straftaten ableiten, kann unerörtert bleiben, weil es such hier einzig um die Verfolgung gewöhnlicher Straftaten handelt." However, in his article from 1984 (in which he comments on the still-to-discuss, see Subsection 2.2, 1982 decision of the Swiss Federal Court in the case of X), Schultz does make a general statement against *male captus* methods in which he mentions the fact that the suspects against whom such methods are used may be charged with serious crimes, see Schultz 1984, pp. 110-111: "Vorkommnisse, wie sie sich in dem hier geschilderten Auslieferungsfall abspielten, sind nicht nur eines Staates, der sich als Rechtsstaat ausgibt, unwürdig. Sie sind außerdem überaus bedauerlich, weil sie allen denen Auftrieb geben, die der zwischenstaatlichen Rechtshilfe jeder Art mit Mißtrauen begegnen und überall Mißbrauch wittern. Der kurzfristige Vorteil, einmal einen ins Ausland entwischten Angeschuldigten, der schwerer Delikte bezichtigt wird, auf eine solche Weise zur Strecke zu bringen, wiegt die dadurch hervorgerufene, lange nachwirkende Erschütterung des Vertrauens in dieses wichtige Mittel zwischenstaatlicher Zusammenarbeit nie auf [original footnote omitted, ChP]."
[429] Wilske 2000, p. 324. See also Schultz 1967, pp. 72-73.

prosecuting authorities were aware of the conduct of the private individuals and had used the arising opportunity to arrest the accused. Because the Court already decided not to exercise jurisdiction in this case on the basis of domestic law[430] (which was, however, interpreted in light of international law),[431] it did not have to look at the 'real' international law dimension of this case.[432]

2.2 More recent cases

The first more recent *male captus* case from the civil law context which should be mentioned here is the Dutch *Menten* case from 1977. In 1976, the media in the Netherlands reported on the role allegedly played by Pieter Menten, a Dutch national, in the execution of a number of Jewish citizens in 1941 in what was then a Polish region.[433] However, the day before the Public Prosecutor wished to start criminal proceedings, Menten fled to Switzerland.[434] On 6 December 1976, Menten was arrested by the Swiss authorities and a little more than two weeks later, he was handed over to the Netherlands where he was charged with a war crime and/or a crime against humanity before the Extraordinary Penal Chamber of the District Court of Amsterdam.[435]

Counsel for Menten, referring to an article written by Orie (who is now, among other things, a judge at the ICTY),[436] argued that the Swiss and Dutch Governments had acted unlawfully in bringing Menten to justice and that as a result, the legal proceedings now being conducted were unacceptable.[437] However, the District

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[430] See Wilske 2000, p. 324: "Folge dessen sei ein so schwer wiegender Verstoß gegen grundlegende rechtsstaatlichen Regeln, daß die derart begründete Gerichtsgewalt als nicht bestehend angesehen werden müsse [original footnote omitted, ChP]."

[431] See Wilske and Schiller 1998, p. 228.

[432] See Wilske 2000, p. 324. See also Schultz 1967, p. 85.

[433] See District Court of Amsterdam, Extraordinary Penal Chamber; Supreme Court; District Court of [T]he Hague, Extraordinary Penal Chamber; Supreme Court; District Court of Rotterdam, Extraordinary Penal Chamber; Supreme Court, *Public Prosecutor* v. *Menten*, 14 December 1977; 29 May 1978; 4 December 1978; 22 May 1979; 9 July 1980; 13 January 1981, *International Law Reports*, Vol. 75 (1987), pp. 331-332 (summary).

[434] See *ibid*., p. 332 (summary).

[435] See *ibid*. See also *ibid*.: "[T]hat on 7 July 1941, at Podhorodce, alone or together and in conjunction with one or more other persons, he intentionally and after calm consideration and quiet deliberation, in any case intentionally, took the life of at least one or more of approximately twenty or thirty, in any case a number of persons (…), all of whom belonged to the civilian population of this area, by shooting them dead or by shattering their skulls, or by burying them alive or at least having them buried by others after having fired at them or injured them otherwise. He was also charged with the murder of 125 to 200 persons, the majority of them of Jewish origin, at Urycz on 27 August 1941."

[436] See Orie 1978. See also Frowein 1994, p. 176: "When a Dutch national suspected of war-crimes during World War II was arrested in Switzerland in 1976, apparently the Netherlands Minister of Justice travelled to Bern. No formal request for extradition seems to have been presented to the Swiss authorities. The person concerned was subsequently expelled from Swiss territory and handed over to the Netherlands authorities [original footnote omitted, ChP]." See finally Poort 1988, p. 71: "The case of the war criminal Pieter Menten (…) is a clear example of a disguised extradition."

[437] See District Court of Amsterdam, Extraordinary Penal Chamber, *Public Prosecutor* v. *Menten*, 14 December 1977, *International Law Reports*, Vol. 75 (1987), p. 343.

Court of Amsterdam was not of the opinion that a *male captus* had occurred. As a result, it was not necessary to determine the effect of the alleged *male captus* on the jurisdiction of the Court. In addition, it found that the present proceedings were not the appropriate place to discuss these matters:

> [T]he conclusion in Orie's opinion does not go beyond the view, formed after 'brief investigation', that the transfer of the accused from Switzerland to the Netherlands in December 1976 'was almost certainly accomplished illegally' because Switzerland had acted contrary to the operative rules of extradition and aliens law. A reservation is made as regards the possibility, doubted by the author, that the accused had been given an opportunity to 'orientate' himself towards another destination. Apart from this possibility, the Netherlands was alleged to have acted as an 'instigator of' or as an 'accomplice in' Switzerland's unlawful conduct. Subsequently the question is raised – but left unanswered – of whether the judge who is now considering the offences charged must draw the conclusion that the prosecution which is based, *inter alia*, on this unlawful conduct, should equally be regarded as unlawful, and if so to what decision such a conclusion should lead. However, the Court has not reached this question since it has not been established that the accused's transfer from Switzerland to the Netherlands was unlawful. Nor is it relevant to consider the question of unlawfulness within the limits of the present prosecution. This would require a procedure in which the State of the Netherlands was in a position to defend itself against the alleged unlawful conduct otherwise than through the Public Prosecutor, and in which it should above all be established whether Switzerland's conduct towards the accused was unlawful and, if so, whether the conduct of the Netherlands should also be qualified as unlawful.[438]

It must be said that it is a pity that the Court does not motivate its decision on these points. The Court, notwithstanding Orie's article, can, of course, be of the opinion that it has not been established that Menten's transfer to the Netherlands was unlawful, but on which basis does it found its conclusion?[439] Furthermore, it can be argued that the Court's motivation as to why the State, in these criminal proceedings and through the Public Prosecutor, cannot defend itself properly against the allegations of Menten, is also insufficient; cases discussed in this book show that both the Defence and the Prosecution could amply argue and defend their case with respect to alleged pre-trial irregularities, also in criminal cases in which the suspect (and not the alleged wrongdoing State) is the subject of the proceedings.

In the other *Menten* decisions following that of the District Court of Amsterdam,[440] the point of his *male captus* did not return.

However, when Menten went to Strasbourg after the Dutch courts had pronounced themselves on his case, he complained "about the conditions under which he was expelled from Switzerland and that the expulsion was in fact a

[438] *Ibid*.
[439] *Cf*. also the criticism of Orie (1978, pp. 154-157) in the 'Post Scriptum' of his article (written after the District Court had issued its decision).
[440] See n. 433.

disguised extradition which enabled the Swiss authorities to disregard a number of judicial safeguards."[441]

The ECmHR, however, declared his application inadmissible,[442] explaining that Menten

> has failed to show that the above complaint has been submitted to the Netherlands courts in the context of the criminal proceedings instituted against him and in particular to claim the illegality of his arrest, and can therefore not be considered having exhausted the remedies available to him under Dutch law. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at this disposal.[443]

The second case to be discussed here also has a link with Switzerland. After the Swiss Federal Court (*Bundesgericht*) had arguably issued a *male captus bene deditus* decision in the *Bozano* case (see footnote 276 and accompanying text of Chapter III), namely that Bozano could indeed be extradited to Italy, notwithstanding his alleged *male captus* – a disguised extradition – from France to Switzerland,[444] the same Court in Switzerland issued a *male captus male deditus* decision two years later, in the case of X.[445]

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[441] *Nederlandse Jurisprudentie* 1982, 142, 'Europese Commissie voor de rechten van de mens, 11 december 1981, nr. 9433/81' under complaint 6. (The document available via the ECtHR's database *Hudoc* (available at: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database), see ECmHR (Plenary), *X. v/The Netherlands*, Application No. 9433/81, 'Decision of 11 December 1981 on the admissibility of the application', *Decisions and Reports*, No. 27, pp. 233-242) is incomplete and does not mention Menten's *male captus* submission.)

[442] See also Swart 2002 C, p. 1655, n. 48.

[443] *Nederlandse Jurisprudentie* 1982, 142, 'Europese Commissie voor de rechten van de mens, 11 december 1981, nr. 9433/81' under the European Commission's point 6.

[444] Nevertheless, the Swiss Court did not see it that way. It noted that the view that *ex iniuria ius non oritur* takes precedence over *male captus bene detentus* had indeed been defended in doctrine, but that this point was not relevant in this case as there had been no manifest violation of human rights in the first place, see Schweizerisches Bundesgericht, Lausanne, IIe Cour de droit public, arrêt du 13 juin 1980 dans la cause Lorenzo Bozano contre Ministère public de la Confédération (opposition à une demande d'extradition), *BGE* 106 (1980), p. 406: "L'opinion a (...) été soutenue en doctrine qu'en cas d'enlèvement illicite dans un pays pour livrer la personne enlevée à un Etat étranger, ou en cas de recours à la procédure d'expulsion pour éluder les règles d'extradition, le principe traditionnel "male captus bene judicatus" devrait le céder devant la maxime "ex injuria jus non oritur"; l'Etat de jugement serait dès lors tenu d'examiner l'illicéité de l'extradition intervenue au regard du droit étranger et du droit des gens (...) On peut se dispenser en l'espèce de se déterminer sur les problèmes ainsi posés. En effet, tant le Tribunal fédéral que les auteurs susmentionnés subordonnent l'éventuelle application des principes qu'ils évoquent aux cas où les circonstances dans lesquelles l'intéressé est traduit devant la justice de l'Etat poursuivant constituent une violation manifeste du droit des gens (...), ce qui n'est nullement démontré en l'occurrence. En outre, ainsi que cela sera examiné plus bas, l'expulsion à l'égard d'un Etat tiers ne devrait en soi pas être tenue en droit des gens pour un succédané illicite de l'extradition." Notwithstanding this, as was already explained in n. 273 and accompanying text of Chapter III, the ECtHR decided afterwards that Bozano had indeed been the victim of a disguised extradition, violating his human right to liberty and security.

[445] Schweizerisches Bundesgericht, Lausanne, P 1201/81/fs, Urteil der II. öffentlichrechtlichen Abteilung vom 15. Juli 1982, *X, belgischer Staatsangehöriger, gegen Bundesanwaltschaft, Eidg. Justiz-*

In this case, German officials tried to apprehend a Belgian national residing in Belgium, who was accused of fraud and forgery of documents.[446] However, because Belgium does not extradite its own nationals, an extradition request would not have led to any result.[447]

Hence, with help of a few telephone calls and under the pretext of arranging a business deal, a German agent lured X, who could not reckon that he was going to be arrested abroad,[448] from Belgium to Zurich, Switzerland, where he was arrested by the Swiss authorities.[449] Shortly afterwards, the Germans asked for his extradition.[450] The Swiss Federal Court, basing itself on international law,[451] refused, however, holding "that Germany had violated the territorial sovereignty of Belgium, and therefore, Switzerland would be an accessory after the fact if it approved Germany's extradition request."[452] Looking at the already in Chapter III

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und Polizeidepartement, *Europäische Grundrechte-Zeitschrift* 1983, pp. 435-438. See also Schultz 1984.

[446] See Schweizerisches Bundesgericht, Lausanne, P 1201/81/fs, Urteil der II. öffentlichrechtlichen Abteilung vom 15. Juli 1982, *X, belgischer Staatsangehöriger, gegen Bundesanwaltschaft, Eidg. Justiz- und Polizeidepartement*, *Europäische Grundrechte-Zeitschrift* 1983, p. 435.

[447] See Wilske and Schiller 1998, p. 228, n. 118.

[448] See Schweizerisches Bundesgericht, Lausanne, P 1201/81/fs, Urteil der II. öffentlichrechtlichen Abteilung vom 15. Juli 1982, *X, belgischer Staatsangehöriger, gegen Bundesanwaltschaft, Eidg. Justiz- und Polizeidepartement*, *Europäische Grundrechte-Zeitschrift* 1983, p. 437: "Dass der Einsprecher mit seiner Verhaftung im Ausland hätte rechnen müssen, ist auszuschliessen, wusste er doch nichts von dem gegen ihn erhobenen Strafverfahren in der Bundesrepublik under der Existenz des Haftbefehls vom …".

[449] See *ibid*., p. 435.

[450] See *ibid*.

[451] See Wilske 2000, p. 326: "Das Urteil des Schweizerischen Bundesgerichts vom 15. Juli 1982 argumentiert ausschließlich völkerrechtlich."

[452] Wilske and Schiller 1998, p. 228. See for the original text: Schweizerisches Bundesgericht, Lausanne, P 1201/81/fs, Urteil der II. öffentlichrechtlichen Abteilung vom 15. Juli 1982, *X, belgischer Staatsangehöriger, gegen Bundesanwaltschaft, Eidg. Justiz- und Polizeidepartement*, *Europäische Grundrechte-Zeitschrift* 1983, p. 437: "Wird die verfolgte Person mittels der erwähnten Vorkehren in eines Drittstaat gelockt, von dem daraufhin die Auslieferung des Betreffenden verlangt wirde, trägt der ersuchte Staat mit der Auslieferung zum Erfolg, nämlich der Behändigung des Verfolgten under Missachtung der Souveränität, mindestens mittelbar bei. Der Grundsatz der Souveränität gilt indes absolut, d. h. gegen jedermann. Als Verletzung dieses Grundsatzes muss dehalb auch gelten, wenn der Staat, dessen Souveränität nicht verletzt wird, das völkerrechtswidrige Vorgehen dadurch begünstigt, dass er den Verfolgten ausliefert. Diesfall macht sich der ersuchte Staat zum Gehilfen der Souveränitätsverletzung. (…) Sinn und Geist der verschiedenen Abkommen verbieten dem ersuchten Staat daher, Personen auszuliefern, die unter Umgehung der allein massgebenden inner- und zwischenstaatlichen Auslieferungsbestimmungen und unter Verwendung völkerrechtswidriger Mittel ins Ausland gelockt wurden." It must be noted that the Swiss Federal Court was hence also of the (arguably rather far-reaching, see ns. 79-80 and 82 and accompanying text of Chapter III) opinion that Belgium's sovereignty had been violated by the telephone calls setting in motion the luring operation (an operation which did not involve police activities of foreign agents on the territory of Belgium in the strict sense), see *ibid*.: "Nach den Grundsätzen des Völkerrechts ist jeder Staat verpflichtet, die Souveränität anderer Staaten zu beachten; Handlungen eines Staates auf fremdem Staatsgebiet sind daher unzulässig. Soweit eine verfolgte Person sich im Ausland befindet, kann sie dem verfolgenden Staat nur mittels eines hoheitlichen Aktes des Staates, auf dessen Gebiet sie sich befindet, überstellt werden; werden Organen des verfolgenden Staates ohne Bewilligung auf dem Gebiet eines anderen Staates tätig, bemächtigen sie sich insbesondere des Verfolgten mittels Gewalt, List oder Drohung, verletzen sie die Souveränität (…). *Nicht entscheidend ist, dass derjenige, der die Souveränität verletzt, sich auf dem Gebiet des*

discussed DARS, such a refusal could now, under certain circumstances, perhaps be founded on Article 16 ('Aid or assistance in the commission of an internationally wrongful act'), which stipulates:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State.[453]

Wilske and Schiller note that Schultz, in his legal opinion for X,[454] "is of the opinion that this decision implicitly follows the principle *ex iniuria ius non oritur* and rejects the *male captus, bene detentus* principle [original footnote omitted, ChP]."[455]

This case is rather special as it seems to be the only case in this overview (until now) where a court connects the non-continuation of the case with a *male captus* not executed by the authorities of the court's own State.[456]

However, it must also be noted that the continuation of the case was not linked with a trial in Switzerland itself, but with proceedings to determine whether or not extradition had to be granted to a third State. One could argue that, if the interests of the Swiss had been stronger (for example, if they sought to prosecute this person themselves for alleged crimes committed in Switzerland), the result might have been different.

Nevertheless, one could also assert that the Swiss Court wished to send a signal on how to bring suspects to justice and that that signal not only applies if the court in question 'merely' has to decide on whether or not extradition should be granted, but that it applies *a fortiori* when that court seeks to prosecute the suspect itself.[457]

Before turning to the next case in this overview, the 1983 French case of Barbie, it may be appropriate to mention that in other, more recent Swiss alleged *male*

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betreffenden Staates betätigt; es genügt, dass sein Verhalten den Taterfolg im Ausland bewirkt [emphasis added, ChP]."

[453] See also n. 353 of Chapter III.

[454] See Schultz 1984.

[455] Wilske and Schiller 1998, p. 228. See also Schultz 1984, p. 105: "Mit seinem Urteil vom 15. Juli 1982 folgte das Bundesgericht, ohne es ausdrücklich zu sagen, dem Grundsatz ex iniuria ius non oritur und erteilte dem Grundsatze male captus bene deditus eine deutliche Absage [original footnote omitted, ChP]."

[456] In the 1967 Swiss case, see the final case of Subsection 2.1, the Zurich Higher Court refused jurisdiction because of a *male captus* – a luring operation – executed by private individuals. As such, it seems to fall within the category of this 1982 case as well. However, in the 1967 case, the Court found that there had been some involvement of the Swiss authorities, although it must be admitted that the test regarding the level of cooperation between the authorities and the private individuals was very low: "Ausreichend sei bereits, wenn die Strafverfolgungsorgane von dem Vorgehen der Privatpersonen Kenntnis gehabt und die so geschaffene Gelegenheit, den Angeklagten zu verhaften, ausgenützt hätten [original footnote omitted, ChP]." (See also n. 429 and accompanying text.) Hence, the prosecuting authorities only had to be aware of the conduct of the private individuals so that they could use the arising opportunity to arrest the accused.

[457] In any case, Mann (1989, p. 415) is of the opinion that "[t]his is a decision expressive of an exemplary sense of international morality and respect for international law."

captus cases from 2000[458] and 2007,[459] the general 1982 reasoning[460] was upheld.[461] However, in both cases, the allegations by the victim of the alleged *male captus* were rejected.

In the 2000 case, in which the suspect claimed that he had been lured into Switzerland, it was stressed that the 1982 case and the present one were different in that in the first one, the Belgian suspect could not reckon that he was going to be arrested abroad[462] whereas the suspect of the 2000 case could. Notwithstanding this, the latter freely agreed to accompany the Swiss customs officers from German territory (where the customs office, at which the suspect's car was stopped, was located)[463] to Swiss territory to make a statement regarding the arrest of his female companion. Because of this, the Court held, he could not rightfully argue that he was lured into Switzerland.[464]

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[458] See Schweizerisches Bundesgericht, Lausanne, 6P.64/2000/hev, Kassationshof in Strafsachen, 5. Dezember 2000, *X. gegen Staatsanwaltschaft des Kantons Aargau, Obergericht des Kantons Argau*, available at: http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2000/Entscheide_6P_2000/6P.64__2000.html.

[459] See Schweizerisches Bundesgericht, Lausanne, T 0/2 1B_87/2007/fun, Urteil vom 22. Juni 2007, I. öffentlichrechtliche Abteilung, *X. gegen Staatsanwaltschaft III des Kantons Zürich, Bezirksgericht Zürich*, available at: http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=22.06.2007_1B_87/2007.

[460] "Nach den Grundsätzen des Völkerrechts ist jeder Staat verpflichtet, die Souveränität anderer Staaten zu beachten; Handlungen eines Staates auf fremdem Staatsgebiet sind daher unzulässig. Soweit eine verfolgte Person sich im Ausland befindet, kann sie dem verfolgenden Staat nur mittels eines hoheitlichen Aktes des Staates, auf dessen Gebiet sie sich befindet, überstellt werden; werden Organen des verfolgenden Staates ohne Bewilligung auf dem Gebiet eines anderen Staates tätig, bemächtigen sie sich insbesondere des Verfolgten mittels Gewalt, List oder Drohung, verletzen sie die Souveränität". See also n. 452.

[461] See Schweizerisches Bundesgericht, Lausanne, 6P.64/2000/hev, Kassationshof in Strafsachen, 5. Dezember 2000, *X. gegen Staatsanwaltschaft des Kantons Aargau, Obergericht des Kantons Argau* (available at: http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2000/Entscheide_6P_2000/6P.64__2000.html), under (D) (3) (a) and Schweizerisches Bundesgericht, Lausanne, T 0/2 1B_87/2007/fun, Urteil vom 22. Juni 2007, I. öffentlichrechtliche Abteilung, *X. gegen Staatsanwaltschaft III des Kantons Zürich, Bezirksgericht Zürich* (available at: http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=22.06.2007_1B_87/2007) under (D) (2.5.1).

[462] See also n. 448 and accompanying text.

[463] See Schweizerisches Bundesgericht, Lausanne, 6P.64/2000/hev, Kassationshof in Strafsachen, 5. Dezember 2000, *X. gegen Staatsanwaltschaft des Kantons Aargau, Obergericht des Kantons Argau* (available at: http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2000/Entscheide_6P_2000/6P.64__2000.html), under (A): "Das Zollamt [Stein/Bad Säckingen, ChP] befindet sich aufgrund des Abkommens zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über die Errichtung nebeneinanderliegender Grenzabfertigungsstellen und die Grenzabfertigung in Verkehrsmitteln während der Fahrt vom 1. Juni 1961 (…) auf deutschem Gebiet".

[464] See *ibid.*, under (D) (3) (a): "Daraus ergibt sich aber, dass auch dem guten Glauben dessen, der angeblich mit List ins Inland gelockt worden ist, entscheidende Bedeutung zukommt. Rechnete er mit einer möglichen Verhaftung, oder musste er damit rechnen, hat er selber auf den ihm zustehenden Schutz verzichtet und kann sich nicht mehr auf das Verhalten der Behörden berufen. So wurde die Einsprache im erwähnten Bundesgerichtsentscheid von 1982 nur geschützt, weil der Einsprecher nicht mit seiner Verhaftung rechnen konnte (BGE vom 15. Juli 1982, in EuGRZ 1983 S. 437 (…)). Nach den willkürfreien Feststellungen des Obergerichts wusste der Beschwerdeführer von der Durchsuchung

In the 2007 case, the suspect in question, a German citizen charged with investment fraud in Switzerland and other countries, was arrested on 9 August 2006 in his place of residence, Santo Domingo (Dominican Republic), and was brought to Switzerland by Swiss police officials on 19 August 2006.[465]

The suspect claimed that his case should be dismissed and that he should be released on the ground that he was abducted from Santo Domingo.[466] He hereby referred to a report of Professor Wohlers from the University of Zurich, who concluded that, on the basis of the present findings, it was uncertain whether or not the handing over of the suspect was unlawful[467] but that "[e]s spreche allerdings einiges dafür, dass die Überstellung als eine völkerrechtswidrige Entführung und die Inhaftierung damit als gegen Art. 5 Ziff. 1 Satz 2 EMRK verstossend einzustufen sei."[468]

Wohlers explained that the handing over had to be qualified as unlawful if the police authorities of the Dominican Republic, through actual conduct, had thwarted the regular extradition and deportation procedures and if the Swiss authorities had foreseen this and had exploited the resulting situation.[469] Nevertheless, according to him, if this were indeed established, it does not lead to an obstacle to exercise jurisdiction, but 'merely' to a release.[470] This point was already explained in Subsection 4.4 of Chapter III: according to human rights law, a violation of Article 5 of the ECHR leads to a release, but not necessarily to the ending of the case, although granting the released person the opportunity to leave the State (see footnote 470) may *de facto* lead to the ending of the case, see also footnote 615 of Chapter III. In addition, serious human rights violations can convince the judge that the *male captus* is so serious that jurisdiction must nonetheless be refused.

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seines Mietwagens und musste demzufolge mit der Entdeckung des versteckten Geldes und auch der Verhaftung rechnen (…). Gleichwohl erklärte er sich freiwillig bereit, auf den Polizeiposten Stein mitzugehen, um eine Aussage zur Verhaftung seiner Begleiterin zu machen. Damit kann er nicht mehr vorbringen, mittels einer völkerrechtswidrigen List in die Schweiz gelockt worden zu sein."

[465] See Schweizerisches Bundesgericht, Lausanne, T 0/2 1B_87/2007/fun, Urteil vom 22. Juni 2007, I. öffentlichrechtliche Abteilung, *X. gegen Staatsanwaltschaft III des Kantons Zürich, Bezirksgericht Zürich* (available at: http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=22.06.2007_1B_87/2007), under (A).

[466] See *ibid*., under (D) (2.1).

[467] See *ibid*., under (D) (2.3).

[468] *Ibid*.

[469] See *ibid*.: "Unrechtmässig sei die Überstellung dann, wenn die Polizeibehörden der Dominikanischen Republik gehandelt hätten, um die Regelung des Auslieferungs- und Ausweisungsrechts durch faktisches Verhalten zu unterlaufen. Soweit das Verhalten der Polizeibehörden der Dominikanischen Republik die Voraussetzungen für ein völkerrechtliches Delikt begründe und dies für die Strafverfolgungsbehörden der Schweiz erkennbar gewesen sei, führe das Ausnutzen dieser Situation dazu, dass auch das Handeln der schweizerischen Behörden als völkerrechtswidrig und damit unrechtmässig im Sinne von Art. 5 Ziff. 1 Satz 2 EMRK einzustufen wäre."

[470] See *ibid*.: "Erweise sich die Überstellung als völkerrechtswidrige Entführung, bestehe nach Auffassung des Gutachters zwar kein Prozesshindernis, wohl aber ein Hafthinderungsgrund. Damit sei der Beschwerdeführer aus der Haft zu entlassen und sei ihm die Möglichkeit zu geben, die Schweiz zu verlassen. Soweit ihm dies mangels eigener finanzieller Ressourcen nicht möglich sein sollte, wäre er diesbezüglich zu unterstützen, da die Schweiz verpflichtet sei, einen von ihr mitverursachten rechtswidrigen Zustand zu beseitigen."

The Court noted that the Swiss authorities had asked the authorities in Santo Domingo in March 2006 if the suspect could be extradited to Switzerland if he were to be arrested there. If so, Swiss officials would come to Santo Domingo to accompany the suspect back to Switzerland. On 9 August 2006, Interpol Santo Domingo sent a fax to Interpol Bern in which it was made clear that the suspect was in custody and that he would be deported, partly because there was no extradition treaty between the two States. However, according to Interpol Santo Domingo, Dominican officials had to escort the suspect back to Switzerland otherwise the suspect could argue that he had been kidnapped.[471] On 14 August, the Swiss authorities notified their colleagues in Santo Domingo that the suspect could also be picked up at any time in Santo Domingo and one day later, Interpol Santo Domingo informed the Swiss:

> Dear colleagues, in ref. to your message dated Aug. 14/2006 please be advised that X._____ was taken to court today because his lawyers filed for a "Habeas Corpus" procedure for the judge to determine if the a/m person's imprisonment was legal or not. The judge ruled in our favor and Mr. X._____ imprisonment was declared legal as of today. You have to send an escort team to pick up the fugitive as soon as possible because his lawyers are preparing an appeal to rule out the judge's decision. We can only guarantee detainment of Mr. X._____ for 4 to 5 more days. After that we can't guarantee that Mr. X._____ remains under custody because if his lawyers file for an appeal, he might be set free. Please advise your opinion on this matter.[472]

As a result of this, on 18 August 2006, three Swiss police officials went to Santo Domingo and one day later, brought the suspect back to Switzerland.[473] The Court, referring, among other things, to the already discussed *Öcalan* case before the ECtHR,[474] explained that the Swiss authorities had not violated the sovereignty of the Dominican Republic.[475] Furthermore, it was of the opinion that the Swiss could be accused of *mala fide* conduct neither.[476] It would be different if the Swiss authorities, with the intent to circumvent an extradition procedure, had asked the

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[471] See *ibid.*, under (D) (2.4): "Dear colleagues, please be advised that today at 08.25 local time Mr. X._____, born on ..., and wanted by the economic fraud section of the Zurich cantonal district attorney, was apprehended while coming out of his residence. He [is] actually under custody at Interpol's office. Since he doesn't have documents that can prove his legal status in our territory and there's no extradition treaty between our nations a deportation is imminent. We were told that Swiss officers are to escort Mr. X._____ back to Switzerland. Bear in mind that if a deportation procedure is made [D]ominican officers have to escort him back to Switzerland otherwise Mr. X._____ could say it was a kidnapping. Let us know your comments on this matter. We can hold him under custody for 48 hours after which we have to send him to the immigration facility so that he can wait there for the deportation procedure to be completed."

[472] *Ibid.*

[473] See *ibid.*

[474] See *ibid.*, under (D) (2.5.2).

[475] See *ibid.*, under (D) (2.6).

[476] See *ibid.*

Dominican officials to deport the suspect to Switzerland instead.[477] However, that was not the case here: "Vielmehr haben die dominikanischen Behörden von sich aus mitgeteilt, der Beschwerdeführer werde ausgewiesen."[478] In addition, there were not sufficient reasons for the Swiss authorities to assume that the conduct of the Dominican officials was evidently unlawful pursuant to the law of that State: "Dass ein Staat das Recht hat, Ausländer ohne gültige Aufenthaltspapiere auszuweisen, liegt auf der Hand und brauchte bei den schweizerischen Behörden keinen Argwohn zu erwecken." [479] In these circumstances, there was no obstacle to the suspect's arrest.[480] Although the Court agreed with Schultz that the maxim *ex iniuria ius non oritur* must be followed (see footnote 428), the Swiss authorities had not committed any *iniuria*.[481]

The next case to be discussed here is the 1983 French *Barbie* case. In 1952 and 1954, Klaus Barbie, head of the Gestapo in Lyon from November 1942 to August 1944, was sentenced to death *in absentia* for war crimes.[482] After a number of years, it was discovered that he had fled to Bolivia but a request for his extradition by the French Government was rejected by the Supreme Court of Bolivia on 11 December 1974 as there was no extradition treaty between the two States.[483] In February 1982, new proceedings were instituted against Barbie, this time for crimes against humanity,[484] and on 3 November 1982, an arrest warrant was issued.[485] When a new Bolivian President was elected in December 1982, "the Bolivian authorities decided to expel Barbie on the ground that he had used a false identity to obtain Bolivian

[477] See *ibid*.
[478] *Ibid*.
[479] *Ibid*.
[480] See *ibid*.: "Entscheidend ist, dass die Schweiz die Souveränität der Dominikanischen Republik beachtet und weder Zwang, List, Drohung noch sonst wie einen "üblen Polizeitrick" (…) angewandt hat, um des Beschwerdeführers habhaft zu werden. Bei dieser Sachlage ist ein Hafthinderungsgrund zu verneinen."
[481] See *ibid*.: "Wie Hans Schultz ausführt, muss der Staat, gerade wenn er Recht sprechen und demjenigen Strafe auferlegen will, der gegen das Recht verstiess, sich davor hüten, dass seinem Verfahren Unrecht anhafte. Nicht der Grundsatz, dass auf welche Weise auch immer jeder möglicherweise Schuldige zur Rechenschaft gezogen werden kann, ist die oberste Maxime wirklicher Strafrechtspflege, sondern der richtige Leitsatz lautet, dass die strafrechtliche Verantwortung nur den Grundsätzen des Rechts folgend geltend gemacht werden soll. Es gilt der Satz: Ex iniuria ius non oritur [the Court refers here to Schultz 1967, p. 83, see n. 428, ChP]. Dem ist uneingeschränkt zuzustimmen. Nach dem Gesagten haben die schweizerischen Behörden jedoch kein Unrecht begangen, um den Beschwerdeführer verhaften und ihn – wie die Mitangeschuldigten – dem hiesigen Strafverfahren zuführen zu können. Wesentlich ist der gute Glaube der schweizerischen Behörden (…). Dafür, dass ihnen dieser gefehlt hätte, enthalten die Akten keine Anhaltspunkte."
[482] See Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983 and 26 January 1984, *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others* v. *Barbie*, 20 December 1985, *International Law Reports*, Vol. 78 (1988), p. 125 (summary).
[483] See *ibid*.
[484] See *ibid*.: "Barbie was accused of murder, torture and arbitrary arrests, detentions and imprisonment. In Lyons alone he was alleged to have been responsible for the murder of 4,342 persons, the deportation of 7,591 Jews and the arrest and deportation of 14,311 members of the French Resistance."
[485] See *ibid*.

citizenship."[486] His deportation took place on 3 February 1983, when he was put on a plane bound for French Guiana, where he was subsequently arrested by French airport police and flown to metropolitan France.[487] It was there that Barbie argued that he was the victim of a disguised extradition and that, as a result of that, the proceedings against him had to be stopped.[488] The *Chambre d'accusation* of the Court of Appeal in Paris refused to release Barbie as a consequence of his disguised extradition. First, it noted that there could not be a disguised extradition as there was no extradition treaty between France and Bolivia.[489] Then, it turned to the (seriousness of the) crimes with which Barbie was charged. The Supreme Court explained the reasoning of the Court of Appeal as follows:

> [The Court of Appeal held] that, by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal criminal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.[490]

This quotation appears to mean that because of the seriousness of the crimes with which Barbie is charged, normal rules do not apply.

If this general observation (not limited to this specific case) entails, for example, that States should be able to prosecute international crimes even if there is no clear jurisdictional link with the State, comparable to the universality principle, then the words quoted above are, of course, to be welcomed.

However, they may also be interpreted more broadly to mean that suspects of international crimes are to be apprehended, irrespective of the means. That could mean even without the consent of the State where that suspect is residing and hence in disrespect of that State's territorial sovereignty, see the notion that these crimes "are subject to an international criminal order to which the notions of frontiers (…) arising therefrom are completely foreign."[491] This point was arguably also raised by

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[486] *Ibid*.
[487] See *ibid*.
[488] See *ibid*.
[489] See Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), p. 128: "[The decision of the Court of Appeal was based] on the grounds that the execution of an arrest warrant against a person who has taken refuge abroad is not subject to his voluntary return to France or to the setting in motion of extradition proceedings. The accused certainly claims that his arrest was the result of a fraud arising from a concerted agreement between the French and Bolivian Governments for his disguised extradition. Disguised extradition is characterized, however, by the violation of the provisions of a treaty and there is no extradition treaty between France and Bolivia."
[490] *Ibid*.
[491] *Cf.* also Michell 1996, p. 423, n. 205: "A possible "Eichmann exception" to the rule against the exercise of police power within another state's territory might be grounded in the universality principle, which permits states to prescribe certain crimes and to try persons for them, regardless of where the offenses were committed, or the nationality of the offenders. (…) Although the universality principle is the basis for prescriptive and not enforcement jurisdiction, in cases where the fugitive is accused of war crimes or crimes against humanity, it is arguable that the presumption against enforcement jurisdiction within the territory of another state may be realigned. States may be able to abduct a fugitive from

Barbie himself. After attacking the first point of the Court of Appeal,[492] he stated that

> the French Government is not empowered to express its adhesion to an international criminal order other than in accordance with constitutional rules. For its part the judiciary, as protector of individual freedom, is required by Article 66 of the Constitution to ensure respect for the principle that no one shall be arbitrarily detained. The judiciary is required to ensure respect for this principle under conditions laid down by the law and not by enforcing a so-called informal international law which has no permanent organizational structures and which furthermore, following the disappearance of temporary organizational structures which had been established, formally remitted the prosecution and judgment of crimes against humanity to the municipal legal orders of the States concerned. [The applicant therefore concludes] that, in relying on … the informal principles of a so-called "international criminal order to which the notion of frontiers and the extradition rules arising therefrom are completely foreign", the Court of Appeal violated the provisions mentioned above.[493]

However, the Supreme Court agreed with the findings of the Court of Appeal.[494] With respect to the first point, it noted that

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another state and charge him with crimes under international law without incurring international responsibility for the violation of the latter's territorial sovereignty, particularly where the asylum state has refused to either extradite or prosecute a fugitive accused of an international crime. (…) The abducting state's violation of the injured state's territorial sovereignty may be outweighed by both the abducting state's and injured state's *jus cogens* obligation to prosecute the fugitive for international crimes. (…) Such an approach is implied in Barbie (…)."

[492] See Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), p. 129: "[The applicant contends] however that, in the absence of any treaty, the conditions, procedure and effects of extradition are determined by the Law of 10 March 1927 (Article 1) [this Law is called 'Loi du 10 mars 1927 relative à l'extradition des étrangers', is available at: http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/loi_extradition.htm and its Art. 1 reads: "En l'absence de traité, les conditions, la procédure et les effets de l'extradition sont déterminés par les dispositions de la présente loi. La présente loi s'applique également aux points qui n'auraient pas été réglementés par les traités.", ChP] so that disguised extradition is present not only where a treaty has been violated but also where the provisions of the Law in question have been violated. It is not contested that the operation carried out corresponds exactly to the definition of extradition, which involves the surrender of an individual by the Government of the State of refuge to another Government which has requested his surrender, either to inflict a penalty upon him or to try him. By failing to examine, in application of Article 23 of the Law, whether the extradition of the applicant was a nullity [this article states, among other things: "L'extradition obtenue par le Gouvernement français est nulle, si elle est intervenue en dehors des cas prévus par la présente loi.", ChP], in which case an order for his release would have been required under Article 25 [this article states: "Dans le cas où l'extradition est annulée, l'extradé s'il n'est pas réclamé par le gouvernement requis, est mis en liberté et ne peut être repris, soit à raison des faits qui ont motivé son extradition, soit à raison des faits antérieurs, que si, dans les trente jours qui suivent la mise en liberté, il est arrêté sur le territoire français.", ChP], the Court of Appeal failed, in the applicant's view, to give a proper legal basis to its decision."

[493] *Ibid*., p. 130.

[494] See *ibid*.: "The *Chambre d'accusation* [of the Court of Appeal] held that it was competent to examine the submissions made in the application, according to which the detention of Barbie was a nullity since it was the result of a 'disguised extradition'. The Court of Appeal held that "In the absence of any

> [e]xtradition proceedings had not been started at the time of the expulsion of Barbie by the Bolivian authorities. Furthermore, the acts for which he was sought are not excluded from the ambit of extradition by the Law of 10 March 1927 so that Articles 23 and 25 of that Law[[495]] cannot be applied. There is therefore no obstacle to the bringing of a prosecution against the accused on national territory provided that the rights of the defence are fully and freely ensured before both the examining magistrate and the trial court.[496]

Hence, the fact that normal extradition procedures (on the basis of an extradition treaty) had not been initiated between Bolivia and France does not preclude the prosecution of Barbie in France, because the acts for which Barbie are sought are not excluded by the French extradition law of 1927, which applies when no extradition treaty can be relied upon. This statement seems to imply that the Court – which, incidentally, appears to be especially interested in the concept of fair trial *in the courtroom* ("provided that the rights of the defence are fully and freely ensured before both the examining magistrate and the trial court"), *cf*. its decision in *Argoud* almost 20 years earlier (which, however, seems to go even further, see footnote 396 and accompanying text) – is of the opinion that the transfer of Barbie from Bolivia to France can nevertheless be seen as a form of extradition as it argues that the law regulating extradition if there is no extradition treaty in place has not been violated and hence does not block a further prosecution. Thus, it seems that the Court is not asserting that it had jurisdiction, notwithstanding the fact that Barbie was the victim of a disguised extradition, but that it had jurisdiction because there was no disguised extradition.

With respect to the second point, the Supreme Court referred to a number of provisions stemming from documents dealing with the prosecution of international crimes[497] and explained that

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extradition request, the execution of an arrest warrant on national territory, against a person who has not [this negation must be deleted, see also n. 489, ChP] previously taken refuge abroad, is not subject to his voluntary return to France or to the institution of extradition proceedings. Furthermore, by reason of their nature, the crimes against humanity with which Klaus Barbie, who claims German nationality, is charged in France where those crimes were committed, do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign." In giving this ruling … the Court of Appeal gave a proper legal basis to its decision, without inadequacy or contradiction." It must be remarked that very often (see, for example, the ICTY's Appeals Chamber's decision of 5 June 2003 in the *Nikolić* case (see Subsection 3.1.4 of the following chapter), para. 23, n. 28, Lamb 2000, p. 227, n. 215 or Ülgen 2003, p. 458, n. 88), the decision '*Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others* v. *Barbie*' is mentioned as the source of this quotation. However, that case was decided on 20 December 1985 and, reading its summary (which only starts at p. 136 of Vol. 78 of the *International Law Reports*), does not contain that quotation.)

[495] See n. 492.

[496] Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), pp. 130-131.

[497] See, for example, UNGA Res. 3 (I) of 13 February 1946 ('Extradition and Punishment of War Criminals'). In this resolution, the UNGA recommended "that Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in

> [i]t results from these provisions that "all necessary measures" are to be taken by the Member States of the United Nations to ensure that war crimes, crimes against peace and crimes against humanity are punished and that those persons suspected of being responsible for such crimes are sent back "to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those countries".[498]

It can be argued that several positions can be discerned from the above-mentioned observations of the Supreme Court, which does not make it easy to distil *the* opinion of the Supreme Court on this issue.

First, because it emphasises the importance of fair proceedings in the courtroom and because it notes that it is very important that persons such as Barbie, persons charged with very serious crimes, are brought to justice, it seems to argue that problems in the pre-trial phase (for example, a disguised extradition) are not really to be looked at in these kinds of cases.[499] Nevertheless, there is arguably also room for the idea that the Supreme Court is of the opinion that there was nothing wrong with Barbie's transfer[500] and that it can in fact be seen as a sort of extradition (or in any case as a transfer not prohibited by the French extradition law of 1927).[501] Swart

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which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries". With respect to the "governments of States which are not Members of the United Nations", the UNGA called upon them "also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries."

[498] Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), p. 131. For a more refined resolution, see, for example, UNGA Res. 170 (II) of 31 October 1947 ('Surrender of war criminals and traitors'): "*The General Assembly* (…) *Recommends* Members of the United Nations, which desire the surrender of alleged war criminals or traitors (…) by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable *prima facie* case exists as to identity and guilt".

[499] Sluiter notes, for example, that "the French *Cour de Cassation* in the *Barbie* case recognised disguised extradition as lawful in relation to crimes against humanity, where the "ordinary extradition rules do not apply" [original footnote omitted, ChP]." (Sluiter 2003 C, pp. 648-649.) It must be noted that these exact words ("ordinary extradition rules do not apply") will not be found in this decision. Nevertheless, this does not seem to have been Sluiter's position as the original text of his (misprinted) article (see on this point also n. 187 of Chapter VIII) does not contain double (but only single) quotation marks, which points to a paraphrase rather than to an exact quotation. See also Lamb 2000, p. 239: "It (...) appears that, implicitly at least, the basing of Barbie's guilt upon crimes against humanity assisted the French court in overlooking any irregularities in Barbie's arrest [original footnote omitted, ChP]." See finally Conforti 1993, p. 157, referring to *Barbie* and writing: "[D]omestic case-law suggests that punishment may be carried on even if the culprit was illegally captured abroad, in breach of the sovereignty of the State where the capture took place". Note however that in this case, no breach of sovereignty occurred.

[500] *Cf.* the opinion of the Court of Appeal on this point in n. 489 where it states that Barbie had not been the victim of a disguised extradition.

[501] Sloan (2006, p. 330), for example, is of the opinion that the Court "was not asserting that somehow, due to the universally condemned nature of the crimes attributed to the accused, the French courts would be less troubled by irregular capture or the violation of state sovereignty. Indeed, in *Barbie* there was no illegal interstate capture [original footnote omitted, ChP]." See also *ibid*., n. 78: "Counsel for the

appears to take a middle position when he states that "on 6 October 1983, the French Cour de Cassation invoked Resolution 3(I) in ruling that the expulsion of Barbie from Bolivia to France did not amount to disguised extradition contrary to French law".[502]

Barbie also filed a complaint with the ECmHR, but as was already explained in Chapter III, his application was declared inadmissible.

The next case under examination is the German 1985 *Stocké* case. To a certain extent, the decisions of the ECmHR and ECtHR in this case have already been discussed earlier, see Subsection 2.2.4 of Chapter III, but before the case went to Strasbourg, the German Federal Constitutional Court (*Bundesverfassungsgericht*) examined the case as well. The Court noted that the lower court, the Federal Court of Justice (*Bundesgerichtshof*),

> konnte (…) davon ausgehen, daß eine allgemeine regel des Völkerrechts nicht besteht, derzufolge die Durchführung eines Strafverfahrens gegen eine Person gehindert wäre, die unter Verletzung der Gebiethoheit eines fremden Staates in den Gebietsstaat verbracht worden ist (…).[503]

Hence, the German Constitutional Court was of the opinion that there was no international law rule stating that a court cannot exercise jurisdiction in the case of a

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defence argued that because the crimes in question were not provided for in French law, they lacked a proper legal basis and the defendant could not be charged with them. Rejecting this assertion, the court emphasised the universal nature of the crimes attributed to the accused." (See also Currie 2007, p. 370, n. 101, referring to Sloan 2006, p. 330, n. 77 (this must be: n. 78).) However, as was also shown in the main text, the Supreme Court did not only seem to link the seriousness of the crimes with the French jurisdiction *ratione materiae*; there are also signs that this element was connected with the French jurisdiction *ratione personae*.

[502] Swart 2002 C, p. 1646, n. 19. It may be interesting to note that Swart (*ibid*.) remarks after these words that "[a] similar ruling was given by the Buenos Aires Court of First Instance in the case of *Jan Durcansky*" (with reference to L.C. Green's article 'Political Offences, War Crimes and Extradition', *International and Comparative Law Quarterly*, Vol. 11 (1962), p. 347.) However, it seems that this Court decided exactly the opposite of the *Barbie* Court, namely that extradition had to be *refused* notwithstanding these UNGA Resolutions, see Green's article at p. 347: "The Buenos Aires Court of First Instance rejected a Czechoslovak request for the extradition of an individual charged with participating in mass murders of civilians in Czechoslovakia between November 1944 and the end of the war. (…) The fact that there had been Resolutions on the subject by the General Assembly of the United Nations affected the Argentine Court as much as it did the United States Court of Appeals in *Karadzole* v. *Artukovic*." Namely: not at all. See the following observation by the US Court of Appeals in *Karadzole* v. *Artukovic* (as presented by Green at p. 344 of his article): "Appellant in essence argues that by virtue of resolutions taken in 1946 and 1947 by the United Nations General Assembly as to the surrender of alleged war criminals, it is incumbent on this court to hold that Artukovic is charged with an offence which is extraditable. We have examined the various United Nations Resolutions and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions. Perhaps changes should be made as to such treaties" [original footnote omitted, ChP]." However, perhaps, Swart is not making the comparison here between the *Durcansky* and *Barbie* cases but between the *Durcansky* and the *Kardzole v. Artukovic* cases. (Swart, at the beginning of his footnote, also refers to this latter case.)

[503] BVerfG (1. Kammer des Zweiten Senats), Beschl. v. 17.7 1985 – 2 BvR 1190/84. *NJW* 1986, Heft 22, p. 1428.

male captus violating the territorial sovereignty of a foreign State. It would be different if one could point to a general State practice and *opinio iuris* that the freedom of States in that respect is limited because of international law.[504] However, that was not the case according to the Constitutional Court:

> Ein Blick auf die Staatenpraxis zeigt, daß Gerichte es nur dann allgemein ablehnen, ein Strafverfahren gegen einen völkerrechtswidrig Entführten zu betreiben, wenn der durch die Entführung verletzte Staat gegen die Unrechtshandlung protestiert und die Rückgabe des Entführten gefordert hat (…).[505]

Thus, according to the Constitutional Court, State practice showed that courts generally only refuse to exercise jurisdiction in a case of an abduction violating international law if the injured State has protested the wrong and has demanded the return of the abducted person (which was not the case here).

Nevertheless, after having referred to a few *male captus bene detentus* cases to support its stance,[506] it also admitted that courts have decided *male captus male detentus* cases (in which no formal protest and request for the return of the suspect could be identified).

However, this practice, the Court continued, is not sufficiently widespread as to amount to an established practice, limiting the jurisdiction of a State. Furthermore, it does not express with the necessary clarity the conviction that the discontinuation of the criminal proceedings against the person abducted in violation of international law is required *because of international law*; in several cases, it is rather explicitly

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[504] See *ibid*., p. 1428: "Eine solche Regel bestünde als allgemeine Regel nur, wenn eine entsprechende Staatenpraxis nachweisbar wäre, die allgemein und in der Überzeugung geübt würde, daß die Freiheit der Staaten, die in ihrem Hoheitsbereich befindlichen Personen ihrer Strafgerichtsbarkeit in bezug auf Sachverhalte zu unterwerfen, die eine gewisse Mindestbeziehung zum eigenen Hoheitsberech aufweisen, von Völkerrechts wegen in der genannten Weise eingeschränkt ist."

[505] *Ibid*.

[506] The Court mentioned the cases of *Eichmann* and *Argoud* and stated that "[d]ie genannten Entscheidungen stimmen schließlich auch mit der Rechtsprechung britischer und amerikanischer Gerichte überein, die in zahlreichen Entscheidungen die Auffassung vertreten haben, daß die Umstände, unter denen ein Angeklagter vor die Schranken des Gerichts gelangt sie, die Durchführung des Verfahrens gegen ihn nicht hinderten". (*Ibid*.) The reference to *Eichmann* is correct. It must be emphasised again (see also Chapter III) that, even though Argentina initially requested the return of Eichmann, it dropped its demand in the context of the UNSC deliberations. Thus, there was no need for the Israeli Executive to return Eichmann to Argentina. Furthermore, this issue had become insignificant when the Israeli Judiciary examined the case because by that time, the incident on the violation of the sovereignty of Argentina had been closed. (See also *ibid*., p. 1428: "Zwar hat der *Gerichtshof* seine Entscheidung auch auf die Erwägung gestützt, eine mögliche Völkerrechtsverletzung im Zusammenhang mit der Verbringung *Eichmanns* nach Israel sei durch einen Verzicht Argentiniens auf allfällige Ansprüche im Rahmen einer gemeinsamen Erklärung der Regierungen beider Staaten geheilt (…). Daß eine völkerrechtlichen Pflicht zur einstellung des Verfahrens gegen *Eichmann* bestanden hätte, wenn eine solche Erklärung nicht abgegeben worden wäre, hat der Gerichtshof indessen nicht festgestellt.") However, the reference to the *male captus bene detentus* case of Argoud is less convincing because that case even went a step further when it arguably held that Argoud could be tried, *even if* the injured State had demanded the return of the abducted person.

stated that the principles *of domestic law* (rule of law, due process of law) are the ones obstructing the conduct of the proceedings.[507]

Here, the Court referred to the previously mentioned (see Subsection 2.1) decision of the Swiss *Obergerichts* of 11 April 1967 (which, by the way, involved a luring operation and not an abduction) and to the 1974 *Toscanino* decision. As was shown earlier, the Swiss Court indeed focused on domestic law but the judges in *Toscanino* also based their decision on international law aspects.[508]

Nevertheless, and taking into account that this study primarily focused on the practice of courts alone (although the reactions of other statal organs were sometimes also examined, see, for example, the reactions of governments in the context of the *Alvarez-Machain* case), there are indications that the German Court's statement that there is evidence in State practice that courts will generally refuse jurisdiction in the case of an abduction followed by a protest and request for the return of the suspect, appears to be correct.

The Constitutional Court also looked, among other things, into the human rights context and argued, as has been done in this book (and in the above-mentioned Swiss case from 2007), that a violation of the right to liberty and security/the right not to be arrested or detained arbitrarily does not automatically lead to the ending of the proceedings (but merely to a release).[509]

Finally, the Court examined whether Stocké's trial was barred because of domestic considerations, namely those related to the rule of law and to Article 1, paragraph 1 of the German *Grundgesetz* (Basic Law (or Constitution)), which states: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[510] It found that the opinion of the *Bundesgerichtshof*, that the rule of law and Article 1, paragraph 1 did not oppose the conviction of the suspect, even if German State officials had acted unlawfully with respect to the events of Stocké's

[507] See *ibid.*: "Zwar sind in mehreren Staaten entscheidungen ergangen, denen offenbar die Ansicht zugrunde liegt, daß der mit einer Entführung verwirklichte Unrechtstatbestand ein Verfahrenshindernis zu begründen geeignet sei. Diese Praxis ist indessen weder hinlänglich verbreitet, um als gefestigte, die staatliche Gerichtsbarkeit einschränkende Übung angesehen werden zu können, nocht bringt sie mit der notwendigen Deutlichkeit die Überzeugung zum Ausdruck, daß die Einstellung eines Strafverfahrens gegen einen in völkerrechtswidriger Weise Entführten *von Völkerrechts wegen* geboten sei; in einigen Entscheidungen wird vielmehr ausdrücklich festgestellt, daß es Grundsätze des *internen Rechts* (Rechtsstaatlichkeit, due process of law) seien, die eine Verfahrensführung hinderten [emphasis in original, ChP]".

[508] See n. 64 and accompanying text.

[509] See BVerfG (1. Kammer des Zweiten Senats), Beschl. v. 17.7 1985 – 2 BvR 1190/84. *NJW* 1986, Heft 22, p. 1428: "Schließlich bestanden und bestehen auch keine nach Art. 100 II GG ["Ist in einem Rechtsstreite zweifelhaft, ob eine Regel des Völkerrechtes Bestandteil des Bundesrechtes ist und ob sie unmittelbar Rechte und Pflichten für den Einzelnen erzeugt (Artikel 25), so hat das Gericht die Entscheidung des Bundesverfassungsgerichtes einzuholen.", ChP.] erheblichen Zweifel daran, daß sich aus einem menschenrechtlichen Verbot der willkürlichen Festnahme Einzelner nicht schon eine Pflicht zur Einstellung eines Strafverfahrens gegen einen solchermaßen Festgenommenen ergibt." (GG stands for *Grundgesetz*, the German Basic Law/Constitution, see also the main text in a few moments.)

[510] Basic Law for the Federal Republic of Germany. Promulgated by the Parliamentary Council on 23 May 1949 as amended up to June 2008. Published by German Bundestag, Administration, Public Relations Division, Berlin, 2008, available at: https://www.btg-bestellservice.de/pdf/80201000.pdf.

male captus on 7 November 1978, can in any case, and taking everything into account, not be criticised.[511]

A bar to the proceedings can at most be resorted to in extremely exceptional cases ("in extreme gelagerten Ausnahmefällen"),[512] such as an excessively long trial (recall the first situation of the abuse of process doctrine in *Bennett*: "because it will be impossible (usually by reason of delay) to give the accused a fair trial"), which is not the case here according to the Constitutional Court.[513]

After all, the Court continued, assuming his account is accurate, Stocké was not brought to Germany with help of measures involving physical force (but with help of a trick), his arrest by German police officials did not take place on French territory (but in Germany), at the time of his arrest, a legally valid arrest warrant was issued against him, and finally, that according to the Public Prosecutor's investigation regarding the possible cooperation of German State organs in the *male captus* of Stocké, the operation involved conduct of officials from a subordinate police station acting on their own authority, the conduct of which was made possible because of inadequate official supervision has not been established.[514] In short, one cannot deduce from the Constitution that in these circumstances, the criminal claim of the State can be considered forfeited.[515]

It should be noted that these avenues to the *male detentus* outcome are reminiscent of the *Toscanino* exception, although the domestic *male detentus* possibility of the latter concept appears to be more specific (a *male captus*

[511] See BVerfG (1. Kammer des Zweiten Senats), Beschl. v. 17.7 1985 – 2 BvR 1190/84. *NJW* 1986, Heft 22, p. 1429: "Die Auffassung des *BGH*, das Rechtsstaatsprinzip oder Art. 1I GG hätten einer Verurteilung des Bf. auch dann nicht entgegengestanden, wenn sich Träger deutscher Hoheitsgewalt im Zusammenhang mit den Ereignissen vom 7. 11. 1978 strafbar gemacht haben sollten, ist jedenfalls im Ergebnis nicht zu beanstanden." The formulation of such a hypothetical situation ("auch dann nicht (…) wenn sich Träger deutscher Hoheitsgewalt (…) strafbar gemacht haben sollten") arguably shows that the Court is of the opinion that German State officials did not do anything wrong in this case. However, n. 514 (and accompanying text) seems to imply that German officials may have done something wrong, but that this point is immaterial as those officials came from a subordinate police station and were acting on their own authority.

[512] *Ibid*.

[513] See *ibid*.: "Denn ein solches Verfahrenshindernis könnte allenfalls in extrem gelagerten Ausnahmefällen eingreifen (in diesem Sinne auch der zuständige Vorprüfungsausschuß des *Senats* in einem Beschluß vom 24. 11. 1983 betreffend die überlange Dauer eines Strafverfahrens (…); einer wertende Betrachtung aller Gesichtspunkte, die für die Beurteilung des vom *BGH* als möglich understellten Hergangs der Ergreifung des Bf. von Bedeutung sind, ergibt indessen, daß ein solcher Fall hier nicht vorliegt."

[514] See *ibid*.: "Der Bf. wurde – sein Vorbringen als zutreffend understellt – nicht mit Hilfe von Maßnahmen körperlichen Zwangs, sondern mittels List in die Bundesrepublik Deutschland verbracht; seine Festnahme durch deutsche Polizeibeambte erfolgte nicht auf französischem Hoheitsgebiet, sondern in der Bundesrepublik Deutschland. Zum Zeitpunkt der Ergreifung des Bf. lag ein rechtswirksamer Haftbefehl vor (…). Hinzu kommt, daß es sich nach den Ermittlungen der Staatsanwaltschaft bei der möglichen Beteiligung staatlicher Organe an der Verbringung des Bf. in die Bundesrepublik Deutschland um ein eigenmächtiges Verhalten von Beamten einer untergeordneten Polizeidienststelle handelte; daß dieses Verhalten durch unzulängliche dienstliche Aufsicht ermöglicht worden wäre, ist nicht festgestellt worden."

[515] See *ibid*.: "Dem Grundgesetz kann nicht entnommen werden, daß auch bei einer solchen Lage der Dinge der Strafanspruch des Staates als verwirkt anzusehen wäre."

accompanied by serious mistreatment)[516] than the rather general words employed here (extremely exceptional cases). Nevertheless, the German Court may very well have been thinking about situations which can be compared with the assumed facts of the *Toscanino* case.[517]

As explained earlier, the case also went to the European human rights institutions but these did not take an explicit stance on the *male captus bene/male detentus* discussion, although they did not reject the statements on the *male captus* issue of the German Constitutional Court as presented at footnotes 503, 505 and 507 and accompanying text either.[518]

The (national) *Stocké* judgment was followed one year later by the Constitutional Court deciding a case in which a German citizen was allegedly abducted from the Netherlands.[519]

After having concluded that international law did not lead to an obstruction of the proceedings,[520] the Constitutional Court looked at the domestic law context (rule of law and Article 1, paragraph 1 of the German *Grundgesetz*) and stated that this case was also not extremely exceptional, even though, in contrast to Stocké, "[d]er Bf. wurde (…) mit Hilfe von Maßnahmen körperlichen Zwangs auf niederländischem Hoheitsgebiet unter Verletzung seines strafrechtlich geschützten Freiheitsrechts (…) festgenommen."[521] Interestingly, in establishing whether or not there was such an extremely exceptional case which could lead to the ending of the case, it examined the concept of rule of law (*Rechtsstaatsprinzip*) and the

[516] It is to be recalled that although *Toscanino* involved an abduction, the serious mistreatment exception does not seem to be confined to this *male captus* situation (see also *Yunis*). For example, if a luring operation would be accompanied by serious, *Toscanino*-like mistreatment, courts may decide to refuse the case. Notwithstanding this, it can be argued that the criticism towards the *Alvarez-Machain* case (which involved an abduction case) shows that it is only certain with respect to the *male captus* situation of abduction that courts around the world appear to be of the opinion that jurisdiction *must* be refused in these circumstances.

[517] See also Wilske 2000, p. 334, n. 413: "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also Grams 1994, pp. 70-71.

[518] See ECmHR (Plenary), *Walter Stock[é] against the Federal Republic of Germany*, Application No. 11755/85, *Report of the Commission* (Adopted on 12 October 1989), para. 162: "The Federal Constitutional Court (...) found no general rule in international law according to which prosecution of a person was barred in a State to whose territory the person concerned had been taken in violation of the territorial sovereignty of another State." See also ECtHR (Chamber), *Case of Stocké v. Germany*, Application No. 11755/85, 'Judgment', 19 March 1991, para. 37: "The [German Constitutional] court held that there was no rule of international law to prevent a State's courts from prosecuting a person brought before them in breach of the territorial sovereignty of another State or of an extradition treaty. It was apparent from American, Israeli, French and British case-law that in such an event a court did not decline jurisdiction unless the other State had protested and sought the return of the person concerned. The fact that there were a few decisions in which courts had ordered that the proceedings should be stayed was not sufficient to establish a real practice to that effect."

[519] BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022.

[520] See *ibid*., p. 3021: "Die Niederlande haben weder die unverzügliche Rücklieferung des Bf. gefordert noch einen vergleichbaren Anspruch geltend gemacht."

[521] *Ibid*., p. 3022.

importance of effective prosecution in that respect.[522] (This, again, is reminiscent of the abuse of process doctrine and the idea that even the smallest aspect, including the importance of prosecution – which, of course, weighs heavier in the context of serious crimes – should be taken into account when determining whether a certain irregularity must lead to the ending of the case or not. However, it must also be stressed that certain *male captus* techniques, such as the one here of an abduction by one's own agents, are intrinsically so serious that jurisdiction should be refused, even if dealing with suspects of serious crimes.) [523] However, the Court even went a step further, when it appeared to weigh the wrong of the 'kidnapping' against the *culpability* (*Schuld*) of the suspect, an arguably rather unfortunate choice of words given the basic principle of the presumption of innocence, even if the suspect's more general 'criminal energy' had already been proven by his previous convictions.[524]

This case confirms the resemblance between the *Stocké* case and the *Toscanino* exception noted above and even specifies that not only a luring situation (*Stocké*) but also an abduction (as such) may not necessarily have to lead to the ending of the case. This seems to imply that German courts, in a case involving abduction, would only refuse jurisdiction if the abduction 1) is followed by a protest and request for the return of the suspect from the injured State[525] or 2) is accompanied by serious mistreatment/serious human rights violations. (This last possibility is not clear but one can assume that such an abduction would fall under the concept of "extremely exceptional case".)[526]

The penultimate case to be discussed here is the already briefly mentioned (see Subsection 2.2.4 of Chapter III) 1995 French case of Illich Ramirez Sánchez. Ramirez Sánchez, better known as Carlos the Jackal,[527]

> alleged that, while he was staying lawfully in Khartoum, Sudanese police officers had seized, bound, drugged and hooded him and handed him over to French police

[522] See *ibid*.

[523] *Cf.* also the criticism of Oehmichen (2007, pp. 230-231) on this case. In fact, Oehmichen, referring to the presumption of innocence, has serious reservations as concerns the element 'seriousness of the alleged crimes' in general (see *ibid*.).

[524] See BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, p. 3022: "Der (…) strafrechtliche Unrechtsgehalt der „Entführung" wiegt weniger schwer gegenüber der Schuld des Bf. dessen hohe kriminelle Energie auch seine erheblichen Vorstrafen belegen."

[525] Note that the German Court in the 1986 case did not explicitly confirm the reasoning it had made one year earlier in the *Stocké* case as it did not find it necessary to go into this point now that the Netherlands had not requested the return of the suspect, see *ibid*., p. 3021: "Die Niederlande haben weder die unverzügliche Rücklieferung des Bf. gefordert noch einen vergleichbaren Anspruch geltend gemacht. Offenbleiben kann daher die Frage, ob eine allgemeine Regel des Völkerrechts besteht, wonach die Durchführung eines Strafverfahren gegen eine Person, die in völkerrechtswidriger Weise in den Gerichtsstaat verbracht worden ist, gehindert ware, wenn der verletzte Staat ihre unverzügliche Rücklieferung fordert oder einen vergleichbaren Anspruch geltend macht".

[526] See again (see also n. 517) Wilske 2000, p. 334, n. 413: "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also again Grams 1994, pp. 70-71.

[527] It may be interesting to note that this nickname was given to him, not because he was the man on whom Frederick Forsyth based his famous novel *The day of the Jackal* but merely because, reportedly, a copy of this book was found among Ramirez Sánchez's belongings.

> officers, who had put him, by force, into a French military plane bound for Villacoublay military base (…).[528]

However, in France, where "[h]e was charged with being an accessory to causing criminal damage to real and personal property (…), thereby killing one person and permanently maiming others, and also with murder and grievous bodily harm",[529] the Indictments Division of the Paris Court of Appeal (*Chambre d'accusation de la Cour d'Appel de Paris*) issued a *male captus bene detentus* decision on 7 November 1994.

The Court first admitted that it appeared that Ramirez Sánchez "was indeed deported to France without any judicial extradition proceedings".[530] However, as there was no extradition treaty between France and Sudan, the Court continued, "it has not been established that the applicant was handed over by Sudan in breach of the provisions of a treaty, nor that he was the subject of a disguised extradition."[531] The Court then repeated the *Argoud* reasoning[532] that "the ability to take criminal proceedings against, and apply the criminal law in France to, someone who has fled abroad is not dependent on that person returning voluntarily to France or on extradition proceedings being taken"[533] and explained that Ramirez Sánchez could not challenge the sovereign expulsion/deportation decision of Sudan before French courts.[534] Subsequently, the Court presented the clearest *male captus bene detentus* reasoning of this decision, stating:

> Moreover, case-law also provides that the circumstances in which someone, against whom proceedings are lawfully being taken and against whom a valid arrest warrant has been issued, has been apprehended and handed over to the French legal authorities are not in themselves sufficient to render the proceedings void, provided that they have not vitiated the search for and process of establishing the truth, nor made it impossible for the defence to exercise its rights before the investigating authorities and the trial courts.[535]

As a result, the application of Ramirez Sánchez was dismissed.

'Carlos the Jackal' appealed, however, to the Supreme Court, arguing that it was too simple to consider the transfer of him to France as a sovereign act of Sudan which France had nothing to do with.[536]

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[528] ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 156.
[529] In fact, Ramirez Sánchez has already been convicted *in absentia* two years earlier "on several counts of murder and one of attempted murder and sentenced to life imprisonment." (*Ibid*.)
[530] *Ibid*., p. 157.
[531] *Ibid*., p. 158.
[532] See ns. 489 and 494.
[533] ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 158.
[534] See *ibid*.
[535] *Ibid*.
[536] See *ibid*., p. 159: "The applicant had alleged, *inter alia*, that there had been a violation of Article 5 of the [European] Convention [on Human Rights] on the grounds that, "the court could not pretend to

Nevertheless, the Supreme Court, in its decision of 21 February 1995, agreed with the above-mentioned quotation of the Court of Appeal,[537] reiterated other *male captus bene detentus* reasonings[538] and rejected the appeal.[539] A subsequent application filed with the ECmHR was also unsuccessful, as became already clear in Chapter III.

The final case to be discussed in this subsection dealing with more recent civil law decisions is *Al-Moayad*, a German terrorism case from 2003 involving luring.[540]

The suspect, the Yemeni citizen Al-Moayad,[541] was "an adviser of the Yemeni Minister for Religious Foundations in the rank of an undersecretary of state and imam of the Al-Ihsan Mosque in Sanaa/Yemen"[542] and was arrested in Frankfurt am

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believe that an acting Chief Superintendent of the DST [the French Intelligence Service (*Direction de la surveillance du territoire*), see *ibid*., p. 156, ChP] had learned, at the very last moment, 'from his superiors' that the appellant was at Villacoublay, where he could be apprehended, without dealing with the appellant's submissions (which, for good reason, have not been disputed) that he was not arrested at Villacoublay, but in Khartoum; that despite the absence of any international arrest warrant, he was handed over, on Sudanese territory, by the Sudanese police to French police officers flown over specially for that purpose by French military aeroplane; and that the appellant, while still under arrest, was put onto the aeroplane and taken, under guard, to Villacoublay military airbase where an arrest warrant valid within French territory was served on him. Thus, the court avoided ruling on the lawfulness of the appellant's being held under arrest by representatives of the French State from Khartoum to Villacoublay. Yet this was precisely the ground on which it had been argued that Sánchez Ramirez's detention was arbitrary. (…)""

[537] See *ibid*., p. 160: "In so holding, the court [below] gave legal grounds for its decision and did not commit the errors alleged by the appellant in his grounds of appeal." The final original French words of the Supreme Court preceding the words "[i]n so holding, …" ("[a]ttendu qu'en statuant ainsi, …") were not printed in *Decisions and Reports,* No. 86-B, but they go as follows: "Que, selon l'arrêt, les conditions dans lesquelles une personne, faisant l'object d'une poursuite régulière et d'un titre légal d'arrestation, a été appréhendée et livrée à la justice française ne sont pas de nature à entraîner par elles-mêmes la nullité des poursuites dès lors que la recherche et l'établissement de la vérité ne s'en sont pas trouvés viciés ni la défense mise dans l'impossibilité d'exercer ses droits devant la jurisdiction d'instruction et de jugement". (*Bulletin criminel* 1995, No. 74 (21 février 1995, No. 94-85.626), p. 178.)

[538] See ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 160: "It was correct in stating that the ability to take criminal proceedings against, and apply the criminal law to, a person who has fled abroad is in no way dependent on that person returning voluntarily to France or on extradition proceedings being taken. (…) Moreover, the national courts have no jurisdiction to examine the circumstances in which a person is arrested abroad by the local authorities, acting alone and in the exercise of their sovereign powers, and handed over to French police officers." This is a good repetition of the position of the Court of Appeal but the Court of Cassation does arguably not really go into the complaint of Ramirez Sánchez that it cannot be maintained that the Sudanese authorities organised the entire operation themselves.

[539] See *ibid*.

[540] See German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03), 43 *International Legal Materials* (2004), pp. 774-788.

[541] Although his full name was not mentioned in the German decision, it can be found in the ECtHR's decision of this case, which will be discussed after the national case.

[542] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, A., I., para. 1), 43 *International Legal Materials* (2004), p. 774.

Main on 10 January 2003 on the basis of a US arrest warrant.[543] The US prosecution authorities charged Al-Moayad "with having provided money, weapons and communications equipment to terrorist groups, in particular Al-Qaeda and Hamas, and with having recruited new members for these groups, between October 1997 and his arrest"[544] and transmitted a request to the German authorities to have him extradited to the US.[545]

Al-Moayad challenged this extradition for several reasons. The most interesting one for this study[546] was that he claimed that he had been abducted from Yemen to Germany (as one will see in a few moments, the operation in question should rather be seen as luring and not as abduction) and that because of that, his extradition to the US should be declared inadmissible.[547] His State of residence, the State of Yemen, also protested the 'abduction' and requested that Al-Moayad be repatriated to Yemen.[548] What had happened exactly? The decision explains:

> Instrumental in making the complainant travel to Germany were conversations that a Yemeni citizen maintained with the complainant in Yemen in an undercover mission of the United States investigation and prosecution authorities. The confidential informant convinced the complainant that he could bring him into contact with another person abroad who was willing to make a major financial contribution. In this context, it is controversial for what purposes the money was supposed to be donated. According to the statement made by the complainant's secretary [who was arrested together with Al-Moayad, ChP] in his interrogation by the German investigation authorities in which he was heard as a person charged with a criminal offence, the decision to travel to Germany was based on the complainant's voluntary decision.[549]

The Frankfurt am Main Higher Regional Court (*Oberlandesgericht*) found his extradition admissible and was not impressed by Yemen's protests and requests for repatriation because those had to be dealt with on a political and not on a judicial

[543] See *ibid*.
[544] *Ibid*.
[545] See *ibid*.
[546] Another one was focused on the future, on what he feared would happen to him in the US, see *ibid*., 2 BvR 1506/03, A., I., para. 6 a)), 43 *International Legal Materials* (2004), p. 775: "He (...) alleged that an extradition to the United States infringed the minimum standards that international law requires for a state governed by the rule of law. According to the complainant, United States authorities use, in the case of persons who are charged with an offence and who are suspected of terrorism, methods of interrogation that fall under the ban on torture pursuant to Article 3 of the European Convention on Human Rights and Article 1 of the United Nations Convention against Torture."
[547] See *ibid*.: "[T]he complainant sought to achieve (...) that the extradition (…) be declared inadmissible. The complainant put forward that he had been abducted from Yemen to Germany contrary to international law in order to circumvent Yemeni law on extradition."
[548] See *ibid*., 2 BvR 1506/03, A., I., para. 4), 43 *International Legal Materials* (2004), p. 775: "In several diplomatic notes, the last one of which is dated 27 March 2003, the Embassy of the Republic of Yemen expounded to the Federal Foreign Office (*Auswärtiges Amt*) its opinion that the complainant had been abducted from Yemen to Germany contrary to international law, and circumventing the Yemeni constitution's ban on the extradition of Yemen's own citizens. The federal government was requested to repatriate the complainant to Yemen."
[549] *Ibid*., 2 BvR 1506/03, A., I., para. 1), 43 *International Legal Materials* (2004), p. 774.

level.[550] The Court explained (as paraphrased by the German Federal Constitutional Court (*Bundesverfassungsgericht*), which considered Al-Moayad's constitutional complaint in this case):

> Even if the use of a Yemeni citizen in Yemen as a covert investigator of the United States were to be regarded as a violation of Yemen's sovereignty that was contrary to international law, this would not be contrary to the complainant's criminal prosecution. No general rule of international law existed that would oblige the state of the forum to withdraw the charge if a person had been induced to commit the offence, and to enter the state of the forum, by an agent provocateur, by means of trickery, and violating the territorial sovereignty of a foreign state. Such a rule would require the existence of a state practice to this effect. In state practice, however, different opinions concerning the legal consequences of an abduction that is contrary to international law could be found. This appraisal was confirmed by the existing literature on international law.[551]

In this quotation, the Court did not go into the (un)desirability of the luring operation itself – it merely focused on the effect of such an operation on a court's jurisdiction – but immediately after these words, it became clear that the Court was in fact in favour of such methods when the stakes are high and that national law dictated that it would only refuse jurisdiction in exceptional cases. This reference to the seriousness of the crimes with which Al-Moayad was charged is, of course, very interesting for this study and should thus be mentioned here as well:

> The court further stated that the use of confidential informants had not infringed the principle of a state governed by the rule of law and also not Article 1.1 of the Basic Law.[[552]] The use of such methods of investigation was necessary and required for the prosecution of particularly dangerous offences that were difficult to resolve. An obstacle precluding proceedings could only be assumed in extreme and exceptional cases if it became evident that considering all circumstances, requirements that are indispensable in a state governed by the rule of law had not been complied with. The present case was no such exceptional case.[553]

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[550] *Ibid*., 2 BvR 1506/03, A., I., para. 6 b)), 43 *International Legal Materials* (2004), p. 776: "The court further held that the request for repatriation that had been made by the Republic of Yemen in a diplomatic note to the federal government did not affect the admissibility of extradition. Because possible claims for reparation under international law exclusively existed between the two states."

[551] *Ibid*.

[552] Art. 1, para. 1 of the Basic Law (or *Grundgesetz*) for the Federal Republic of Germany reads: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." (Basic Law for the Federal Republic of Germany. Promulgated by the Parliamentary Council on 23 May 1949 as amended up to June 2008. Published by German Bundestag, Administration, Public Relations Division, Berlin, 2008, available at: https://www.btg-bestellservice.de/pdf/80201000.pdf.) See also n. 510 and accompanying text.

[553] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, A., I., para. 6 b)), 43 *International Legal Materials* (2004), p. 776.

A few remarks should be made about these statements. Confidential informants may, of course, be necessary in the fight against terrorism and States should definitely be able to use them in their own State and, if one cooperates with the State in which one is interested, in that latter State.

However, neither must one forget that what confidential informants do is police work. And one State cannot do police work on another State's territory without that State's consent. That leads to a violation of State sovereignty and international law. If the work of the foreign confidential informants leads not to mere intelligence but to an arrest (even if that arrest did not take place on the territory of the injured State), the injured State may find out, protest and request the return of the suspect. If the police work on the other State's territory leads to an apprehension on that territory (this is an abduction), then the 'abducting' State has to return the suspect. And if the Executive does not do what it should do in the aftermath of a violation of international law, the Judiciary should take its responsibility as guardian of the international law system, refuse jurisdiction and order the return of the suspect.

It appears from the previous cases that this rule, which was already assumed in Chapter III,[554] has quite some support in the practice of courts. The *Alvarez-Machain* case can be seen as a clear break with that rule, but one should doubt whether that decision has really quashed the strength of that rule, at least in the rest of the world, given the immense criticism vented against that decision.

However, the case may be different with respect to the technique of luring. As explained in Subsection 2.1 of Chapter III, this technique, in certain circumstances, could also be seen as violating another State's sovereignty. That, in turn, would also mean that if the injured State protests and requests the return of the suspect, the 'luring' State must repair the violation of State sovereignty, the most appropriate form, according to the DARS, being to bring the situation back as it was before the luring, namely to return the suspect to the injured State. Although there is some support for this view,[555] it cannot be denied that luring is normally seen as a less serious violation of international law and that States and courts, as a result, may have turned to other, less far-reaching forms of reparation, even if the return would, according to the DARS, still be the most appropriate form of reparation for the violation of international law.

In that respect, the German Court may be right in asserting that there is no general rule of international law obliging the forum State to withdraw the charge after a luring operation.[556]

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[554] See ns. 560-561 and accompanying text of Chapter III.

[555] See n. 573 and accompanying text of Chapter III.

[556] Note, however, that courts may nevertheless refuse jurisdiction if they are of the opinion that the luring operation, even if it did not violate another State's sovereignty (so seriously), may constitute such reprehensible conduct under national law that it cannot be legally 'approved' by continuing the case. See, for example, the *Schmidt* case in which context Lord Sedley was of the opinion that subterfuge (which would not necessarily have to violate international law) could lead to the ending of the case: "I do not accept his argument [the argument of the respondents' QC, ChP] that only the use of physical force passes the threshold. Lawlessness can take many forms. In my judgment what the doctrine of Bennett's case strikes at is an act on the part of the executive government of the United Kingdom: (a)

However, in the case of abductions, followed by a protest and request for the return of the injured State, it appears that most courts around the world would refuse jurisdiction and order the return of the suspect if the Executives of the 'abducting' States have not already done so. (Note, however, that this is not to say that a general rule of international law exists in that respect. It only means that State practice indicates that courts would refuse jurisdiction in such cases. This matter, the correlation between State practice and a general rule of international law, will be returned to *infra*.)

A final point which must be made here is that the obligation to return on the basis of the violation of the sovereignty of Yemen would in principle only be valid for the abducting/luring State and not for Germany.

However, as explained, that does not mean, of course, that the German Court may not be able to examine the way in which Al-Moayad came into its power and to refuse jurisdiction on the basis of national law if it is of the opinion that the pre-trial phase must be qualified as so irregular (even if Germany was not involved in it) that the judges, in their good conscience, cannot proceed with the case. In addition, the judges could also argue, if they are of the opinion that the US violated the sovereignty of Yemen, that they should not extradite the suspect to the former State for they would then support, in a way, that violation from the US, *cf.* also the 1982 Swiss case of X and Article 16 of the DARS (discussed in that case).[557]

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which violates the laws of the foreign state, international law or the legal rights of the individual within that state, and thus offends against the principle of comity; (b) which circumvents extradition arrangements made with that state; (c) which instead brings the suspect by coercion into the jurisdiction of the United Kingdom's courts; and (d) but for which the domestic proceedings could not have been initiated." (House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 *A.C.* 357 (Decision of the Divisional Court of the Queen's Bench Division, Justice Sedley).) (Lord Jauncey of Tullichettle, in a hypothetical exercise that he could use the *Bennett* discretion in the context of extradition procedures, did not refuse jurisdiction in the end, but it is not clear from his words whether he is of the opinion that every luring operation cannot lead to the ending of the case or whether *this specific* luring operation (in which, according to him, no coercion had been used) could not lead to the ending of the case.) However, even though courts may thus refuse jurisdiction if they are of the opinion that the luring operation, even if it did not violate another State's sovereignty (so seriously), may constitute such reprehensible conduct under national law that it cannot be legally 'approved' by continuing the case, there have also been courts which were of the opinion that luring, not looking at international law issues now, *cannot* lead to the ending of the case (unless in the case of *Toscanino*-like mistreatment situations). See, for example, the following words from *Yunis* (explaining the US position on this technique): "In cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920.) A court, in determining whether jurisdiction must be refused or not, may hereby also look at human rights considerations. See in that respect also the discussion in the context of the *Stocké* case in Chapter III and the question as to whether a luring operation can be seen as a technique against the will of the suspect (this may lead to a human rights violation).

[557] See n. 453 and accompanying text. See also German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 2, 43 *International Legal Materials* (2004), pp. 781-782: "On the German side, an obstacle precluding extradition could possibly result from this if the action of the Yemeni confidential informant on behalf of the United States investigation authorities were to be regarded as being contrary to

Al-Moayad, of course, did not agree with the outcome of his case before the Frankfurt am Main Higher Regional Court. As a result, he filed a constitutional complaint with the German Federal Constitutional Court (*Bundesverfassungsgericht*).

He thereby pointed to the 1982 case of the Swiss Federal Court mentioned earlier in this chapter because this Court, according to Al-Moayad, had confirmed the existence of a "general rule of international law pursuant to which no one may be extradited who has been abducted from his or her state of origin to the requested state in order to circumvent the ban on extradition that is valid in the state of origin".[558]

In its examination of whether the general rule of international law as alleged by Al-Moayad existed, the Court first explained what a general rule of international law in fact is and how it can be found.

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international law. The territorial sovereignty of a state, which is an expression of its sovereignty, prohibits, in principle, sovereign acts by other states or by organs of state authority, on the territory of the state affected. In this context, private individuals' acts can be attributed to a state if, for instance, such acts are controlled by this state. Tortious action on the part of the United States would establish their responsibility under international law *vis-à-vis* Yemen. In such a case, there would be the risk that by extraditing the complainant, Germany would support a United States' action that is possibly contrary to international law, which would make Germany itself responsible under international law *vis-à-vis* Yemen. That such state responsibility can, under specific preconditions, be established by the support of third parties' action that is contrary to international law is shown by Article 16 of the International Law Commission's Draft Convention on State Responsibility, which codifies customary international law in this field".

[558] *Ibid*., 2 BvR 1506/03, A., II., para. 1), 43 *International Legal Materials* (2004), p. 778. *Cf.* also n. 452 where one can read: "Nach den Grundsätzen des Völkerrechts ist jeder Staat verpflichtet, die Souveränität anderer Staaten zu beachten; Handlungen eines Staates auf fremdem Staatsgebiet sind daher unzulässig. Soweit eine verfolgte Person sich im Ausland befindet, kann sie dem verfolgenden Staat nur mittels eines hoheitlichen Aktes des Staates, auf dessen Gebiet sie sich befindet, überstellt werden; werden Organen des verfolgenden Staates ohne Bewilligung auf dem Gebiet eines anderen Staates tätig, bemächtigen sie sich insbesondere des Verfolgten mittels Gewalt, List oder Drohung, verletzen sie die Souveränität (…). Wird die verfolgte Person mittels der erwähnten Vorkehren in eines Drittstaat gelockt, von dem daraufhin die Auslieferung des Betreffenden verlangt wirde, trägt der ersuchte Staat mit der Auslieferung zum Erfolg, nämlich der Behändigung des Verfolgten under Missachtung der Souveränität, mindestens mittelbar bei. Der Grundsatz der Souveränität gilt indes absolut, d. h. gegen jedermann. Als Verletzung dieses Grundsatzes muss dehalb auch gelten, wenn der Staat, dessen Souveränität nicht verletzt wird, das völkerrechtswidrige Vorgehen dadurch begünstigt, dass er den Verfolgten ausliefert. Diesfall macht sich der ersuchte Staat zum Gehilfen der Souveränitätsverletzung. (…) Sinn und Geist der verschiedenen Abkommen verbieten dem ersuchten Staat daher, Personen auszuliefern, die unter Umgehung der allein massgebenden inner- und zwischenstaatlichen Auslieferungsbestimmungen und unter Verwendung völkerrechtswidriger Mittel ins Ausland gelockt wurden." (Schweizerisches Bundesgericht, Lausanne, P 1201/81/fs, Urteil der II. öffentlichrechtlichen Abteilung vom 15. Juli 1982, *X, belgischer Staatsangehöriger, gegen Bundesanwaltschaft, Eidg. Justiz- und Polizeidepartement*, *Europäische Grundrechte-Zeitschrift* 1983, p. 437.)

It stated that "[t]he general rules of international law are primarily customary international law that is of universal validity and that is complemented by accepted general principles of law".[559]

It then explained in more detail the two elements of customary international law, where it used a broad concept of practice (not limited to *State* practice):

> [I]ts evolution depends on two preconditions: firstly, on conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of states and other subjects of international law with law-making authority; secondly on the opinion that is behind this practice "to act in the framework of what is required and permitted or necessary under international law" (*opinio iuris sive necessitatis* (...)).[560]

Focusing on State practice, the Court explained that one could, for example, look at the acts of courts "to the extent that their conduct is directly relevant under international law".[561] In addition, it stated that it would examine the "acts of bodies of international organisations, and in particular of international courts".[562] Although it may appear rather odd to look at the decisions of *international courts* to find out what *States* do, decisions of international courts often include overviews of national case law, for example, if the international judges want to find out whether a certain rule has support in State practice. It is, of course, unproblematic if those overviews (and hence the decisions which contain those overviews) are examined by judges to find out the position of States regarding a certain rule. However, decisions of international courts *as such* (which do not delve into the practice of States) arguably have nothing to do with *State* practice, although they may show how international practice more generally (a practice in which more actors that just States are active, see also the quotation from the Court at footnote 560 and accompanying text) copes with a certain rule.

It is not entirely clear whether the Federal Constitutional Court acts correctly in that respect as there are indications that the Court, when addressing the concept of *State* practice,[563] is not only interested in the references – in international decisions – to national case law[564] but also in decisions of international courts *as such*.[565]

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[559] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 a)), 43 *International Legal Materials* (2004), p. 782.

[560] *Ibid*.

[561] *Ibid*.: "The Federal Constitutional Court ascertains the existence and scope of general rules within the meaning of Article 25 of the Basic Law ["The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.", ChP] by consulting the relevant state practice".

[562] *Ibid*., 2 BvR 1506/03, B., I., para. 3 a)), 43 *International Legal Materials* (2004), p. 783.

[563] See *ibid*., 2 BvR 1506/03, B., I., para. 3 b), 43 *International Legal Materials* (2004), p. 783: "The examination of state practice shows that the general rule of international law that is alleged by the complainant does not exist."

[564] The first two times the Federal Constitutional Court refers to international decisions are: 1) "[C]f International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, Decision of 5 June 2003 – IT-94-2-AR73, Appeals Chamber, numbers 24 *et seq*. with reference to the decision of the

Be that as it may, the German Federal Constitutional Court concluded that "[t]he examination of state practice shows that the general rule of international law that is alleged by the complainant does not exist"[566] because case law regarding the question of whether luring is an obstacle to extradition is heterogeneous.[567]

It also made a more general statement on the status of *male captus bene detentus*, asserting that "[t]he majority of decisions even does not regard the circumstances that preceded the arrest as an obstacle precluding criminal prosecution in the state of the forum",[568] although it also admitted that there is an exception with respect to the

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U.S. Federal Court of Appeal, *United States v. Toscanino*, 500 Federal Reporter, Second Series 267 [1974]" (*ibid*., 2 BvR 1506/03, B., I., para. 3 b) aa)), 43 *International Legal Materials* (2004), p. 783) and 2) "After a comprehensive examination of state practice (...), the International Criminal Tribunal for the Former Yugoslavia came to the conclusion that the criminal prosecution of a person who had been persuaded by deception to enter an area that was accessible to seizures by foreign organs of criminal prosecution can, in state practice, at any rate only be regarded as a violation of international law or of individual fundamental rights if an effective extradition treaty was circumvented or if the prosecuted person was subjected to the use of force in an unjustifiable manner (International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dokmanovic* [Motion for Release], Trial Chamber, decision of 22 October 1997 - IT-95-13a-PT -, International Law Reports Vol. 111 [1998], p. 459 [at p. 490]; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest of 5 June 2003, IT-94-2-AR73, numbers 20 *et seq*.)." (*Ibid*., B., I., para. 3 b) bb) (1), 43 *International Legal Materials* (2004), p. 784.)

[565] After all, some references are so general and indeterminate that they could also be seen as including the views of international decisions *as such*. For example, although para. 24 of the ICTY Appeals Chamber's decision in the *Nikolić* case (see the previous footnote) refers to the conclusions reached by the ICTY after having reviewed national State practice, and although the following paragraphs of that decision (25, 26 and 27) continue on these conclusions, they also contain views of the ICTY itself. See also the explicit reference by the Federal Constitutional Court to para. 26 of the ICTY Appeals Chamber's decision in the *Nikolić* case (the third time the Federal Constitutional Court refers to an international decision): "Moreover, recent state practice also takes the seriousness of the crime with which the person is charged into account, which means that in this respect, it takes proportionality into consideration. The protection of high-ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state's personal sovereignty that possibly goes along with the use of trickery (cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, *loc. cit.*, number 26)." (German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 b) bb) (3)), 43 *International Legal Materials* (2004), p. 785.) It must be noted that the two decisions in the *Nikolić* case which the ICTY uses to back its view that the seriousness of the crimes with which the suspect is charged is relevant in the *male captus* discussion are the *Eichmann* and *Barbie* cases which date from 1962 and 1983, respectively. One can wonder whether the Federal Constitutional Court is referring to these cases (whose recentness can be doubted, see also n. 590) when it says that *recent* State practice takes the seriousness of the crime with which the person is charged into account or whether it is in fact referring to the 2003 ICTY case *itself*. Again, it is unproblematic to refer to such international decisions as such if one is interested in international practice more generally (see n. 560 and accompanying text) but one can arguably not refer to these decisions as such if one is examining the concept of *State* practice.

[566] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 b)), 43 *International Legal Materials* (2004), p. 783.

[567] See *ibid*.

[568] *Ibid*.

male captus situation of abduction (which, however, was not applicable in this luring case):

> In this context, it need not be decided whether a national obstacle precluding criminal proceedings or extradition results from customary international law if the prosecuted person has been taken from his or her state of origin to the state of the forum or to the requested state by use of force. Admittedly, more recent state practice, in particular as a consequence of dealing with the U.S. Supreme Court decision in the *Alvarez-Machain* case (…) indicates that the principle *male captus, bene detentus* is rejected at any rate if the state of the forum got hold of the prosecuted person by committing serious human rights violations, and if the state whose territorial sovereignty was violated protested against such procedure (cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, Decision of 5 June 2003 – IT-94-2-AR73, Appeals Chamber, numbers 24 *et seq*. with reference to the decision of the U.S. Federal Court of Appeal, *United States v. Toscanino*, 500 Federal Reporter, Second Series 267 [1974]; *see also* Wilske, *Die völkerrechtliche Entführung und ihre Rechtsfolgen*, 2000, pp. 272 *et seq.*, at p. 336, with further references). The facts of the present case, however, differ from these cases in important details.[569]

Before turning to the remainder of this decision, it is interesting to examine in greater detail the Court's conclusion on the status of the *male captus bene detentus* maxim. It appears that the Court is of the opinion that State practice shows that there are *two* distinct grounds which must lead in any event to the rejection of the *male captus bene detentus* rule.

At first, the words "against such procedure" seem to refer to the words "if the state of the forum got hold of the prosecuted person by committing serious human rights violations". That would mean that there is only *one* situation which leads to the *male captus male detentus* result, namely when the State of the forum gets hold of the prosecuted person by committing serious human rights violations and the State whose territorial sovereignty was violated (by this *male captus*, which engendered serious human rights violations) protested against this *male captus* (which engendered serious human rights violations and which violated its territorial sovereignty). However, it can be argued that "against such procedure" does not refer to the words "if the state of the forum got hold of the prosecuted person by committing serious human rights violations", but to the words "if the prosecuted person has been taken from his or her state of origin to the state of the forum or to the requested state by use of force" mentioned earlier (see the first sentence of the quotation). That would mean that the more recent State practice indicates that there are two situations which, in any event, must lead to a *male captus male detentus* result, namely in the case of 1) an abduction (the taking of the person from his State of residence/origin to the forum/requested State by use of force) accompanied by serious human rights violations (as one could argue that an abduction as such can already be seen as a serious violation of the human right to liberty and security, the

[569] *Ibid*., 2 BvR 1506/03, B., I., para. 3 b) aa)), 43 *International Legal Materials* (2004), p. 783.

Court probably means serious violations/mistreatment in the course of the abduction here) *or* 2) an abduction followed by a protest from the injured State.

The Court's sources support the idea that the German judges assume the existence of two situations here. With respect to the reference to *Toscanino* (in the still-to-discuss (see Chapter VI) *Nikolić* case): until the *Alvarez-Machain* case was issued, US courts, confronted by an abduction, were arguably of the opinion that *Toscanino* and its aftermath stood for the idea that a court had to refuse jurisdiction in two situations, namely if that abduction 1) was followed by a protest (and a request for the return of the abducted person) from the injured State, see, for example, *Verdugo-Urquidez*[570] *or* 2) was accompanied by serious mistreatment, whether or not there was a protest from the injured State, see, for example, *Lujan*.[571]

It is true that *Alvarez-Machain* (in which the Supreme Court did not refuse jurisdiction in the case of an abduction which was followed by a protest and request for the return of Alvarez-Machain and about which the judges even stated that it may be "shocking") quashed the *male detentus* situation of *Toscanino* with respect to an abduction followed by a protest and request for the return of the suspect by the injured State.

Although the word "shocking" is reminiscent of the second *male detentus* situation of *Toscanino* (namely an abduction accompanied by serious mistreatment),

[570] See also, more generally, American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 432 ('Measures in Aid of Enforcement of Criminal Law'), comment 'c' ('Consequences of violation of territorial limits of law enforcement'): "If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws." Note that this specific *male captus male detentus* situation was also already recognised by the German Federal Constitutional Court 17 years earlier in the *Stocké* case: "Ein Blick auf die Staatenpraxis zeigt, daß Gerichte es nur dann allgemein ablehnen, ein Strafverfahren gegen einen völkerrechtswidrig Entführten zu betreiben, wenn der durch die Entführung verletzte Staat gegen die Unrechtshandlung protestiert und die Rückgabe des Entführten gefordert hat". (BVerfG (1. Kammer des Zweiten Senats), Beschl. v. 17.7 1985 – 2 BvR 1190/84. *NJW* 1986, Heft 22, p. 1428.)

[571] See also, more generally, American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 433 ('External Measures In Aid Of Enforcement Of Criminal Law: Law Of The United States', para. 2: "A person apprehended in a foreign state, whether by foreign or by United States officials, and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society." *Cf.* also the 1986 decision of the German Federal Constitutional Court (BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022), which involved an abduction without a protest and request for the return of the abducted suspect from the injured State. Here, the Court stated that jurisdiction could also be refused under domestic law if the situation could be qualified as an "extremely exceptional case". The meaning of this rather general concept is not clear, but one may argue that it involves *Toscanino*-like circumstances, see also Wilske 2000, p. 334, n. 413 (commenting on this concept): "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also Grams 1994, pp. 70-71.

it is arguably not so that that exception is no longer valid in US courts, see footnote 206.

However, to the extent that States are of the opinion that *Alvarez-Machain* has quashed both *male detentus* situations, one can argue that the immense criticism towards this decision in general is proof of the idea that many States are of the opinion that in those two situations (an abduction followed by a protest and request for the return of the suspect, and an abduction accompanied by serious mistreatment) jurisdiction must be refused.

Before turning to the reference to Wilske, it must again be emphasised that the serious mistreatment exception may also be applied to other *male captus* situations, meaning that a luring operation accompanied by serious mistreatment may perhaps also lead to the ending of the case, see, for example, *Yunis*.[572]

However, even if there are courts which will refuse to exercise jurisdiction in the case of a luring operation accompanied by serious mistreatment – arguably a good thing – it is less clear whether there is also general support in State practice for that idea. The *Alvarez-Machain* case does not shed further light on this issue for that case did not involve a luring, but an abduction operation.

With respect to the reference to page 336 of Wilske's book: on this page, where the author writes about the worldwide protests against the *Alvarez-Machain* case (in whose aftermath the German Court seems also very interested),[573] one can read:

> Gerade diese Entscheidung [namely the *Alvarez-Machain* decision, ChP] ist der Schlüssel zu einer geänderten Staatenpraxis, die die *male captus, bene detentus*-Regel zumindest im Fall eines Staatenprotestes wie auch bei schweren Menschenrechtsverletzungen eindeutig ablehnt.[574]

Hence, Wilske also concludes that there are two situations in more recent State practice which, in any event, must lead to the *male captus male detentus* outcome, namely if the *male captus* (Wilske arguably refers here to an abduction) 1) is followed by a protest from the injured State *or* ("wie auch") 2) engenders serious human rights violations.

In addition, the point mentioned above, that the Court probably writes about 'serious mistreatment in the course of the abduction' (when it refers to "if the state of the forum got hold of the prosecuted person by committing serious human rights violations") not only finds support in the *Toscanino* exception, but also in Wilske. Although his above-mentioned words do not indicate this ("bei schweren

[572] See also the 1985 *Stocké* case, which involved a luring case and where the German Federal Constitutional Court stated that jurisdiction would be refused under national law if the situation could be seen as an "extremely exceptional case". As explained in the previous footnote, although the meaning of this concept is not clear, one may argue that it involves *Toscanino*-like circumstances, see again Wilske 2000, p. 334, n. 413 (commenting on this concept): "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also again Grams 1994, pp. 70-71.

[573] The German Court namely writes about "more recent state practice, in particular as a consequence of dealing with the U.S. Supreme Court decision in the *Alvarez-Machain* case".

[574] Wilske 2000, p. 336.

Menschenrechtsverletzungen" is still rather general), another (and broader!)[575] formulation of Wilske's conclusion, which, again, stresses that there are two *male detentus* situations, is clearer in that respect: "Ein Strafverfahrenshindernis aus Völkerrechts ist immer dann anzunehmen, wenn der verletzte Staat protestiert hat. Dies gilt aber auch, wenn die Entführung von schweren Menschenrechtsverletzungen *begleitet war* [emphasis added, ChP]."[576]

It must be emphasised that the above-mentioned situations concern cases where *male captus bene detentus* is rejected *at any rate*, *in any event*. That does not mean, however, that courts may not utilise a lower *male captus male detentus* threshold. There have also been *male captus* cases (not necessarily involving abductions) where the court refused/would refuse jurisdiction where the suspect was not seriously mistreated and where there was no protest from the injured State, see, for example, the cases of *Hartley*, *Levinge*, *Bennett* and the still-to-discuss cases of *Ebrahim* and *Beahan*. And rightly so (to add a normative note here). After all, why should a suspect have to prove, for example, that the injured State protested the abduction if it has been established that he was abducted by agents from the now prosecuting State? Likewise, why should a suspect have to prove that he was seriously mistreated during this abduction, or that he was abducted at all? Should the fact that authorities of a State have resorted to a serious *male captus* (one should not limit oneself to an abduction here) in circumvention of available procedures not already suffice to divest jurisdiction, whether or not there was a protest from the injured State and whether or not the suspect was seriously mistreated in the course of this *male captus*?[577] Is not the fact that State agents have turned to such illegal methods already enough for a court to refuse jurisdiction?[578] One could argue that the (lower) tests produced by *Hartley*, *Levinge*, *Bennett*, *Ebrahim* and *Beahan* are much more appropriate if the court wants to protect values like State sovereignty, human rights, due process of law/the rule of law, including the integrity of the judicial and executive proceedings. Only a lower *male detentus* standard can effectively deter the prosecuting authorities from using dubious methods in bringing

[575] After all, on p. 336 of his book (see the previous footnote and accompanying text), Wilske writes about State practice (which, it is reminded, is only one element of customary international law) whereas on p. 340 (and p. 349) of his book (see the next footnote and accompanying text), he argues that these two situations are not only recognised by more recent State practice, but in fact by international (customary) law more generally. (Wilske uses the word "Völkerrecht" here, but it is clear that he means "Völker*gewohnheits*recht". See, for example, Wilske 2000, p. 338: "Ziel der hier dargestellten Staatenpraxis war, eine Antwort auf die Frage zu erhalten, ob Völker*gewohnheits*recht einem Strafverfahren gegen völkerrechtswidrig entführte Personen entgegensteht [emphasis added, ChP].")

[576] Wilske 2000, p. 340. See also *ibid*., p. 349: "Nach Auswertung der Staatenpraxis ist ein Strafverfahrenshindernis aus Völkerrechts immer dann anuznehmen, wenn der verletzte Staat protestiert hat oder wenn die Entführung von schweren Menschenrechtsverletzungen *begleitet war* [emphasis added, ChP]."

[577] See also Michell 1996, p. 403.

[578] See also Hamid 2004, p. 85: "It is a long established legal principle that an illegal act does not give rise to any right; *ex injuria jus non oritur*. Since the act of abduction itself is illegal and invalid under international law, the abducting State does not have a right to subject the abducted individual to its laws and proceedings following such illegal abduction."

a suspect to trial. However, it must also be remarked that these tests assume the involvement of the prosecuting State's authorities in the *male captus*. One can imagine that there might also be judges who will refuse jurisdiction if they deem the *male captus* so serious that they feel that jurisdiction must be refused, even if the authorities from the now prosecuting State were not involved in the *male captus* (for example, if the suspect were seriously mistreated in the process of his arrest and detention).

Returning to the decision in *Al-Moayad* itself (which seemingly rejected an earlier decision from 19 October 1994),[579] as explained in the final sentence of the Court's quotation mentioned above, the judges were of the opinion that this case did not meet the two situations which State practice recognises as undisputed *male detentus* avenues. This was because both situations require *at least* an abduction by the forum State, which was not the case here (Al-Moayad was lured but not abducted from Yemen and in addition, Germany was not responsible for the *male captus*).[580] According to the German Court, "[i]t cannot be ascertained that a

[579] In that decision, the German Federal Constitutional Court did not identify a general rule of international law, forbidding the exercise of jurisdiction in the case of a luring operation followed by a protest and request for the return of the suspect by the injured State (the Netherlands). That reasoning is still in conformity with the earlier-mentioned German cases and this case of Al-Moayad, which, after all, at least demand an abduction. However, the Court also noted, in an *obiter dictum*: "Selbst bei Vorliegen einer völkerrechtswidrigen Entführung, die wegen der Gewaltanwendung einen stärkeren Eingriff in die Gebietshoheit des Aufenthaltsstaates darstellen dürfte als das Herauslocken mit List, bestehen sowohl in der Staatenpraxis wie auch in der völkerrechtlichen Literatur unterschiedliche Auffassungen zu der Frage, ob bei Protest des verletzten Staates die völkerrechtswidrige Ergreifung ein Strafverfahren im Gerichtsstaat aus Gründen des Völkerrechts hindert". See Wilske 2000, p. 335, with reference to *BVerfG* NStZ 1995, 96. (Oehmichen (2007, p. 236) also refers to this case, with the reference BVerfG 2 BvR 435/87, 48 NJW 651 f (1995).) However, Wilske notes that the judges referred here to literature stemming from the 1980s (with the exception of a 1992 study from Oppenheim) which do not shed light on the more recent State practice, in particular the reactions from States in the aftermath of the *Alvarez-Machain* decision. (See Wilske 2000, p. 335.) Nevertheless, the German Court did look at the US decision itself and commented that "[o]bwohl im Verfahren auch die Frage einer das Strafverfahren hindernden Norm des Völkergewohnheitsrechts aufgeworfen wurde, ging der Supreme Court in seiner Entscheidung nicht vom Bestehen einer solchen Regel aus". See *ibid*. Wilske notes (see *ibid*., p. 336) that this is not correct as the Supreme Court only looked at the treaty and not at customary international law. However, even though the Supreme Court indeed focused on the treaty, it did seemingly also indirectly look at international law, namely to find out whether international law was so strong on this particular topic that it had to be read into the treaty. As that was not the case, there was no treaty violation and it was deemed not necessary to look at the international law dimension more generally, see n. 203 and accompanying text. Notwithstanding this, one can agree with Wilske that it is surprising that the German Court did not take into account the "weltweiten Protestes gegen diese Entscheidung" (*ibid*.).

[580] See German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 b) aa)), 43 *International Legal Materials* (2004), p. 783: "The facts of the present case, however, differ from these cases in important details. Because the complainant's decision to leave Yemen was based on the complainant's voluntary decision. According to the statement of his secretary, the complainant himself suggested Frankfurt am Main as the venue of a meeting that was supposed to serve fundraising on account of the favourable visa regulations for Yemeni citizens in Germany and of the good traffic connections. Admittedly, the complainant has been deceived by trickery so that the motives for which he travelled to Germany were based on

practice under international law has evolved for these facts of the case that would make the extradition appear to be an infringement of customary international law."[581]

This, again, appears to be a correct observation of the law. Several (international) cases show that luring as such and not committed by the forum State is no obstacle to a subsequent extradition or criminal prosecution.[582]

Although at least one case can be mentioned which contradicts that view, namely the 1982 Swiss case of X, the German Federal Constitutional Court is arguably correct when it states that "[s]uch practice (...) is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law."[583]

However, even though the situations which must definitely lead to the ending of the case do not apply in this case, one can wonder whether the luring operation of Al-Moayad did not involve a violation of international law and whether that violation, if any, should then not lead to another, less far-reaching remedy. The Court also touched upon this point, stating:

> [I]t cannot be left out of consideration that it is even doubtful under which preconditions the luring of a prosecuted person out of his or her state of residence by means of trickery – unlike the use of force – can be regarded as an act that is contrary to international law at all (...). To the extent that in the case of the use of trickery, the prosecuted person's intended border crossing is also motivated by his or her own interests, and to the extent that the possibility exists that the prosecuted person decides against departure, the prosecuted person, as a general rule, is not object of state coercion. Admittedly, the boundary between luring someone out of a state by means of trickery and breaking someone's will by the use of force can be fluid in a

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deception. However, he was not subjected to direct force aimed at bending his will, and he was also not threatened with the use of force, and the trickery did not facilitate a subsequent forceful abduction. The acts of deception were not performed by German authorities, and they are also not attributable to them. Finally, there are no indications that would permit the assumption that the German authorities cooperated with the United States criminal prosecution and investigation authorities in a collusive manner in order to induce the complainant to travel exactly to Germany."

[581] *Ibid*., 2 BvR 1506/03, B., I., para. 3 b) bb)), 43 *International Legal Materials* (2004), p. 783.

[582] See also *ibid*., 2 BvR 1506/03, B., I., para. 3 b) bb) (1)), 43 *International Legal Materials* (2004), pp. 783-784. Cases mentioned by the German Federal Constitutional Court are the English *Schmidt* case (see Subsection 1.2), the US *United States v Wilson* case (see the end of this footnote for more information), the Canadian *Hartnett* case (see again the end of this footnote for more information) and two cases from the ICTY, namely the *Dokmanović* (see Subsection 3.1.1 of the following chapter) and *Nikolić* (see Subsection 3.1.4 of the following chapter) case. Although this latter case did not involve a luring operation, the decision did refer to, among other things, the luring cases of *Stocké* and *Dokmanović*. For more information on the *Wilson* and *Hartnett* cases, see *ibid*., p. 784: "In the *United States v Wilson* case, the U.S. Federal Court of Appeal upheld the indictment of the prosecuted person, who had been persuaded by an agent to leave his refuge in Libya on the grounds that he had merely become the victim of "a non-violent trick" (U.S. Federal Court of Appeal, 721 Federal Reporter, Second Series 967 [1983]). The Canadian Ontario High Court of Justice ruled in the Hartnett proceedings that the arrest of two United States citizens for fraud-related offences, who had been invited to Canada under the pretext of being examined as witnesses there, did not justify the assumption of an obstacle precluding proceedings (Ontario High Court of Justice, Re Hartnett and the Queen, decision of 20 September 1973, 14 Canadian Criminal Cases 6)."

[583] *Ibid*., 2 BvR 1506/03, B., I., para. 3 b) bb) (2)), 43 *International Legal Materials* (2004), p. 784.

> borderline area, for instance if someone is deluded into believing something that has the effect of an irresistible coercion on the person affected. Such circumstances, however, do not exist here. Instead, the complainant travelled to the federal territory on account of an autonomous decision in order to pursue specific own interests there.[584]

It is, of course, true that luring operations differ and that an operation in which coercion is used and in which someone leaves his State of residence clearly against his will can be seen as more serious than a luring operation in which a person comes to another State because he has merely been deceived. This may more easily lead to a violation of someone's human rights[585] and even to a court's refusal to exercise jurisdiction.[586] However, this does not mean that in each case, the sovereignty of a State (and hence classical international law) may not have been breached.

It is arguably very well possible that a luring operation is non-coercive in nature, but nevertheless violates the sovereignty of the State where the 'luring' agent was executing the police work which ultimately led to the arrest outside of the territory of the injured State.[587] As explained above, the most appropriate reparation in the case of a violation of another State's sovereignty is restitution and would hence mean the return of the lured suspect if the injured State protests and requests his return. However, it is also clear that there does not seem to be a general rule in the practice of courts that judges refuse jurisdiction after a luring operation, arguably because luring is not seen as such a serious violation of international law that a return is required. However, in that case, it would arguably be appropriate if the court now handling the case would nevertheless repair the wrong caused by this violation of State sovereignty. (In addition to granting remedies to the suspect if his human rights were violated by the luring operation.)

Although the German Federal Constitutional Court was of the opinion that both situations which must *in any event* lead to a rejection of *male captus bene detentus* were not applicable here and although it can be assumed, see the first words of the quotation at footnote 584 and accompanying text, that the Court would not refuse jurisdiction in the case of normal luring executed by German agents (and perhaps followed by a protest), one still wonders how the German Court would react in the case of a normal abduction executed by German agents but without a protest from the injured State and not accompanied by serious violations/mistreatment, or in the case of a luring operation executed by German agents and accompanied by serious mistreatment. Perhaps, the two earlier German cases from 1985 (*Stocké*) and 1986 (see footnote 519 and accompanying text) may provide the answers here. The first can be read to imply that a luring operation executed by German agents and accompanied by serious mistreatment could lead to the ending of the case whereas

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[584] *Ibid*., 2 BvR 1506/03, B., I., para. 3 b) bb) (3)), 43 *International Legal Materials* (2004), pp. 784-785.
[585] See the discussion on this issue in the context of the *Stocké* case.
[586] See the discussion on this issue in the context of the *Schmidt* case.
[587] See Subsection 2.1 of Chapter III.

the case from 1986 entails that an abduction as such, without protest or mistreatment, would not lead to a refusal.

Very interestingly, the German Federal Constitutional Court also referred to the seriousness of the crimes with which the suspect is charged as an element to take into consideration in the *male captus* discussion. Although a court is, of course, entitled to deem such an element important – in fact there is no reason why a judge should not take that important aspect of the case into account if some generally accepted rule does not already dictate a certain remedy in the case of a violation (which does not seem the case here) – the Court's references to back its view are arguably weak. It stated:

> [R]ecent state practice also takes the seriousness of the crime with which the person is charged into account, which means that in this respect, it takes proportionality into consideration. The protection of high-ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state's personal sovereignty that possibly goes along with the use of trickery (cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, *loc. cit.*, number 26). To the extent that the fight of most serious crimes such as the support of international drugs trade and of terrorism is concerned, luring someone out of a state's territorial sovereignty by means of trickery is not, at any rate to the extent that would be required to demonstrate state practice, regarded as an obstacle precluding criminal prosecution. Nothing different can apply as regards the existence of an obstacle precluding extradition.[588]

Although the German Federal Constitutional Court speaks of "recent state practice", paragraph 26 of the Appeals Chamber's decision in the *Nikolić* case[589] essentially concerns the ICTY's own views on this problem.

As already stated, see footnote 565, one can wonder whether the views of the ICTY can be seen as evidence of *State* practice but perhaps, the German Federal Constitutional Court is mainly interested in the cases on which the ICTY relies to support its view.

However, in that case, one might wonder whether the word "recent (state practice)" is well chosen as the two cases mentioned by the ICTY were not decided *that* recently (namely in 1962 (the *Eichmann* case) and 1983 (the *Barbie* case)).[590] In addition to this, although it was shown that there are indeed indications that the

[588] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 b) bb) (3)), 43 *International Legal Materials* (2004), p. 785.

[589] Although it must be noted that this case did not involve a luring operation, the observation made here is arguably of a more general nature.

[590] It is to be noted that this book is also of the opinion that *Barbie* is not a recent case. The fact that it nevertheless has been included in the subsection 'more recent cases' (note, however, that the subsection is not called 'recent cases') must be seen in light of the fact that there are many (very) old *male captus* cases and that the *Toscanino* case of 1974 has been chosen as the dividing line between the older cases and the more recent cases.

Supreme Court of France may have taken into account the seriousness of the crimes with which Barbie was charged in its decision whether or not jurisdiction had to be declined, it will be shown in Subsection 3.1 of this chapter and Subsection 3.1.4 of the next chapter that the ICTY's reliance on the *Eichmann* case is incorrect as the Israeli courts did not continue with the exercise of jurisdiction *because of* Eichmann's alleged heinous crimes, but because the *male captus bene detentus* maxim was in those days an accepted rule of law, applicable to anyone, whether that 'anyone' was charged with fraud or with crimes against humanity.

It must be noted that one could argue, now that the ICTY Appeals Chamber's reference to the *Eichmann* case (as support for the idea that the seriousness of the alleged crimes must be taken into account in the *male captus* discussion) is found to be incorrect, that the German Court's reference to *Nikolić* is also incorrect.

However, as already explained,[591] the ICTY Appeals Chamber also made some observations of its own concerning this issue, after it had discussed the inter-State context. And there is, of course, no problem if the German Court wants to refer to *those* observations if it is interested in international practice more generally, see also footnote 560 and accompanying text. (Note, however, that in that case, it should not refer to "recent *state* practice".)

Finally, the Court also rejected Al-Moayad's claims that German law was violated by the operation, hereby again referring to the seriousness of the crimes with which he was charged.[592]

On the same day that his extradition to the US was authorised by the German Government (14 November 2003),[593] Al-Moayad lodged an application with the ECtHR, in which he, among other things, claimed that his detention pending extradition was unlawful pursuant to Article 5, paragraph 1 of the ECHR, "as his placement under surveillance in and abduction from Yemen had breached public international law",[594] and that for the same reasons the extradition proceedings in

[591] See n. 565.

[592] See, for example, German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., IV., para. 3, 43 *International Legal Materials* (2004), pp. 786-787: "Also against the standards of German law, the use of confidential informants in order to prevent or to resolve criminal offences with a terrorist background does not meet with reservations with a view to the proportionality of the means employed (as concerns the prosecution of particularly serious crimes, which are difficult to resolve, in particular in the drugs trade".

[593] In the US, Al-Moayad was sentenced by the US District Court for the Eastern District of New York "to 75 years' imprisonment, the statutory maximum sentence, for conspiracy to support Al Qaeda and Hamas, for having provided material support to Hamas and for having attempted to provide material support to Al Qaeda." (ECtHR (Fifth Section), 'Decision as to the Admissibility of Application No. 35865/03 by Mohammed Ali Hassan Al-Moayad against Germany', 20 February 2007, para. 28.) However, on 2 October 2008, the US Court of Appeals for the Second Circuit overturned the conviction, arguing that the District Court had improperly admitted evidence during the trial which had prejudiced the jury. Almost a year later, on 7 August 2009, a plea agreement was reached: Al-Moayad pleaded guilty to conspiring to provide financial support to Hamas and was subsequently sentenced to time served. As a result, Al-Moayad (and the same goes for his secretary) were released and deported back to Yemen.

[594] *Ibid*., para. 50.

Germany had not been fair and were to be considered a breach of Article 6, paragraph 1 of the ECHR.[595]

The Court, which rendered its decision a little more than three years later,[596] first confirmed its *Illich Ramirez Sánchez* and *Öcalan* jurisprudence (see Subsection 2.2.4 of Chapter III) that "[t]he fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5".[597]

However, the Court also reiterated its views in cases such as *Bozano* and *Stocké* (see again Subsection 2.2.4 of Chapter III) that "lawfulness" also implies absence of any arbitrariness and hence that

> extra-territorial measures of a respondent State resulting in the applicant's detention which entailed clear violations of international law, for instance in the case of forcing an applicant against his will to enter the respondent State in a manner that is inconsistent with the sovereignty of his host State, raise an issue under Article 5 § 1 of the Convention (…).[598]

With respect to this specific case, the Court noted that the German Federal Constitutional Court, "in a thoroughly reasoned decision",[599] had disagreed with Al-Moayad and secondly that it (the European Court itself), "[h]aving reviewed the national courts' finding that domestic law, including the rules of public international law applicable in the respondent State, authorised the applicant's detention pending extradition",[600] discerned "no issues that raise doubts about the compatibility of the applicant's detention with German law."[601]

However, it also looked at what had happened *prior* to Al-Moayad's arrest and detention in Germany, see also the above-mentioned quotation at footnote 598 and accompanying text.[602]

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[595] See *ibid*.
[596] See ECtHR (Fifth Section), 'Decision as to the Admissibility of Application No. 35865/03 by Mohammed Ali Hassan Al-Moayad against Germany', 20 February 2007.
[597] *Ibid*., para. 80.
[598] *Ibid*., para. 81.
[599] *Ibid*., para. 84.
[600] *Ibid*., para. 85.
[601] *Ibid*., para. 85.
[602] See *ibid*., para. 86: "With "lawfulness" under Article 5 implying also the absence of arbitrariness, the Court moreover attaches weight to the circumstances which led to the applicant's arrest and detention". The Court referred here to para. 59 of its 2002 decision in *Čonka v. Belgium* (ECtHR (Third Section), *Case of Čonka v. Belgium*, Application No. 51564/99, 'Judgment', 5 February 2002), where it stated: "The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (…). *That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4* [emphasis added, ChP]." See also *ibid*., paras. 41-42, where this point also comes back in the more specific context of Art. 5 of the ECHR: "[A]cts whereby the authorities seek to gain the trust of asylum-seekers *with a view to arresting and subsequently deporting them* may be found to contravene the general principles stated or

Two aspects were highlighted in that respect, namely the non-involvement of Germany in the luring operation[603] and the absence of the use of force.[604] It was already noted earlier that some decisions from the European institutions could be seen as support for the *male captus bene detentus* rule.[605] However, it was only now, in this case of Al-Moayad, that the Court explicitly pronounced itself on the status of the maxim in State practice (albeit in a case of *bene deditus* rather than in a case of *bene detentus*); it agreed with the German Federal Constitutional Court's position that "if a State apprehends a suspect by committing serious human rights violations and if the State whose territorial sovereignty is violated protests, State practice indicates that there is an obstacle to extradition and, consequently, to detention pending extradition."[606]

Furthermore, it found that "[i]n such cases, the detention also raises an issue under Article 5 § 1 of the Convention."[607]

Nevertheless, as no abduction occurred in this case, and as Germany was not involved in the *male captus*, the German Court's test which must in any event lead to the rejection of *male captus bene detentus* (and which assumes the existence of, at least, an abduction executed by the forum State) was not met here.

As Germany was not involved in the *male captus*, it could not be asserted either that Germany violated the human rights of Al-Moayad. (It should be remembered that this is an additional point, alongside the question of whether or not jurisdiction had to be refused, which can be examined.)

Furthermore, "[t]he cooperation between German and US authorities on German territory pursuant to the rules governing mutual legal assistance in arresting and detaining the applicant do not in itself give rise to any problem under Article 5".[608] As a result, this part of Al-Moayad's application was rejected.[609]

It must be stressed that because the European Court, like the German one, focuses on the situation where there is an obstacle to extradition *in any event*, it is not clear whether it would also accept a refusal of extradition/jurisdiction in a less

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implicit in the Convention. (…) [A] conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice *so as to make it easier to deprive them of their liberty* is not compatible with Article 5 [emphasis added, ChP]."

[603] See ECtHR (Fifth Section), 'Decision as to the Admissibility of Application No. 35865/03 by Mohammed Ali Hassan Al-Moayad against Germany', 20 February 2007, para. 87: "It observes in the first place that it was not the respondent State itself – or persons for whose actions it must be deemed responsible – which had taken extraterritorial measures on Yemen's territory aimed at inciting the applicant to leave that country."

[604] See *ibid*., para. 88: "Moreover, the present case does not concern the use of force. The applicant was tricked by the US authorities into travelling to Germany. (…) [T]he use of force on the territory of a third-party State in violation of its territorial sovereignty in order to remove a suspect from his or her State of origin to the respondent State was not alleged in the present case."

[605] See ns. 388 and 595 of Chapter III.

[606] ECtHR (Fifth Section), 'Decision as to the Admissibility of Application No. 35865/03 by Mohammed Ali Hassan Al-Moayad against Germany', 20 February 2007, para. 88.

[607] *Ibid*.

[608] *Ibid*.

[609] See *ibid*., para. 89.

serious case than an abduction 1) accompanied by serious human rights violations/serious mistreatment or 2) followed by a protest from the injured State.

Finally, with respect to Al-Moayad's complaints under Article 6, paragraph 1 of the ECHR, the ECtHR stated that this provision does not apply to the extradition procedures in Germany.[610] As a result, that part of Al-Moayad's application was also rejected.[611]

3 INTERESTING CASES NOT (CLEARLY) FALLING UNDER EITHER SYSTEM

3.1 Older cases

There are several cases which do not clearly fall under either the common or civil law system but which still merit to be mentioned in any *male captus bene/male detentus* discussion. The first case which should be examined in this subsection is the already briefly mentioned[612] Scottish[613] *Sinclair* case. In this case, Matthew Sinclair, who was charged with the crime of breach of trust and embezzlement in Scotland, argued

> that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the Tagus, and there had been taken into custody by a Glasgow detective-officer without production of a warrant; that during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours; that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, and there committed to prison, and that no warrant whatever was produced or exhibited to him.[614]

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[610] See *ibid*., paras. 93-94: "The Court reiterates that extradition proceedings do not concern a dispute ("*contestation*") over an applicant's civil rights and obligations (...) It further recalls that the words "determination ... of a criminal charge" in Article 6 § 1 of the Convention relate to the full process of examining an individual's guilt or innocence in respect of a criminal offence, and not merely, as is the case in extradition proceedings, to the process of determining whether or not a person may be extradited to a foreign country (...). Therefore, Article 6 is not applicable to the present case in so far as the applicant complained about the fairness of the extradition proceedings before the German courts." (Note, however, that the concept of fair trial in exceptional cases can play a role in extradition proceedings, namely in the case of a '*Soering* circumstance' (see also n. 174 of Chapter VIII), "where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country". (*Ibid*., para. 100.) However, that was not the case here, see *ibid*., para. 107.)

[611] See *ibid*., para. 108.

[612] See ns. 38 and 45.

[613] The Scottish legal system is a mixture of civil and common law, see the extremely helpful 'Alphabetical Index of the Political Entities and Corresponding Legal Systems' of JuriGlobe, a research group from the Law Faculty of the University of Ottawa, available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php.

[614] High Court of Justiciary, *Sinclair* v. *Her Majesty's Advocate and Another*, 20 March 1890, 17 *R. (Just. Cas.)* 39, *British International Law Cases*, Vol. 3: jurisdiction (1965), pp. 5-6.

The first Justice to give his opinion was the Lord Justice Clerk (Lord MacDonald). He stated that judges cannot look at what other governments may have done wrongly in the process of bringing a person to Scotland[615] but if a Scottish official committed pre-trial irregularities, he can be held liable. Notwithstanding this, such irregularities will not lead to a *male detentus*, no matter what happened in this pre-trial period.[616] Lord Adam simply agreed with this.[617] The third Justice, Lord M'Laren, first combined the two reasons of the non-inquiry rule (see footnote 38) with respect to the proceedings of foreign governments.[618] He then explained that

> I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. In a case of substantial

[615] See *ibid*., 17 *R. (Just. Cas.)* 41, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 7: "As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings." See also *ibid*., 17 *R. (Just. Cas.)* 41, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 8: "It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go beyond this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer".

[616] See *ibid*., 17 *R. (Just. Cas.)* 41, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 7: "If there was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here." See also *ibid*., 17 *R. (Just. Cas.)* 42, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 8: "No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign government, and irregularly dealt with by a subordinate officer."

[617] See *ibid*., 17 *R. (Just. Cas.)* 42-43, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 9: "I am of opinion with your Lordship that we cannot go behind the perfectly regular warrant under which the suspender was apprehended and brought before a competent court. If there was anything irregular and illegal in the mode in which the suspender was brought here, he will have his remedy against the wrongdoer".

[618] See *ibid*., 17 *R. (Just. Cas.)* 43, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 9: "With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and *we have neither title nor interest* to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody [emphasis added, ChP]."

> infringement of right this Court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention.[619]

The exact scope of this quotation is not very clear. Because Lord M'Laren states not only that a magistrate is obliged to exercise jurisdiction "without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction" but also that the Court will always give redress "[i]n a case of substantial infringement of right" one may think that these infringements are hence not connected to the way in which a suspect was brought from one jurisdiction to another. (After all, how can these infringements be connected to the means by which a suspect was brought from one jurisdiction to another if a magistrate cannot consider these means in the first place?) Thus, what is probably meant here is an infringement of right during the proceedings in the courtroom. If that infringement is substantial, then the court must give redress, although it is not clear what this entails exactly (for example, whether it also encompasses a refusal of jurisdiction). Although this is still quite understandable, the last part of the second sentence states that "the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention". This makes one wonder whether irregularities related to the arrest and detention committed by *superior* officers *can* prejudice the proceedings. However, if that were the true meaning of this part of the quotation, then it contradicts the first sentence of the quotation (namely that a magistrate must exercise jurisdiction "*without any consideration of the means* which have been used [emphasis added, ChP]" to bring a suspect from one jurisdiction to another).

It thus seems that the only certainty about the scope of this quotation is that it is uncertain.[620]

Therefore, it is quite hard to agree with Michell who rather straightforwardly states that Lord M'Laren "argued that the court would intervene to prevent the exercise of criminal jurisdiction where there had been "substantial infringement of right" [emphasis added, ChP]."[621] As one can see in the quotation mentioned above, Lord M'Laren only generally observes that the Court, in serious cases, will give redress, not that it will allow the more specific (and rather far-reaching) remedy of refusal of jurisdiction. A few sentences later, Michell writes that "Lord McLaren's suggestion that courts would refuse to allow criminal proceedings in certain circumstances suggests that the *male captus bene detentus* doctrine was not absolute."[622] Michell hereby connects the "substantial infringement of right" (in his eyes: a refusal of jurisdiction) to the *male captus* context, to the pre-trial context of arrest and detention. However, it is still doubtful whether this can in fact be done, given the fact that the first sentence of the quotation states that a magistrate must

[619] *Ibid*., 17 *R. (Just. Cas.)* 44, *British International Law Cases*, Vol. 3: jurisdiction (1965), p. 10.
[620] *Cf.* also Jones and Doobay 2004, p. 82.
[621] Michell 1996, p. 449.
[622] *Ibid*.

exercise jurisdiction without any consideration of the means by which a person was brought into the now prosecuting jurisdiction.

The most well-known inter-State *male captus* case is, of course, the 1961/1962 Israeli[623] *Eichmann* case. Many aspects of this case have already been addressed earlier in this book, but one important point, which has also already been briefly mentioned, see Subsection 1.2 of Chapter I and Subsection 2.2 of this chapter (in the context of the *Al-Moayad* case), still needs to be addressed in further detail. It is often said (see also the next chapter and the discussion of the ICTY Appeals Chamber's decision in *Nikolić*), that the Israeli courts applied the *male captus bene detentus* principle because of the seriousness of Eichmann's alleged crimes.[624]

As Sloan has correctly previously observed,[625] it is true that the District Court of Jerusalem/the Israeli Supreme Court proceeded with Eichmann's case (*bene detentus*) notwithstanding the fact that Eichmann was abducted from Argentina (*male captus*).

However, the judges did not apply this *male captus bene detentus* rule *because* Eichmann was accused of very serious crimes; the Israeli judges were of the opinion that "[i]t is *an established rule of law* that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State [emphasis added, ChP]."[626] Hence, according to them, the rule was applicable to *any* person standing trial, not necessarily a person charged with very serious crimes. Admittedly, the seriousness of Eichmann's crimes *did* play a role for the Israeli judges, but *not* to defend the "established rule of law" summarised by *male captus bene detentus*; it played a role to defend the judges' usage of the universality

[623] The Israeli legal system is a mixture of civil, common, Jewish and Muslim law, see again (see n. 613) JuriGlobe's 'Alphabetical Index of the Political Entities and Corresponding Legal Systems', available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php. Another mixed legal system involving Muslim law, to also pay some attention to States with that legal background, is Egypt (mixture of Muslim and civil law), see again JuriGloves' Index. It may be interesting to note that El Zeidy has written about a decision of the Supreme Court of Egypt which upheld a decision of the public prosecutor (which has powers comparable with an investigating judge in the civil law system) to dismiss a case of unlawful arrest, see El Zeidy 2006, p. 455, n. 28, referring to "Egyptian Court of Cassation, Criminal Appeal No. 1762, Judicial Year 31, 10 April 1962".

[624] See also Michell 1996, p. 499: "It is also argued that the more serious the alleged offense, the less appropriate it is that a stay should be ordered. Conduct on the part of the domestic authorities amounting to an abuse of process in the case of a lesser offense might not amount to such an abuse where the alleged offense was more serious. There was no explicit mention of this factor in *Bennett II* itself, although it might be implied from Lord Lowry's suggestion that not every "venial irregularity" should result in a stay. [See, however, n. 301, ChP.] Roch, L.J., in *Schmidt I* did consider it a factor, however. [See n. 335 and accompanying text, ChP.] It emerges more clearly from cases such as *Eichmann* [original footnote omitted, ChP]." See also Van der Wilt 2004, p. 279 and Mohit 2006, p. 144.

[625] See Sloan 2006, pp. 329-330 or Sloan 2005, p. 494, n. 14.

[626] District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 41 (36 *International Law Reports* 1968, p. 59). This observation was confirmed by their colleagues in the Israeli Supreme Court, see n. 15 of Chapter I. See also the last sentence of the quotation in n. 629.

principle,[627] whose rationale is that some crimes are so serious that even a State with no direct jurisdictional link can try a suspect charged with these serious crimes so that the latter can never escape justice. By using the universality principle, the Israeli judges claimed that they had the laws enabling them to exercise jurisdiction over Eichmann. However, as already explained in Subsection 1.2 of Chapter III, to start a trial, one must have not only the legal means, but also the person himself (jurisdiction *ratione personae*).[628] These are two separate issues and it is only in relation to the second where the problem of *male captus bene/male detentus* comes in.[629]

With respect to the application of the *male captus bene detentus* rule, it may in conclusion be interesting to mention that the District Court, whose judgment was far more extensive than that of the Supreme Court, not only referred to the well-known British and American *male captus bene detentus* cases such as *Scott* and *Ker* but also to, for example, the following two cases decided by the Supreme Court of Palestine,[630] cases which are also reviewed every now and then in the *male captus* discussion.

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[627] See Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 12 (36 *International Law Reports* 1968, p. 304): "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, *pursuant to the principle of universal jurisdiction* and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant [emphasis added, ChP]."

[628] Except, of course, in the case of a trial *in absentia*.

[629] See Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 13 (36 *International Law Reports* 1968, pp. 306-307): "The appellant is a "fugitive from justice" from the point of view of the law of nations, since the crimes attributed to him are of an *international* character and have been condemned publicly by the civilized world (…) and therefore, by virtue of the principle of universal jurisdiction, every country has the right to try him. This jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign State. Accordingly, in bringing the appellant to trial, it has functioned as an organ of international law and has acted to enforce the provisions of that law through its own laws. (…) Indeed, counsel for the appellant has here confused the question of the *substantive* penal jurisdiction of the State of Israel with the question whether his client enjoys immunity from the exercise of that jurisdiction against him by reason of the fact of his abduction. These two questions are entirely separate from one another. As has been indicated, the moment it is conceded that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, the Court is no longer bound to investigate the manner and legality of the appellant's detention, as indeed may be gathered from the judgments upon which the District Court has rightly relied [emphasis in original, ChP]."

[630] Although this Court was, of course, heavy influenced by British law (Britain officially controlled Palestine from 1923 to 1948 (when the State of Israel was created), 'the Mandate period'), it also applied local, Palestine law; British law and Palestine law were thus not similar. See also Baade 1961, who first notes on pp. 403-404 that "[i]t has been held in England that English courts "have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here [original footnote omitted, ChP]"" and then explains that this English rule from the *Elliott* case (see also *Scott*) "was *received into the law of Palestine* during the Mandate period [emphasis added, ChP]." (*Ibid*., p. 404, n. 12.) Baade consequently referred to the two cases which will now be mentioned very briefly in the main text.

The first is the 1941 case *Yousef Said Abu Dourrah* v. *The Attorney-General*.[631] In this case, the Court noted that the Defence of the appellant, who was extradited from Trans-Jordan to Palestine, brought before the Assize Court in Jerusalem and charged with murder, had argued "that the extradition proceedings were improper and that therefore the Assize Court had no jurisdiction to try the man".[632] The Court stated, however, that, if the Government was satisfied that the correct procedures of the extradition arrangement had been complied with, "that, we think, must be the end of the matter, except that possibly the courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained".[633] Furthermore, the Court also remarked with respect to the appellant's claim that his case concerned a political offence that "even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it".[634]

The second case is *Afouneh* v. *Attorney-General* from 1942.[635] In this case, the suspect, accused of (and later convicted for) murder had fled to Syria, where he was arrested by a British sergeant,[636] who subsequently brought him – against his will – to the frontier where he was arrested on the Palestinian side of the border.[637] There was an extradition treaty between Palestine and Syria and extradition papers had in fact been sent to Syria, but they only arrived there after Afouneh was brought to Palestine.

The Court was, however, of the opinion that he could be tried, even if no extradition had taken place:

> If there is an extradition agreement between two countries and a request for extradition is made, the government to whom the request is made must satisfy themselves that the formalities of the agreement have been complied with. It is a matter for them and not for the government which is making the application. When once the accused person has been handed over to the requesting government, the position would seem to be that, subject to the limitation that he cannot be tried for an offence other than that for which he was extradited, he cannot avail himself of the plea that the government to whom the request was made should not have extradited him at all because certain irregularities of procedure had occurred.[638]

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[631] Supreme Court of Palestine (sitting as a Court of Criminal Appeal), *Yousef Said Abu Dourrah* v. *The Attorney-General*, 20 January 1941, *Annual Digest and Reports of Public International Law Cases*, Vol. 10 (1941-1942), Case No. 101, pp. 331-332.
[632] *Ibid*., p. 331.
[633] *Ibid*.
[634] *Ibid*., p. 332.
[635] Supreme Court of Palestine (sitting as a Court of Criminal Appeal), *Afouneh* v. *Attorney-General*, 11 February 1942, *Annual Digest and Reports of Public International Law Cases*, Vol. 10 (1941-1942), Case No. 97, pp. 327-328.
[636] At that time, Syria was occupied by the Allied Forces, see *ibid*., p. 327.
[637] See *ibid*.
[638] *Ibid*., pp. 327-328.

In making this *male captus bene detentus* statement, the Court referred to the *Scott* case and also to a quotation which is not from, but which can be traced back to, the decision of the US Supreme Court in *Ker*.[639]

3.2 More recent cases

Before turning to the first real case of this subsection, it must first be noted that the *Eichmann* reasoning was also upheld in Israel in more recent times. An example of this can be found in the case *Vanunu*, which, however, will not be addressed here in detail as the complete decisions of the Israeli courts in this case could not be consulted.[640]

However, what can be said about this case is that in late September 1986, Mordechai Vanunu, a former employee of the Israeli Negev Nuclear Research Center, was lured from London to Rome and from there abducted to Israel by the *Mossad*, after he had spoken with a journalist from the London newspaper *The Sunday Times* about Israel's nuclear capabilities.[641] In Israel, Vanunu objected to his abduction – note that the UK did not file a protest[642] but that Italy did object to the abduction[643] – but the Israeli courts were not impressed and rejected his claims.[644] On 27 February 1988, the Israeli District Court sentenced him to 18 years' imprisonment for treason and espionage and on 27 May 1990, Vanunu's appeal before the Israeli Supreme Court was dismissed.[645] This judgment was heavily

[639] See *ibid*., p. 328: "Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights." As explained in the main text, these words will not be found in the *Ker* decision itself; they can be found in J.B. Moore's *A digest of international law as embodied in diplomatic discussions, treaties, and other international agreements, international awards, the decisions of municipal courts, and the writings of jurists, and especially in documents, published and unpublished, issued by Presidents and Secretaries of State of the United States, the opinions of the Attorneys-General, and the decisions of courts, Federal and State*, Vol. 4, Government printing office: Washington D.C. 1906, p. 311, where reference is made to the *Ker* case.

[640] See also Wilske and Schiller 1998, p. 226: "He was convicted of treason and espionage in a closed criminal proceeding; only the guilty verdict and sentence were made public [original footnote omitted, ChP]."

[641] *The Sunday Times* published its story on 5 October 1986, a couple of days after Vanunu had disappeared, see Cherif Bassiouni 1987, p. 199. About the operation itself, *The Sunday Times* "later reported that Vanunu was lured by a female Mossad agent to Rome, "where he was attacked by two men and held down while she injected him with a powerful anesthetic. He was chained and smuggled out of Italy in a cargo ship."" (J. Cohen and N. Solomon, 'U.S. Media Still Ignoring Journalist Held in Israeli Cell', *The Seattle Times*, 30 December 1994, available at: http://community.seattletimes.nwsource.com/archive/?date=19941230&slug=1949829.)

[642] See Cherif Bassiouni 1987, p. 199.

[643] See Wilske 2000, p. 321.

[644] See Cherif Bassiouni 1987, p. 199: "At a hearing before the Jerusalem district court, on Dec. 21, 1986, Vanunu raised the issue of his kidnapping, but the court dismissed it." See also Quigley 1993, pp. 726-727 (n. 23).

[645] See Wilske and Schiller 1998, p. 226.

criticised by the European Parliament[646] which recalled that Vanunu "was kidnapped in Rome by the Israeli authorities, in order to stand trial"[647] and which reminded "the Government of Israel that the kidnapping (...) was a gross violation of the sovereignty of a Member State of the European Community".[648]

The first real case to be discussed here is the clearest example of a strict *male captus male detentus* decision ever pronounced by a judge (and as a result will be addressed here quite extensively): the already briefly mentioned[649] 1991 South African[650] *Opinion in State v. Ebrahim* case.[651]

Although South Africa had followed the traditional *male captus bene detentus* line in the past,[652] the *Ebrahim* case is a clear rupture with that tradition. In this case, the Appellate Division of the South African Supreme Court unanimously set aside the conviction by a South African trial court of South African citizen Ebrahim Ismail Ebrahim, who was charged with treason in 1987 and sentenced to 20 years' imprisonment. What had happened?

In 1964, Ebrahim, a member of Umkhonto We Sizwe (the military wing of the African National Congress (ANC)),[653] was convicted of several acts of sabotage and was sentenced to 15 years' imprisonment.[654] After his release in 1979, his movements were restricted to the magistrate's district of Pinetown in Natal.[655] Notwithstanding his restriction order, he fled to Swaziland on 19 December 1980 where, according to the South African Government, he became, among other things, active in anti-South African activities.[656] On 15 December 1986, Ebrahim was forcibly abducted from Swaziland to South Africa by two men who informed him

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[646] See *ibid*.
[647] European Parliament, 'Resolution on the kidnapping and imprisonment of Mr Mordechai Vanunu', 14 June 1990, OJ C 175, 16 July 1990, p. 168, under C.
[648] *Ibid*., under 2.
[649] See Chapter II.
[650] The South African legal system is a mixture of civil law and common law, see again (see n. 613) JuriGlobe's 'Alphabetical Index of the Political Entities and Corresponding Legal Systems', available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php. See also Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 892 where editor John Dugard explains: "The South African common law is Roman-Dutch law, comprising principles of Roman law and Germanic custom, as developed in the seventeenth and eighteenth centuries by the writings of jurists and the decision of the courts in Holland and its associated provinces in the United Netherlands. It has been strongly influenced during the past two hundred years by the English common law."
[651] In this chapter, both the edited and abbreviated English translation in *International Legal Materials*, prepared by John Dugard (Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), pp. 888-899) and the English translation of the case in 95 *International Law Reports* (1994), pp. 417-445 were used.
[652] See, for example, the cases *Abrahams v. Minister of Justice* and *R v. Robertson*, see Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 895. See n. 685 for more information. See for more cases Dugard 1991, p. 200.
[653] See 95 *International Law Reports* (1994), p. 419.
[654] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 890.
[655] See *ibid*.
[656] See *ibid*.

that they were South African police officers.[657] Near the border, Ebrahim was picked up by armed men who brought him to Pretoria. During this trip, Ebrahim was questioned, among other things, about the ANC. From this, he inferred that they were members of the security police.[658] In Pretoria, Jan Cronjé, head of the security branch of the South African Police in the Northern Transvaal, was informed that Ebrahim was in Pretoria.[659] He arranged for Ebrahim to be brought to the police headquarters where Cronjé officially arrested him.[660] Ebrahim, who was subsequently charged with treason, then applied for release, submitting that his "abduction in Swaziland took place with the authority and knowledge of the South African Police or other agents of the South African state".[661] The South African police, however, denied that it had anything to do with the kidnapping.[662] Ebrahim's alternative allegation, namely that the kidnappers were South African agents, was left unanswered by the police.[663] Be that as it may, the above-mentioned Trial Court rejected the application[664] and Ebrahim was tried, convicted and sentenced to 20 years' imprisonment.

Because of the denials of the South African police, the Supreme Court – in the words of Judge Steyn who wrote the opinion of the Court – stated that it had to be

[657] See *ibid*. The opinion of the Supreme Court did not say anything about the level of violence used against Ebrahim (except that he was "forcibly abducted"). In addition, the opinion informs that "[h]e was bound, blindfolded and gagged". (*Ibid*., p. 890.) In 95 *International Law Reports* (1994), where one can find more details on the abduction itself, one can read that Ebrahim's kidnappers "pointed guns at him and warned him that they would kill him if he screamed or made a noise." (95 *International Law Reports* (1994), p. 420.)

[658] See *ibid*., p. 421.

[659] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 891.

[660] See *ibid*. It may be rather amusing within the context of this academic study to note that Cronjé was accompanied by two other senior police officers and that, when Ebrahim complained to one of them, namely Brigadier Willem Schoon, that he had been abducted from Swaziland, that Schoon replied that he was now in South Africa and "that his alleged abduction was therefore of academic interest only". (95 *International Law Reports* (1994), p. 422.) As will be shown *infra*, the Supreme Court clearly disagreed with Schoon.

[661] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 891.

[662] See *ibid*.

[663] See *ibid*.

[664] Ebrahim sought the following orders: "1. Directing and holding that the applicant is not amenable to the criminal jurisdiction of the Court in respect of the indictment referred to in paragraph 3. 2. Declaring that the applicant's apprehension and abduction in the Kingdom of Swaziland on 15 December 1986 and his subsequent transportation to the Republic of South Africa and purported arrest and detention pursuant thereto is in breach of international law and wrongful and unlawful. 3. Declaring that the applicant has not properly and lawfully been arrested and properly and lawfully been arraigned before a court of competent jurisdiction for the purposes of trying him on the indictment proffered by the prosecution against the applicant and two other persons. 4. Declaring that the applicant is entitled to be discharged from his imprisonment and detention at present pending his trial on the said indictment. 5. Granting to the applicant further or alternative relief." (95 *International Law Reports* (1994), pp. 418-419.)

accepted that they were indeed not involved in the abduction.[665] Nevertheless, it also had to be accepted that it was very likely that the kidnappers were South African State agents.[666] Taking this into account, the Supreme Court looked at the basic arguments of Ebrahim "that the abduction was a violation of the applicable rules of international law, that these rules are part of our law, and that the violation of these rules deprived the trial court of competence to hear the matter".[667] Ebrahim hereby focused on traditional international (namely inter-State) law and not, for example, on human rights law:

> It will be submitted that, having regard to all the facts, the appellant was not amenable to the criminal jurisdiction of the Court a quo, alternatively that if such jurisdiction in fact existed in theory, the Court a quo had a discretion as to whether the appellant should be tried and should, in the exercise of that discretion, have refused to exercise its jurisdiction in circumstances where there had been a fundamental breach of those rules of acceptable behaviour which govern the comity of nations.[668]

The Supreme Court subsequently made clear that it would not look at international law but at "our common law"[669] to resolve the issue.[670]

As already explained in footnote 650, this common law is a mixture of Roman-Dutch law and English common law. Hence, what the Supreme Court had to do was to examine the perspective of Roman law, Roman-Dutch law and South African law (which has been strongly influenced by English common law) on the present problem.

In its review of Roman law, the Supreme Court mentioned exactly the same three rules from the *Digest* as already presented in Chapter II of this study, namely D.1.18.3,[671] D.2.1.20[672] and D.48.3.7.[673] The Court then explained that

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[665] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 891.

[666] See *ibid*., p. 891: "All the circumstances surrounding the abduction point very strongly to an involvement of the state in the abduction. This is confirmed by the failure of the police to disclose the identity of the abductors to the court despite the fact that their identity must have been known to the police. The appeal must therefore be decided on the basis that the appellant was abducted by agents of the South African state."

[667] *Ibid*., p. 892.

[668] *Ibid*.

[669] *Ibid*.

[670] See *ibid*.

[671] "The governor of a province has authority only over the people of his own province, and that only while he is in the province. For the moment he leaves it, he is a private citizen. Sometimes he has power even in relation to non-residents, if they have taken direct part in criminal activity. For it is to be found in the imperial warrants of appointment that he who has charge of the province shall attend to cleansing the province of evil men; and no distinction is drawn as to where they may come from." (D.1.18.3 (from Paul, *Sabinus, book 13*).) See Mommsen, Krueger and Watson 1985 A, pp. 34-35 and Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), pp. 892-893.

[672] "One who administers justice beyond the limits of his territory may be disobeyed with impunity". (D.2.1.20 (from Paul, *Edict, book 1*).) See Mommsen, Krueger and Watson 1985 A, p. 42 and Supreme

> [t]his limitation on the legal powers of Roman provincial governors and lawgivers is understandable and was unavoidable in the light of the great number of provinces comprising the Roman Empire in classical times, with their ethnic and cultural diversity, and their different legal systems which the politically pragmatic Romans allowed to remain largely in force in their conquered territories. Until late in the history of the Roman Empire certain provinces were controlled by the Senate and others by the Emperor. Intervention by one province in the domestic affairs of another was a source of potential conflict. In order to maintain sound mutual relations, a practice developed among provincial governors relating to the arrest and extradition of offenders.[674]

After having clarified that this practice became law in Justinian's *Novellae Constitutiones*,[675] the Supreme Court argued:

> It is inconceivable that the Roman authorities would recognize a conviction and sentence, and allow them to stand, when they were the result of an abduction of a criminal from one province on the order or with the co-operation of the authority of another province. This would not only have been an approval of illegal conduct, and therefore a subversion of authority, but would also have threatened the internal inter-provincial peace of the Empire.[676]

One can wonder, as was already explained in Chapter II, whether this is correct. After all, the fact that an inter-State abduction was forbidden in antiquity does not

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Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 892.

[673] "It is customary for the governors of provinces in which an offense has been committed to write to their colleagues [in whose provinces] the perpetrators are alleged to live, requesting that they be returned along with those who are to prosecute them; this also is laid down in a number of rescripts." (D.48.3.7 (from Macer, *Duties of the Governor, book 2*).) See Mommsen, Krueger and Watson 1985 B, p. 801a and Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 893. (Note that the *Ebrahim* case speaks of "Macer, *Duties of the Governor, book 1*" here, but this is incorrect.)

[674] *Ibid*.

[675] See *ibid*. See Novella 134, Chapter 5: "When any one of the criminals whom we have just mentioned conceals himself, or leaves the province in which he has committed the offence, We order the judge to call him into court by the publication of lawful edicts, and if he does not obey, the judge shall proceed in the manner prescribed by the laws. If it should be ascertained that the guilty party is living in some other province, We order the judge of the district in which the offence was committed to notify the judge of the province in which the delinquent resides, by means of a letter, to arrest him on his own responsibility and that of his court, and to send the accused to him. When the judge who has received a public letter of this kind fails to do what We have stated, and his court does not surrender the criminal, or if it does not execute the orders given it, We decree that the said magistrate shall pay a fine of three pounds in gold, and his court an equal amount. If, induced by a desire for gain, a judge, or any officer of his court, does not arrest a person of this description, or if, after having arrested him, he does not deliver him up, he shall, after conviction, be deprived of his office, and sent into exile."

[676] *Ibid*., p. 894.

necessarily mean that the judges in those days could not opt for a *male captus bene detentus* outcome.[677] (This point will be further examined shortly.)

In its examination of Roman-Dutch law, the South African Supreme Court referred to several Roman-Dutch jurists from the 16th to the 19th century to conclude that "it is clear that the unlawful removal of a person from one jurisdiction to another was regarded as an abduction and as a serious breach of the law in Roman-Dutch law".[678]

However, this still does not say anything about the consequences of such an illegality on the jurisdiction of the court.[679]

This was the next point to be examined by the Supreme Court. It explained:

> A further question is whether a conviction and sentence following such an abduction, in the jurisdiction to which the person was abducted, had any legal validity in Roman-Dutch law. In other words, did the court before which the abducted person was brought to trial have the competence to try him? One would expect that it was not competent for the same reasons advanced in respect of the Roman Empire. Furthermore, it would have been pointless to have a strict prohibition on the violation of territorial sovereignty if it could be simply ignored without any adverse consequences in the ensuing legal proceedings.[680]

After referring to a 17th-century case in Brabant (the Netherlands), where two Dutch lawyers indeed deemed a court order following an abduction to be invalid, the Supreme Court concluded: "It is therefore clear that in Roman-Dutch law a court of one state had no jurisdiction to try a person abducted from another state by agents of the former state."[681] Although one can doubt whether it was really *that* certain that a

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[677] It may be good to refer here again to the *Eichmann* analogy: even though the UNSC did indeed condemn the inter-State abduction of Eichmann, it did not lead to the refusal of exercising jurisdiction in the Israeli courts, where the judges applied *male captus bene detentus*.

[678] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 894.

[679] Note, however, that the Supreme Court also explains that one of these Roman-Dutch jurists, Johannes Voet (a law professor at Leiden University) in turn referred to the 16th-century Spanish jurist Gomezius (Antonio Gomez) and that this Gomez *did* speak about the consequences of an abduction. According to the Supreme Court, he "stated that a judge might not order or effect the arrest of a criminal in another's territory and that if this was done the arrested person was to be immediately released." (Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 894.)

[680] *Ibid.*, p. 895. The last point is especially strong in case a weaker State does not complain against a violation of its sovereignty by a more powerful State. In that case, only the judge can enforce the prohibition on inter-State abductions. See also Dugard 1991, p. 201: "The international law rule prohibiting cross-border abductions can be enforced in two ways. First, the state whose sovereignty has been violated may seek to secure the return of the abductee by means of diplomatic protest and pressure. Secondly, the courts of the state in whose territory the abductee is brought to trial may decline to exercise jurisdiction. The first method has proved to be ineffective in the South African context as states have generally failed to protest against the actions of their more powerful neighbour. Thus Swaziland failed to protest against the arrest of Ebrahim (…). The second method is potentially much more effective as it removes the object of the abduction and serves to discourage future abductions."

[681] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 895.

court did not have jurisdiction following an abduction by State agents, it cannot be denied that logic and the case mentioned by the Supreme Court[682] are more in favour of a *male captus male detentus* than a *male captus bene detentus* outcome.

The last category the Supreme Court had to examine was the common law of South Africa, which "is still substantially Roman-Dutch law as adjusted to local circumstances".[683] After explaining that neither statutory nor case law exclude the possibility of applying the Roman-Dutch rule, the Supreme Court clarified that previous "judgments dealing with the effect of abduction from another state on the jurisdiction of our courts to try an abducted person are based either on facts that differed materially from the present or failed to consider the question in the light of the common law".[684] Although it may be true that these cases did not look at Roman-Dutch law, one can wonder whether the cases were factually really that different from the present one.[685] In addition to this, the English common law was disposed of quite easily, even though Dugard had argued that the South African common law "has been strongly influenced during the past two hundred years by the English common law".[686] Reading the opinion of the Supreme Court, one gets the impression that the Supreme Court wants to reach a certain outcome, even if the legal avenue in reaching that outcome is arguably not without its flaws. Be that as it may, the Supreme Court concluded that the Roman-Dutch rules were still part of the South African law.[687]

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[682] Note also the consequence of release put forward by Gomez, see n. 679.

[683] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 895.

[684] *Ibid*.

[685] See, for example, the cases *R v. Robertson* 1912 TPD 10 and *Abrahams v. Minister of Justice* 1963 (4) SA 452 (C), see Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), pp. 895-896: "In Abrahams v. Minister of Justice 1963 (4) SA 542 (C) the applicant applied for habeas corpus on the ground that he was abducted from Bechuanaland (as Botswana was then known) by members of the South African Police and taken to Gobabis in South West Africa (now Namibia) where he was duly arrested. Relying on the authority of R v. Robertson 1912 TPD 10 and R v. Officer Commanding Depot Battalion, Colchester: Ex parte Elliot[t] [1947] 1 ALL ER 373, the court decided that where a lawful arrest took place within a state's own borders the circumstances under which the accused was brought into the state were irrelevant. In Robertson's case it was argued that a person who had been unlawfully arrested in Natal and brought to the Transvaal could not be subjected to extradition proceedings in the Transvaal in answer to an extradition request from Britain to stand trial in Scotland. The argument was dismissed by the court as follows: "The applicant was brought into the Transvaal. Whether he was brought here legally or illegally, this Court has nothing to do with: as a fact he was brought here, and thereafter he was arrested, on the 10th October, on a valid warrant which had been issued in Scotland, and which in my opinion was duly endorsed. That being so, it is not necessary to go into the other points which have been raised" (at 12-13) [emphasis in original, ChP]."

[686] See n. 650. See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896: "Elliot[t]'s case was also an application for habeas corpus. (…) The case was decided according to the principles of the English common law. It is consequently not relevant (…) [emphasis in original, ChP]." See also Semmelman 1993, p. 134.

[687] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896.

After these reviews of the different legal systems, the Supreme Court made an assessment of the above information in which it again confirmed the above-mentioned impression that the Supreme Court wanted to break with the (legal) past and install new legal principles for the reborn State of South Africa.[688] Although many of them are indeed exemplary of a healthy system of law and hence cannot but be applauded, one can wonder whether they also have the solid basis in the (Roman-Dutch law influenced) law of South Africa as claimed by the Supreme Court.

An example is the introduction of the concept of the protection and promotion of human rights which was not mentioned at all in the Supreme Court's overview of Roman-Dutch rules.[689]

> Several fundamental legal principles are contained in these [Roman-Dutch] rules, namely the protection and promotion of human rights, good inter-state relations and a healthy administration of justice. The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice. This applies equally to the state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state

[688] At that moment in time, South Africa was transforming from a State of apartheid into a democratic country. See in that respect also Dugard 1991, commenting on the case, on pp. 200, 202 and 203: "In the 'bad old days' when 'instruments' of the South African state frequently crossed into neighbouring territories to arrest (or kill) anti-apartheid 'operatives', South African courts readily assumed jurisdiction over kidnapped persons, relying on English decisions (…) and the decision of the Israeli Supreme Court in *Attorney-General, Israel v Eichmann* (…) which studiously followed Anglo-American precedent." "*Ebrahim* is a welcome decision. It is a great judgment which emphasises the importance of respect for fair standards of criminal justice, due process of law, human rights and international law and warns against the abuse of law by the state. It is unfortunate that such a decision was not handed down when it was most needed and that instead state lawlessness was often condoned by the courts in the interests of apartheid. Had judgments of this kind been given in the days of apartheid our courts would not have faced the crises of legitimacy that confronts them today." "What is to become of Roman-Dutch law in a post-apartheid society? Is it to be replaced by a code? Is it to fall into disuse until it is replaced by a South African version of the English common law? Or is it to keep its place as a proud, enlightened system, forming the most significant component of the South African common law? To do so, it needs to be rescued by the courts from the reputation it acquired under the system of apartheid. Judgments such as *Ebrahim* are an essential part of this rescue operation." Semmelman (1993, p. 133) is even more outspoken: "The *Ebrahim* case provides an interesting contrast with *Alvarez*. While the two opinions are readily distinguishable doctrinally, the unusual holding in *Ebrahim* and the Court's apparent eagerness to reach its conclusion suggest that the political situation in South Africa may have played a crucial role in the decision." See also *ibid*., pp. 136-137.

[689] See, however, Dugard 1991, p. 203: "During the past 40 years the entire South African legal system has been permeated by apartheid. Unfortunately Roman-Dutch law did not escape his contagion as the failure of the Appellate Division, under the leadership of LC Steyn, N Ogilvie Thompson, F L H Rumpff and P J Rabie [these were the chief justices of the Appellate Division between 1959 and 1989, ChP] to apply the principles of Roman-Dutch law in disputes between individual and state inevitably created the impression that Roman-Dutch law either had nothing to say on human rights issues or was a silent collaborator in the apartheid system."

> itself is involved in an abduction across international borders, as in the present case, its hands are not clean.[690]

The Supreme Court, also mentioning that "[s]igns of this development appear increasingly in the municipal law of other countries",[691] concluded that "according to our common law, the trial court had no jurisdiction to hear the case against the appellant. Consequently his conviction and sentence cannot stand."[692]

Although the legal methodology of this decision is arguably not without its flaws, the case is still important for many reasons.

First, it must be noted that the State from which Ebrahim was abducted (Swaziland) did not protest against the abduction.[693] This means that the Supreme Court argues that even if there is no actual friction between two States, a 'normal' abduction (without serious mistreatment) performed by State agents must not lead to a trial. This, in turn, means that the focus should not be only on traditional international (inter-State) law[694] but also on other aspects such as human rights protection and a healthy administration of justice.

Secondly, the Supreme Court argues that in the case of an international abduction performed by State agents,[695] a court *has* no jurisdiction to hear the case.[696]

This means that there is no discretion for judges in deciding whether or not they should exercise jurisdiction: they automatically have no jurisdiction in these kinds

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[690] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896.

[691] *Ibid*. Note, however, that the Supreme Court hereby only referred to the already discussed *Toscanino* case (and cases mentioned therein). It did not address the aftermath of *Toscanino*, such as the *Lujan* case. For criticism on this point, see Semmelman 1993, p. 136.

[692] Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 899. Note that next to this *male captus male detentus* outcome, Ebrahim received compensation in a civil case, see Baker 2004, p. 1388.

[693] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 891: "There was no suggestion made in the application that the government of Swaziland protested to the South African government over appellant's abduction."

[694] Although it is true that the Supreme Court decided this case on the basis of national law only, the judges clearly underscored the importance of respect for international law. See also Dugard 1991, p. 200 and Cowling 1992, pp. 248-250.

[695] See for criticism on this point Nsereko 2008, p. 61: "While the court's decision is salutary, its value is somewhat diminished by the distinction that the court drew between action by private and official agents. The distinction is unfortunate as it allows the court to ignore the illegal actions of private agents, however outrageous, and enables the state of prosecuting authorities to benefit from them." *Cf.* also Costi 2003, p. 90.

[696] Cowling (1992, p. 255) also refers to another important aspect of this case: "Akehurst remarks that the number of extradition treaties has declined recently, and the reason for this could well be that states prefer to enjoy a free hand in this respect and hence not be tied to any obligations or procedures. This is why it is necessary for the courts to step in to provide assistance to individuals by ensuring that basic standards of due process across international boundaries are maintained and that extradition is not to be regarded exclusively as facilitating inter-state co-operation in action against crime. *Ebrahim's* case represents a landmark in this respect, since the Appellate Division was prepared to come to the assistance of the individual without relying on the existence of an extradition treaty [original footnote omitted, ChP]."

of pre-trial irregularities. Because of this automatism, this case is the most perfect example of the *male captus male detentus* reasoning, which, after all, also encompasses an automatism (in the case of a *male captus*, a *male detentus will* follow.) However, it is clear that the rigidity of this ruling will be difficult to accept in the world of judges, who arguably wish to have at least *some* room and flexibility in weighing all the different interests at stake. Practice after *Ebrahim* has also confirmed this. In the words of Michell:

> The South African courts have (...) gone a considerable distance in elaborating the framework first set out in *Ebrahim*. The subsequent decisions, however, have been surprisingly inconsistent, given *Ebrahim*'s strict rule against transnational forcible abduction. Part of the explanation for the murky state of the South African law after *Ebrahim* may simply be the reluctance of some judges to let go of the *male captus bene detentus* rule. This reluctance may also be inspired by the strictness of the *Ebrahim* doctrine itself, which requires that courts divest themselves of jurisdiction. Where the facts are not as stark as in *Ebrahim*, judges may seek to avoid having to apply such a strict rule.[697]

Another interesting case often mentioned in the *male captus* discussion is the Zimbabwean[698] *Beahan* case.[699] Beahan, a resident of the Republic of South Africa and a UK citizen,[700] "had planned with others to assist convicted prisoners serving sentences in Zimbabwe to escape".[701] However, when Beahan wanted to enter Zimbabwe to carry out his plan, it became clear that his vehicle was going to be searched by the customs officials.[702] As a result of that, he fled into Botswana where he was arrested a day later.[703] A couple of days passed during which Beahan "was not taken before a court or given access to legal representation"[704] and then, "the Botswana Police handed the appellant over to the Zimbabwe Police at the border. There was no extradition treaty between Botswana and Zimbabwe."[705] In Botswana, Beahan "was charged with having attempted to commit an act of terrorism or sabotage by conspiring with others to release convicted prisoners from Zimbabwean prisons".[706] Beahan claimed "that the Court lacked jurisdiction, because he had been unlawfully removed from Botswana, that his removal had not complied with

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[697] Michell 1996, p. 458.
[698] The Zimbabwean legal system is a mixture of civil, common and customary law, see JuriGlobe's 'Alphabetical Index of the Political Entities and Corresponding Legal Systems' available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php.
[699] Supreme Court, *Beahan* v. *State*, 4 September 1991, *International Law Reports*, Vol. 103 (1996), pp. 203-224.
[700] See *ibid*., p. 206.
[701] Supreme Court, *Beahan* v. *State*, 4 September 1991, *International Law Reports*, Vol. 103 (1996), p. 203 (summary).
[702] See *ibid*.
[703] See *ibid*.
[704] *Ibid*.
[705] *Ibid.* This was because "[m]embers of the Botswana Police Force became aware that the accused was wanted by the Zimbabwe Republic Police". (*Ibid*., p. 207.)
[706] *Ibid*., p. 203 (summary).

Botswana laws regulating deportation and that it was, in effect, an extradition in which the proper procedures had not been followed".[707]

The Supreme Court, in the words of Chief Justice Gubbay who delivered the judgment, first reiterated what the High Court (whose decision was now under appeal before the Supreme Court) had decided on this point:

> [W]hile the Court has jurisdiction to try a person properly brought before it regardless of the means used to secure his presence before the Court nevertheless the Court can decline to exercise that jurisdiction in respect of a person irregularly or illegally brought before it and can decline to exercise jurisdiction as a mark of disapproval of the abuse of process (…).[708]

Then, Justice Gubbay tried to find out whether this "middle path" solution[709] was correct. In doing so, it made an overview of many cases, several of which have also been reviewed in this book, such as the cases of *Ebrahim*,[710] *Scott*, *Elliott*, *Driver*, *Ker*, *Frisbie*, *Toscanino*[711] and *Lujan*. Then, he concluded:

> In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting state. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual.[712]

It is clear from this statement that Gubbay, who also focuses on the international law dimension and who does not seem to demand a protest from the injured State either

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[707] *Ibid*.
[708] *Ibid*., pp. 208-209.
[709] See *ibid*., p. 209.
[710] Of which Justice Gubbay stated: "This decision commends itself and I respectfully agree with it. Not only is it founded on the inherited principles of common law which this country shares with South Africa, it has the added quality of being in accord with justice, fairness and good sense." (*Ibid*., p. 211.)
[711] Of which Justice Gubbay stated: "It is refreshing to note (…) that a departure from the restricted concept embodied in the *Ker-Frisbie* rule is expressed in the bold judgment of Mansfield Circuit Judge in *United States v Toscanino*". (*Ibid*., p. 213.) Although he also noted (*ibid*.) that "[t]his dictum does not, of course, accurately reflect the law of the United States", he found that "[n]onetheless, it signifies to me a realistic and responsive approach for the need to recognise and enforce fair standards of criminal justice towards which every legal system should strive." (*Ibid*., p. 214.) Given this remark and the remark he made in the context of the *Ebrahim* case (see the previous footnote), it is clear that Gubbay is more in favour of the *male captus male detentus* reasonings. This is also evidenced by his conclusion which will now be cited in the main text.
[712] *Ibid*.

(*cf. Ebrahim*), is in favour of the *male captus male detentus* reasoning, although he does not go that far as the *Ebrahim* case in holding that a court is *automatically* deprived of jurisdiction in such cases; courts *should* refuse jurisdiction.[713] However, this reasoning was not really of any help to Beahan as "the circumstances under which the appellant was brought to this country from Botswana cannot be likened to an abduction by agents of the government of Zimbabwe".[714]

Only two further cases need to be discussed in this overview, first the 2002 Scottish case *Vervuren* and second the 2004 Namibian[715] case *Mushwena*.

In the *Vervuren* case,[716] a Dutch national was "charged (...) with the importation and supplying of a controlled drug, namely amphetamine".[717]

On 30 May 2001, Vervuren was arrested and detained in Portugal.[718] After being extradited to Scotland, he appeared before a Scottish court on 27 July 2001, where he claimed that his arrest and the extradition proceedings in Portugal had violated Articles 5 and 6 of the ECHR because he had not received effective legal assistance at the extradition hearings in Portugal, because he had not been informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him and because he had signed the relevant documentation under undue pressure.[719] Vervuren, who – because of these circumstances – had signed the relevant documentation for his accelerated extradition procedure "Under protest",[720] submitted that the (already discussed, see Subsection 3.1) Scottish *male captus bene detentus Sinclair* case was no longer good law and that *Bennett* had to be followed:[721]

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[713] Note that Justice Gubbay was "prepared to assume that a discretion vested in the learned judge a quo to refuse to exercise jurisdiction [under the abuse of process doctrine, ChP]". (*Ibid*., p. 216.)

[714] *Ibid*., p. 214. This was because the *male captus* of Beahan "did not constitute a violation of international law for it involved no affront to the sovereignty of a foreign state. (…) The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practised by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana police in whose custody he was. Where agents of the state of refuge without resort to extradition or deportation proceedings surrender the fugitive for prosecution to another state, that receiving state, since it has not exercised any force upon the territory of the refuge state and has in no way violated its territorial sovereignty, is not in breach of international law". (*Ibid*., with reference to, among other things, Morgenstern 1953, pp. 270-271.)

[715] The Namibian legal system is a mixture of common and civil law, see JuriGlobe's 'Alphabetical Index of the Political Entities and Corresponding Legal Systems' available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php.

[716] High Court of Justiciary, *HM Advocate v. Vervuren*, 12 April 2002, 2002 *S.L.T.* 555.

[717] *Ibid*., p. 556.

[718] See *ibid*. Note that that other *male captus* case from Scotland (*Sinclair*) also involved, among other things, alleged irregularities in Portugal.

[719] See *ibid*.

[720] *Ibid*., p. 557.

[721] See *ibid*., p. 559: "Senior counsel submitted that the case of Sinclair v HM Advocate was no longer good law. The court should prefer the views expressed in the House of Lords in R v Horseferry Road Magistrates' Court, ex p Bennett. The court should also take into account the preamble to the ECHR, and the need to preserve the integrity of the rule of law: cf dicta of Lord Griffiths in Horseferry. Counsel submitted that what had occurred in (...) [the court in Portugal, ChP] fell within the definition "serious abuse of power" referred to by Lord Griffiths at p 62. (...) There was no need for the United Kingdom to

> [F]irst, that the British authorities had a duty, when making an extradition request to a country such as Portugal, to be satisfied that no illegality occurred in the subsequent Portuguese extradition proceedings. Secondly, even if that proposition was wrong, and there was no positive duty upon Britain to vet the Portuguese extradition proceedings, the British government and authorities could not turn a blind eye to irregularities in the Portuguese extradition proceedings once these irregularities had been brought to their attention (...). The Lord Advocate, on becoming aware of the illegality (...), should not raise proceedings by way of indictment against the minuter [this is Vervuren, ChP].[722] Thirdly, the British authorities could not collude with a foreign state in order to benefit from a person's presence in the United Kingdom: in other words, the end could not justify the means.[723]

With respect to his first proposition, Lady Paton, writing the opinion, noted that "[s]enior counsel could point to no authority supporting such a proposition"[724] and then made the following (and already-mentioned, see footnote 7) explanation that

> the approach adopted by the United Kingdom courts in the past was that it was irrelevant how a person arrived on the airport tarmac: all that mattered was, once the person was in the United Kingdom, was he subject to due process, to fair proceedings. All the courts had been concerned about was the propriety of the domestic procedure.[725]

Although senior counsel for Vervuren submitted "that some authority for his submission that a positive duty of checking rested upon the United Kingdom

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have been involved in such serious abuse of power: the United Kingdom had merely to be aware of the abuse of power." Although counsel accepted that the facts in *Bennett* (where "the accused had in effect been kidnapped: there had been no court proceedings, no extradition proceedings" (*ibid.*)) were graver than in the present case, he "argued that, in the present case, the extradition procedure had been disregarded by the Portuguese authorities, and that the authorities in the United Kingdom ought to know of this either through exercising due diligence and actively checking the procedures (the first argument) or by becoming aware of the illegality as a result of the minute in the current proceedings (the second argument)." (*Ibid.*) See also *ibid.*: "[C]ounsel argued that the sentiments and principles in Horseferry, together with the advent of the Human Rights Act, placed constraints upon the Lord Advocate, and required the court to look at the procedure by which the minuter came to be in a Scottish court. The court could not support or turn a blind eye to an illegality. Signatory states could not allow other signatories to the ECHR to abuse their rights."

[722] See also *ibid.*, p. 558: "Senior counsel submitted that if there appeared to be a substantial infringement of the minuter's human rights, this court should give redress by prohibiting the Lord Advocate from acting further. Reference was made to s 57 of the Scotland Act 1998. By continuing with these criminal proceedings against the minuter, the Lord Advocate was acting incompatibly with the Convention, and was attempting to benefit from the illegality perpetrated by the Portuguese authorities. The current proceedings against the minuter should be discharged in the exercise of the court's supervisory power. Alternatively, if the case was not one falling within s 57 (2), the court itself was a public authority, with a duty to preserve the integrity of the High Court: the proceedings should be discharged on that basis also. Alternatively the court could order that an inquiry be made into whether the proceedings should be discharged, founded as they were on the illegality of another state."

[723] *Ibid.*, pp. 556-557.

[724] *Ibid.*, p. 558.

[725] *Ibid.*

Government could be found in the preamble to the European Convention on Human Rights",[726] he "accepted that his first proposition seemed to run contrary to a line of established authority".[727]

Lady Paton did not comment on the second proposition, but she did attack the third because "there was no evidence to suggest that there had been a positive act by United Kingdom Government agents colluding with an illegality in the Portuguese courts".[728]

As a result of this, counsel dropped his third proposition.[729]

Lady Paton divided her opinion in two categories, namely 1) if the *Sinclair* case, where it was decided "that Scottish courts should not inquire into the circumstances whereby an accused person comes to be in Scotland, facing trial there",[730] is still authoritative[731] and 2) if the *Sinclair* case is no longer authoritative.[732]

Paton noted with respect to the first situation that Vervuren's arguments had to be dismissed because *Sinclair* "has not been reviewed by a larger court, nor formally disapproved, nor overturned. Technically therefore it is still a binding authority."[733] Although it may, of course, be the case that *Sinclair* is still good law in Scotland, it seems strange to then also hypothesise this situation: if Paton is indeed of the opinion that *Sinclair* is still binding authority, then why does she use a heading stating "[*i*]*f the case of Sinclair is still authoritative*"?[734]

With respect to the second situation, Paton noted that because of the *Bennett* case (both the one decided by the House of Lords and the one decided by the Scottish court which noted the weakness of the *Sinclair/male captus bene detentus* rule after *Bennett*, see footnote 308) and the ECHR now in force, "it may be necessary that I give a view on the assumption that Sinclair might now be regarded as a doubtful authority".[735]

Paton then returned to the three arguments of Vervuren already mentioned above and rejected the first argument

> to the effect that any ECHR signatory state has a duty to adopt a proactive role in relation to another ECHR state's extradition proceedings, including checking the

[726] *Ibid*.
[727] *Ibid*.
[728] *Ibid*. See also *ibid*.: "There was no suggestion that the British authorities had procured the minuter's signature on the form, or that the British authorities had placed the minuter under any pressure, or that the British authorities had provided the interpreter. Accordingly there was no suggestion that the United Kingdom came to court with unclean hands, or that the state had acted in bad faith. The United Kingdom had merely made a request under the Extradition Act in the normal manner."
[729] See *ibid*.
[730] *Ibid*., p. 560.
[731] See *ibid*., pp. 560-561.
[732] See *ibid*., pp. 561-562.
[733] *Ibid*., p. 561. It must be noted that the House of Lords is the final court of appeal on points of law for the UK (including Scotland) for *civil* cases only (and that *Bennett* was a criminal case). The highest criminal court for Scotland is the Scottish High Court of Justiciary.
[734] *Ibid*., p. 560.
[735] *Ibid*., p. 561.

> regularity and legality of any foreign extradition proceedings initiated as a result of a United Kingdom request for extradition.[736]

As already clarified above, the third argument was dropped because counsel for Vervuren had conceded that there was "no question of inappropriate actings or collusion on the part of the British authorities in the present case".[737] However, Paton noted that both the Prosecution and the Defence agreed that if that had nevertheless been the case, then the following solution could have been relied upon: "if the United Kingdom authorities were guilty of some form of collusion, and did not come to court with clean hands, the courts were entitled to respond by, for example, sustaining a plea in bar of trial."[738] This in a way resembles the statement of Lord Bridge of Harwich in *Bennett* that

> [w]hen it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.[739]

Then, Paton turned to the second and final argument of Vervuren which suggested a broader responsibility[740] for the authorities in the UK, namely that

> once an illegality or irregularity in foreign extradition proceedings had been brought to the attention of the United Kingdom authorities (including the courts), those authorities could not turn a blind eye to them. Once the United Kingdom authorities were aware of either non-existent proceedings, or proceedings which had themselves thrown up an illegality (for example, because the truncated proceedings could not truly be regarded as due process), the United Kingdom authorities were disabled from benefiting from the illegality.[741]

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[736] *Ibid*. See also *ibid*., pp. 561-562: "It seems to me that any ECHR signatory state is entitled, in the absence of any sign or evidence to the contrary, to the presumption omnia rite acta esse. [All things are presumed to be done in due form, ChP.] Moreover, as each state has its own laws and procedures, about which British lawyers, uninstructed in the foreign law, have little or no knowledge or expertise, it would in my view prove a time consuming task were every foreign extradition (made in response to a United Kingdom request) to undergo a full scrutiny by the United Kingdom. There would probably be a need to obtain expert opinion from lawyers about the law of the extraditing state. The resultant procedure would be lengthy, expensive, and cumbersome."

[737] *Ibid*., p. 562.

[738] *Ibid*.

[739] House of Lords, Lord Bridge of Harwich, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 155.

[740] See also n. 287 and accompanying text where it was written that Lord Bridge of Harwich agreed with Lord Griffiths but his test is arguably a little more strict as in his view, the domestic authorities really have to *do* something irregular (and not only be a knowing party to the irregular conduct from, for example, foreign authorities).

[741] High Court of Justiciary, *HM Advocate v. Vervuren*, 12 April 2002, 2002 *S.L.T.* 562.

This rather broad 'knowing but doing nothing' standard[742] resembles the statement of Lord Griffiths in *Bennett* that

> [i]n my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.[743]

Paton accepted "that there may be circumstances where information is placed before a Scottish court which that court could not but regard as prima facie evidence of an irregularity or illegality meriting some further investigation before any trial should be proceeded with".[744] However, "[w]hether or not that investigation might lead to the sustaining of a plea in bar of trial would depend on the circumstances of the case."[745]

Paton then made a comparison with the *Bennett* case, which could be used "as an illustration of the sort of facts which a Scottish court might regard as worthy of investigation",[746] but did not accept that the fact that Vervuren had written "Under protest" on the documents enabling his accelerated extradition from Portugal was sufficient in itself "to demonstrate to a Scottish court some irregularity or illegality or lack of genuine or voluntary consent to the accelerated extradition proceedings".[747]

Hence, the words "Under protest" did not merit further investigation by the Scottish court into the regularity of the Portuguese proceedings.[748] In addition, matters were not altered by the fuller information provided by the Defence.[749] As a result, Paton concluded:

> Taking the minuter's assertions at their highest, as I am invited to do by counsel for the minuter, I do not accept that there may have been in this case the sort of irregularity or illegality contemplated by their Lordships in R v Horseferry Road Magistrates' Court, ex p Bennett, and therefore meriting further investigation. Nor prima facie does there appear to have been a breach of art 5 or 6 of the Convention.[750]

In short, even if *Bennett* and not *Sinclair* was the case to follow here, the arguments of Vervuren had to be rejected.[751]

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[742] Arnell (2004, p. 255) uses the interesting expression of "clean hands" but no "clear conscience".
[743] House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 151.
[744] High Court of Justiciary, *HM Advocate v. Vervuren*, 12 April 2002, 2002 *S.L.T.* 562.
[745] *Ibid.*
[746] *Ibid.*
[747] *Ibid.*
[748] See *ibid.*
[749] See *ibid.*
[750] *Ibid.*
[751] See *ibid.*

Although Paton, because of the two decisions in *Bennett* and the growth of human rights law, also looked at the *hypothetical* situation that the *male captus bene detentus* case of Sinclair was no longer good law,[752] it appears that she is of the opinion that this latter case still represents the law in Scotland, something which has been sharply criticised in literature.[753]

The final case in this chapter is *Mushwena*, also known as the 'Caprivi treason trial',[754] decided by the Supreme Court of Namibia in 2004.[755] In this case, the 13 respondents (including Moses Limbo Mushwena) and 117[756] other persons

> were facing 278 charges of which the most serious are high treason, murder, attempted murder[,] seduction [this should probably be "sedition", ChP],[[757]] robbery with aggravating circumstances, public violence[,] unauthorized possession of firearms and ammunition, theft and malicious damage to property.[758]

All these charges were connected to just one incident, namely an attack by groups of armed men on several Namibian governmental institutions on 2 August 1999 in Katima Mulilo (Namibia), as a result of which several people died and property was damaged.[759] It was explained that "[t]he respondents and their co-accused were part of an exodus of people from the Caprivi Region [of which Katima Mulilo is the administrative centre, ChP] into neighbouring countries that took place as a result of and prior to the incident."[760]

In Botswana, to where the respondents had fled, they were granted asylum and put in refugee camps.[761] However, at various times during 1999, all the respondents (except for one) left these camps again and seemingly went to Zambia – another neighbouring country of Namibia – because it was there that they were subsequently apprehended and detained by Zambian authorities and later handed over to the Namibian authorities.[762] "All the [respondents] claimed in their affidavits that they

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[752] See n. 735 and accompanying text.

[753] See Arnell 2004, p. 251 (abstract): "*Scots law adheres to the rule* male captus bene detentus*. It was recently applied in* H.M. Advocate v Vervuren*, where it was held that no account could be taken by the court of alleged irregularities in an accused's extradition to Scotland. The rule is bad. Human rights and the rule of law stand in opposition to it. It is time for Scots law to limit the scope of* male captus bene detentus [emphasis in original, ChP]."

[754] See Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 249.

[755] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf).

[756] Acting Justice of Appeal O'Linn mentions the number of 107, however, see *ibid*., p. 48.

[757] See *ibid*., p. 48.

[758] *Ibid*., p. 2.

[759] See *ibid*.

[760] *Ibid*.

[761] See *ibid*.

[762] See *ibid*., pp. 2-3. The one who had not left the refugee camps was handed over to Namibia by the Botswana authorities, see *ibid*., p. 3.

were abducted by the Namibian authorities and unlawfully surrendered to Namibia."[763] Namibia argued, however, that the suspects were deported to Namibia with no involvement of the Namibian authorities.[764]

When the case was brought before the High Court in Grootfontein, Judge Hoff decided to release the suspects. Although he did not believe that this case involved abduction comparable with, for example, the *Ebrahim* case,[765] he was of the opinion that another *male captus* technique, namely disguised extradition, had been used to bring 12 of the 13 suspects into the jurisdiction of the Court and that because of this *male captus*, in which the Namibian authorities had been involved,[766] the Court did not have jurisdiction to try the suspects (*male detentus*).[767]

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[763] *Ibid*. One of the clearest accounts of what had happened was provided by Charles Mafenyaho Mushekwa, see *ibid*., pp. 3-4: "We were separated and placed in different camps in Botswana. Others and myself were taken to Dukwe Refugee Camp. Although we had been granted political asylum we still reported to the Police Station three times a day (…). I was not happy with the treatment I received in the camp including the continuous routine of reporting to the Police Station. We were not given enough food so we were starving. Because of these difficulties I decided to leave the country to Zambia. I left with my friend (…). (…) When we were in Zambia we went to the Police Station and reported ourselves there. This was on the 18 of June 1999. We informed the police that we were claiming political asylum. (…) We were later transferred to Mongu Prison. At Mongu prison we were interviewed by members of Zambian Intelligence Office. (…) While we were being interviewed by the State Security Officers, the Namibian Police came and wanted to take us back to Namibia. The Commander of the Zambian Police refused. (…) On the 7th of August we were called by the prison officers to the prison reception where we were handed to an officer from the Office of the President of Zambia. We were initially asked to collect all our belonging as we were made to believe we were being taken to Europe. We then proceeded to the Zambian Airport. We boarded the plane. But before we boarded the plane we enquired whether the plane was suitable to take us all the way to Europe. The plane was a military plane and we were sure that it could not manage to fly all the way to Europe. The pilot assured us that we were right in thinking that the plane would not reach Europe on a single flight, but told us that we would be making a stop over in a number of countries to refuel and that our first stop was Uganda. When we were airborne we saw that we were going in the wrong direction. We landed at Sesheke Air Strip. [This is still Zambian territory, ChP.] We found the Zambian Police had surrounded the Air Strip. A few minutes later Namibia Police also arrived. At that time we were six of us. After disembarking from the plane we were surrounded by both Zambian and Namibian Police. One of my colleagues asked the Zambian Police why they had lied. The Zambian Police said that it was not their problem. The Namibian Police then forcibly took us into their custody. The Namibian Police then forcibly marched us to the Namibian side [emphasis in original, ChP]."

[764] See *ibid*., p. 7.

[765] See *ibid*., p. 8. See also *ibid*., p. 63.

[766] In reaching that conclusion, Hoff took into account the role played by the Namibian Major General Shali who had asked the Zambian authorities to hand over the suspects, see *ibid*., pp. 23-24: "In my view on the facts of this case, the deportation of twelve of the accused persons (…) was indeed a disguised extradition. Major General Shali requested his counterparts in Zambia to immediately hand over specific fugitives they were looking for and according to his testimony the Zambians did exactly what they were asked to do. (…) In my view the protest by the Namibian authorities that they had no part in irregularities which occurred during the deportation procedures in Zambia and Botswana, in itself, cannot come to their rescue since their own initial conduct, by informally requesting the handing over of fugitives and thus bypassing formal extradition proceedings tainted those very deportation proceedings they now want to put at a distance. Even if one accepts, in favour of the State, that the accused persons had been arrested by the respective neighbouring authorities, a decision had not been

The State appealed this decision, ensuring that the Supreme Court had to address the issue. The first judge, Acting Justice of Appeal Mtambanengwe, upheld the State's appeal because he was not convinced that a disguised extradition had occurred in this case (or in any case not a *male captus* in which the Namibian authorities were involved):

> I go along with appellant's counsel's submission that the court *a quo* erred both in fact and in law in reaching its conclusion that the acts of the Namibian authorities in securing the return of the respondents were tainted, more particularly given the fact that the court concluded that no conspiracy or connivance was established between Namibian authorities and Zambian or Botswana authorities. This is so because the evidence does not establish that either Botswana or Zambia rendered the fugitive respondents because of the request by Mayor General Shali;[768] no causal link is shown to have existed between the request and the handing over of the respondents by Zambia or Botswana. The inference sought to be drawn by respondents' counsel from the evidence, and drawn by the court *a quo,* from the fact that some of the respondents had been arrested by respective neighbouring countries authorities and a decision had not been taken and they had not been deported until after the Namibian authorities had requested their return, is not warranted on a proper review of the evidence.[769]

In his judgment, Mtambanengwe stressed that practice shows that courts around the world both defend and reject the *male captus bene detentus* principle. However, the courts which opt for *male captus male detentus* only do so when the prosecuting State's *own* authorities are involved in the *male captus*.[770] A conclusion which

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taken and they had not been deported until some time after the Namibian authorities had requested their return [emphasis in original, ChP]."

[767] See *ibid*., p. 8. See also *ibid*., pp. 21 and 62. According to Hoff, one of the suspects (Charles Samboma) had not been the victim of a disguised extradition, but was nevertheless irregularly brought into the jurisdiction of the Court because there was no proper consent in his removal from Zambia to Namibia.

[768] See n. 766.

[769] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 24.

[770] See *ibid*., p. 33: "The important point that clearly emerges from cases such as (…) Mackeson (…)[,] Bennett (…), (…) Ebrahim (…), (…) Hartley (…) and Beahan (…) is that the court will exercise its power to decline jurisdiction where the prosecuting authorities, the police or executive authorities have been shown to have been directly or indirectly involved in a breach of international law or the law of another state or their own municipal law. In Prosecutor v Dragan Nikolic (…) the Trial Chamber of the [ICTY] discussed the principle *'male captus bene detentus'* as applied or formally applied in various jurisdiction[s]. The cases cited or referred to in that discussion also illustrate the point above in jurisdictions that have moved away from that principle. (…) In that case the Trial Chamber held that misconduct, by somebody other than the prosecution did not form a basis of a successful challenge to the jurisdiction of the Tribunal." As will be shown in Subsection 3.1.4 of the next chapter, this is an incorrect interpretation of the judges' reasoning as the Trial Chamber also held "that, in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting

indeed seems to be correct.[771] Then, he made two very interesting references to observations stemming from the still-to-discuss ICTY Appeals Chamber's decision in the *Nikolić* case, see Subsection 3.1.4 of the following chapter, and from the already discussed ECtHR's decision in the *Öcalan* case, see Subsection 2.2.4 of Chapter III, namely "that even if the activities of the abductors could be attributed to the UN Officers (…) this by itself would not remove the Tribunal's jurisdiction to hear the matter"[772] because the rights of the suspect must be balanced against the fact that he is charged with very serious crimes and that his prosecution is needed (*Nikolić*, *cf.* the German case *Al-Moayad*) and that one must fairly balance "between the demand[s] of the general interest of the community and the requirements of the protection of the individual's fundamental rights [emphasis in original, ChP]"[773] (*Öcalan*).

Hence, Mtambanengwe was of the opinion that the Namibian authorities were not involved in the alleged *male captus* and arguably also that even if they were, the seriousness of the suspects' charges could nevertheless lead to a *bene detentus* outcome. This can be derived not only from the fact that Mtambanengwe refers to the quotations from the *Nikolić*[774] and *Öcalan* cases but also from the fact that he made the following statement in the context of human rights:

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for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated. This, the Chamber observes, is in keeping with the approach of the Appeals Chamber in the *Barayagwiza* case, according to which in cases of egregious violations of the rights of the Accused, it is "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights" [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114.) Mtambanengwe's observation on the same p. 33 of the *Mushwena* judgment that "the Appeal[s] Chamber in the Prosecutor v Dragan Nikolic case (…) upheld the above decision" is also incorrect in that respect as the Appeals Chamber (as will also be shown in Subsection 3.1.4 of the following chapter) held more generally that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined." (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30. See also n. 619 and accompanying text of Chapter VI.) Such a general statement could, of course, be interpreted as meaning that the Appeals Chamber does not necessarily require the involvement of the Tribunal in the violations to refuse jurisdiction in certain cases. Note, however, that in the addendum to his judgment, Mtambanengwe refers to the opinion of Acting Justice of Appeal O'Linn who cites – not very accurately by the way – the last words of the above-mentioned quotation from the ICTY Trial Chamber's decision in *Nikolić*, see Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 38.

[771] Note, however, that in the 1982 Swiss case of X, the Swiss Federal Court issued a *male deditus* decision (but no *male detentus* decision) as a consequence of a *male captus* in which no Swiss authorities had been involved, see n. 445 and accompanying text.

[772] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 33.

[773] *Ibid*., p. 34. See also n. 341 and accompanying text of Chapter III.

[774] As also explained in the context of the *Al-Moayad* case, it must be noted that one could argue, now that the ICTY Appeals Chamber's reference to the *Eichmann* case (as support for the idea that the

> [W]hen one considers the question of human rights care must be taken to balance the rights of accused against these of the victims of their [alleged!, ChP] actions. We have in this case antecedent circumstances where some people lost their lives and property was destroyed as a result of the incident at Katima Mulilo on 2 August 1999. The public interest that those responsible must be brought to justice i[s] a very weighty counter in the balance.[775]

Acting Justice of Appeal O'Linn also reviewed, among other things, the *Nikolić* and *Öcalan* cases.

With respect to the *Öcalan* case, he agreed with the general statement at footnote 341 and accompanying text of Chapter III,[776] but only as support for his observation that

> [t]he answer it seems to me is for states to enact fair but effective procedures, simplified if necessary, for extradition and/or deportation in the exercise of their sovereignty. Then to give effect to due process and the rule of law as laid down by their own laws and that of democratic countries the world over and to intensify and expedite international cooperation to this end.[777]

However, he arguably did not see the *Öcalan* statement as evidence for the idea that, for example, one can weigh the rights of suspects against (the rights of the victims of) their alleged crimes, as was suggested by Mtambanengwe.

Proof of that assertion can be found in the following remark by O'Linn with respect to the *Nikolić* case:[778]

> I have been referred to the following quotation from the Appeal[s] Chamber, which[,] so it is argued, requires the balancing of "rights of the accused[''], against "the crimes

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seriousness of the alleged crimes must be taken into account in the *male captus* discussion), is incorrect, that Mtambanengwe's reference to *Nikolić* is also incorrect. However, as already explained earlier (see n. 565), the ICTY Appeals Chamber also made some observations of its own concerning this issue (after it had discussed the inter-State context). And to those observations, Mtambanengwe can, of course, refer. (Indeed, it can be argued that Mtambanengwe is especially interested in the observations of the ICTY judges themselves.)

[775] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 37.

[776] See also n. 773 and accompanying text.

[777] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 114.

[778] Of which case he also noted that the ICTY held that it agreed with the finding of the ICTR in *Barayagwiza* "according to which in cases of egregious violations of the rights of the Accused, it is "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights" [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114.) See Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 123 and the last words of n. 770.

> committed". The passage however does not do so. What it purports to balance is "international justice" against "infringing to a limited extent in the sovereignty of states."[779]

It appears that O'Linn is thus of the opinion that although the balancing exercise of "international justice" on the one hand and "infringing to a limited extent in the sovereignty of states" on the other may be justified at the level of the international criminal tribunals, this may not be the case at the inter-State level where the concept of State sovereignty plays quite a different role.

O'Linn namely explains that the ICTY in the *Nikolić* case did not deal with a situation, as in this *Mushwena* case,

> where each and every provision of the laws of the affected countries were contravened and thereby not only the fundamental rights of the accused, and their protection provided by those laws, but also an abuse of those laws amounting to a breach of the sovereignty of the states whose sovereign parliaments enacted those laws in the exercise of their sovereignty. (...) In the case of the International Court, the purpose is to try persons who are accused of international crimes against humanity such as genocide where states are enjoined and required to cooperate and assist the Tribunal in its functions: There are special procedures. One of the most important differences is that sovereign national states, can if they so wish, enact laws with mandatory provisions in regard to extradition and deportation. This was done by Namibia, Botswana and Zambia.[780]

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[779] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 124. Although the passage to which O'Linn refers ("[T]he damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved." (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 26.)) does not mention human rights indeed, the passage is preceded by the following words: "Universally Condemned Offences are a matter of concern to the international community as a whole. There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts. This legitimate expectation needs to be weighed against the principle of State sovereignty *and the fundamental human rights of the accused* [emphasis added and original footnote omitted, ChP]." (*Ibid*., paras. 25-26.)

[780] Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), pp. 123-124.

Hence, at the inter-State level, it is, of course, also important to pay attention to the public interest that suspects are prosecuted; but it is never in the public interest to, in doing so, violate, among other things, the sovereignty of other States:

> To see that justice is done not only to accused persons, but also to the victims of crime is part of the aim of the Rule of Law and the public interest. Nevertheless, there is no good reason why the State's officials should flout the constitution and laws of their own country and those of neighbouring states. Such abuse of process in countries which subscribe to the Rule of Law, can never be in the public interest.[781]

In contrast to Mtambanengwe, O'Linn was of the opinion that that was what had happened here; the Namibian authorities *were* involved in the irregular transfer[782] of the 12 suspects to Namibia:[783]

> On the evidence before Court, Namibia was, if not the main instigator, at least a "knowing party", in the words of Lord Griffiths in the Bennet[t] decision. Lord Griffiths also made it clear that a situation where "a practice developed where the police or prosecuting authorities in this country ignored extradition procedures by a mere request to police colleagues in another country, they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that the Court should declare itself to be powerless and stand idly by,…" The case now under consideration is precisely such a case.[784]

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[781] *Ibid.*, p. 165. See also *ibid.*, p. 203: "I must also point out that the "public interest" is not an interest apart from or in opposition to the Rule of Law, due process and the fundamental rights of the accused. It is in the public interest to uphold the fundamental rights of the accused persons, just as it is in the public interest to protect victims and the law-abiding citizens at large. (...) I need to emphasize: Nothing in this judgment is intended to discourage cooperation between police, military and immigration officials of the Namibian State with their counterparts in neighbouring states. What cannot be allowed however, is cooperation in taking short cuts in conflict with the express provisions of the domestic law of these countries and even of International Law, because such actions will gravely undermine the Rule of Law, entrenched in the Namibian Constitution, which is the Supreme Law of Namibia. Such actions cannot be justified as in the public interest."

[782] Although O'Linn speaks of an 'official abduction' (an abduction in which the authorities of Zambia cooperated with their Namibian colleagues, see also ns. 21 and 63 of Chapter III and n. 94 of the present chapter), he does not find the exact label to be very important, see *ibid.*, p. 187. *Cf.* the final words of Section 1 of Chapter III.

[783] However, in contrast to Judge Hoff, he was of the opinion that the 13th suspect (Charles Samboma) validly consented to his transfer from Zambia to Namibia. As a result, his presence before the Namibian courts was lawful. See *ibid.*, pp. 188-189.

[784] *Ibid.*, p. 180. See also *ibid.*, p. 186: "So what we have is that Namibian officials illegally took of[f] the accused prisoner inside Zambia and Botswana, illegally detained them and illegally removed them across the Namibian border. To do this, the Zambians and the Namibians were dependant on each other and the illegal deed was done by cooperation between them." See finally *ibid.*, pp. 193-194. Again (see also n. 766), the role of Mayor General Shali appeared to be crucial, see *ibid.*, p. 185: "The purpose of the handing over of the "terrorists" by army personnel in Zambia to army personnel in Namibia was so that they "could be brought to book in Namibia" and because General Shali asked for their immediate handover for that very purpose. The handover, when it happened was clearly at the initiative of General Shali and other Namibian military and police officials. In this context the purpose and motive was neither legal extradition nor legal deportation. At least General Shali and the other Namibian Defence

As a result, the Court had to divest jurisdiction. It is interesting to note that O'Linn argues that it is unnecessary to solve the question as to whether a court has a discretion in refusing to exercise jurisdiction or whether it is automatically divested of jurisdiction (see *Ebrahim*) because the result would still remain the same in this case (no jurisdiction).[785] In his judgment, one can find both words which might be seen as evidence for the fact that he supports the first position,[786] but also that he supports the second position.[787]

The third Acting Justice of Appeal, Gibson, agreed with Mtambanengwe. After after referring to the now often-mentioned dictum of the ECtHR in *Öcalan*,[788] she stated:

> [T]he fugitives were collected from Zambia and Botswana without any form of collusion or deception by the agents of Namibia but explicitly at the request of the two foreign countries.[[789]] Even if it were found that Zambia and Botswana in doing so acted in breach of their own municipal laws that was not a matter for the concern of Namibia.[[790]] Therefore there is no justification for holding that Namibia's hands were not clean on account of the above circumstances.[791]

Force and police officials influenced the handing over, or knowingly cooperated [emphasis in original. ChP]."

[785] See *ibid*., p. 197.

[786] See *ibid*.: "[I]n my respectful view, it was not necessary for the presiding judge to expressly state that he was exercising a discretion, although it would have been prudent to do so."

[787] See *ibid*., p. 174: "[M]y view is that a total disregard of the laws of the relevant states in regard to extradition and/or deportation and even of international law, is in fact "a wrongdoing of the most serious kind". Such wrongdoing is also "exceptional" and falls within its own distinct class or category of gross illegality and abuse, which without more, will *require* a criminal court to decline jurisdiction [emphasis added, ChP]." See also *ibid*., p. 197: "It follows if the Court *a quo* followed Ebrahim, and thus the Namibian common law, he would not have been required to exercise the "discretion" referred to." See finally *ibid*., p. 209: "The "balancing" would certainly be relevant if the Court was not as in Ebrahim, Wellem and Buys, bound to apply the Roman Dutch Common Law, which requires the Court to refuse jurisdiction, when it is proved that the applicable legal procedures were not followed [emphasis in original, ChP]." This quotation also mentions two other cases in which the strict *male captus male detentus* reasoning of *Ebrahim* was followed but other cases after *Wellem* and *Buys* overruled these two cases, both implicitly and explicitly, see *ibid*., p. 160. See also Michell 1996, p. 458, who notes that after *Ebrahim*, "[t]he subsequent decisions (...) have been surprisingly inconsistent". (See also n. 697 and accompanying text.)

[788] See Supreme Court of Namibia, *The State v. Mushwena and Others*, 'Appeal judgment', 21 July 2004, Case No. SA6/2004 (available at: http://www.superiorcourts.org.na/supreme/docs/judgments/Criminal/Mushwena.pdf), p. 245.

[789] The request by Mayor General Shali was deemed not to be relevant here, see *ibid*., p. 246: "In the instant case, the actions of the Namibia officials which were censured by the trial Court as having "tainted" the process of procuring the fugitives from Botswana and Zambia only consist of a request by the officer commanding the Namibian forces to his counterpart in Zambia and nothing further is suggested by this request."

[790] This would, however, be different in the case of "a breach of international law or gross invasion of human rights." See *ibid*., p. 223. Apparently, Gibson was of the opinion that this had not occurred here.

[791] *Ibid*., pp. 247-248.

The penultimate Justice to give his opinion was Acting Chief Justice Strydom.

Although he was of the opinion that, because of the cooperation between the authorities of the States involved, no international law had been violated (thereby arguably adopting a rather old-fashioned (inter-State) version of the concept of international law),[792] he did agree with Justice O'Linn that the way 12 of the 13 suspects were brought from Zambia and Botswana into Namibia was nevertheless irregular, that Namibian authorities were actively involved in this irregular transfer[793] and hence that the Court had no jurisdiction to try them.[794]

The final Justice was Acting Justice of Appeal Chomba who concurred with the views of Mtambanengwe and Gibson, as a result of which the final outcome of this case was – three Justices for and two Justices against – that the appeal of the State was granted and that jurisdiction could be exercised. In his judgment, Chomba, referring to the *Öcalan* case, categorically and arguably also rather bluntly, opted for the importance that suspects of serious crimes are prosecuted, even if irregularities[795] had occurred in the way they were brought into the jurisdiction of the now prosecuting court:

> I readily concede that there are many celebrated decided cases in many countries including South Africa and the United Kingdom in which the plea of lack of jurisdiction by courts of trial has succeeded grounded on the principle that the accused's rendition to the country of trial was unlawful in as much as the laws of deportation or extradition had not been complied with by the surrendering countries. However, in the situation which presents itself in the appeal before us, to use that rationale would not, in my considered opinion, meet the tenets of justice. In this day and age when the world has been and continues to be ravaged by terrorist activity it is otiose to apply that rationale. In my view the rationale on which those celebrated cases are predicated sends wrong signals to potential terrorists. All you have to do is terrorize a state and when you are about to be apprehended by the authorities you cross territorial borders if you have the means to do so and you will be safe unless and until the country of refuge catches up with you and either deports or extradites you under the law. Meanwhile any of your collaborators who were unable to make a cross border escape can face the consequences of the law alone. Furthermore, I think that the human rights of fugitives from the law should not be considered by courts to be of

[792] See *ibid*., p. 255: "In the instant case there was clear co-operation between the officials and forces of Namibia and Zambia and Botswana (...). I have therefore come to the conclusion that in the present instance there was no breach of international law as far as the handing over of the respondents was concerned."

[793] See *ibid*., p. 266: "Because of the involvement of the Namibian police and/or members of the defence force, the respondents were denied any rights they may have had in terms of the deportation laws and extradition laws of Zambia and Botswana and also Namibia. (...) The unlawful action of the Namibian police and defence force members therefore consists in [their] active participation in the handing over of the 12 respondents despite and contrary to reciprocal legislation providing for a procedure and safeguards in such handing over and thereby causing the circumventing of those procedures and rights which the respondents had in terms of that legislation."

[794] With respect to the 13th suspect, Charles Samboma, Strydom agreed with O'Linn that he had validly consented to his transfer from Zambia to Namibia and thus that he could be tried, see *ibid*., p. 265.

[795] Note, however, that Chomba was not of the opinion that international law had been violated in this case, see *ibid*., p. 271.

prior concern over those of victims of terrorism whose security remains endangered as long as the fugitives remain at large.[796]

[796] *Ibid*., pp. 268-269.

CHAPTER VI
CASES BETWEEN STATES AND INTERNATIONAL(ISED) CRIMINAL TRIBUNALS

1 INTRODUCTION

In this chapter, alleged *male captus* cases between States and international(ised) criminal tribunals will be discussed.[1]

After having briefly examined (in Section 2) the main characteristics of the cooperation and transfer regime between States and the two most important international criminal tribunals (other than the ICC), namely the UN *ad hoc* Tribunals, the ICTY and ICTR, attention will be paid (in Section 3) to the *male captus* cases which occurred in the context of these two Tribunals. After that, the system of legal assistance in the context of international*ised* (or hybrid) criminal tribunals (Section 4) and the *male captus* case law stemming from these tribunals (Section 5) will be touched upon. Lastly, Section 6 will address a few final interesting observations stemming from this last context of the internationalised criminal tribunals. It should be noted that in Section 4, only a few general remarks will be devoted to the system of legal assistance in the context of the internationalised criminal tribunals as it is unnecessary for the purpose of this study to explain all the different cooperation regimes of these tribunals in detail. A final point which should be explained is that this chapter will start with the ICTY and ICTR and not with the first international criminal tribunals established after WW II, the IMTs of Tokyo and Nuremberg.[2] This is because it appears that those Tribunals

[1] It is assumed that general information on the international(ised) criminal tribunals and the conflicts which engendered their existence is known to the reader. Such information, which can be found in books such as Romano, Nollkaemper and Kleffner 2004 and Schabas 2006, will thus not be presented here again.

[2] Although there were no international tribunals established after WW I, one (rather unknown) story stemming from this context is that fascinating that it still needs to be mentioned in this book, even if it did not lead to a *male captus* situation in the end. In Art. 227 of the Treaty of Versailles (of 28 June 1919, available at: http://avalon.law.yale.edu/subject_menus/versailles_menu.asp), one can read that the Allied and Associated Powers sought to try the German Emperor William II "for a supreme offence against international morality and the sanctity of treaties" before "[a] special tribunal", "composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan." However, William II fled to the Netherlands and found refuge in the country estate of Count Bentinck at Amerongen. (See also Meron 2006, p. 557.) Then, in early 1919, "the kaiser briefly faced danger from a group of American soldiers who tried to spirit him off to Paris.

never considered a true *male captus* claim – in any case, literature on the *male captus* issue is silent in this context.[3] One explanation for this may be the fact that many suspects were already in allied custody after the war. Hence, there was no need to come up with dubious *male captus* methods of capturing them and bringing them into the power of the Tribunals: they *were* already in the *de facto* power of these Tribunals.[4]

Colonel Luke Lea, former United States senator and publisher of the Nashville *Tennessean*, suspected that the British did not really intend to "hang the Kaiser" and thought that if the kaiser were brought to Paris public opinion would force action. "The capture, trial, and punishment of the Kaiser," he said, "was to the American doughboy the object which inspired him" to fight. Lea undoubtedly wanted to be remembered as the man who achieved the soldier's fantasy, the man who bagged "Kaiser Bill." Lea led six soldiers to Amerongen just after New Year's Day. They planned to seize the kaiser by surprise and roar off to Paris, daring the Dutch to shoot while the kaiser was held prisoner in their car. (...) What had begun as a serious undertaking consequently turned into a semicomic confrontation. The Americans determined to persuade the kaiser to go with them voluntarily to face his accusers manfully. They continued on to the Bentinck estate on the night of January 5, bluffed their way inside the house, and demanded to see Wilhelm II. After a two-hour standoff, during which the kaiser refused to meet with the Americans, Dutch troops surrounded the estate with spotlights and machine guns, forcing Colonel Lea and his men to depart. Subsequently, Allied governments had no more success in getting the kaiser out of the Netherlands than did the venturesome American soldiers [original footnote omitted, ChP]." (Willis 1982, pp. 100-101.) (Two requests for the surrender of William II, in January and February 1920, were refused by the Dutch authorities. "In doing so the Dutch government invoked principles of national constitutional law as well as a secular tradition of granting asylum." (Swart 2002 C, pp. 1642-1643.))

[3] Although it had nothing to do with an *international male captus* situation, it may, however, be interesting to note that Julius Streicher claimed that he was mistreated after being arrested and before being brought to the IMT of Nuremberg. This claim was, however, not accepted by the Tribunal, see the following quote of Streicher, responding to the American psychiatrist Goldensohn in Nuremberg when the latter asked him about his defence: "The main thing I tried to stress was how badly I was treated in the American camp at Freising, but the American prosecutor and the judges ruled that my comments on my poor treatment there had to be expunged from the record because it was irrelevant. I don't think it is irrelevant when we National Socialists are accused of war crimes and of murdering 5 million Jews and millions of other innocent people such as partisans, hostages, war prisoners. Therefore, I should have been allowed to insert into the record of this trial how badly I was treated personally as a prisoner of war, after the war was over, mind you, in Freising." (Gellately 2004, p. 260.)

[4] See Gallant 1994, p. 557 ("Unlike the victors' war crimes tribunals at Nuremberg and Tokyo, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 will probably not find most of its defendants already captured and ready to be tried."), Wald 2001, p. 96 ("the vast majority of the defendants were already in allied hands before trials began") and Zappalà 2002 A, p. 1186 (or – for an almost identical text – Zappalà 2003, p. 67): "It is well known that the Allies, both in Nuremberg and in Tokyo, held defendants in custody before the issue of the indictments. Most of them had been arrested even before the decision to establish an international tribunal was taken and were detained by national contingents. Detention was the general rule and there were no exceptions. Moreover, it seems that there was no chance to argue for provisional release, nor was there any right to challenge the legality of arrest. The reasons for the adoption of this solution are clearly linked to the unique character of those jurisdictions. The Nuremberg and Tokyo Tribunals were international military organs created by victor powers to judge persons responsible for the most heinous crimes. Naturally, the combination of the gravity of the crimes, the international character of the proceedings, and the post-conflict situation created a solid background of reasons to try to prevent any attempt to escape [original footnote omitted, ChP]."). As will be shown in this chapter and in Chapter VIII, the element 'gravity of the crimes' also (indirectly) plays a role in the context of the ICTY/ICTR/ICC to justify provisional

2 MAIN CHARACTERISTICS OF THE COOPERATION AND TRANSFER REGIME IN THE CONTEXT OF THE ICTY AND ICTR

In Chapter III of this book, in which the different *male captus* situations were examined, it was explained that inter-State cooperation is usually achieved by means of extradition, "the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence".[5] Although the fugitive lacks consent by this method, this is not the case with respect to the States involved: they work together because they *consent* to work together, because they *want* to work together. Adjectives which may typify the relationship of States in this context are 'equal', 'reciprocal' and 'horizontal'.[6] Such a relationship "emphasizes state sovereignty and, correspondingly, attributes decisive weight to the interests of the requested state if they are at variance with the execution of the request [original footnote omitted, ChP]".[7]

This is completely different in the context of cooperation between States and the ICTY and ICTR.

This cooperation regime can be seen as *vertical* in nature:[8] it is based on superiority and non-equality: States[9] *must* cooperate with the hierarchically higher Tribunal,[10] whether they want to or not.[11]

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detentions, hence leading to a context in which provisional release is indeed the exception to the rule (of provisional detention).

[5] Stein 1995, p. 327.

[6] It is submitted that horizontal, even though it is often (and correctly) connected with the inter-State context, is not necessarily a feature which is *only* applicable to the inter-State context. Horizontal is here understood to mean equal. And, of course, a working relationship based on equality can also very well be applicable to non-statal entities. One could hereby think of a cooperation agreement between two international organisations which consent to cooperate on a reciprocal basis. This also goes the other way around. It is very well possible that a relationship which is often seen as vertical in nature (for example, between a State and an international tribunal) may contain horizontal elements. This will be discussed in more detail when addressing the arrest and surrender regime of the ICC in Chapter VIII.

[7] Kaul and Kreß 2000, p. 158.

[8] The first time the horizontal-vertical distinction was used in a decision was in the ICTY *Blaškić* case, see ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', Case No. IT-95-14, 29 October 1997, para. 47: "The International Tribunal is an international criminal court constituting a novelty in the world community. Normally, individuals subject to the sovereign authority of States may only be tried by national courts. If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation. Thus, the relation between national courts of different States is "horizontal" in nature. In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of

Where does this obligation to cooperate originate?

In his report on the ICTY Statute, the UNSG explained, after having suggested that the ICTY needed to be established by a decision of the UNSC acting under Chapter VII of the UN Charter:

> 23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII. (...)
>
> 28. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. (...)
>
> 125. As pointed out in paragraph 23 above, the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.
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> 126. In this connection, an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International tribunal shall be considered to be the

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enforcement the International Tribunal is still dependent upon States and the Security Council)." See also *ibid.*, para. 54, Cassese 1998, p. 13 and Swart and Sluiter 1999, pp. 97-101.

[9] Note that 'State' in the context of the ICTY must be read extensively, see Rule 2 (A) of its RPE: "In the Rules, unless the context otherwise requires, the following terms shall mean: (…) State: (i) A State Member or non-Member of the United Nations; (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not". See also Furuya 1999, pp. 659-660. (The RPE of the ICTR do not contain a definition of the term State.)

[10] See also Art. 9, para. 2 of the ICTY Statute ("The International Tribunal shall have primacy over national courts") and Art. 8, para. 2 of the ICTR Statute ("The International Tribunal for Rwanda shall have the primacy over the national courts of all States").

[11] Such an obligation can, of course, be justified by several considerations, see Swart 2002 B, p. 1594: "First, while in the vast majority of criminal cases, national courts do not need international cooperation in order to be able to function properly, the international tribunals entirely depend on cooperation in every single criminal case. The mandatory and unconditional duty for States to cooperate with the Tribunals is, moreover, explained by the fact that the international crimes within their jurisdiction violate peremptory norms of international law, in the repression of which all States have an equal interest. Thirdly, it is the function of the Tribunals, as creatures of the Security Council, to contribute to the preservation or restoration of the peace that is endangered by these crimes." See also Kaul and Kreß 2000, p. 158: "The vertical approach departs from traditional interstate concepts of cooperation in that it attaches greater weight to the community interest in an international criminal prosecution than in conflicting interests of the requested state."

> application of an enforcement measure under Chapter VII of the Charter of the United Nations.[12]

One can read two justifications here as to why States must cooperate with orders of the ICTY (and the same would go for those of the ICTR).

The first (to be found in paragraphs 28 and 126) is that the ICTY is a subsidiary organ of the UNSC and that all its decisions (including, for example, an order of surrender) can thus be seen as indirect decisions taken by the UNSC on the basis of Chapter VII of the UN Charter. Article 25 of the UN Charter stipulates that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[13] Hence, all UN Member States must cooperate with a request or order of the Tribunal. This justification does not pose any problems.

The second justification (to be found in paragraphs 23 and 125) does not speak of the status of the ICTY as a subsidiary organ of the UNSC but states more generally that the fact that the UNSC decides (on the basis of Chapter VII) to establish an international tribunal means that States *thus* have an obligation to cooperate with that tribunal. The duty of cooperation in that case is hence based on the idea that States, according to Article 25 of the UN Charter, must "accept and carry out" the decision of the UNSC to establish the ICTY. Now, it is true that States are under an obligation to carry out and implement the decision of the UNSC to *establish* a tribunal, but strictly speaking, that would arguably only involve 'start up' support such as finding an appropriate location to accommodate the tribunal. The duty to cooperate with the tribunal in matters of arrest and the like does not seem to have anything to do with the *establishment* of the tribunal; it has to do with the daily functioning of the tribunal.

Hence, it can be argued that States must indeed cooperate with the Tribunal in matters of arrest and surrender but this arguably cannot be derived from the decision of the UNSC to establish a tribunal as such. It can, however, be derived from the actual content of the decision by which the Tribunal was established, in which one can clearly find the more specific decision of the UNSC that States must cooperate with the Tribunal.[14] It is therefore submitted that the fact that the UNSC decides to

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[12] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, paras. 23, 28 and 125-126.

[13] Reading this text, one could argue that in fact *any* decision of the UNSC (whether it is based on Chapter VII of the UN Charter or not) is binding on all UN Member States. There is much controversy about this issue (see Shaw 2003, p. 1102) but this interesting discussion is not relevant for the present one (there is no doubt whatsoever that a Chapter VII decision is binding on all UN Member States) and as a result will not be examined here.

[14] For the ICTY, see UNSC Res. 827 of 25 May 1993: "The Security Council, (...) Acting under Chapter VII of the Charter of the United Nations, (...) 2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace (...); (...) 4. Decides that *all States shall cooperate fully with the International Tribunal and its organs* in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any

establish an international tribunal does not automatically mean that States have to cooperate with it in matters of arrest and surrender, but that this depends on the actual content of the decision.

UNSC Resolution 1593 of 31 March 2005 appears to support the above-mentioned argument. In this resolution, the UNSC referred the situation in Darfur, Sudan, to the ICC. Were one to adhere to the interpretation of the UNSG mentioned above, one could argue that the fact that Article 25 of the UN Charter stipulates that States must accept and carry out/implement the decision of the UNSC (to refer the situation in Darfur to the ICC) in practice means that all States must cooperate with the ICC. After all, that would be the only way the ICC could effectively deal with the situation in Darfur. In the words of Condorelli and Ciampi:

> It is perfectly conceivable that the Security Council could adopt a resolution having as its sole object the decision that all Member States shall cooperate with the Court. It would even seem natural that a decision to this effect be included in a resolution where the Security Council decides to refer a situation to the ICC. One could even argue that one of the implications of a SC referral is that *all* states are automatically

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measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute; (...) [underlined emphasis in original and italicised emphasis added, ChP]." This duty can also be found in Art. 29 of the ICTY Statute: "1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal." For the ICTR, see UNSC Res. 955 of 8 November 1994: "The Security Council, (...) Acting under Chapter VII of the Charter of the United Nations, 1. Decides hereby (...) to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (...) ; 2. Decides that *all States shall cooperate fully with the International Tribunal and its organs* in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures; (...) [underlined emphasis in original and italicised emphasis added, ChP]." This duty can also be found in Art. 28 of the ICTR Statute: "1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to: (a) The identification and location of persons; (b) The taking of testimony and the production of evidence; (c) The service of documents; (d) The arrest or detention of persons; (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda." Note finally that the duty to cooperate has also been worked out in other documents, such as the RPE and (for the ICTY) the Dayton Peace Agreement of 14 December 1995. See for more information on this topic in the context of the ICTY Mundis 2002, pp. 121*ff*. Note finally that the word "request" in Artt. 29, para. 2 of the ICTY Statute and 28, para. 2 of the ICTR Statute "is misleading since it implies an element of discretion on the part of the state". (Henquet 1999, p. 979.)

> put under an international obligation to comply with requests for cooperation by the Court [emphasis in original and original footnote omitted, ChP].[15]

However, as has been argued above, whether States have a duty of cooperation or not arguably does not stem from the decision of the UNSC to establish a tribunal or to refer a situation to a tribunal, but from the actual content of this decision.[16] Even though it would be logical for the UNSC to decide in such a decision that all States must cooperate with the ICC – after all, one can imagine that the UNSC, if it truly finds that a certain situation constitutes a threat to international peace and security, will appeal to every member of the international community to support the institution in trying to cope with this international problem – the UNSC may nevertheless decide differently.[17] UNSC Resolution 1593, for example, reads:

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[15] Condorelli and Ciampi 2005, p. 593. See also Swart 2002 C, p. 1677: "Some remarks should also be made here with regard to the referral of a situation to the Court by the Security Council pursuant to Article 13 of the Statute. The fact that the Security Council, in doing so, is acting under Chapter VII of the Charter of the United Nations has a number of important consequences for the system of surrender. The obligations arising out of Parts 5 and 9 [of the ICC Statute, ChP] for States in the matter of arrest and surrender thereby become obligations for all Member States of the United Nations regardless of whether or not they are Parties to the Statute."

[16] See also Gallant 2003 B, p. 587 (writing on the ICC): "Where (…) a matter is referred by the Security Council, Chapter VII of the UN Charter *may* place a UN member state under a legal obligation to co-operate with the Court even where the state is not a party to the ICC Statute [emphasis added, ChP]".

[17] See also Sluiter who, writing at a time when it was still uncertain how the UNSC would deal with this issue, does also recognise the possibility that not every State will be obliged to cooperate with the ICC after a UNSC referral under Chapter VII of the UN Charter (even though he is of the opinion that this possibility, for the very same reasons mentioned above, would be an unlikely option): "In case the Council will in the future decide to trigger the ICC's jurisdiction, it is possible to distinguish *grosso modo* three alternative modes of submitting a matter. First of all, the Security Council may refer a situation, which it may describe in more detail, in a resolution to the Court, without any further comments or details. In this scenario the matter will be dealt with in accordance with the Statute and the duty to co-operate will be exclusively based on the Statute, meaning, for example, that States non-parties are under no obligation to assist the Court. Such a 'blank submission' without referring to assistance to the Court by all UN members appears an unlikely option having regard to the nature of referral. The Council can only refer a matter when acting under Chapter VII. In other words, it must consider investigation and prosecution by the Court necessary to restore or maintain international peace and security, which, one may argue, implies co-operation by all UN members, including States that are no parties to the Statute. A second, more likely, scenario therefore is that a Chapter VII resolution submitting a matter to the Court decides that all States – or all UN members – shall co-operate with the Court in accordance with its Statute. The resolution, and ultimately the UN Charter, would then constitute the legal basis for the duty to co-operate for all UN members. The duty to co-operate would, for States that are members of the United Nations but not parties to the Statute, be confined to the investigation submitted to the Court by the Council. The scope of the duty to co-operate would not differ from that incumbent on State parties in case of an investigation triggered by a State or initiated by the Prosecutor. As a result, the grounds of refusal set out in the Statute are applicable to and can be invoked by the States non-parties. The third and final option is that the Security Council, with a view to restoring international peace and security, decides that UN members should have the obligation to co-operate fully with the Court. To be more specific, the Council could decide that (certain of) the grounds for refusal in the ICC Statute are not applicable to UN members. This is, again, an unlikely situation because it requires that the Council shapes a new co-operation regime, which may be difficult to reconcile with the legal framework in which the Court has to operate. Furthermore, this may be seen as

> *The Security Council, Determining* that the situation in Sudan continues to constitute a threat to international peace and security, *Acting* under Chapter VII of the Charter of the United Nations, 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court; 2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States no party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully [emphasis in original, ChP].[18]

Be that as it may, it is in any case clear that States must cooperate with the UN *ad hoc* Tribunals, the ICTY and ICTR, and that this obligation, pursuant to Article 103 of the UN Charter, prevails over other international obligations of States if the latter come into conflict with the former.[19] In addition, States cannot invoke national law to justify a failure to comply with orders from the ICTY and ICTR.[20] This can, for example, be discerned from Rule 58 of the ICTY/ICTR RPE (to focus already a little more on a specific part of the cooperation regime, namely the transfer[21] provisions):

> The obligations laid down in Article [29 for the ICTY and 28 for the ICTR, ChP] of the Statute shall prevail over any legal impediment to the surrender or transfer of the

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an unauthorised interference with the application in practice of the Statute." (Sluiter 2002 C, pp. 71-72.) See also Sluiter 2002 A, p. 129.

[18] UNSC Res. 1593 of 31 March 2005, UN Doc. S/Res/1593 (2005). Note, however, the criticism of Condorelli and Ciampi (who, as was shown above, have stated that "[o]ne could even argue that one of the implications of a SC referral is that *all* states are automatically put under an international obligation to comply with requests for cooperation by the Court [emphasis in original, ChP]") towards this resolution: "Of course, this argument – that the SC referral per se blurs the distinction between states party and states not party to the Statute as far as cooperation with the Court is concerned – could be made if the resolution was silent on this point. It cannot, however, be advanced with respect to Res. 1593 (2005), where § 2 expressly rules out such a consequence of the SC referral. The contradiction inherent in the decision to refer the Darfur situation to the ICC, on one hand, and, on the other, to expressly confine the obligation to cooperate with the Court to the states party to the Statute [*and* to the Government of Sudan and all other parties to the conflict in Darfur, ChP], is, however, nothing but one sign of the overall scant coherency of Res. 1593 (2005)." (Condorelli and Ciampi 2005, p. 593.) See also Heyder 2006, pp. 654-655: "[O]n the one hand, the international community has mandated (…) the ICC to exercise jurisdiction; but (…), on the other hand, states that are not party to the Statute of Rome, except for Sudan [and those other parties to the conflict which are not party to the ICC Statute, ChP], have no obligation to cooperate or support the ICC in fulfilling this task. This contradiction, inherent in the Security Council's logic, is hardly understandable."

[19] See Art. 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[20] See also Swart 2002 A, p. 1249: "In the matter of arrest and detention, little autonomy or discretion is left to the requested State to refuse to comply with the Tribunals' orders."

[21] Like Swart, this study will use the concept of "transfer" in the context of the ICTY and ICTR. (The reasons therefore are that 1) there does not seem to be a legal difference in the ICTY/ICTR RPE between the concepts of "surrender" and "transfer" (which both are mentioned in the instruments of the ICTY/ICTR) and 2) the ICTY/ICTR RPE have a clear preference for 'transfer', see Swart 2002 C, p. 1666.)

> accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.[22]

Swart explains after having referred to the same rule:

> All this seems to imply that constitutional impediments to the handing over of persons to a tribunal are as irrelevant as other impediments in domestic law. It also implies that a Member State may not invoke the provisions of human rights treaties to which it is a party in order to justify a refusal of transfer.[[23]] The only, rather theoretical, situation in which transfer might be refused is that in which *jus cogens* would forbid a State to transfer a person. In all these respects transfer of persons to a tribunal is fundamentally different from extradition between States [original footnote omitted, ChP].[24]

Although it would go beyond the scope of this study to make an extensive overview of the entire arrest and transfer framework in the context of the ICTY/ICTR,[25] some

[22] Notwithstanding this, Young (2001, p. 340, n. 77) notes that "[d]espite these seemingly coercive powers, the practice of the ICTY and ICTR has shown many incidences where States have imposed their national laws to impede the transfer of accused." Of course, one can imagine that it is sometimes possible to refuse the transfer of a person in such obvious cases as mistaken identity, see, for example, Art. 4, para. 3 of the Dutch Law of 21 April 1994 implementing the ICTY Statute (available at: http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_the_netherlands_1994_en.pdf): "If the District Court [in The Hague, ChP], which is to rule on whether the Tribunal's request may be granted, holds either that it cannot be established that the person brought before it is the person whose surrender has been requested or that surrender has been requested on account of offences in respect of which the Tribunal is clearly not competent under its Statute, its judgement shall declare the surrender inadmissible." However, O'Shea (1995-1996, pp. 433-434) explains that some States go further than that: "A significant number of states have complied with the Security Council resolutions establishing the ad hoc tribunals by adopting implementing legislation modelled, in most cases, on current extradition law. The newly enacted laws run the gamut from no or optional judicial review (as in the case of Australia and Finland), to limited judicial review (as in the case of France and Italy [and O'Shea also includes the Netherlands among these States, see *ibid*., p. 379, ChP]), to judicial review of prima facie evidence (as in the case of the United States). Most striking among the new legislation are those of Australia and New Zealand which, despite the tribunals' legal origins in Chapter VII of the U.N. Charter, allows "requests" for cooperation to be denied under exceptional circumstances." *Cf.* finally Knoops 2002, pp. 70-76 and Zhu 2006, pp. 103-105.

[23] That the State may not invoke provisions from human rights treaties to refuse the transfer does not mean, of course, that the State can forget all its obligations under international human rights law in this context. On the contrary. See, for example, the still-to-discuss *Kajelijeli* case before the ICTR: "[T]he Appeals Chamber is mindful of the fact that a cooperating State, when effecting an urgent arrest and detention pursuant to the Prosecution's request under Rule 40 of the Rules, must strike a balance between two different obligations under international law. First, the State is required under Security Council Resolution 955 and Article 28 of the Tribunal's Statute to comply fully without undue delay with any requests for assistance from the Tribunal in fulfilling the weighty task of investigating and prosecuting persons accused of committing serious violations of international humanitarian law. On the other hand, the cooperating State still remains under its obligation to respect the human rights of the suspect as protected in customary international law, in the international treaties to which it has acceded, as well as in its own national legislation [original footnote omitted, ChP]." (ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 220.)

[24] Swart 2002 C, pp. 1664-1665. See also Zappalà 2003, p. 9.

[25] See for a more detailed overview, for example, Gallant 1994 (discussing the ICTY rules).

interesting provisions from their Statutes and, in particular, their RPE definitely deserve to be mentioned here.

However, before doing so, the importance of the arrest and transfer provisions must again be emphasised, see also Chapter I of this book. The Tribunals do not recognise trials *in absentia*, that is, without the person in question being present. As a result, arrests and transfers normally have to be made before the trials can commence.[26] Furthermore, the ICTY/ICTR have no police force of their own. Hence, they are dependent on others – one could hereby think of States and international forces – in the enforcement of arrests. They are, to again refer to the famous metaphor by Cassese, "giant[s] without arms and legs"[27] who need "artificial limbs to walk and work".[28]

Turning now to the arrest and transfer proceedings in the context of the ICTY/ICTR, Article 18, paragraph 4, Article 19 and Article 20, paragraph 2 of the ICTY Statute[29] explain very basically the procedure to follow here: if the Prosecutor determines the existence of a *prima facie* case, he shall prepare an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute".[30] This indictment shall then be transmitted to the Trial Chamber where a judge shall review it. "If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."[31] If the indictment is confirmed, "the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial".[32] Finally, "[a] person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International

[26] See Art. 21, para. 4 (d) of the ICTY ("In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (…) to be tried in his presence") and ICTR ("In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (…) To be tried in his or her presence") Statutes. In addition, a ban of trials *in absentia* may also be derived from Art. 20 of the ICTY Statute (see for the ICTR Art. 19 of its Statute): "Article 20 provides that the Trial Chamber can set the date for trial only after reading the indictment to an accused and after confirming that he understands its meaning. This indicates that the physical presence of an accused before the Chamber is an indispensable requirement for commencing a trial." (Furuya 1999, p. 638.) Note finally that suspects, however, may also come voluntarily to The Hague, in which case the arrest is, of course, no *conditio sine qua non* to the commencement of the trial. However, in most cases, an arrest will be necessary. *Cf*. also n. 33 of Chapter I and n. 2 of Chapter VIII.

[27] Cassese 1998, p. 13.

[28] *Ibid*. Arbour (2004, p. 397) notes: "I arrived at the ICTY in October 1996. There were many interesting issues at play in the Office of the Prosecutor (OTP), but there was only one overwhelming, all-encompassing and, I would say, life-threatening issue for the ICTY as it had been conceived: arrests. In fact, the issue of arrests was so acute that although it 'belonged' essentially to the Prosecutor, it had become, inevitably, everybody's issue: the whole of the ICTY, the NGOs and the Press."

[29] See for the ICTR Statute Artt. 17, para. 4, 18 and 19, para. 2.

[30] Art. 18, para. 4 of the ICTY Statute.

[31] Art. 19, para. 1 of the ICTY Statute.

[32] Art. 19, para. 2 of the ICTY Statute.

Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal".[33]

An elaboration of this very basic procedure can be found in the RPE of the Tribunals, in particular Section 1 ('Investigations': Rules 39-43) of Part 4 ('Investigations and Rights of the Suspect') and Sections 1 ('Indictments': Rules 47-53 *bis*), 2 ('Orders and Warrants': Rules 54-61) and 3 ('Preliminary Proceedings': Rules 62-65 *ter*) of Part 5 ('Pre-Trial Proceedings').[34] Before focusing on some of these provisions, it may be worth emphasising that these rules speak of both suspects and accused. (Note that in the above-mentioned statutory provisions, only the term 'accused' was mentioned.) The difference between the two is explained in Rule 2 (A) of the ICTY/ICTR RPE: a suspect is "[a] person concerning whom the Prosecutor possesses reliable information which tends to show that [t]he [person] may have committed a crime over which the Tribunal has jurisdiction" whereas an accused is "[a] person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47".

The first rule which is worth mentioning here is Rule 40 (i) of the ICTY RPE.[35] This rule explains that "[i]n case of urgency, the Prosecutor may request any State (...) to arrest a suspect or an accused provisionally". Rule 40 *bis* of the ICTY/ICTR RPE then further clarifies the law concerning the transfer and provisional detention of suspects. A number of paragraphs from this provision should be addressed here. First, paragraph (B) states which three conditions must be met before the judge shall order the transfer and provisional detention of the suspect.[36] In paragraph (C), one can read that the order for the transfer and provisional detention of the suspect "shall (…) specify the initial time-limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of the suspect, as specified in this Rule and in Rules 42 and 43".[37] Paragraph (D) further clarifies that "[t]he provisional

[33] Art. 20, para. 2 of the ICTY Statute.

[34] Note that in the ICTR RPE context, one will not find a section called 'Preliminary Proceedings'. The provisions from this section have namely been incorporated in Section 2 ('Orders and Warrants': Rules 54-65 *bis*) of Part 5 ('Pre-Trial Proceedings') of the ICTR RPE.

[35] See for a comparable provision in the ICTR context Rule 40 (A) (i) of the ICTR RPE.

[36] Rule 40 *bis* (B) of the ICTY RPE reads: "The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met: (i) the Prosecutor has requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect is otherwise detained by State authorities; (ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and (iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation." See for a comparable provision in the ICTR context Rule 40 *bis* (B) of the ICTR RPE.

[37] Rule 40 *bis* (C) of the ICTY RPE and Rule 40 *bis* (D) of the ICTR RPE. Rule 42 of the ICTY RPE reads: "(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the

detention of a suspect shall be ordered for a period not exceeding thirty days from the date of the transfer of the suspect to the seat of the Tribunal."[38] Although this detention can be extended,

> [t]he total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State.[39]

Although the total period of provisional detention may thus not exceed ninety days, this period only starts to run as from the date of[40] or the day after[41] the transfer. However, it is not clear how long a person may be deprived of his liberty *before* the (day after the) transfer.[42] Swart notes that at the stage of the transfer proceedings in the requested State (as well as in the earlier stage of provisional arrest),

> the arrested person's sole recourse is to a tribunal for *habeas corpus* or for obtaining interim release, since Rule 57 of the RPE of both *ad hoc* Tribunals leaves no discretion to States to decide on these matters.[[43]] It is, therefore, to be deplored that neither the Statutes nor the RPE of the *ad hoc* Tribunals accord an explicit remedy to the person at this stage. The duration will be determined by the diligence of the

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suspect makes shall be recorded and may be used in evidence. (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel." See for a comparable provision in the ICTR context Rule 42 of the ICTR RPE. Finally, Rule 43 of the ICTY/ICTR RPE has to do with the recording of the questioning of suspects.

[38] See for a comparable (but as regards content also slightly different) provision in the ICTR context Rule 40 *bis* (C) of the ICTR RPE: "The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day *after* the transfer of the suspect to the detention unit of the Tribunal [emphasis added, ChP]."

[39] Rule 40 *bis* (D) of the ICTY RPE. See for a comparable (but as regards content also slightly different) provision in the ICTR context Rule 40 *bis* (H) of the ICTR RPE: "The total period of provisional detention shall in no case exceed 90 days *after* the day of transfer of the suspect to the Tribunal, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made [emphasis added, ChP]."

[40] See Rule 40 *bis* (D) of the ICTY RPE.

[41] See Rule 40 *bis* (H) of the ICTR RPE.

[42] See also Swart 2002 A, p. 1250: "[T]he RPE attach no time limit to the period a person may be deprived of his liberty at the request of the Prosecutor pending the issuance of an order by a judge or Chamber."

[43] Rule 57 of the ICTY RPE reads: "Upon arrest, the accused shall be detained by the State concerned which shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned, the authorities of the host country and the Registrar." See for a comparable provision in the ICTR context Rule 57 of the ICTR RPE. *Cf.* also the still to be mentioned Rule 65 (A) of the ICTY RPE: "Once detained, an accused may not be released except upon an order of a Chamber." Gallant (1994, p. 585) writes on this rule that it "suggests that the arresting state has no authority to release the defendant pursuant to its own law."

> Tribunal and the requested State in conducting the proceedings as well as by the choice of the person requested to challenge transfer or to consent to it. [44]

Nevertheless, in the discussion of the ICTR *Barayagwiza* case in Subsection 3.2.1, it will be shown that the judges have, to a certain extent, filled this legal gap in the arrest and transfer proceedings.[45]

If the suspect has been transferred to the Tribunal, he "shall be brought, without delay, before the Judge who made the order, or another permanent Judge of the same Trial Chamber, who shall ensure that the rights of the suspect are respected".[46] Alongside the already-mentioned release possibilities pursuant to Rule 40 *bis* (D) of the ICTY RPE/Rule 40 *bis* (H) of the ICTR RPE, paragraph (G)[47] adds the following *habeas corpus*-like provision to these proceedings: "During detention, the Prosecutor and the suspect or the suspect's counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release."

Turning now to the provisions focusing on the accused: if the Prosecutor is "satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal",[48] he "shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material".[49] If any or all of the counts in the indictment are confirmed, "(i) the Judge may issue an arrest warrant, in accordance with Rule 55 (A),[[50]] and any orders as provided in Article 19 of the Statute, and (ii) the suspect shall have the status of an accused."[51] A final provision which should be mentioned here, before looking at the provisions on the execution of arrest warrants, is Rule 53 of the ICTY/ICTR RPE.[52] This rule

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[44] Swart 2002 A, p. 1250. See also *ibid*., p. 1251: "Time limits included in the RPE (...) are not concerned with arrest and detention in the requested State but with provisional detention after the person's transfer by that State."

[45] See also n. 863 and, generally, n. 880.

[46] Rule 40 *bis* (F) of the ICTY RPE. See for a comparable provision in the ICTR context Rule 40 *bis* (J) of the ICTR RPE.

[47] See for a comparable provision in the ICTR context Rule 40 *bis* (K) of the ICTR RPE.

[48] Rule 47 (B) of the ICTY/ICTR RPE.

[49] Rule 47 (B) of the ICTY/ICTR RPE.

[50] Rule 55 (A) of the ICTY RPE reads: "A warrant of arrest shall be signed by a permanent Judge. It shall include an order for the prompt transfer of the accused to the Tribunal upon the arrest of the accused." See for a comparable provision in the ICTR context Rule 55 (A) of the ICTR RPE.

[51] Rule 47 (H) of the ICTY RPE. See for a comparable provision in the ICTR context Rule 47 (H) of the ICTR RPE.

[52] Rule 53 of the ICTY RPE ('Non-disclosure') reads: "(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order. (B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused. (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice. (D) Notwithstanding paragraphs (A), (B)

authorises the use of sealed indictments, which is one of the three "innovative ways"[53] to obtain the arrest and transfer of persons to The Hague mentioned by Chief of Investigations at the ICTY's OTP Office Lopez-Terres (the other two will be mentioned below).

> Sealed indictments proved effective in a number of cases. It was indeed so effective that many perpetrators of war crimes, including many who were not wanted by the ICTY, started leaving Bosnia and Herzegovina and went to safer areas in Croatia and Serbia and Montenegro where they knew nothing could happen to them.[[54]] The practice was, however, discontinued after the number of accused was significantly reduced in Bosnia and Herzegovina.[55]

The instrument of sealed indictments will be returned to in the discussion of the *Dokmanović* case, to be examined in Subsection 3.1.1 of this chapter.

Rule 55 of the ICTY/ICTR RPE deals with the execution of arrest warrants. Two paragraphs from this provision merit some more attention here.

First, Rule 55 (C) of the ICTY RPE[56] mentions the rights to which the accused is entitled. Here, reference is made to (the already-mentioned) Rules 42 and 43 of the

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and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost." See for a comparable provision in the ICTR context Rule 53 of the ICTR RPE.

[53] P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 5.

[54] *Cf.* Scharf 1998, pp. 376-377: "The Dayton Peace Accords, Security Council Resolution 1031, and the subsequent agreement of the Bosnian government make clear that NATO forces may lawfully exercise police powers in Bosnia and Herzegovina. Similarly, Security Council Resolution 1037, which with the consent of Croatia and the FRY temporarily placed the administration of Eastern Slavonia under UNTAES, gave the United Nations peacekeeping force the right to exercise police powers in that region of Croatia. Consequently, there is no violation of territorial integrity of the rights of the accused where NATO or United Nations personnel apprehend indicted war criminals in Bosnia and Herzegovina or the region of Eastern Slavonia, Croatia. Such activities conducted in the FRY and other regions of Croatia, however, are another matter [original footnotes omitted, ChP]." See also ns. 265 and 516.

[55] P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), pp. 6-7. See also Arbour 2004, p. 397: "Despite the inexplicable (for the time being, one hopes) lack of arrest of Karadžić and Mladić, the 1997 arrest strategy was successful. This was not due exclusively to a reversal from widely publicized indictments to indictments under seal: many other factors came into play to provide, if nothing else, a window of opportunity. But the sealed indictments were critical. They provided us with unanswerable arguments to the alleged operational difficulties of arresting publicly accused and gave us back some of the leadership of our own operations." (Note, of course, that Karadžić is now in ICTY custody.)

[56] "Each certified copy [of the official arrest warrant, ChP] shall be accompanied by a copy of the indictment certified in accordance with Rule 47 (G) and a statement of the rights of the accused set forth in Article 21 of the Statute, and in Rules 42 and 43 *mutatis mutandis*. If the accused does not understand either of the official languages of the Tribunal and if the language understood by the accused is known to the Registrar, each certified copy of the warrant of arrest shall also be accompanied by a translation of

ICTY/ICTR RPE and Article 21 of the ICTY Statute/Article 20 of the ICTR Statute (entitled 'Rights of the Accused').[57]

The other paragraph from Rule 55 deserving special attention is Rule 55 (G) of the ICTY RPE, which reveals that the execution of arrest warrants is not restricted to States: "When an arrest warrant issued by the Tribunal is executed by the authorities of a State, *or an appropriate authority or international body*, a member of the Office of the Prosecutor may be present as from the time of the arrest [emphasis added, ChP]."

Rule 59 *bis* (A) of the ICTY RPE[58] should also be mentioned in this context. This provision reads:

> Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an *appropriate authority or international body* or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the

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the statement of the rights of the accused in that language." See for a comparable provision in the ICTR context Rule 55 (A) and (B) of the ICTR RPE.

[57] Art. 21 of the ICTY Statute reads: "1. All persons shall be equal before the International Tribunal. 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute [which deals with the protection of victims and witnesses, ChP]. 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute. 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal; (g) not to be compelled to testify against himself or to confess guilt." See for a comparable provision in the ICTR context Art. 20 of the ICTR Statute.

[58] Interestingly, the contents of these two provisions (Rule 55 (G) of the ICTY RPE and Rule 59 *bis* (A) of the ICTY RPE) will not be found in the ICTR RPE, which only mention the concepts of 'appropriate authority' and 'international body' in Rule 53 (D) of the ICTR RPE (where it is stated that "the Prosecutor may disclose an indictment or part thereof to (...) an appropriate authority or international body where the Prosecutor deems it necessary to secure the possible arrest of an accused") and Rule 39 (iii) of the ICTR RPE (where it is stated that "[i]n the conduct of an investigation, the Prosecutor may (...) [s]eek (...) the assistance (...) of any relevant international body including the International Criminal Police Organization (INTERPOL)"). (Note that the ICTR RPE also mention the concept of 'appropriate authority' in the specific context of the State in Rule 61 (A) (i) of the ICTR RPE where it is explained that one of the requirements before the judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber (in case a warrant of arrest has not been executed) is that "[t]he Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the accused to be served resides or was last known to be".)

> Tribunal in the event that the accused be taken into custody by that *authority or international body* or the Prosecutor [emphasis added, ChP].[59]

Since the nature of international crimes is often characterised by a high level of State involvement[60] and States may hence be reluctant to make arrests,[61] cooperation with entities other than States may be very necessary. In fact, Rule 59 *bis* of the ICTY RPE[62] is also one of the "innovative ways" to obtain the arrest and transfer of persons to The Hague mentioned by Lopez-Terres: "[A] significant number of arrests did not occur until the enactment of Rule 59*bis*, which explicitly permitted the transmission of arrest warrants to peacekeeping forces deployed in Bosnia-Herzegovina."[63]

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[59] Note that this provision stipulates that the Prosecutor may also be involved in the arrest itself, even though OTP officials do not seem to be allowed to make the arrest themselves. See for the latter point the already-mentioned (see n. 8) *Blaškić* case of 29 October 1997 where the ICTY Appeals Chamber stated: "The International Tribunal can prosecute and try those persons. This is its primary jurisdiction. However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal." (ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', Case No. IT-95-14, 29 October 1997, para. 26.) A good illustration of this issue can be found in the still –to-discuss *Dokmanović* case where an ICTY OTP official set up a luring operation after which the suspect was taken into custody by UNTAES. During the arrest, the OTP official was present and even read the accused's rights. Scharf (1998, p. 379) notes that "[t]he *Blaskić* opinion [see the above-mentioned quotation, ChP] makes clear that the officers of the OTP are not authorized to act on their own as an international constabulary. This would suggest that they may not unilaterally arrest indicted persons, but it does not prevent them from participating in operations as an adjunct of the United Nations or NATO." See finally Zhou (2006, p. 209) who is of the opinion that "the relevant rules of the ICTY RPE suggest that the OTP should retain a strong participatory role in the apprehension of individuals indicted by the ICTY."

[60] See Van der Wilt 2004, pp. 274-275.

[61] This is especially so with respect to the ICTY. Ruxton (2001, p. 20) writes, for example, that in the context of the ICTR, "we had considerable success working with national authorities of African countries. As a result we had many high-ranking accused in custody from an early stage."

[62] The entire article reads: "(A) Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody by that authority or international body or the Prosecutor. (B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language. (C) Notwithstanding paragraph (B), the indictment and statement of rights of the accused need not be read to the accused if the accused is served with these, or with a translation of these, in a language the accused understands and is able to read."

[63] P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 5. See also Sluiter 2001, p. 151 and the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at:

There has been great discussion[64] as to whether IFOR/SFOR not only had the *possibility* (as can be derived from Rules 55 (G) of the ICTY RPE and 59 *bis* of the ICTY RPE) but also an *obligation* to arrest (as do States have, see Rule 56 of the ICTY/ICTR RPE).[65] Gaeta, who asserts that IFOR (and SFOR) do have the authority but not a duty to arrest persons indicted by the ICTY,[66] explains that the North Atlantic Council (NATO's political body under which authority the force(s) operate) adopted a resolution on 16 December 1995 which provided that

> having regard to the United Nations Security Council Resolution 827, the United Nations Security Council Resolution 1031, and Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina, IFOR *should* detain any persons indicted by the International Criminal Tribunal[[67]] *who come into contact with* IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal [emphasis added, ChP].[68]

Of interest is the word "should". Gaeta notices that "[t]he choice of the word 'should' seems to indicate both *the absence of an obligation proper* and a *strong*

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http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, para. 91. The NATO-led peacekeeping force in Bosnia-Herzegovina, IFOR, was replaced by NATO's SFOR and later by the EU's EUFOR. Other examples of peacekeeping forces in the context of the conflict in former Yugoslavia are the UN-led UNTAES (in Croatia) and the NATO-led KFOR (in Kosovo).

[64] See, for example, Lamb 2000, p. 192, Scharf 2000, pp. 951-964, Sluiter 2001, pp. 151-152, Henquet 2003, pp. 132*ff* and Frulli 2006, p. 355.

[65] Rule 56 of the ICTY RPE reads: "The State to which a warrant of arrest or a transfer order for a witness is transmitted *shall* act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute [emphasis added, ChP]." See for a comparable provision in the ICTR context Rule 56 of the ICTR RPE. Jones (1996, p. 239) argues that "[t]wo arguments might be made that IFOR has not only the right but also the *duty* to execute the Tribunal's arrest warrants [emphasis in original, ChP]." Both of them are indirect: they deal with the obligation of *States* and argue that these obligations are also applicable to national contingents within IFOR. "The first argument derives from the Tribunal's Rules and the overriding obligation of all States to comply with the tribunal's orders pursuant to Resolution 827 (1993). (…) For example, the United States contingent of the IFOR currently has responsibility for the operational area which includes Srebrenica. If the Registrar believed an accused to be in Srebrenica, she could send an arrest warrant to the appropriate authorities of the United States, which would then have the duty to execute the arrest warrant [original footnote omitted, ChP]." (*Ibid*.) The second argument has to do with the *aut dedere* (to perhaps also the ICTY) *aut iudicare* obligation of (troop-contributing) States with respect to suspects charged with grave breaches of the Geneva Conventions of 1949. (See *ibid*., pp. 239-240.)

[66] See Gaeta 1998, p. 181. The situation is different with respect to UNTAES though: an *obligation* to cooperate with the ICTY (including the obligation to execute arrest warrants) has been imposed upon UNTAES by UNSC Res. 1037 of 15 January 1996 where (in para. 21) the words "UNTAES *shall* co-operate with the International Tribunal in the performance of its mandate [emphasis added, ChP]" are used (see Gaeta 1998, p. 180, n. 16.). The same is valid for KFOR: para. 14 of UNSC Res. 1244 of 10 June 1999, establishing KFOR, "*Demands* full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia [underlined emphasis in original and italicised emphasis added, ChP]". See also Ciampi 2002, p. 1620.

[67] International forces, fond of abbreviations, usually call these persons 'PIFWCs': Persons Indicted For War Crimes.

[68] Gaeta 1998, p. 178. See also Lamb 2000, p. 191.

invitation to IFOR to execute arrest warrants [emphasis added, ChP]".[69] Furthermore, the passage "persons (…) who come into contact" hints that IFOR does not need to actively seek the indicted persons. However, this resolution is not very clear and this may also explain the different interpretations on this issue by subsequent Trial Chambers.[70]

For example, in the 2000 *Simić* et al. decision (this is the *Todorović* case which will be discussed in more detail in Subsection 3.1.2), the ICTY Trial Chamber, even though it agreed with the fact that forces do not need to initiate a search themselves, took another stance with respect to the authorisation/obligation discussion. It argued that there is in principle

> no reason why Article 29 [which, as was clarified earlier, see footnote 14, *obliges* States to cooperate, ChP] should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case. A purposive construction of Article 29 suggests that it is as applicable to such collective enterprises as it is to States. The purpose of Article 29 of the Statute of the International Tribunal is to secure cooperation with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law in the former Yugoslavia. The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force. Although this cooperation would, more naturally, be expected from States, it is also achievable through the assistance of international organizations through their competent organs which, by virtue of their activities, might have information relating to, or come into contact with, persons indicted by the International Tribunal for serious violations of international humanitarian law.[71]

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[69] Gaeta 1998, p. 178, n. 10. See also Lamb 2000, p. 191, n. 80.

[70] See also Ph. Vallières-Roland, 'Prosecuting War Criminals: A Critique of the Relationship between NATO and the International Criminal Courts', Centre for European Security and Disarmament (CESD) – Briefing Paper, February 2002, available at http://www.isis-europe.org/pdf/2008_artrel_87_2002_archives_59_paper.natoandiccs.pdf, p. 7: "In circumspect, the North Atlantic Council (NAC) acted cautiously in its 16 December 1995 regulation, both by using optional language and by limiting to the arrest of ICTY indictees the enforcement authority of the multinational force. The NAC probably hoped that the relationship between NATO and the ICTY would slowly evolve through the years and be strengthened informally if needed. However, the lack of precision on such an important precedent of regulation between an international criminal court and a multi-state entity opened the door for an array of speculation and difficult issues for the international criminal courts to settle. A good opportunity was therefore lost to set out clear guidelines for a future relationship between an international criminal court and a multi-state entity [original footnote omitted, ChP]."

[71] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 46. (See also *ibid*., paras. 47-49.) *Cf*. also Sluiter (2003 A, pp. 288-289) who endorses the purposive construction of Art. 29 but who is not sure whether it can be applied to SFOR: "One has difficulty accepting that the ICTY is able to issue orders to a "multinational implementation force", which also enjoys a mandate from the Security Council [which does not oblige it to provide legal assistance to the ICTY, ChP]. In other words, I believe that no hierarchical relationship can be established between the ICTY and IFOR/SFOR. (…) The Trial Chamber can be criticised for not having sufficiently taken into account SFOR's own Security Council-based

This decision was rejected in the 2001 *Brđanin & Talić* decision[72] but confirmed in the 2002 *Nikolić* decision, which will be discussed at length in Subsection 3.1.4 of this chapter.[73] The only point all these decisions agree upon is the fact that forces do not have to look for suspects themselves. There is only an obligation to arrest – if such an obligation is indeed present, which is still doubtful – if those forces come into contact with suspects. A perhaps – from another perspective – more relevant matter is how the commanders *on the ground* have viewed their mandate with respect to the arrest of suspects. Although it was previously mentioned by Lopez-Terres that "a significant number of arrests did not occur until the enactment of Rule 59*bis*",[74] the above-mentioned mandate stemming from the 1995 North Atlantic Council resolution, unfortunately, was nevertheless

> interpreted restrictively by most commanders on the field, especially when it came to senior accused, such as Radovan Karadzic and Ratko Mladic. There are several documented instances where, from 1995 till 1998, both men could have been arrested by NATO forces, but the local commanders apparently refused to give the appropriate orders.[75]

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mandate, which makes it in my view impossible to treat SFOR as just a group of States to which Article 29 is fully applicable." See also Henquet (2003, pp. 138*ff*), who is very critical of the reasoning in this *Todorović* decision as well.

[72] See ICTY, Trial Chamber II, *Prosecutor v. Radoslav Brđanin & Momir Talić*, 'Decision on Motion by Momir Talić for Provisional Release', Case No. IT-99-36-PT, 28 March 2001, para. 29: "The use of the word "should" [the judges, like Gaeta, looked at the same resolution of the North Atlantic Council, ChP] demonstrates the reality that SFOR does not accept any legal obligation on its part to arrest anyone. The resolution does not even contemplate any obligation upon SFOR to seek out indicted persons in order to arrest them. The inaction by SFOR during the period following the publication of the SFOR Decision [this is the above-mentioned 2000 *Simić* decision, ChP] only underlines the unfortunate fact that reliance cannot be placed upon SFOR to arrest indicted persons who fail to appear for trial, in the way a police force may be expected to act in domestic legal systems."

[73] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, paras. 49 ("The question that may arise is whether the duty to co-operate, as laid down in Article 29, applies to States only, or also to other entities or collective enterprises, such as SFOR. Read literally, Article 29 seems to relate to States only. This question had been discussed previously, *inter alia*, by the Trial Chamber in the *Simić* Decision. This Trial Chamber sees no reason to take a different view") and 67 ("Once a person comes "in contact with" SFOR, (…) SFOR is *obliged* under Article 29 of the Statute and Rule 59 *bis* to arrest/detain the person and have him transferred to the Tribunal [emphasis added, ChP].").

[74] See also P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 6: "This practice has known some success, especially with the "smaller fish" in the first years of the life of the Tribunal."

[75] According to Lopez-Terres, there appears to be "a significant lack of political will to arrest these men. Preserving the security of troops and fear for the "bodybag syndrome" are certainly some of the reasons why States participating in international forces have not taken such action." (*Ibid*.) Although Karadžić has by now been arrested (albeit not by international forces), see Subsection 3.1.6, the above-mentioned reasons indeed seem to constitute important reasons for international forces to refrain from arrests more generally.

The penultimate rule which should be mentioned here is Rule 61 of the ICTY/ICTR RPE, created to anticipate potential problems the Tribunals would face concerning uncooperative States in the context of arrest and surrender and therefore deserving special attention in this book.[76]

Interestingly, the first case in which the procedure of this rule was used was the ICTY[77] *Nikolić* case,[78] arguably the most important *male captus* case in the context of this chapter, see Subsection 3.1.4.

What is to be done if the warrant is not executed within a reasonable time? In that case, "the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken".[79]

The provision then continues, explaining:

> When the Judge is satisfied that: (i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and (ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60,[[80]] the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member.[81]

Sections under (B) and (C) subsequently introduce a procedure which has often been linked with a trial *in absentia* – forbidden in the context of the ICTY/ICTR[82] – because the proceeding is held without the accused being present.

According to the first section, Section (B), the Prosecutor, upon obtaining the order as mentioned under the above-quoted Section (A),

> shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber

[76] In addition, a link with the ICC can also be quickly made here. See Art. 61, para. 2 of the ICC Statute (see ns. 1 and 291 and accompanying text of Chapter VIII) for more information. See also Furuya 1999, p. 637.
[77] The ICTR never showed any interest in Rule 61 proceedings, see Schabas 2006, p. 383. See also Swart 2002 C, p. 1675.
[78] See Quintal 1998, p. 756.
[79] Rule 61 (A) of the ICTY/ICTR RPE.
[80] Rule 60 of the ICTY RPE reads: "At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio and television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal." See for a comparable provision in the ICTR context Rule 60 of the ICTR RPE.
[81] Rule 61 (A) of the ICTY RPE. See for a comparable provision in the ICTR context Rule 61 (A) of the ICTR RPE.
[82] See n. 26 and accompanying text.

> may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge.[83]

Section (C) further clarifies:

> If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above.[84]

There is more, however. According to Section (D),

> [t]he Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.[[85]] Upon request by the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.[86]

The Rule 61 procedure, sometimes referred to as the 'voice of the victims',[87] indeed very much resembles an *in absentia* trial. However, it is not the same. After all, the rule does not allow for a determination of the accused's guilt.

As a result, no sentence can be pronounced.[88] Notwithstanding this, it is indeed true that "judgement, in a sense, is levelled through the creation of a public record.

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[83] See for a comparable provision in the ICTR context Rule 61 (B) of the ICTR RPE.

[84] See for a comparable provision in the ICTR context Rule 61 (C) of the ICTR RPE.

[85] According to the ICTY, such an international arrest warrant entails a number of clear-cut consequences: "-the accused will find himself publicly branded an "international fugitive", and the country he has taken cover in will be converted into an "open-air prison"; - the accused will become a hostage to the political changes which might take place in his country of refuge: any protection he enjoys today may turn out to be only temporary; - and lastly, should the accused hold a public, civil or military position of responsibility, his exercise thereof will be seriously affected, both internationally and domestically, by his status as a "wanted person"." ('Rule 61: The voice of the victims. Rule 61 proceedings: Tribunal not defeated by non-appearance of the accused', *ICTY Bulletin*, No. 3, 22-II-1996.) For criticism, see Quintal 1998, p. 758.

[86] See for a comparable provision in the ICTR context Rule 61 (D) of the ICTR RPE. Note that national laws may even allow the freezing of assets of people allegedly supporting the accused persons in evading justice: "Under existing legislation in BiH [*Bosne i Hercegovine*: Bosnia and Herzegovina, ChP], the property of ICTY indictees who go on the run can be frozen and their business dealings can be halted. The same applies in any case where officials have a "grounded suspicion" that a person is helping an indictee to evade justice. In this regard, the legislation in question explicitly lists "spouses or consensual partners, first line blood relatives, brothers or sisters, adopting parents or adopted children and their spouses or consensual partners, attorney, medical doctor or priest"." (E. Mackic and M. Husejnovic, 'Justice Report: Targeting Fugitives' Family Finances', *BIRN* (*Balkan Investigative Reporting Network*), 19 October 2007, available at: http://www.birn.eu.com/en/108/10/5331.)

[87] See 'Rule 61: The voice of the victims. Rule 61 proceedings: Tribunal not defeated by non-appearance of the accused', *ICTY Bulletin*, No. 3, 22-II-1996.

[88] See *ibid*. Note, however, that under Rule 61 (D), the assets of the accused can be frozen provisionally and that that may be seen as a sort of 'sentence', see Furuya 1999, p. 645: "[I]f the accused continues to

The perpetrators' actions, thus, are publicized for eternity in a process very much akin to a Truth Commission."[89] Thieroff and Amley, Jr. also argue that the differences between trials *in absentia* and Rule 61 proceedings may be less significant in practice than on paper.[90]

Be that as it may, the practice of the rule, which, by the way, was also criticised from a *prima facie* perhaps unexpected corner, namely from former Chief Prosecutor Arbour,[91] "was discontinued once the Tribunal had defendants in custody and the suggestion that it could only function if it could conduct *in absentia* hearings no longer made any sense [original footnote omitted, ChP]".[92]

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refuse to appear before the tribunal, the measures to freeze his assets would substantially assume the role of a penalty."

[89] Quintal 1998, p. 750. See also 'Rule 61: The voice of the victims. Rule 61 proceedings: Tribunal not defeated by non-appearance of the accused', *ICTY Bulletin*, No. 3, 22-II-1996: "Rule 61 affords a formal means of redress for the victims of the absent accused's alleged crimes by giving them an opportunity to have their testimony recorded for posterity either directly if they are invited to testify or indirectly when the Prosecutor speaks on their behalf. Thus the accused cannot escape from international justice simply by staying away from the Tribunal, and the Tribunal will create an historic record against him." This, Quintal remarks (Quintal 1998, p. 723), "creates a disincentive on the part of the international community to arrest suspected war criminals and bring them to [T]he Hague for trial." In addition, she argues, besides the point that the rule is unnecessary (see *ibid*., p. 754), "that the proceedings conducted under the auspices of Rule 61 may not comport entirely with the norms of due process required by international law." (*Ibid*., p. 726.) An example mentioned by her (see *ibid*., p. 752) is the fact that a record "is created without the defense having any ability to cross-examine the witnesses. This is a violation of a defendant's ability to confront a witness guaranteed in Article 14(3)(e) of the I.C.C.P.R." See *ibid*., pp. 752-753 for more examples.

[90] See Thieroff and Amley, Jr. 1998, p. 259: "Although formal distinctions between trials in absentia and Rule 61 proceedings may exist, it is possible that reconfirmation hearings function as trials in absentia in all but name." See also Furuya 1999, p. 635: "Officially, this 'Rule 61 procedure' is only a proceeding for reconfirming an indictment, which does not determine an accused's guilt or innocence. In substance, however, it has functioned as a trial-like procedure to some extent." In contrast to Quintal, Thieroff and Amley, Jr. argue (see Thieroff and Amley, Jr. 1998, p. 234) that the instrument, "even if it is characterized as the functional equivalent of a trial in absentia, is consistent with international law." Furuya sides more with Quintal in that respect. See for her criticism towards the rule, Furuya 1999, pp. 662*ff*.

[91] See Arbour 2004, p. 399: "The benefit of this process was obviously to satisfy the appetite of the press for access to the investigative phase of the work of the Tribunal – a phase not typically conducted in public. In turn, the process led to the increased visibility of the Tribunal, and provided a forum to mobilize public opinion in favour of aggressive arrest initiatives and budgetary support. I do not know if recourse to Rule 61 was either necessary or effective for this purpose. On the other hand, I believed that recourse to Rule 61 was detrimental to the work of the Prosecutor, and I was never persuaded that its benefits outweighed its deleterious effects. First and foremost, the Rule 61 hearings exposed publicly large parts of the evidence against the accused before he was apprehended. This exposure increased the danger of witness intimidation, tampering with evidence and fabrication of convenient evidentiary responses. It also monopolized important and scarce resources within OTP, with investigators and prosecutors re-examining the case for hearing preparation rather than moving on to developing new cases. Because the hearings were, by definition, *ex parte*, it also gave the trial attorneys, in my view, a false sense of security and confidence in the quality of their case. Evidence always looks better when it is unopposed and unchallenged."

[92] Schabas 2006, p. 382.

The last provision which should be mentioned here is the *habeas corpus*-like provision related to accused persons:[93] Rule 65 of the ICTY/ICTR RPE. This provision clarifies, among other things, that "[o]nce detained, an accused may not be released except upon an order of a Trial Chamber"[94] and that provisional release may – there is hence no obligation – only be ordered by the Trial Chamber if, among other things, "it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person".[95] Furthermore, the Trial Chamber can impose conditions, such as "the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others".[96]

It must be noted that the formulation of this provision – especially an earlier version of it which demanded that the suspect showed "exceptional circumstances" to justify release[97] – has been criticised in that it creates a context in which pre-trial detention is the rule and provisional release the exception, this being in contravention of an article such as Article 9, paragraph 3 of the ICCPR[98] and the presumption of innocence.[99] It is indeed strange that a person had to demonstrate "exceptional circumstances" to justify release. The burden of proof should be with the Prosecution here. One can agree with Sluiter that the criticism and damage done to the authority of the Tribunals caused by this provision could easily have been avoided; a different provision would arguably not have led to a situation in which persons would be released too quickly.[100] After all, it would not be too difficult for the Prosecution to prove – given the seriousness of the crimes with which the person

[93] For this provision related to suspects, see the already-mentioned Rule 40 *bis* (G) of the ICTY RPE and Rule 40 *bis* (K) of the ICTR RPE.
[94] Rule 65 (A) of the ICTY RPE. See for a comparable provision in the ICTR context Rule 65 (A) of the ICTR RPE.
[95] Rule 65 (B) of the ICTY/ICTR RPE.
[96] Rule 65 (C) of the ICTY RPE. See for a comparable provision in the ICTR context Rule 65 (C) of the ICTR RPE.
[97] Within the context of the ICTY, the amendment of the rule, removing the requirement "exceptional circumstances", entered into force on 6 December 1999, see ICTY, Trial Chamber III, *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, 'Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release', Case No. IT-00-39 & 40-PT, 8 October 2001, n. 21. Within the context of the ICTR, this only took place more than three years later, on 27 May 2003, see O'Dowd 2004, p. 96.
[98] Which reads: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. *It shall not be the general rule that persons awaiting trial shall be detained in custody*, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement [emphasis added, ChP]."
[99] See Zappalà 2003, p. 70, Gordon 2007, pp. 691-692 and Sluiter 2007, p. 14 (and n. 28). Note that even judges of the ICTY had to admit that the removal of the "exceptional circumstances" requirement did not change "the position that provisional release continues to be the exception and not the rule". (ICTY, Trial Chamber III, *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, 'Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release', Case No. IT-00-39 & 40-PT, 8 October 2001, para. 12.) See also O'Dowd 2004, p. 97. See also *ibid*., p. 98 (and n. 49), explaining that ICTR judges have also followed this stance.
[100] See Sluiter 2007, pp. 14-15.

is charged[101] and the fact that there is thus a chance that that person may be sentenced to a considerable time in prison – that there is also a chance that that person may flee if released.[102] Alongside this risk of absconding, which will lead to the same problems the police force-lacking Tribunals may have encountered in apprehending the person in the first place,[103] Sluiter also points to social disturbance as a legitimate ground for provisional detention. This approach would indeed be more correct, even if the factual outcome may very well be the same as in the first approach, namely that detention is the rule and release the exception.

These kinds of grounds, which were also identified in the context of the (problems related to the) remedy of release from provisions such as Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 4 of the ECHR (see Subsection 4.4 of Chapter III), can explain why a Tribunal, once it has a person (finally) in custody, will not be keen then to provisionally release him. However, much will depend on the exact circumstances of the specific case. One must also understand that a person charged with very serious crimes may very well be provisionally released, for example, if it is clear that that person will appear for trial and will not pose a danger to other persons and if other grounds for denying release, such as social disturbance, are lacking. Note finally that supporting such conditional releases arguably does not in any way undermine the construction proposed in the context of the problematic remedy of release from Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 4 of the ECHR, a remedy which has nothing to do with provisional release; the release stemming from the two above-mentioned human rights provisions is the remedy for an unlawful detention and not for the fact that a judge decides that a person, under certain conditions, can await his trial in freedom rather than in custody.

Having briefly discussed the arrest and transfer provisions of the ICTY/ICTR (RPE), about which Swart concludes that they are "mainly concerned on the duties of States vis-à-vis the Tribunals"[104] and "[t]o a certain extent (...) neglect the rights

[101] See also Khan 2008, p. 1164, n. 34: "Various commentators have justified or explained the more restrictive pre-trial release conditions in the ICTY/R Rules of Procedure and Evidence. For example, D. D. Ntanda Nsereko, observes that, "Considering that the rules subscribe to the presumption of innocence, the provisional release restrictions are quite stringent. The only justification for this stringency that comes to mind is the gravity of the offences over which the Tribunal has jurisdiction and the desire to avoid a public outcry over allowing accused persons to be at large" (...). Similarly, K. S. Gallant, has stated that "While such a rule [that pre-trial release is exceptional] would be harsh in a court with jurisdiction over ordinary crimes, it is reasonable given that the only crimes over which the Tribunal has jurisdiction are serious violations of international humanitarian law. The harshness of this rule, however, emphasises the need to ensure that persons are not arrested and detained except on reasonable (or probable) cause". (...)." See also O'Dowd 2004, p. 93.

[102] See also O'Dowd 2004, p. 93.

[103] See the remainder of the quotation from the case of Krajišnik and Plavšić (see n. 99), where the judges write on the "position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants [original footnote omitted, ChP]." (ICTY, Trial Chamber III, *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, 'Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release', Case No. IT-00-39 & 40-PT, 8 October 2001, para. 12.) See also O'Dowd 2004, p. 93.

[104] Swart 2002 A, p. 1251.

of the individual persons concerned",[105] three points still need to be addressed before turning to the actual *male captus* cases.

First, the third and last "innovative way" to obtain the arrest of persons and their transfer to The Hague mentioned by Lopez-Terres is still to be discussed.

This is the creation, in 2001, of a specialised tracking and intelligence unit in the OTP.[106] This team has no powers of arrest;[107] it assembles information on the

[105] *Ibid*. See also Sluiter 2009, p. 467.

[106] See P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 7. Note that the ICTR also had (in fact, was the first to have, see Simmons 2004) such a tracking team, see, for example, 'Security Council reviews progress made by international tribunals for Rwanda, former Yugoslavia. Speakers Stress Need to Bring High-Profile Offenders To Justice, Gain Cooperation of Governments in Arresting Those Accused', UNSC, 5199th Meeting (AM) (13 June 2005), Press Release SC/8409, available at: http://www.un.org/News/Press/docs/2005/sc8409.doc.htm: "Noting that the tracking and apprehension of the 14 fugitives continued to be a high priority, he [ICTR Prosecutor Jallow, ChP] said the organization and strategies of the Tracking Unit had been the subject of review as a result of which three measures had been taken. The Unit's capacity had been increased with additional staff. It also had now adopted a strategy for ensuring a greater physical presence of its members in the field than at headquarters in Arusha and Kigali. Contact with the political and law enforcement authorities had been initiated with the countries in which the fugitives were suspected to be taking refuge. Each of those countries had agreed to establish joint mechanism with the Prosecutor's Investigation Division tracking team through which they could collaborate in tracking the fugitives. There had also been useful discussions with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the African Union on modalities of collaboration in that respect." See on this topic also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), pp. 34-36.

[107] In that respect, it must be clearly discerned from an international *arrest* team whose establishment was proposed by the Royal Marechaussee of the Netherlands in 2001, see Leurdijk 2001, p. 69. During the discussions on this proposal, it was stated that "arresting war criminals is not a soldier's job but a police responsibility. The actual arrests (…) should be left to specialised police trained teams of the gendarmerie-type, such as the Marechaussee itself". (*Ibid*.) Since these kinds of teams are already available, "the real question (…) would be whether it would be politically feasible." (*Ibid*., p. 70.) Leurdijk, after mentioning potential obstacles with respect to the proposal such as the role of the non-intervention principle, answers this question in the negative: "[W]hile a permanent arresting team might be considered highly desirable, at the same time, it is highly unlikely that here is sufficient political support among the UN member states to establish such an 'A-team'". (*Ibid*., p. 71.) See also Supernor 2001, p. 231: "The UN Charter envisioned that the UN would possess its own standing military force but this has never occurred. If, after approximately fifty years, the UN has been unable to implement its original intent of possessing a standing military force; it is difficult to envision the creation of a standing international police force [original footnote omitted, ChP]." On 14 March 2007, during the lecture 'The Tribunal's Completion Strategy and the Importance of Cooperation of States for its Work', presented by Olga Kavran, spokesperson for the ICTY's Prosecutor and hosted by the *International Criminal Law Network* in The Hague, the author of this study asked Olga Kavran whether she knew the current opinion of the international community on this issue. Again, the answer was that an international arrest team will probably not be feasible because of a lack of political will. See for an older account Gallant 1994, p. 583: "The reliance upon national authorities to effect arrest is necessary because it is not yet politically feasible to establish an international police force with arrest powers." See finally Lavrijssen 1998, pp. 27-28, describing the views of Goldstone and Van Boven on this matter: "*Dr. Richard Goldstone*: 'I do not believe that we are going to have an international police force in the foreseeable future. Countries are just not going to allow a foreign police force to come into their territory and start

ground, for example through surveillance,[108] in order to track down the suspects. This intelligence is then provided to governments, organisations or other entities with arrest powers, which must make the actual arrests.[109]

The above-mentioned link with the government implies that the State on which territory the team is assembling information is aware of this team and has consented with its mandate and powers.[110]

However, that does not mean that the authorities will always cooperate with the team, even if they have an obligation to do so.[111]

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arresting their citizens. As much I would like it to happen, it is just not practical politics. (…)' *Professor Theo van Boven*: 'It is not realistic to expect that the International Criminal Court will have a police force at its disposal. (…)'[emphasis in original but bold emphasis changed into italicised emphasis, ChP]"

[108] See M. Simons, 'Tribunal Detectives Pursue War Criminals in the Balkans', *New York Times*, 25 July 2004, available at: http://query.nytimes.com/gst/fullpage.html?res=9E01EFD6173DF936A15754C0A9629C8B63&sec=&spon=&pagewanted=all: "The war crimes tribunal for the former Yugoslavia has no assault troops or police commandos at its service. But it does have detectives armed with cameras. For almost two years, the undercover agents and their network of informants have snooped around streets in Serbia and travelled through the mountains in Bosnia. Their business is to find and shadow people suspected of committing war crimes during the Balkan conflict of the early 1990's. (…) "It's classic shadowing work, with the use of sources and informants," said a former investigator familiar with the work of both tribunals."

[109] See P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 7. See also the presentation of David Tolbert of the ICTY during the 'Second public hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts', The Hague, 26 September 2006 (available at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+2), commenting on the ICC OTP's *Report on Prosecutorial Strategy*, The Hague, 14 September 2006 (available at: http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf), providing two examples where the ICTY tracking team was used, namely the *Hadžić* case (see n. 112) and the *Gotovina* case: "[T]he key information which resulted in Gotovina's arrest in the Canary Islands could only be properly assessed because the OTP's "tracking team" could evaluate it. (…) [T]he Office needs "eyes and ears" of its own. (…) Because we had gathered our own intelligence/expertise from the field, we were able to test Croatia in the Gotovina case when the authorities c[a]me forward with information. Thus, the Prosecutor had the tools to test the information submitted by the Croatian government. When the crucial information came that Gotovina was possibly in the Canary Islands, we were able to check this information."

[110] See also n. 106 (where Chief Prosecutor Jallow explains the policy at the ICTR). If that is not the case, then one can wonder whether the police work executed by this team is not a violation of a State's sovereignty. (Although the ICTY's OTP has not qualified the work of the unit as police work (See the following summary from the ICTY Weekly Press Briefing, 2 May 2001, available at: http://www.icty.org/sid/3334: "He [Jean Jacques Joris, Advisor to the Prosecutor, ChP] added that the term 'police task force' was given to the general idea previously, now the Prosecutor favoured the expression 'tracking team' because that was what the team would be about. Not police, because they would not be carrying out the arrests, solely locating people. Like a scouting group, he concluded."), it is hard to see why it is not. The fact that the team does not have the (indeed very crucial) power to arrest, does not make all its other powers, which appear to go to the core of police work, meaningless. See also Subsection 2.1 of Chapter III and its examination of the concept of luring.)

The famous *Hadžić* tip-off story makes this abundantly clear.[112] Notwithstanding this, Lopez-Terres explains that the unit "has played a crucial role in obtaining intelligence and information on the whereabouts of several fugitives, which eventually led to their arrest, both in Bosnia and Herzegovina and in Serbia".[113]

The second point to be made is that it is probably not the above-mentioned techniques, but political pressure from third States and organisations that has led to most arrests and transfers. In the words of the (then) Chief Prosecutor of the ICTY, Carla Del Ponte: "Experience had shown that the political pressure from the European Union and the United States was the most significant factor encouraging the States of the former Yugoslavia to transfer indictees to The Hague."[114] One could hereby think of the carrot-and-stick method with respect to finances[115] and

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[111] See P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 7.

[112] See Simons 2004: "Recounting her [Carla Del Ponte's, ChP] story in an interview, she said that earlier this month, when her office was about to deliver a new indictment and arrest warrant to Serbia, she and her agents decided to set a trap. The arrest order was for Goran Hadzic, a leader of rebel Serbs in Krajina, Croatia, who was charged with war crimes and crimes against humanity. A warehouse worker before the war, Mr. Hadzic profited from wartime smuggling, Ms. Del Ponte said, and now lives in a comfortable villa in Novi Sad, a Serbian city on the Danube. "The day before delivering the papers, we put Hadzic's house under surveillance," she said. She offered a detailed account of what came next. On July 13, at 9:30 a.m., her representatives delivered the indictment and arrest warrant for Mr. Hadzic to the Serbian Foreign Ministry in Belgrade. They also provided Mr. Hadzic's address. In keeping with the standard practice, on the same day, at 11:30 a.m., copies were transmitted to the Serbian Embassy at The Hague. At 3:30 p.m., Ms. Del Ponte said, the Serbian Foreign Ministry sent the documents to the Belgrade District Court. They arrived there after working hours. That day, Mr. Hadzic was seen in his garden. He left his home at 12:38 p.m., and returned 45 minutes later. "Around 4 o'clock he gets a call on his cellphone," Ms. Del Ponte said. "It's the call tipping him off. I'd quite like to know who that was." At 4:27 p.m., he was seen leaving his house carrying a bag. He got into a car with a driver and drove off. Two days later, Ms. Del Ponte said, the local police reported to the Belgrade Court that Mr. Hadzic was not at home and that his whereabouts were unknown. On Thursday, after she released the surveillance photographs, the Serbian police said they would open an internal investigation into Mr. Hadzic's escape. It was not the first time, she said, that a suspect had vanished after the Belgrade authorities were asked to make an arrest." For the official press conference on these events, see 'Press Conference by Prosecutor Carla Del Ponte 19 July 2004', The Hague, 19 July 2004, JP/P.I.S./872-e, available at: http://www.icty.org/sid/8389.

[113] P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 7. See also the ICTY itself on its website available at: http://www.icty.org/sid/97: "The tracking team, which consists of information agents from various countries, has contributed to the arrest of several indictees. Providing national authorities with exact data on the fugitives' location can circumvent the passiveness of many states in searching for them."

[114] 'Presidents, Prosecutors of Rwanda, former Yugoslavia Tribunals Brief Security Council on Progress in Implementing Completion Strategies. Say Aim to Conclude by 2010, but Schedule Will Be Affected By Apprehension of At-Large Indictees, Transfer of Cases to National Courts', UNSC, 5328th Meeting (AM) (15 December 2005), Press Release SC/8586, available at: http://www.un.org/News/Press/docs/2005/sc8586.doc.htm.

[115] As will be further clarified in Subsection 3.1.3, "[f]ormer President Milosevic was surrendered to the ICTY on 28 June 2001 due to a US threat to boycott a key donor's conference." (P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December

membership of organisations.[116] One can argue that such actions are not only based on politics but may also have a legal dimension. In the words of the ICTY:

> Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*". By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29 (…). Faced with the situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each

2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 10.) See also Gillett 2008, p. 19 (writing on the Milošević transfer as well): "[I]t took the conditioning of US $1.28 billion of desperately needed aid on his surrender to persuade the Serbian National Assembly to hand him over [original footnote omitted, ChP]." See also Scharf (2000, p. 938), who does not, however, limit himself to the statal context: "[F]inancial inducement can be used as a stick (as with the threat or imposition of trade embargoes and the freezing of assets), or as a carrot (as with the conditional promise of reconstruction aid or the offer of "rewards)." One can agree with Scharf's preference for the more personal method of freezing of assets here (see *ibid.*, p. 946): "Compared to other forms of financial inducement such as imposition of economic sanctions and conditionality of reconstruction aid – which hurt the population at large, as well as the target country's trading partners – freezing the assets of indicted war criminals is a precision tool for promoting justice. It is a tool of great potential value to the ICC, which would be available where its jurisdiction is triggered by the Security Council." See also n. 300 of Chapter VIII, where the ICC's *own* possibilities with respect to this tool are further explained. As concerns the rewards, one could think here of financial rewards for citizens for information or assistance which will lead, in the end, to the arrest of suspects of international crimes, see the 'US Rewards for Justice Program', available at: http://www.rewardsforjustice.net. See also *ibid.*, p. 950, where Scharf explains that "[o]n June 24, 1999, the United States announced that it was offering a reward of $5 million for such information and assistance related to indicted Yugoslav war criminals [original footnote omitted, ChP]." This last tool could indeed be very practical, at least when it is clear that awards will only be granted for information and assistance in the arrest efforts of the competent authorities and not for actually turning in the suspect in question, which may lead to chaotic wild-west scenarios executed by private bounty hunters, see also n. 281 of this chapter.

[116] See P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), pp. 10-11: "In 2002, in Copenhagen, the European Union agreed to a strategy defining the conditions for the States of the former Yugoslavia to join the EU. The full co-operation with the ICTY was one of them. In parallel, NATO told Bosnia and Herzegovina and Serbia and Montenegro that could not join the Partnership for Peace program as long as the most wanted indictees would remain at large." An example mentioned by Lopez-Terres (at p. 11) is the *Gotovina* case: "It was only after the Prosecutor confirmed that Croatia was fully co-operating with the ICTY, on 3 October 2005, that the accession talks [with the EU, ChP] finally began. A few days earlier, Croatia had communicated Gotovina's whereabouts." See also Ciampi 2006, p. 734 and Roper and Barria 2008, p. 461. The latter authors, by the way, differentiate between political (less efficient) and economic (more efficient) pressure, see *ibid.*, pp. 466-467 (where they write about the ICC, in whose context political/economic pressure may, of course, also be of crucial importance): "We regard political pressure by third parties, whether by states or non-state actors, as generally having a limited ability to enhance the bargaining effectiveness of the ICC with regard to the capture of indictees. Instead, military or peacekeeping pressure and especially economic pressure are more successful tools available to third parties to enhance the leverage of the ICC." See finally Rastan 2008, pp. 438-439 and C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), pp. 21-22.

> Member State of the United Nations may act upon the legal interest referred to; consequently it may request the State to terminate its breach of Article 29. In addition to this possible unilateral action, a collective response through other intergovernmental organizations may be envisaged. The fundamental principles of the United Nations Charter and the spirit of the Statute of the International Tribunal aim to limit, as far as possible, the risks of arbitrariness and conflict. They therefore give pride of place to collective or joint action to be taken through an intergovernmental organization. It is appropriate to emphasise that this collective action: (i) may only be taken after a judicial finding has been made by the International Tribunal; and (ii) may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions. In addition, collective action would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace [original footnotes omitted, ChP].[117]

Recourse to these methods can also be explained by the fact that the normal mechanism in the case of non-compliance[118] is not very effective.[119]

In that respect, the fact that the Tribunals are, on paper, backed by the UN Charter and the UNSC, to which, for example, the ICTY's OTP has often turned for assistance, [120] may not necessarily be of any help to these institutions.[121]

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[117] ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', IT-95-14, 29 October 1997, paras. 26 and 36.

[118] According to Rule 7 *bis* of the ICTY (and ICTR) RPE, "[a] judge, a Trial [C]hamber or the Prosecutor may request the President to make a finding of non-compliance with the obligation to cooperate, and if the President makes such a finding, the Security Council must be notified. Upon receipt of the President's report, the Security Council has the discretion with respect to what action, if any, is necessary, to bring the recalcitrant State into compliance with its duties." (P. Lopez-Terres, Chief of Investigations, ICTY, 'Arrest and transfer of indictees. The experience of the ICTY', 15 December 2006 (available at: http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf), p. 9.)

[119] See *ibid*.: "Such a mechanism of denunciation before the Security Council, is potentially a useful tool, since if used diligently, is tantamount to a public blame before the representatives of the whole international community in New York, which most of States will want to avoid. However, the Security Council has not always responded effectively to the Tribunal's reports of non-compliance, typically issuing a Resolution or a Presidential Statement in response to the ICTY President's reports of non-compliance. (…) Given the relative inefficiency of such a mechanism the Office of the Prosecutor had to find innovative ways to obtain the cooperation from the recalcitrant states by using a substitute strategy and also by creating incentives for full cooperation with the ICTY, such as conditioning aid programs and admission to international organizations." The fact that the Tribunals (and this, of course, also goes for the ICC) do not have the power to force States to comply with their orders has been qualified as the Achilles heel of these institutions. (See, for example, Van Sliedregt 2001 B, p. 74.) Although this term is indeed most often used in the context of lack of enforcement powers (see, for example, also Sadat 1999, p. 116, Knoops 2002, pp. 1 and 324 and Sloan 2005, p. 492), the term has also been used to describe other features in the systems of international criminal tribunals, see for example Tolbert 2003, p. 975 ("the defense counsel and legal aid systems") and Crane 2006, p. 513 ("the experience of the judges who are appointed to try the cases and hear the various appeals").

[120] See, for example, the following words from Carla Del Ponte. After having talked about the "accused who are beyond the reach of SFOR" (UNSC, Fifty-fourth year, 4063rd meeting, 10 November 1999,

The third and final point which must be made here before turning to the actual *male captus* cases has to do with the interaction between the law of the Tribunals (of which part has been described in the previous pages) and human rights law. Although the Statute and the RPE mention certain rights,[122] one can wonder whether the Tribunals are also bound to human rights law stemming from, for example, the ICCPR and the ECHR.

Although the provisions of international and regional human rights treaties in principle only create obligations for States and thus not for non-State entities such as an international criminal tribunal,[123] it can be argued (*cf.* also the discussion in Chapter III on the right to liberty and security) that several of these treaty provisions are evidence of customary international law and as such binding on all subjects of

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S/PV.4063, p. 3), she stated (*ibid*., p. 4): "I cannot emphasize enough the importance of the support the Security Council can give the Tribunal. We do not seek it lightly, and I therefore urge the Council to put its full weight behind our efforts when we ask for its assistance and to be creative in finding ways to bring to bear the sort of pressures that will produce results." It must be noted that the word "creative" is linked here to the words "in finding ways to bring to bear the sort of pressures that will produce results." Hence, it is linked with the political pressure which the UNSC can resort to. However, these words can arguably not be seen as a green light for 'creative'/dubious ways to arrest suspects, for example, through abduction. However, Supernor (2001, p. 217) *does* connect these words of Carla Del Ponte with the abduction of Nikolić (whose case will be discussed in Section 3.1.4).

[121] See in that respect the *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005. In this report, which can be found in Annex II of UN Doc. S/2005/458 of 15 July 2005 ('Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council'), one can read (in para. 417): "[T]he experience of the ICTY has shown that a legal foundation in Chapter VII may not necessarily guarantee effective enforcement *in practice* [emphasis in original, ChP]." Nevertheless, it is also true that "[o]ne cannot say (...) that all actions by the Security Council against Serbia and Montenegro, Croatia and Bosnia-Herzegovina have had no effect on these States' efforts to cooperate with the ICTY's requests of arrest and surrender of suspects located in their territory." (Ciampi 2006, p. 732.) Ciampi also provides (see *ibid*., p. 733) an example related to an internationalised criminal tribunal in that respect: "[E]ven the mere possibility that the Security Council requires the surrender of suspects under the threat of sanctions has proved effective: for example, when the Prosecutor for the Sierra Leone Special Court advanced the proposal of a Chapter VII Security Council resolution to compel Nigeria to arrest and transfer wanted fugitive Charles Taylor to the Special Court, Charles Taylor was eventually turned over by the Nigerian government before any Security Council's action was taken against the latter [original footnote omitted, ChP]." A very famous example, not related to the present international(ised) criminal tribunals, where a Chapter VII recourse (eventually) seems to have worked is the *Lockerbie* case. In UNSC Res. 748 of 31 March 1992, the Council, acting under Chapter VII, decided that Libya had to comply, among other things, with requests for extradition of the two Libyan officials who were suspected of murdering 270 people in the 1988 explosion of Pan Am Flight 103 over the Scottish town of Lockerbie, "failing which a set of enforcement measures would be imposed. Enforcement measures were eventually imposed, remained into force for a decade and were finally lifted following not only the surrender of the two suspects to the Netherlands for trial before a Scottish tribunal, but also acceptance of responsibility by [the] government of Libya for the actions of its officials, payment of appropriate compensation to the victims and an express renunciation of terrorism [original footnote omitted, ChP]." (Ciampi 2006, p. 732.)

[122] See, for example, the already discussed Art. 21 of the ICTY Statute/Art. 20 of the ICTR Statute ('Rights of the accused') and Rule 42 of the ICTY/ICTR RPE ('Rights of Suspects during Investigation').

[123] See also Zappalà 2002 B, p. 1327.

international law, including an international criminal tribunal.[124] Moreover, if a tribunal were not bound by such provisions, obligations imposed on States could then easily be circumvented by creating tribunals which could then take over State functions.[125] Finally, it could also be asserted that it is not very logical to maintain that these sub-organs of the UNSC, which are often seen as model institutions with respect to fair proceedings,[126] could operate without respecting such (procedural) rights. If that were to happen, then it could have "negative consequences that transcend the limited framework of the Tribunals".[127]

Notwithstanding this, the first impression one may have obtained from the overview of the arrest and transfer provisions discussed above is that the Tribunals are particularly focused on efficiency and not so much on the rights of the suspect.[128] However, in 1993, the UNSG, commenting on the rights of the accused in the context of the ICTY, stated that

> [i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.[[129]] In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[130]

Nevertheless, in the Tribunal's very first case, the *Tadić* case, the judges, while taking into account this paragraph of the UNSG's report,[131] clarified:

> The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so

[124] See also *ibid*., pp. 1327-1328. See also Sluiter 2003 B, p. 937: "[H]uman rights law binds the Tribunals in their activities to the extent that it is part of customary international law or constitutes general principles of law."
[125] See Zappalà 2002 B, p. 1328. See also Sluiter 2002 B, p. 702.
[126] *Cf.* also Art. 1 ('purposes') of the UN Charter: "promoting and encouraging respect for human rights and for fundamental freedoms for all" and Zappalà 2002 B, p. 1328.
[127] Swart 2001, p. 201. This is because "both *ad hoc* Tribunals inevitably provide role models for national systems of criminal justice." (*Ibid*.) See also Schomburg 2005, p. 95: "[A]ll international criminal tribunals fulfill an important model role for national courts".
[128] See the already-mentioned remarks of Swart at ns. 24 and 104-105 and accompanying text.
[129] The words "at all stages of its proceedings" show that the Tribunal should ensure that the suspect receives not only a fair trial in court (a fair hearing) but also a fair trial more generally, which includes the pre-trial process. (*Cf.* in that respect also the already-mentioned Rule 42 of the ICTY/ICTR RPE: "rights of suspects during investigation".)
[130] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, para. 106.
[131] ICTY, Trial Chamber I, *Prosecutor v. Duško Tadić a/k/a "Dule"*, 'Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', Case No. IT-94-1-T, 10 August 1995, para. 25.

> horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence. (…) [T]he Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair trial and the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as "fair trial", whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied.[132]

These words can clearly be criticised. Recalling the reasoning made in the discussion of the *Levinge* case (see footnote 159 and accompanying text of Chapter V): as concerns the fairness of the trial *in the strict sense of the word* (which was the case here – the issue involved the use of anonymous witnesses), there can arguably be no balance between the suspect's fair trial right and anything else. It is submitted that a fair trial in the strict sense of the word is the minimum requirement for *any* trial. If anything less is offered, under the guise of the court's 'uniqueness', the trial should be stayed to immediately repair the problem. However, if it becomes clear that the suspect can no longer receive a fair trial, the judges should refuse jurisdiction to try the case.

Luckily, however, "[s]ubsequent decisions (...) have displayed a greater ease with sources of law outside the Statute and RPE and have increasingly applied treaty based human rights law [original footnote omitted, ChP]".[133]

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[132] *Ibid*., paras. 28 and 30. For criticism, see, for example, Stapleton 1999, pp. 555*ff*.

[133] Sluiter 2003 B, p. 938. See also Zappalà 2002 B, p. 1328 and the two still-to-discuss *Barayagwiza* (see Subsection 3.2.1) and *Nikolić* (see para. 110 of the Trial Chamber's decision of 9 October 2002, see Subsection 3.1.4) cases. In the first case, for example, the judges held: "The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 40.) Swart (2001, p. 201) welcomes this development: "Persons suspected or accused of international crimes should be no less entitled to respect for their basic individual rights than any other suspects or accused." Of course, one cannot but agree with this statement. Prosecutors and judges must respect basic human rights, such as the right to liberty and security, in every case, whether that case involves a suspect of fraud or a suspect of genocide. In addition, it is also crucial that every pre-trial wrong is repaired by a remedy. However, as will be explained in the context of the *Dokmanović* and *Nikolić* cases, these commendable thoughts do not delete the problems caused by the remedy of release, see Subsection 4.4 of Chapter III. To solve these problems, it was, and again will be, suggested that, in the case of the establishment of an unlawful arrest/detention, one should take into account all the relevant aspects of the case in determining the most appropriate remedy, which may include the fact that the suspect in question is charged with very serious crimes and that prosecuting that person is of paramount importance to the international community as a whole (*cf*. the abuse of process doctrine).

An example of this can be provided with respect to the right to liberty and security/the right not to be subjected to arbitrary arrest and detention, which is so important for this study.

This right is not mentioned in Article 21 of the ICTY Statute/Article 20 of the ICTR Statute ('Rights of the accused') and Rule 42 of the ICTY/ICTR RPE ('Rights of Suspects during Investigation'),[134] which have already been alluded to but, with inspiration from (or by applying directly) treaties like the ICCPR and the ECHR,[135] judges have tried to fill that gap through case law.[136] For example, in the still-to-discuss (see Subsection 3.2.1) *Barayagwiza* case, the ICTR judges saw "no reason to conclude that the protections afforded to suspects under Article 9 of the ICCPR do not also apply to suspects brought before the Tribunal".[137] Zappalà also notes that

> [a]n element that may seem surprising in the texts governing the activities of the *ad hoc* Tribunals is the absence of any express provision granting the right to challenge the legality of the arrest. This is, however, an element that should absolutely not be overestimated. As stated several times by the Chambers of the Tribunals, such a right

[134] See also Sluiter 2001, p. 152. Note, however, that Rule 40 *bis* (G) of the ICTY RPE seems to point to a certain *habeas corpus* possibility: "During detention, the Prosecutor and the suspect or the suspect's counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release." See for a comparable provision in the ICTR context Rule 40 *bis* (K) of the ICTR RPE. See also the review and release possibility from the moment of the suspect's transfer in Rule 40 (C) and (D) of the ICTR RPE.

[135] See *ibid*., p. 155: "One may explain the prominent place of the ECHR and the jurisprudence of the European Court as recognition of the importance and authority of this instrument and this international judicial body. Furthermore, a great number of rights are identical under both the ECHR and the ICCPR, and the ECHR, was used as a source in the development of the ICCPR."

[136] Sluiter (*ibid*., p. 152) notes that, because of the fact that the ICTY Statute and RPE "do not incorporate the right of persons not to be subjected to arbitrary arrest and detention", it is "of vital importance that the Tribunal applies these provisions [namely Artt. 9 of the ICCPR and 5 of the ECHR, ChP] to their full extent, including relevant case law pertaining to these provisions." Hence, that should also include the remedies mentioned therein. *Cf*. in that respect also ICTY, Appeals Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo*, 'Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić', Case No. IT-96-21-AR72.4, 22 November 1996, para. 16: "The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic. The right also entails the right to an effective remedy for deprivation or violation of that right." See also *ibid*., para. 17, where it is clarified that this means that the Chamber must review the lawfulness of a person's deprivation of liberty. Although it is not clearly stated as such, this must arguably also include a release if the deprivation of liberty is deemed unlawful. However, that was not the case here: "The mistake which the Applicant makes, however, is to consider that the Trial Chamber, by denying the motion for provisional release, has violated the Applicant's right to liberty and that the Applicant is therefore entitled to an effective judicial remedy for that violation. The correct analysis is that the Trial Chamber *is the effective judicial remedy* for any alleged violation of the right to liberty. By applying to the Trial Chamber, the Applicant exercises his right to challenge the lawfulness of his detention and deprivation of liberty. The word "effective" does not mean that the Application has to *succeed*; this would be a nonsense. It is enough that the competent judicial authority reviews the position in accordance with the appropriate norms and human rights standards, which the Trial Chamber has done quite properly [emphasis in original, ChP]."

[137] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 79, n. 205.

is implicit in the system of the Tribunals for its fundamental importance and it directly derives from international norms protecting the rights of the individuals in criminal proceedings, which are binding on the Tribunals [original footnote omitted, ChP].[138]

[138] Zappalà 2002 A, p. 1195. (See also Zappalà 2003, p. 75: "In the *ad hoc* Tribunals systems there are no specific provisions for *habeas corpus* motions or for compensation for unlawful arrest or detention. However, the practice of Chambers has shown that the judges are willing to admit such motions, irrespective of the lack of express provisions, in accordance with international human rights law. Furthermore, as regards the right of compensation the Appeals Chamber of the Tribunal held that where the rights of the accused were violated he or she had to receive compensation [original footnotes omitted, ChP]." See also Knoops 2003, p. 221.) Zappalà hereby refers, besides the *Dokmanović*, *Barayagwiza* and *Todorović* cases which will be addressed in more detail in the next section of this chapter, to the *Djukić and Krsmanović* case (IT-96-19-Misc1). This last case will not be further examined in this book (see also n. 3 of Chapter IV) for the Chamber quickly disposed of the matter: it "declined to pronounce upon the legality of the arrest by national authorities on the view that it could not review the acts of national authorities in this respect". (*Ibid.*) (For the decision itself, see ICTY, Trial Chamber I, *Motion on Behalf of General Djorde Djukić*, 'Decision', Case No. IT-96-19-Misc. 1, 28 February 1996.) *Cf.* also Radosavljevic 2008, p. 276: "[T]he ICTR has consistently held that it lacked jurisdiction to review the legal circumstances attending the arrest of a suspect in so far as the arrest had been made pursuant to the laws of the arresting state [original footnote omitted, ChP]. Radosavljevic refers here to the cases of *Karemera*, *Ngirumpatse* and *Kajelijeli* (ICTR, Trial Chamber II, *The Prosecutor versus Edouard Karemera*, 'Decision on the Defence Motion for the Release of the Accused', Case No. ICTR-98-44-I, 10 December 1999; ICTR, Trial Chamber II, *The Prosecutor v. Matthieu Ngirumpatse*, 'Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items', Case No. ICTR-97-44-I, 10 December 1999; ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000), three cases which were also referred to in the case ICTR, Trial Chamber I, *The Prosecutor v. Siméon Nshamihigo*, 'Decision on the Defence Motion Seeking Release of the Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor', Case No. ICTR-2001-63-DP, 8 May 2002, n. 2. See finally also ICTR, Trial Chamber II, *The Prosecutor v. Joseph Nzirorera*, 'Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized', Case No. ICTR-98-44-T, 7 September 2000, para. 27 (where the Chamber recalled its decisions in *Karemera*, para. 4.3.1, *Ngirumpatse*, para. 56 and *Kajelijeli*, paras. 34 and 35, "where it held that the Chamber lacks jurisdiction to review the legal circumstances attending the arrest of a suspect, under Rule 40 of the Rules, in so far as the arrest has been made pursuant to the laws of the arresting state") and ICTR, Trial Chamber II, *The Prosecutor v. Pauline Nyiramasuhuko*, 'Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized', Case No. ICTR-97-21-T, 12 October 2000, para. 28: "[W]e recall the *Ngirumpatse* Decision, (...) holding that the Tribunal is not competent to determine the legality of operations executed by sovereign national authorities within the context of existing national legislation." As will be argued in the remainder of this chapter, this is arguably a too restrictive stance (a stance which does arguably not find support in cases such as *Dokmanović*, *Barayagwiza*, *Semanza* (Appeals Chamber), *Kajelijeli* (Appeals Chamber) and *Rwamakuba*, cases which will all be examined in this chapter). If arrests and detentions are made by national authorities (or international forces) at the request of the Tribunal, these arrests and detentions are part of the Tribunal's legal proceedings, even if they are executed by others. It is submitted that if wrongs/violations have occurred in these (inter)national arrest and detention proceedings, the Tribunal should be able to repair them by granting remedies. Thus, it should *also* be able to review the legal circumstances attending the arrest and detention of suspects made at the national level if it wants to find out whether or not wrongs have in fact been committed in these proceedings.

Now that the reader has been introduced to some of the characteristics of the arrest and transfer regime of the ICTY and ICTR, it is time to look at the *male captus* cases decided in this context. As will become clear in the next section, not every case will receive the same degree of attention as some cases are legally speaking simply more interesting than others.

3 CASES IN THE CONTEXT OF THE ICTY AND ICTR

3.1 Cases in the context of the ICTY

3.1.1 *Dokmanović*

The 1997 *Dokmanović* case[139] was "the first case before either of the *ad hoc* Tribunals in which the legality of arrest was the object of litigation".[140]

It is an excellent example of luring and resembles, to a certain extent, the already analysed *Stocké* case, see Subsection 2.2.4 of Chapter III (and Subsection 2.2 of Chapter V).

On 3 April 1996, Judge Fouad Riad of the ICTY ordered that Dokmanović's name be secretly[141] added to an indictment against three other accused, namely Mile Mrkšić, Miroslav Radić and Veselin Šlijvančanin, "for their alleged involvement in the November 1991 beatings and killings of non-Serb men at the Ovčara farm in Vukovar".[142] Dokmanović was the President of the Municipal Assembly in Vukovar, the capital of Eastern Slavonia – a region in eastern Croatia – where UNTAES had its headquarters.[143]

The same day, Judge Riad also signed a 'Warrant of Arrest Order for Surrender', directing UNTAES to search for, arrest, and surrender Dokmanović to the ICTY.[144]

Three months later,[145] the necessary documents were forwarded to UNTAES,[146] but in the meantime, Dokmanović had already moved east, to Sombor in the FRY, a territory beyond the jurisdiction of UNTAES.[147]

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[139] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997.

[140] Sluiter 2001, p. 151.

[141] Dokmanović's indictment was sealed (see also Section 2 of this chapter) because Judge Riad was convinced that non-disclosure was necessary for the investigation, see ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 2.

[142] *Ibid*.

[143] See *ibid*., para. 7.

[144] See *ibid*., para. 3. As already explained (see n. 66), in contrast to IFOR/SFOR, UNTAES (and the same goes for KFOR) has an explicit obligation to cooperate with/arrest suspects for the ICTY.

[145] The reason for this delay is explained in ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, n. 1. See also *ibid*., para. 55.

[146] See *ibid*. para. 3.

When in December 1996, the ICTY OTP's Belgrade office was contacted by Dokmanović, who expressed "his desire to give evidence of alleged atrocities committed by Croats against Serbs in the area of Vukovar",[148] the OTP saw its chance; a month later, OTP investigator Kevin Curtis contacted Dokmanović, "suggesting a possible meeting between himself and Mr. Dokmanović in Vukovar".[149]

However, Dokmanović refused, stating he could not come to Vukovar for personal reasons.[150] When Curtis consequently proposed a number of other locations, Dokmanović made clear "that he was not prepared to meet with the OTP anywhere in UNTAES territory [original footnote omitted, ChP]".[151] Although Dokmanović was (most likely) not aware of the sealed indictment against him, he "was among those included on a list of persons not granted amnesty and/or indicted as war criminals by Croatia".[152] That could, obviously, explain his wariness in coming to UNTAES territory. Dokmanović suggested in turn that Curtis could come to Sombor but the latter "stated that he could not make such a trip because of the civil unrest at that time in Belgrade".[153]

Nevertheless, and apparently in an effort to win Dokmanović's trust, OTP investigators contacted him at his home in Sombor in June 1997 and requested a new meeting with him later that month to discuss the above-mentioned statement he wished to give about the atrocities committed against Serbs in Vukovar.[154] At this meeting, on 24 June 1997, a new opportunity presented itself to lure Dokmanović from the FRY to UNTAES territory when Dokmanović "inquired of the OTP investigator, Mr. Curtis, about the possibility of compensation for his property in Croatia".[155] Curtis informed him that for these kinds of matters, he had to contact the Transitional Administrator General Jacques Klein (the head of UNTAES).[156] When Dokmanović stated that he was indeed interested in contacting Klein, Curtis seized the opportunity and informed Dokmanović that he would contact the office of the Transitional Administrator to see if he could arrange such a meeting.[157] Obviously, UNTAES agreed to cooperate. Curtis, and the interpreter who was also present at the meeting of 24 June, came back the next day and told Dokmanović that a meeting was indeed possible and that he had to contact Klein's executive assistant, Mr Hryshchyshyn, at 10:15.[158] Dokmanović consequently made the call and a

[147] See *ibid*., para. 7.
[148] *Ibid*., para. 8.
[149] *Ibid*. Of course, the whole idea was not to have this meeting, but to have Dokmanović arrested by UNTAES so that he could be transferred to the ICTY.
[150] See *ibid*.
[151] *Ibid*.
[152] *Ibid*., n. 6.
[153] *Ibid*., para. 8.
[154] See *ibid*., para. 9.
[155] *Ibid*., para. 9.
[156] See *ibid*.
[157] See *ibid*.
[158] See *ibid*., para. 10.

meeting was scheduled in Vukovar at 15:30 the next day (27 June).[159] Hryshchyshyn informed Dokmanović "that he would send an UNTAES vehicle to collect Mr. Dokmanović from the bridge over the Danube River, which divides Croatia and Serbia and where the UNTAES checkpoint is located".[160]

The account of the next day's events is so precise that it is better to provide the exact words from the decision rather than to try to paraphrase them.

> On the afternoon of 27 June 1997, Mr. Dokmanović and his companion, Milan Knežević, arrived at the border post on the FRY side of the Danube River bridge. After making their way on to the bridge, and having passed the FRY border post, Mr. Dokmanović and Mr. Knežević entered an UNTAES vehicle[[161]] shortly before 15:00 hours, believing that they were being taken to their meeting with General Klein. The vehicle carrying the accused and his companion, along with two escort vehicles, proceeded to cross the bridge towards the Erdut base in the UNTAES administered area of Croatia. Upon arrival in Erdut, UNTAES soldiers removed Mr. Dokmanović and Mr. Knežević from their vehicle at gunpoint and searched them. Mr. Dokmanović was handcuffed, advised by the OTP (through an interpreter) of his rights, and informed of the nature of the charges against him. His jacket and handbag[[162]] were seized, and he had a hood placed over his head before being driven to the Čepin airfield. Upon arrival at the airfield, he was examined by a medical officer and then taken on board an UNTAES aeroplane. Around 16:00 hours, the plane departed the Čepin airfield in Croatia bound for The Hague, The Netherlands, in order to transport Mr. Dokmanović to detention and trial by the International Tribunal. Minutes after lift-off, Mr. Dokmanović was provided with a copy of the Indictment, the arrest warrant, and a statement of his rights, these documents all being in Serbo-Croatian [original footnotes omitted, ChP].[163]

In The Hague, Dokmanović complained that his arrest was illegal, arguing that it violated the ICTY Statute and RPE, the sovereignty of the FRY and international law.[164]

Six arguments seemed to have been brought forward by the Defence in that respect:[165] first, the correct procedure for arrest (see Rule 55 of the ICTY RPE) was

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[159] See *ibid*.
[160] *Ibid*., para. 10.
[161] A footnote in the decision (see *ibid*., n. 7) explains here that "[i]t is disputed as to exactly where Mr. Dokmanović and Mr. Knežević entered the UNTAES vehicle. It is clear that it was somewhere in between the FRY checkpoint in Serbia and the UNTAES checkpoint in Croatia. However, it is *unclear* as to whether it was (…) in FRY or Croatian territory. Nevertheless, as discussed below in the Findings, this factual point is irrelevant because Mr. Dokmanović was not detained against his will until he arrived at the UNTAES Erdut base in Croatia [emphasis in original, ChP]." This point will be returned to *infra* in the discussion of the legal merits of this case.
[162] In which, among other things, a loaded .357 Magnum Zastafa hand pistol was found later, see *ibid*., para. 12.
[163] *Ibid*., para. 11. Note that in Erdut, Mr Knežević "was led away to a building where he was temporarily detained and later released." See *ibid*., n. 8.
[164] See *ibid*., para. 13.
[165] See *ibid*.

not followed.[166] Besides the fact that, according to the Defence, the contents of his indictment were refused to be told to him, Dokmanović argued

> that Sub-rule 55(B) of the Rules was violated "because FRY could extradite any persons who are not citizen[s] of the [FRY] since there is no Constitutional and other legal restrictions for that and Mr. Slavko Dokmanović is not a citizen of [the] Federal Republic of Yugoslavia" [original footnote omitted, ChP].[167]

This last point also played a role in Dokmanović's second argument, namely that the ICTY had not requested the FRY to extradite Dokmanović pursuant to Article 29 of the ICTY Statute.[168] "Thus, the Defence contends that both Rule 55 of the Rules [which at that time did not yet contain the sub-element (G), which states that an arrest warrant can also be executed by "an appropriate authority or international body", see Section 2 of this chapter, ChP] and Article 29 of the Statute [which only mentions the obligations of States, ChP] gave the FRY the sole authority for bringing the accused before the Tribunal."[169] Thirdly, the Defence argued "that Mr. Dokmanović was arrested in a "tricky way," which can only be interpreted as a "kidnapping" [original footnote omitted, ChP]."[170] Fourthly, he had been guaranteed a safe conduct to Croatia and back again to his home in the FRY.[171] Dokmanović's fifth argument was that his arrest "violated the sovereignty of the FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent State authorities [original footnote omitted, ChP]".[172] Finally, he referred to the *male captus male detentus* decision of the US Court of Appeals in the *Alvarez-Machain* case (see footnote 191 and accompanying text of Chapter V), asserting that the ICTY did not have jurisdiction to try his case.[173]

The Prosecution, of course, did not agree with any of these arguments; the execution of the arrest was procedurally correct,[174] it could in no way be viewed as a

[166] See *ibid*., para. 14.
[167] *Ibid*.
[168] See *ibid*., para. 15.
[169] *Ibid*.
[170] *Ibid*., para. 16.
[171] See *ibid*., para. 17.
[172] *Ibid*., para. 18.
[173] See *ibid*., para. 19.
[174] See *ibid*., para. 21. Among other things, it hereby contended that UNTAES was authorised, pursuant to Rule 59 *bis* of the ICTY RPE (whose sub-element (A) (see also Section 2 of this chapter) by that time stated that "[n]otwithstanding Rules 55 to 59, on the order of a Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for his prompt transfer to the Tribunal in the event that he be taken into custody by that authority or international body or the Prosecutor.") to make the arrest. In fact, "UNTAES would have been in contravention of a court order had they failed to take the accused into custody". (*Ibid*.)

"kidnapping",[175] Dokmanović was never given explicit guarantees that he would not be arrested[176] and there was no violation of the sovereignty of the FRY.[177] Finally, the Prosecution relied on the *male captus bene detentus* reasoning: it noted that the decision of the US Court of Appeals in the *Alvarez-Machain* case, to which the Defence referred, had been reversed by the Supreme Court (see footnote 204 and accompanying text of Chapter V) and that on the basis of that decision and other decisions (such as the *Eichmann* case) "the way an accused is brought to the International Tribunal does not affect its jurisdiction".[178]

The Trial Chamber, overwhelmed by all the different arguments, decided to streamline the proceedings a little by dividing the issues into five headings, namely A ('The Arrest of the Accused'), B ('Authority for the arrest of the accused'), C ('Non-disclosure of the indictment and issuance of the warrant of arrest'), D ('The method of arrest') and E ('Safe conduct').[179] These headings will also be followed here in the discussion of the case.

With respect to the arrest of Dokmanović (issue A), the Trial Chamber concluded that Dokmanović had been arrested and detained *only after* he had arrived at the UNTAES base in Erdut, Croatia.[180] The Trial Chamber, relying on (inter)national definitions of arrest,[181] explained:

> Mr. Dokmanović did not have his freedom of movement restricted or liberty deprived until he arrived at Erdut. The record clearly shows that Mr. Dokmanović entered the UNTAES vehicle that carried him to the Erdut base in Croatia of his own free will.[[182]] The accused, in fact, was quite eager to get into the vehicle, due to his belief

[175] *Ibid*., para. 22. This was because, according to the OTP, "there was an Indictment against Mr. Dokmanović, a valid warrant for his arrest, and (...) he went to Erdut, where he was arrested, of his own free will [original footnote omitted, ChP]." (*Ibid*.)

[176] See *ibid*., para. 23. The OTP noted "that Mr. Dokmanović only sought safe conduct in relation to the Croatian authorities [original footnote omitted, ChP]." (*Ibid*.)

[177] See *ibid*., para. 24. This was because "(1) there was no prohibition in force which disallowed vehicles on the Serbian side of the border; (2) Mr. Dokmanović entered the vehicle of his volition; (3) Mr. Dokmanović's arrest cannot be said to have been effected until after the UNTAES vehicle in which he was riding crossed into Croatian territory; and (4) Mr. Dokmanović does not have standing to raise the issue [original footnote omitted, ChP]." (*Ibid*.)

[178] *Ibid*., para. 25.

[179] See *ibid*., para. 26.

[180] See *ibid*., para. 27. Lamb (2000, p. 174) notes: "This was despite the fact that Dokmanović had probably lost his liberty the moment he entered the UNTAES vehicle, for if he had attempted to leave the UNTAES vehicle before it had reached the military compound, he would have almost certainly been restrained."

[181] One example comes from Australia where "to effect an arrest, a law enforcement officer must simply make clear to a person by what is said or done that that person is no longer a free individual [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 29.)

[182] Although it was argued earlier (see Subsection 2.2.4 of Chapter III) that most luring cases can indeed probably not be seen as operations against the will of the person, not everybody agrees with that point of view, see, for example, Scharf 1998, p. 374: "[A] decision based on misrepresentation cannot truly be characterized as a choice made by free will [original footnote omitted, ChP]." If the luring operation had been against the will of Dokmanović, this would probably have effected his right to liberty and security

> that he was heading to a meeting with the Transitional Administrator, General Klein, to discuss his property rights in Croatian territory.[183]

With respect to the authority for the arrest of Dokmanović (issue B), the Trial Chamber concurred with the Prosecution that "the mechanism prescribed in Rule 59 *bis* provides an alternative procedure to that contemplated by Article 29 and Rule 55, and that the circumstances of the present case merited the utilisation of this alternative".[184] It hereby remarked, among other things, that UNTAES is authorised, in fact obliged to cooperate with the ICTY – which includes the making of arrests[185] – and that

> the FRY has failed or refused to execute the warrants which remain outstanding for the arrest of the three co-accused in the indictment against Mr. Dokmanović. Considering this failure, the utilisation of the procedure for arrest contemplated by Rule 55 would very well have been an exercise in futility. In addition, when the warrant for the arrest of Mr. Dokmanović was issued, it was reasonably believed that he was residing in the area of Eastern Slavonia [original footnote omitted, ChP].[186]

Finally, the Trial Chamber concluded that during this operation, the rights of Dokmanović were fully respected and hence that Rule 5 of the ICTY RPE, which by

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(see again Subsection 2.2.4 of Chapter III, where the ECmHR explained that (colluding for the purpose of) returning against his will a person living abroad, without consent of his State of residence, to the territory of a High Contracting Party where the latter State can prosecute that person, can lead to an unlawful arrest/detention within the meaning of Art. 5 of the ECHR). However, that does not do away with the fact that a luring operation where the suspect joins the luring agent on his free will can, under certain circumstances, still be seen as a violation of State sovereignty and the suspect's human rights, see the remainder of this decision.

[183] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 30. The Trial Chamber, providing a few notes from the cross-examination, also noted that Dokmanović was shocked when he was arrested at the base, providing evidence "that UNTAES officials had not created the type of environment in which "a person knows he is not free," until the accused got out of the vehicle at the Erdut base." (*Ibid*., para. 31.) The fact that Mr Dokmanović testified that the door was locked while he was in the vehicle did not change the Trial Chamber's stance: "[H]e did not attempt to open it. He did not express any desire whatsoever for the vehicle to stop or to be let out. Furthermore, he was not handcuffed or forcibly restrained in any way until he arrived at Erdut. Given the uncertainty as to what would have transpired had the accused attempted to leave the vehicle, and the facts stated above, this Trial Chamber finds that the accused was arrested and detained only once he arrived at the UNTAES Erdut base in Croatia." (*Ibid*., para. 32.)

[184] *Ibid*., para. 34.

[185] See *ibid*., para. 46. The Trial Chamber stressed that the accused was arrested by the military forces of UNTAES but that it was an OTP investigator, Vladimir Dzuro, who, through an interpreter, advised him of his rights and informed him of the nature of the charges against him, see *ibid*., para. 51 and n. 62. (The exact stance of the Prosecution on this point was not very clear, see *ibid*., para. 50: "The Prosecution argued orally at the 8 September hearing that the arrest was carried out by military personnel from UNTAES and by representatives of the Office of the Prosecutor, citing Rule 59 *bis* in support. Mr. Hryshchyshyn, however, stated during his testimony that, in his view, the accused was arrested by the Prosecution investigators, with the assistance of UNTAES in his detention [original footnotes omitted, ChP].")

[186] *Ibid*., para. 42.

then stated that an act can be declared null if it is "inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice",[187] could not be relied upon.[188]

In the context of the third issue, the non-disclosure of the indictment and issuance of the warrant of arrest, the Trial Chamber clarified that "the Defence seemingly claims that, because the Indictment was under seal, the FRY was denied the opportunity to serve it upon the accused and thus, somehow, its sovereign rights were violated".[189] In its rejection of this point, the Chamber explained that the idea that the FRY was somehow exempted because of the non-disclosure was without any basis as the rule is clear and absolute in its terms.[190] Another reason advanced by the Chamber as to why the indictment did not have to be transmitted to the FRY was the fact that on 3 April 1996 (when Judge Riad ordered that Dokmanović's name be secretly added to the indictment), Dokmanović was not a resident of the FRY.[191] In addition, and repeating a point the Chamber already made in the context of the second issue,

> given the history of non-cooperation with the Tribunal of the FRY it is reasonable to conclude that if the arrest of the accused was to be achieved, it was necessary that the

[187] The entire Rule 5 read by then: "Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice."

[188] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 52.

[189] *Ibid*., para. 53. It added that the Defence is seemingly "not contending that the fact that Mr. Dokmanović was unaware of the existence of the Indictment against him or the warrant for his arrest constitutes a violation of his rights [original footnote omitted, ChP]." (*Ibid*.) The Chamber refers here to the fact that the Prosecution has "argued that the use of confidential indictments is standard practice in many national jurisdictions and such practice cannot be regarded as constituting a violation of the fundamental rights of the accused person. The latter point is based on Articles 9(2) and 14(3)(a) of the International Covenant o[n] Civil and Political Rights, as reflected in Rules 55 to 59 of the Rules of the Tribunal, which state that an accused person must be informed of the charges against him upon his arrest." (*Ibid*., n. 68.) However, for (human rights law) criticism related to sealed indictments, see Sluiter 2001, pp. 154-155: "At the moment of the confirmation of an indictment, either publicly or secretly, a person is formally accused. As an accused, he is, according to Article 21, paragraph 4, (a) of the Statute, entitled to be informed promptly and in detail of the nature and cause of the charge against him. The language of this provision and provisions in human rights instruments do not suggest that the accused is only entitled to be informed of the charges at the moment of his arrest, as has been suggested by the Prosecutor. There were two other reasons why the practice of sealed indictments could further be looked upon in a critical way. First of all, the accused is denied the opportunity to surrender voluntarily to the Tribunal. (…) Secondly, since the accused is denied the opportunity to surrender to the Tribunal, he is also denied the opportunity to prepare his defence. (…) However, this [latter] situation may be remedied by granting him sufficient time before the commencement of the trial to prepare his case [original footnote omitted, ChP]."

[190] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 54.

[191] See *ibid*. This seems indeed reasonable, see Sluiter 2001, p. 154.

> order for non-disclosure remain in effect, even after October 1996, when his employment in Eastern Slavonia ceased and he resided in Sombor in the FRY [original footnote omitted, ChP].[192]

The most interesting issue for the purpose of this book is clearly issue D ('The method of arrest'). The Chamber promptly distinguished[193] between a luring operation and a kidnapping and explained that

> [w]hile the Prosecution freely concedes that it "used trickery, it was a ruse" and that "[i]t was the intention of the Prosecutor from day one to arrest Mr. Dokmanović," the Trial Chamber *does not* believe that this amounts to a forcible abduction or kidnapping [emphasis in original and original footnote omitted, ChP].[194]

It based its belief on the already-mentioned factors that Dokmanović had entered the UNTAES vehicle of his own free will and that he was in fact eager to get into the car because it would bring him to General Klein with whom he could talk about his property rights in Croatia.[195]

Nevertheless, the Trial Chamber *did* believe that a luring operation had in fact occurred here.[196] Could such a technique be considered legal? The Chamber was of

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[192] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 54.

[193] As already explained in Subsection 1.5 of Chapter III, such a distinction is not recognised by everyone. It may, for example, be good to recall the often-used definition of Shearer (1971, p. 72), defining abduction as "the removal of a person from the jurisdiction of one state to another by the use of force, the threat of force or by fraud" or Scharf's explanation that "most countries do not distinguish between abduction by fraud and abduction by force." (Scharf 1998, p. 374.) The Trial Chamber, admitted this (see ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, n. 73) but argued that "on the continuum between force and fraud, the Trial Chamber does not believe that the accused was coerced in a way that would justify our comparing the case at bar to a *forcible* abduction or kidnapping case [emphasis in original, ChP]." (*Ibid*.) *Cf*. also Knoops 2002, p. 245: "[T]he Trial Chamber's position, differentiating between abduction by force and abduction by fraud, is not a persuasive one and bears no legal authority. In effect, this distinction permits *de facto* forms of abuse of process."

[194] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 57.

[195] See *ibid*. See also n. 183 and accompanying text. *Cf*. also n. 339 of Chapter V (with respect to the case *Somchai Liangsiriprasert v. Government of the United States of America*): "In the present case the applicant and S.C. [Sutham Chokvanitphong, the cousin of Somchai Liangsiriprasert, ChP] came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not because of any unlawful conduct of the authorities but because of their own criminality and greed. The proper extradition procedures have been observed and their Lordships reject without hesitation that it is in the circumstances of this case oppressive or an abuse of the judicial process for the United States to seek their extradition."

[196] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 57: "[T]he accused *was* deceived, tricked and lured into going Eastern Slavonia [emphasis in original, ChP]".

the opinion that it could; "such "luring" is consistent with principles of international law and the sovereignty of the FRY".[197]

How did the Chamber reach this conclusion? First, it looked at the – by now well-known – Articles 9, paragraph 1 of the ICCPR and 5, paragraph 1 of the ECHR and found that all the necessary procedures had been followed in this case.[198] In addition, it also looked at how these provisions had been interpreted in the case law of the ECtHR and the HRC.

Before continuing to look at this case law, it must be emphasised that it is commendable that the judges looked at these important human rights provisions in such a broad way.

In the words of Sluiter:

> A positive aspect of the examination of in particular human rights instruments appears to be its full application to that part of the criminal procedure that takes place outside the courtroom. In this respect, the Chamber, in my view, acknowledged the overall responsibility of the ICTY for these procedures. This responsibility is based on the duty incumbent upon the Trial Chamber pursuant to Article 20 to ensure that the accused receives a fair trial and on the vertical co-operation relationship between States, which enables the Tribunals to impose modalities of execution. It is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or even more jurisdictions [original footnote omitted, ChP].[199]

This study is very much in favour of this stance, which arguably also means that if the Chamber wants to take the ultimate responsibility for everything which happens in the context of its case (which it arguably should), and if it really wants to check whether a suspect's right to liberty and security was respected and to remedy violations of that right, it must make a *full* review of that right.

That entails the judge not only verifying whether the arrest was made on the correct grounds (this requirement will normally be met if a valid indictment has been issued) or whether the ICTY has observed its own procedures (for example, by issuing an arrest warrant),[200] it arguably also means (taking into account that Article 9 of the ICCPR/Article 5 of the ECHR not only refers to international but also to national law) that the judge must examine what actually happened on the ground: whether the arrest was made in accordance with the proper procedures of the (inter)national forces making the arrest, whether the manner of arrest and detention was arrested and detained was correct and whether the arrest/detention/transfer can

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[197] *Ibid*. See for criticism Van Sliedregt 2001 B, p. 79.

[198] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 61: "[A]s has been described in detail above, a valid Indictment was issued for Mr. Dokmanović, as was a "Warrant of Arrest Order of Surrender." The accused was informed of the charges against him in a timely manner upon his arrest, in a language he understands, and was promptly transferred to the International Tribunal for detention and trial."

[199] Sluiter 2001, pp. 155-156. (See also n. 232 and accompanying text of Chapter III.)

[200] See, for example, n. 198.

be seen as non-arbitrary.[201] It can be argued that another interpretation, one that does not take these arguably crucial elements of the right to liberty and security into account, can lead to absurd results. For example, what if the Tribunal had validly indicted the person and had respected all its own procedures, but the person in question was kidnapped by State officials from another State in contravention of all the national laws implementing that State's duties to cooperate with the Tribunal? In such a situation, it is difficult to maintain that there was nothing wrong with the person's right to liberty and security, even if it was based on a valid indictment and arrest warrant. Hence, the judges at the Tribunal level must also be able to review how the arrest was executed by the (inter)national forces on the ground.[202] This does not mean, however, that the national judge can invoke certain national irregularities to refuse the transfer of the suspect to the Tribunal – he cannot.[203] In addition, a suspect cannot invoke an irregularity which originated from a State's failure to cooperate with the Tribunal. For example, he cannot invoke a violation of a provision which stipulates that that State cannot transfer nationals to the Tribunal.[204] It must concern genuine violations of real national provisions.

In those cases, it can be argued that the violations (which, in turn, will lead to a violation of one's human right to liberty and security) must be considered and remedied by the judges at the Tribunal,[205] for the simple reason that these violations, whoever was responsible for them, occurred in the context of their case. (In doing so, they can, of course, take into account that the Tribunal itself was not involved in

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[201] See, for example, also ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 59 (explaining how the ECtHR has interpreted Art. 5, para. 1 of the ECHR): "The term "procedure" in Article 5(1) of the ECHR has been interpreted as including the procedures followed by a court when ordering a detention as well as the rules governing the making of an arrest. The European Court of Human Rights has indicated that this requirement means that the procedure to be followed must be in conformity with the ECHR and applicable municipal law and must not be arbitrary. The "lawfulness" requirement of this Article has been interpreted as relating to both procedure and substance [original footnotes omitted, ChP]."

[202] *Cf.* also Henquet 2003, p. 155: "If the Tribunal must remedy a violation of the rights of an accused during his or her arrest, it must have access to information pertaining to the arrest."

[203] See the words of Swart at n. 24 and accompanying text. It must be noted that Swart admits that "[t]he only, rather theoretical, situation in which transfer might be refused is that in which *jus cogens* would forbid a State to transfer a person." (See again n. 24 and accompanying text.) However, that would be the case if, for example, there is a considerable chance that the suspect be tortured by the Tribunal. In such a theoretical case (because one can assume that such a situation will indeed not occur), the national judge might validly refuse to transfer. However, that would arguably not be the case if the suspect is, for example, abducted from another State. Although the abduction may violate the *ius cogens* norm of non-intervention, the subsequent transfer of a suspect to the Tribunal, after such an abduction, does arguably not constitute, in itself, a violation of a *ius cogens* norm. (Nevertheless, this does not mean that a judge with more power at the national level (see the still-to-discuss context of the ICC) may not refuse to surrender the suspect in such a situation.)

[204] See also the still-to-discuss *Milošević* case, see Subsection 3.1.3.

[205] However, note that not every error in the proceedings amounts to a violation, which, in turn, should lead to a remedy. One could hereby think, for example, of a simple and small technical error in the arrest warrant. *Cf.* n. 603 of Chapter III (with reference to the *Brima* case and the question when an arrest/detention can be qualified as unlawful/illegal).

the hypothetical abduction mentioned above.) This important point will be returned to in the remainder of this study.

Although it initially focused on the Tribunal's own procedures (see footnote 198 and accompanying text),[206] it will be shown in the remainder of the case that the Trial Chamber in *Dokmanović* also looked, seemingly more generally, to the manner in which the actual arrest was made by UNTAES.[207] This is to be welcomed, because the correctness of the way the arrest was made on the ground is, of course, also part of the suspect's right to liberty and security and also falls within the context of the Tribunal's case. However, this likewise means that the Tribunal must be able to review the arrest and detention at the national level not only if the arresting entity is an international force but also if it is a national police force. In that case, the Tribunal must check whether the manner in which the arrest was made was in accordance with, for example, the prohibition of arbitrariness and the national arrest procedures. As will be shown *infra*, this stance, which can arguably also be found in the still-to-discuss *Barayagwiza* case, does not seem to comport with (Trial Chamber) decisions such as *Djukić and Krsmanović*, *Karemera*, *Ngirumpatse*, *Kajelijeli* (Trial Chamber), *Nshamihigo*, *Nzirorera* and *Nyiramasuhuko* (see also footnote 138), which support the idea that the Tribunal is "not competent to determine the legality of operations executed by sovereign national authorities within the context of existing national legislation".[208] However, that would also mean that the Tribunal would not be able to state that an arrest was clearly irregular if national police forces had abducted a person from another State before handing him over to the Tribunal, simply because the arrest was made in the context of national legislation, which the Tribunal could not review. It is submitted that this would, of course, make no sense, for the Tribunal in that case would arguably turn away from a crucial part of a person's right to liberty and security, namely the question as to how he was actually deprived of his liberty. Nevertheless, it appears that these cases have later been (correctly) abandoned in (Appeals Chamber) cases such as *Semanza*, *Kajelijeli* and *Rwamakuba* (Trial Chamber and Appeals Chamber), cases which will all be addressed in the remainder of this chapter.[209]

Returning to the Trial Chamber's examination of the case law stemming from the HRC and ECtHR, the Chamber discussed the – already examined, see Chapter

[206] See also ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 60: "In determining whether Mr. Dokmanović was arrested in accordance with the standards enunciated in Article 5(1) of the ECHR and Article 9(1) of the ICCPR (…), the Tribunal's own Statute and Rules must first be revisited to see if the accused was arrested in a non-arbitrary way in "accordance with procedures prescribed by law" – namely, in accordance with the law of the Tribunal."

[207] See ns. 255-256 and accompanying text.

[208] ICTR, Trial Chamber II, *The Prosecutor v. Pauline Nyiramasuhuko*, 'Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized', Case No. ICTR-97-21-T, 12 October 2000, para. 28.

[209] See also n. 859.

III of this book – *Stocké*,[210] *Bozano*,[211] *Celiberti de Casariego*,[212] *Lopez Burgos*,[213] *Almeida de Quinteros*[214] and *Cañón García*[215] cases and noted that they

> discuss illegality of arrest in relation to violations of specific, established procedures for obtaining custody of a suspect (often relating to an extradition treaty) or in relation to forcible kidnapping, which has been considered manifestly arbitrary. There is, however, no such extradition treaty or cooperation agreement between the International Tribunal or UNTAES and the FRY. (…) In addition, there was no forcible kidnapping at the case at bar, which could be seen as manifestly arbitrary [original footnotes omitted, ChP].[216]

Although one may agree with the last point, the first argument that the ICTY seems to make, namely that the cases from the ECtHR and the HRC are not really relevant here as they had to examine cases where specific, established procedures for obtaining custody of a suspect (such as extradition treaties or cooperation agreements) were violated, is not very convincing. It ignores the fact that between the FRY/UNTAES and the ICTY, there are *also* specific, established procedures in place which can be violated and that the arguably real message of the ECtHR and HRC is, if one has to transpose it to the context of the international criminal tribunals, that one should not circumvent the existing, formal procedures (whether they stem from extradition treaties[217] are not).[218] One can wonder whether this is not what the ICTY has also done here.

A short explanation may be necessary here: the normal procedures of arrest and transfer can be found in, for example, Rules 55 and 59 *bis* of the ICTY RPE. The ICTY, assuming that the FRY would not cooperate pursuant to Rule 55 of the ICTY RPE, decided to instruct UNTAES pursuant to Rule 59 *bis* of the ICTY RPE to arrest Dokmanović. This is, of course, the ICTY's right: it can use Rule 59 *bis*

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[210] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, paras. 62-64.
[211] See *ibid*., para. 65.
[212] See *ibid*., para. 66.
[213] See *ibid*.
[214] See *ibid*.
[215] See *ibid*.
[216] *Ibid*., para. 67.
[217] It is to be noted that, *of course*, extradition treaties cannot be concluded in this vertical context between the ICTY and UNTAES/States (see also the first words of Section 2). Therefore, it is rather strange that the ICTY states that the arrest was not illegal because, among other things, it did not circumvent an extradition treaty. See also Sluiter 2001, p. 156: "[O]bviously, neither the International Tribunal nor UNTAES are States and thus do not have the power to conclude extradition treaties with other States[.] This contention is, even within its context, totally incomprehensible [original footnote omitted, ChP]."
[218] *Cf.* also Lamb 2000, pp. 240-241 (who is, nevertheless, of the opinion that cases which dealt with the circumvention of extradition treaties cannot be looked at, see n. 334): "While the transfer of an accused to the Tribunal cannot constitute a breach of rights under any extradition arrangement, the question of the effects upon the ICTY's jurisdiction of any arrest by Tribunal staff or multinational forces which circumvents the Tribunal's *own* arrest procedures nevertheless remains [emphasis in original, ChP]."

instead of Rule 55 of the ICTY RPE. However, UNTAES could *not* in fact arrest Dokmanović pursuant to Rule 59 *bis* of the ICTY RPE because the latter was not on UNTAES territory. Therefore, the luring operation was set in motion to make sure that Rule 59 *bis* of the ICTY RPE could be enforced and that UNTAES could arrest Dokmanović.

However, can this still be seen as normal use of Rule 59 *bis* of the RPE ICTY? One can very well argue that Dokmanović was not taken into custody on the basis of Rule 59 *bis* alone, but on the basis of a luring operation resulting in an arrest based on Rule 59 *bis* of the ICTY RPE. The question now is whether such a technique, which includes the element of luring, is not a contravention of the existing and normal procedures. It can be argued that it is. After all, even though the ICTY's choice of UNTAES (on the basis of Rule 59 *bis* of the ICTY RPE) instead of FRY (on the basis of Rule 55 of the ICTY RPE) to cooperate in the arrest of Dokmanović may initially have been justified, it is arguably *not* justified to resort to quite another arrest technique (namely the dubious method of luring followed by a normal arrest method, namely Rule 59 *bis* of the ICTY RPE) if there remains another option in the catalogue of normal arrest procedures which does not include the dubious element of the luring operation, namely to simply ask the FRY to transfer Dokmanović to The Hague on the basis of Rule 55 of the ICTY RPE. This point was also observed by Scharf (and followed by Sluiter)[219] who writes: "The luring of Dokmanović *in*

[219] See Sluiter 2001, p. 153. For another opinion, see Van der Wilt 2004, p. 293, who emphasises that the obligation to cooperate with the ICTY can in no way be put on a par with a voluntary cooperation agreement such as an extradition treaty which is based on the freedom of contract. That is indeed undisputed. However, that arguably does not mean that once a certain procedure has been established, whether that procedure has a voluntary origin or not, the procedure in place should not be followed or that a deviation from the existing cooperation procedures between the ICTY and States cannot injure sovereign rights of the State (see *ibid*.). It arguably can. Van der Wilt shares the position of Lamb, Van Sliedregt and this study that an implicit authority to violate a State's sovereignty cannot be derived from the fact that the ICTY was established pursuant to a resolution from the UNSC (see n. 265) and (thus) that the Tribunal cannot be involved itself in violations of State sovereignty, see *ibid*., p. 295. However, it is unclear how that (arguably correct) position must then be seen in light of his earlier (and rather generally formulated) remark that a deviation from the existing cooperation procedures between the ICTY and States cannot injure sovereign rights of the State. It may be the case that Van der Wilt only wants to connect these latter words with actions from third parties. This may be deduced not only from the above-mentioned remark that the Tribunal cannot be involved itself in violations of State sovereignty, but also from *ibid*., p. 294, where he argues that, precisely because the Tribunal lacks a police force and because the commitment of States is of vital importance in this context, the Tribunal, when confronted by States which neglect their duty, must take a more tolerant stance with respect to suspects *who are put at its disposal* through different means. However, in that case, it is perhaps a little unclear that Van der Wilt makes his general remark in the context of the *Dokmanović* case, where, after all, the Prosecution *was* involved in the luring operation. (Note finally that in the case of Dokmanović, it cannot be said that the FRY neglected its duty (to transfer Dokmanović). Even though such an outcome may have been very probable, no request of transfer was sent to the FRY in the first place.) Be that as it may, it can more generally be argued that in the case of non-cooperation, the Tribunals must not debase themselves by resorting to illegal methods in obtaining custody over a suspect. They must follow the normal route when they are confronted by non-compliance, such as reporting such non-compliance to the UNSC. That the UNSC in such cases does not do what it should do, namely putting real pressure on the non-cooperating State, is very unfortunate, but strictly speaking, not the problem of the Tribunals. In that respect, the Tribunals should better clarify to the public that a lack of arrests is usually not the

lieu of pursuing his surrender from the FRY through the formally established procedure (…) raises the same concerns as if the ICTY had acted in circumvention of an operational extradition treaty."[220]

After having examined the international cases, the Trial Chamber looked at the national level. Referring to cases which were already discussed or at least mentioned in the previous chapter – namely the cases of *Yunis*,[221] *Toscanino*,[222] *Wilson*,[223] *Reed*,[224] *Re Hartnett*,[225] *In re Schmidt*[226] and *Liangsiriprasert*[227] – it found "that there is strong support in such national systems for the notion that luring a suspect into another jurisdiction in order to effect his arrest is not an abuse of the suspect's rights or an abuse of process [original footnote omitted, ChP]".[228]

Nevertheless, it admitted that there are also "cases in national jurisdictions where courts have frowned upon the notion of luring an individual into a jurisdiction to effectuate his arrest [original footnote omitted, ChP]".[229] It thereby referred to the already examined Swiss case of 15 July 1982[230] and the (not yet addressed) Canadian case *Walker v. Bank of New York*.[231] However, notwithstanding these two cases, the Chamber argued,

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Tribunals' fault, but the fault of politicians who either default on their legal obligations (the politicians of the non-cooperating States) or who undermine the fight against impunity and the credibility of their own institution by not taking any further action in the case of non-compliance (the politicians in the UNSC). However, a perhaps more constructive route which the Tribunals can take is to make more use of the already-mentioned "innovative ways" to obtain custody over a person, to freeze the assets of the accused under Rule 61 of the ICTY/ICTR RPE, to mobilise powerful States themselves to put pressure on non-cooperating States or to use any other creative (but *legal*, see also Ruxton 2001, p. 21) method which can help in the enforcement of arrest warrants.

[220] Scharf 1998, p. 376. Note that Scharf, when writing of the formally established procedure refers, among other things, to Rule 59 *bis* of the ICTY RPE (see *ibid*., n. 39). Although some may now wonder whether Scharf is still correct (as the luring was not used *instead of* Rule 59 *bis* of the ICTY RPE: it was in fact used to *enable* the use of Rule 59 *bis* of the ICTY RPE), Scharf arguable wants to point out, as was done in the main text, that what *was* used in this case was a luring operation followed by an arrest on the basis of Rule 59 *bis* of the ICTY RPE and that *that* is a circumvention of the existing and formal procedures (because Rule 59 *bis* of the ICTY RPE does not mention the dubious element of luring).

[221] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šljivančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, paras. 69-70.

[222] See *ibid*., para. 70.

[223] See *ibid*., para. 71. (See n. 582 of Chapter V for the *Wilson* case.)

[224] See *ibid*. (See n. 103 of Chapter V for the *Reed* case.)

[225] See *ibid*., para. 72. (See n. 582 of Chapter V for the *Hartnett* case.)

[226] See *ibid*., para. 73.

[227] See *ibid*., n. 104. (See n. 339 of Chapter V for the *Liangsiriprasert* case.)

[228] *Ibid*., para. 68. The Trial Chamber noted that Paust (*et al*. 1996) had another opinion on this (namely that the international community generally disapproves of luring, see also ns. 79 and 234 and accompanying text of Chapter III) but found "the very limited case authority cited for this proposition unhelpful in resolving the present issue." (*Ibid*., n. 92.)

[229] *Ibid*., para. 74.

[230] See *ibid*., n. 105.

[231] See *ibid*. The Trial Chamber explained the case "*Walker v. Bank of New York* (15 O.R. 3d 596 (Ont. (Can.) Gen. Div. 1993), *rev'd on other grounds*, 16 O.R. 3d 504 (Ont. (Can.) C.A. 1994)" (*ibid*.) as follows (*ibid*.): "Plaintiff was arrested in New York as part of a sting operation by the United States government. The plaintiff allegedly was given an aeroplane ticket to fly from Canada to the Bahamas,

> in all the national and international cases with which we are familiar, which found luring to be a violation of some international law principle[232] or a suspect's rights, there existed an established extradition treaty that was, in each case, circumvented or there was unjustified violence used against the suspect [original footnote omitted, ChP].[233]

It then repeated its point already explained above that

> there was no extradition treaty which was circumvented in securing the arrest of the accused. While Mr. Dokmanović could have been arrested and transferred to The Hague pursuant to Rule 55, as discussed, it is not the only method allowed to apprehend suspects [original footnote omitted, ChP].[234]

Again, it can be maintained that this argument is not very convincing.

Although Rule 55 of the ICTY RPE is indeed not the only way in which a person can be arrested (the ICTY can also use Rule 59 *bis* of the ICTY RPE), using another technique which is not recognised by the RPE (namely a normal arrest on the basis of Rule 59 *bis* of the ICTY RPE *made possible by luring*) while there is a regular, formal, existing procedure available which does not contain this dubious element of luring – namely a transfer by the FRY on the basis of Rule 55 of the ICTY RPE – is arguably a contravention of the existing procedures, comparable with the circumvention of extradition treaties at the inter-State level.

As such, one could very well argue that the arrest and detention of Dokmanović were not made pursuant to the specific, established procedures for obtaining custody and hence that his right to liberty and security was violated.[235] Sluiter also notes this

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but was unaware until he was on board that there was a stopover in New York, where he was subsequently arrested. After he was released on bond he fled to Canada. In outlining the background of this case, Paust [*et al*. 1996, ChP] states that although the U.S. requested extradition, Canada refused to convene an extradition hearing, citing violations of Canada's law and sovereignty, Paust, at p. 433". It can be argued that the overview of national case law examined by the Trial Chamber was rather limited. See Sluiter 2001, p. 155: "In terms of international law, the *ad hoc* Tribunals are bound by those domestic rules and practices which may be considered general principles of law recognized by civilized nations[.] If the Chamber wishes to establish the existence of such principles with respect to the arrest of indicted persons, it has not succeeded through this comparative legal exercise. The Trial Chamber believed that [s]trong support for a certain view could be derived from national systems. What followed, however, was a very rudimentary and selective analysis of domestic jurisprudence, in which the focus lay with jurisprudence from one particular jurisdiction, that of the United States." (See also n. 1 of Chapter IV.)

[232] The Chamber explained here in a footnote that "[t]here are at least two commentators who argue that fraudulent luring by a state or its agent is an international law violation." (And then, reference is made to F.A. Mann's 1990 *Further Studies in International* Law (p. 340) and Paust *et al*. 1996, p. 435. *Cf.* n. 79 of Chapter III.)

[233] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 74.

[234] *Ibid*., para. 75.

[235] For another opinion, see Lamb 2000, pp. 202-203.

point and then concludes that Dokmanović's arrest was unlawful.[236] He then continues with the point that "[t]his does not necessarily mean, however, that the accused should be released from custody".[237]

As argued earlier, although paragraph 4 of both Articles 9 of the ICCPR and 5 of the ECHR – a provision which arguably has attained customary international law status and which would thus, in principle, also be applicable in the context of the international criminal tribunals – indeed only mentions that a person should be released in the case of an unlawful *detention*, it is the belief of this study that this should also include a release in the case of an unlawful *arrest*: what is arguably important here is that a person unlawfully deprived of his freedom (through an arrest and detention) is released.[238]

However, it is very well possible that Sluiter has the same opinion on this. If that were indeed the case, then when he writes that an unlawful arrest (read: an unlawful deprivation of liberty) does not necessarily have to lead to a release, he probably means that such a remedy is too far-reaching for the violations committed here. However, in Chapter III of this study, it was explained that if a judge (which would include a judge at an international criminal tribunal) is of the opinion that a person's detention[239] (read: arrest/detention/deprivation of liberty)[240] is unlawful, he must, strictly speaking, release that person.

Nevertheless, it was also explained in the same chapter, in its Subsection 4.4, that this remedy is problematic; if a person has been the victim of an unlawful arrest/detention (but not one which is so serious as to lead to the ending of the case),[241] he must, strictly speaking, be released.[242] However, as explained, that does

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[236] See Sluiter 2001, p. 153. See also Smeulers 2007, p. 109: "From the Dokmanović case, however, it can be concluded that the Trial Chamber does not easily qualify an arrest as illegal. Dokmanović had been lured into entering UNTAES territory in order to be arrested. Although the prosecutor was closely involved in the arrest, the Trial Chamber concluded that the arrest was not unlawful. This is a decision that can be heavily criticized, because it can be seen as a violation of Article 5 European Convention of Human Rights [original footnote omitted, ChP]."

[237] Sluiter 2001, p. 153.

[238] See n. 583 and accompanying text of Chapter III.

[239] See n. 581 and accompanying text of Chapter III.

[240] See ns. 583, 586 and 588 and accompanying text of Chapter III.

[241] As explained in Chapter III, even though the release of Art. 9, para. 4 of the ICCPR or Art. 5, para. 4 of the ECHR does not preclude a re-arrest, a serious violation of these human rights provisions may nevertheless lead to a *male detentus* result, not because these provisions state so but because the judge may decide so in his discretion in finding the most appropriate remedy.

[242] Note that there is, however, also a certain threshold before one can qualify a deprivation as unlawful: small technical errors will not lead to the qualification 'unlawful arrest/detention/deprivation of liberty'. *Cf.* in that respect also the already briefly mentioned (see n. 603 and accompanying text of Chapter III) *Brima* case before the SCSL, where Judge Itoe clarified that "having been taken into custody, a mere technical flaw in the warrant of arrest neither renders the said arrest nor the detention based on that arrest, illegal." (SCSL, Trial Chamber, *The Prosecutor against Tamba Alex Brima*, 'Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant', Case No. SCSL-03-06-PT, 22 July 2003, p. 14.) The reviewing judge must check the *essential* points concerning the lawfulness of the deprivation of liberty, namely 1) are there substantive grounds for the deprivation; 2) is the deprivation in accordance with a procedure prescribed by law and 3) is the deprivation non-arbitrary? See for the *Brima* case also n. 1286 and accompanying text. *Cf.* finally n. 205.

not mean he cannot be re-arrested and brought to trial. (This will particularly be the case if the suspect is charged with serious crimes and prosecution is considered to be of utmost importance.) Although a person released by the ICTY/ICTR (in the Netherlands/Tanzania) cannot be re-arrested for 15 days,[243] one can imagine that the ICTY/ICTR will then demand that all UN Member States (which must cooperate with these Tribunals) immediately transfer the suspect back to the ICTY/ICTR the moment he sets foot on their soil. Thus, one can assume that there is a considerable chance that after those two weeks,[244] the person will be immediately re-arrested and brought to the jurisdiction of the Tribunal in question. In such a case, the prosecuting authorities could assert that this 'remedy' (the 'release') has repaired the

[243] See Art. XX ('The suspect or accused') of the 'Agreement Between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Tribunal for Rwanda' (signed at New York on 31 August 1995): "1. The host country shall not exercise its criminal jurisdiction over any person present in its territory, who is to be or has been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country. 2. The immunity provided for in this Article shall cease when the person, having been acquitted or otherwise released by the Tribunal and having had for a period of fifteen consecutive days from the date of his or her release an opportunity of leaving, has nevertheless remained in the territory of the host country, or having left it, has returned." (See for an almost identical provision in the context of the ICTY Art. XX ('The suspect or accused') of the 'Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991' (signed at New York on 27 May 1994).

[244] And sometimes even earlier, see the *Ntuyahaga* case. In this case, the suspect, who was accused of the murder of former Rwandan Prime Minister Unwilingiyimana and ten Belgium peacekeepers, illegally entered Tanzania and voluntarily handed himself over to the ICTR. The OTP subsequently requested the judges to withdraw the indictment of this case (because it did not fit the prosecution policy of the Tribunal) and to defer the case to Belgium, which had already started to investigate the case. However, the judges, dismissing the ICTR indictment of Ntuyahaga, stated that they could not defer cases to national courts. (This has changed in the meantime, see Rule 11 *bis* of the ICTR RPE ('Referral of the Indictment to another Court').) As a result, he was released on Thursday 18 March 1999, although he stayed in the detention facility of the ICTR for personal security reasons. Belgium subsequently called on Tanzania to arrest Ntuyahaga and to extradite him to Belgium. Peter Gijsels, advisor to the Belgium Ministry of Justice, explained "that in deciding whether to arrest Ntuyahaga, Tanzania would have to consider both the bilateral treaty with Belgium and its agreement with the ICTR. Under the latter accord, persons freed by the tribunal enjoy fifteen days of immunity. But he said there were several reasons why this agreement did not apply in Ntuyahaga's case, and the Tanzanian parliament had not yet ratified it." ('Belgium Calls on Tanzania to Arrest Ntuyahaga Immediately', 19 March 1999, *Fondation Hirondelle*, available at: http://www.hirondelle.org/hirondelle.nsf/0/eefb51a4e2e6f69ac12566bd007e77a2?OpenDocument.) On Monday 29 March 1999, Ntuyahaga was released in Dar Es Salaam (Tanzania), but the very same day, he was arrested by Tanzanian authorities. "The Justice Minister said Ntuyahaga had been detained for his own security, and pending a decision on extradition requests from both Belgium and Rwanda. Mwapachu said it was also to "sort out the immigration issue". Ntuyahaga entered Tanzania illegally when he turned himself over to the ICTR last June." ('Tanzanian Authorities Arrest Ntuyahaga in Dar Es Salaam', 30 March 1999, *Fondation Hirondelle*, available at: http://www.hirondelle.org/hirondelle.nsf/0/eefb51a4e2e6f69ac12566bd007e77a2?OpenDocument.) In the end, Ntuyahaga was extradited to Belgium in 2004 where he was tried, found guilty of murdering several peacekeepers and Rwandan civilians and sentenced to 20 years' imprisonment, a verdict which was confirmed on 12 December 2007.

initial *iniuria* of the irregularity and that the trial can continue as normal. However, in that case, the suspect would only be granted a *pro forma* remedy, comparable with that at the national level (but extended over a longer period), which does arguably not comport with the idea that a remedy must be real and effective, see also Article 2, paragraph 3 (a) of the ICCPR and Article 13 of the ECHR.[245] In addition, the *pro forma* release does not take account of the exact seriousness of the irregularity. In other words: it is not only a *pro forma* remedy but also an over-simplified remedy.

It would thus be better if a judge would avoid this problematic remedy of release and would, if he determines that the suspect was arrested/detained unlawfully, simply grant the most appropriate remedy, taking all the different aspects of the case into account (including, for example, the seriousness of the unlawful arrest/detention/deprivation of liberty and the importance of having this person prosecuted). If one follows that route, then one can still satisfy the common sense idea behind the immediate re-arrest mentioned above, namely that cases involving suspects of serious crimes must be continued if possible – although a *male detentus* must, of course, also not be excluded for these suspects – but one will also replace the strange *pro forma* release and immediate re-arrest with *real* remedies, such as a reduction of the sentence and/or compensation.[246] The judge can then take the exact

[245] See also the still-to-discuss (see Subsection 3.2.1) *Barayagwiza* case where the ICTR judges held: "[T]o order the release of the Appellant without prejudice – particularly in light of what we are certain would be his immediate re-arrest – could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention (...) on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 110.)

[246] It may be interesting to note that on 19 September 2000, the then President of the ICTY, Claude Jorda, wrote a letter to the UNSG in which he requested that the issue of compensation for persons unlawfully arrested/detained, unjustly prosecuted and wrongfully convicted be addressed because a provision regarding compensation, *cf.* Art. 9, para. 5 of the ICCPR for persons unlawfully arrested/detained, was lacking in the ICTY Statute/RPE. With respect to persons unlawfully arrested/detained, he noted, among other things, that the UN would be legally bound to award compensation to the victim of a violation of Art. 9 of the ICCPR but *only* "if the conduct giving rise to this violation is legally imputed to the Tribunal and thus to the United Nations". (UNSC, 'Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council', S/2000/904, 26 September 2000, p. 4.) See also Beresford 2002, p. 640, Acquavivia 2007, pp. 621-623 and Staker 2008, pp. 1499-1500. However, as will be shown in the *Barayagwiza* case, another international criminal tribunal, the ICTR, appeared to indicate that it would award compensation for a suspect who was, among other things, irregularly detained and thereafter found not guilty, *irrespective* of who was responsible for the violation, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, paras. 74-75: "The Appeals Chamber (...) confirms that the Appellant's rights were violated, and that all violations demand a remedy. (...) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation; b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights." Note that this

seriousness of the irregularity into account in determining how much the sentence should be reduced or or how much compensation one should accord the suspect. Such a solution would arguably be fairer to the suspect and better capable of putting flexibility into the system.

Furthermore, this solution also avoids the criticism one may expect from various actors if a suspect of serious crimes is released for an irregularity which is not so serious as to lead to the ending of the case (in such serious cases, the public must understand that the court has no option but to refuse jurisdiction and to release (but now in a 'real' way) the suspect), but which nevertheless ensures that the detention must be qualified as unlawful[247] and that, strictly speaking, the suspect must be released.

In fact, whereas at the national level, one can expect that a suspect of serious crimes will be immediately re-arrested, at the Tribunal level, there may be more problems because of the two-week immunity period. As already stated, all UN Member States (which must cooperate with the Tribunals) will probably do everything in their power to ensure that a suspect of serious international crimes is immediately re-arrested and brought to the jurisdiction of the Tribunals, but one cannot exclude the prospect of the suspect fleeing to a non-UN Member State (which, in principle, has no obligation to cooperate with the Tribunals) or to a State which, even though it has an obligation to cooperate, will not do so. That could mean that a suspect of international crimes, fleeing to such a State, could effectively evade prosecution.

That is to be avoided. Although the law should obviously be obeyed, one must also be careful not to apply the law in such a strict way that it leads to great injustice: *summum ius, summa iniuria*.[248] This constitutes another reason to continue

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construction may be very appropriate (and probably for that reason has also been followed in later cases), but that one must not forget either that provisions like para. 5 of Art. 9 of the ICCPR and Art. 5 of the ECHR state that compensation should not only be awarded in the case of an acquittal. Compensation is, in principle, available to any person whose detention was considered unlawful, whether that person was later acquitted or not. See also Sluiter 2001, pp. 153-154: "[I]t is suggested that creative use be made of (a combination of) other available remedies, such as *the reduction of the sentence in case of conviction – and financial compensation*, rather than termination of the proceedings and the release of the accused [emphasis added and original footnote omitted, ChP]." A final point that must be made is that Claude Jorda's above-mentioned letter, in the end, did not lead to a modification of the ICTY Statute, see Acquaviva 2007, p. 623: "[T]he Security Council has not yet decided to intervene in this delicate matter by modifying the Statutes of the Tribunals. Unless these Statutes are modified, it is hard to envisage the adoption by these two institutions of a rule providing for suitable reparation – which, among other things, would inevitably bring about remarkable financial costs for the institution. In the absence of a pronunciation by the 'legislator', these bodies have difficulties in shaping general rules to face such situations [original footnote omitted, ChP]." Nevertheless, this did not constitute a reason for the still-to-discuss *Rwamakuba* case not to order financial compensation, see Subsection 3.2.4.

[247] Swart, for example, explains that "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal." (Swart 2001, p. 204.)

[248] See Garner 2004, p. 1759: "The highest right is the utmost injury. That is, law too rigidly interpreted produces the greatest injustice." It may be interesting to note that Green (1963, p. 642) also referred to this maxim as a counterargument with respect to the *ex iniuria ius non oritur* claim of Eichmann (see n. 13 of Chapter I).

to exercise jurisdiction in these kinds of (less serious) *male captus* cases and to grant other remedies which do not jeopardise the trial itself.[249]

Thus, it is worth repeating that the judge must take all the different aspects of the case into account (including, for example, the seriousness of the unlawful arrest/detention/deprivation of liberty and the importance of having this person prosecuted) and simply grant the most appropriate remedy in the case of an unlawful arrest/detention, comparable with the abuse of process doctrine. If a judge decides to continue the case (which may very often be the case considering the seriousness of the suspect's charges), then the suspect should be granted real and concrete other remedies such as a reduction of the sentence and/or compensation. In determining which exact remedies are to be provided, the judge could then take into account the precise *male captus* which took place. For example, one could hereby look at the involvement of the Tribunal in the *male captus* situation (it should be noted that the formulation of paragraph 4 is very general and does not take into account which actors were responsible for the unlawful arrest/detention) or the mistreatment suffered by the suspect during the operation.[250] However, neither should it be forgotten that a truly serious *male captus* situation can lead to one remedy only, namely the ending of the case before that particular court, that is, a 'real' release (without the possibility of re-arrest),[251] whether one is dealing with a suspect of international crimes or not.

It seems that Sluiter, when he writes that an unlawful arrest does not necessarily have to lead to a release, alludes to this 'real' release[252] and, of course, it is not hard to agree with him on this point: the seriousness of Dokmanović's *male captus* was not such as to grant him this ('real') release, the *male detentus* remedy. However, as

[249] Note that this does not mean, however, that such a suspect cannot be released in certain cases (besides the situation that he is released because the judge is of the opinion that the case must be stopped). If a judge reviewing a suspect's detention feels that the suspect will appear at trial, there is no longer a need to hold him in detention while awaiting trial. In such a case, the suspect can, of course, be provisionally released pending trial, with or without conditions.

[250] *Cf.* also Sluiter 2003 B, pp. 946-947, where he writes about factors in determining whether or not another remedy, namely the *male detentus* remedy (the termination of the proceedings), should be granted: "Crucial factors in determining whether or not this remedy should be provided for are the following: 1. The degree of attribution of the violation to the Tribunal, in particular the Prosecutor (significant involvement in the violation by the Prosecutor could damage the integrity of the proceedings to such an extent that the trial cannot be continued); 2. The nature of the violation of individual rights (violation of individual rights of an egregious nature, such as subjecting the individual to inhuman or degrading treatment, may constitute a legal impediment to exercise of jurisdiction by the Tribunal, regardless of whether or not the Tribunal, in particular the Prosecutor, had anything to do with the violation)."

[251] See also Swart 2001, p. 206: "[B]oth Article 9 of the ICCPR and Article 5 of the ECHR make it imperative that a person be released if his detention was unlawful. I take it for granted that, in the case of more serious violations of these Articles, the nature of this particular remedy rules out any possibility of re-arresting the suspect or the accused."

[252] See Sluiter 2001, p. 153: "In case of gross violations in which the Prosecutor has been implicated, the dismissal of the indictment, resulting in the release of the accused, should not be ruled out as an appropriate and effective remedy." See also *ibid.*: "I agree with those who believe that the termination of the proceedings and the release of a person indicted should only be the ultimate remedy for violations of the rights of the accused [original footnote omitted, ChP]."

already stated, in principle, he would be entitled to a 'normal' (*pro forma*) release given the fact that his deprivation of liberty was unlawful, but as this remedy, as explained, is not without its problems, he should be granted other remedies such as a reduction of the sentence and/or financial compensation.[253]

Returning to the reasoning of the judges in the *Dokmanović* case, after they had explained that Dokmanović's arrest did not circumvent an established extradition treaty, they turned to the other situation mentioned in case law "which found luring to be a violation of some international law principle or a suspect's rights [original footnote omitted, ChP]",[254] namely unjustified violence used against the suspect. However, that was not the case here either:

> [T]here was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not mistreated in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience. In fact, it was an ordinary arrest by most standards, with no resistance by the accused and no force needed by UNTAES to handcuff him. The videotape and audiotape of the arrest confirm that valid procedures were used in detaining Mr. Dokmanović and transferring him to The Hague [original footnote omitted, ChP].[255]

These words show the point made *supra*[256] that the Trial Chamber in *Dokmanović* looked, seemingly more generally, to the manner in which the actual arrest was made by UNTAES, a point which is to be welcomed because the correctness of the way the arrest was made on the ground is, of course, also part of this suspect's right to liberty and security and also falls within the context of this Tribunal's case.

The words also show the idea established in the *Yunis* case, namely that if the luring operation is accompanied by "cruel, inhumane and outrageous conduct", the case should be dismissed.

It must be stressed that, even though the *Toscanino* decision itself was about an abduction, the Trial Chamber only uses the *Toscanino* threshold here in the context of the method of luring. In other words: there is no evidence that the Trial Chamber would also demand the *Toscanino* threshold in cases of abduction. Hence, it can be argued that the Trial Chamber's decision cannot be used as evidence for the idea that the Tribunal would only refuse jurisdiction if the Tribunal were responsible for an abduction involving "cruel, inhumane and outrageous" conduct (and would hence not refuse jurisdiction if the Tribunal were responsible for a 'normal' abduction, an abduction without "cruel, inhumane and outrageous" conduct).

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[253] See also *ibid*., p. 154: "In the case of Dokmanović, if the Chamber had decided his luring was unlawful, as it should have, release would clearly have been an inappropriate and disproportionate remedy. Financial compensation or a (minor) reduction of the sentence in case of conviction would have been more in line with the nature of the violation."

[254] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 74.

[255] *Ibid*. para. 75.

[256] See n. 207 and accompanying text.

Most probably, the Tribunal would also dismiss a case if the Tribunal was responsible for a 'normal' abduction. In the words of Scharf: "[T]he Trial Chamber focused on the distinction between "luring" (the means used to arrest Dokmanović) and "forcible abduction", reckoning that the former was acceptable while the latter might constitute grounds for dismissal in future cases [original footnote omitted, ChP]."[257]

However, whatever the position of the Trial Chamber is on this issue, it can, in any case, be argued that the Tribunal should resolutely refuse jurisdiction if its own people were responsible for a 'normal' abduction, let alone for an abduction accompanied by "cruel, inhumane and outrageous" conduct. It is submitted that the Tribunal would clearly undermine its integrity as a court of law if it condoned such reprehensible methods of its people, methods which it has been established are clearly arbitrary and illegal.[258]

The Chamber then turned to the argument that the operation violated the sovereignty of the FRY.

Although Dokmanović – and this is in contrast to the view of the Prosecutor[259] – did have standing to raise this issue, the argument itself was, according to the Chamber, without merit.

It explained that there had been "no actual physical violation of FRY territory in gaining custody of Mr. Dokmanović. The arrest occurred in Croatian territory".[260] Although in inter-State luring cases, there may be a question of whether a State's sovereignty has been violated, the judges continued, this point was irrelevant for this case because "the arresting force, UNTAES, was established under Chapter VII authority – binding upon the international community – and thus does not have the type of horizontal relationship with the FRY that would exist between sovereign States".[261] It hereby referred to the *Blaškić* case – in which it was held that "[a]n order within the International Tribunal's mandate, addressed to a State, as with any compulsory action taken by the Security Council itself, in no way offends the sovereignty of that State"[262] – and then stated that "[w]hen UNTAES arrested the accused, it was fulfilling its obligation pursuant to Resolution 1037 to cooperate

[257] Scharf 1998, p. 371.
[258] See ns. 225, 411, 414 and accompanying text of Chapter III and n. 523 and accompanying text of Chapter V.
[259] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 76. The Chamber referred here to the ICTY Appeals Chamber decision in *Tadić*, see also n. 178 of Chapter III.
[260] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 77.
[261] *Ibid*.
[262] ICTY, Trial Chamber II, *Prosecutor v. Tihomir Blaškić*, 'Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*', Case No. IT-95-14-PT, 18 July 1997, para. 51.

with the Tribunal and to contribute to the maintenance of international peace and security".[263]

There are a few points which may undermine these two arguments of the Trial Chamber related to the alleged violation of the sovereignty of the FRY. First of all, can one really assert that there was no actual physical violation of FRY territory in gaining custody of Dokmanović? It is, of course, true that the actual arrest occurred in Croatia, but during the luring operation culminating in this arrest, OTP investigators did enter the territory of the FRY. Should all these preparations simply be cut off from what can be seen as the 'mere' end result of the luring operation itself, namely the arrest by UNTAES? This point was also discussed in Subsection 2.1 of Chapter III (where, it should be remembered, the inter-State context was examined): there, it was explained that, arguably more in line with the principle of respect for another State's sovereignty is not the (limited) idea that agents of other States are not allowed to arrest persons in a State, but rather the (broader) idea that agents of other States are not allowed to carry out *police operations* in that State, whether these operations amount to an actual arrest or not. If one follows this line of reasoning, one may very well consider that the sovereignty of the FRY was in fact violated by the luring operation.[264] However, does the fact that there is a vertical relationship present in the context of this case make a difference here? This point is related to the second argument of the Trial Chamber, namely that the fact that there is such a relationship present ensures that Dokmanović's claim that the sovereignty of the FRY was violated must fail. This argument is also not without its deficiencies: although it is, of course, true that the Chapter VII backbone of Resolution 1037 means that UNTAES may arrest persons on a territory where it has the mandate to do so, such a backbone does not give UNTAES a full carte blanche. For example, it does not allow it to go into the territory of another State where UNTAES does not have such a mandate, like the FRY, to make arrests there.[265] In

[263] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 77.

[264] See also Scharf (1998, p. 374), who notes that "[t]he Trial Chamber's conclusion [that there was no physical violation of FRY territory, ChP] would only have been correct if the communications between law enforcement officials and the target of the luring were conducted exclusively over the phone, radio, e-mail, or fax. In contrast, an agent of the OTP (Kevin Curtis) did physically enter FRY territory with the purpose of engaging in a law enforcement activity (the luring) without the FRY's permission." See also Currie 2007, p. 363: "The distinction made by the Trial Chamber between luring and abduction seems strained, founded as it was on the controversial view that luring is not a sovereignty violation."

[265] *Cf.* in that respect Lamb 2000, p. 223, n. 201: "Potentially at least, a State may plead lawful excuse, on the grounds that the ICTY (and hence by implication its orders) was instituted by the UN Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter. (…) However, such a plea appears unlikely to succeed, on the grounds that while arrest warrants may constitute enforcement measures, these oblige custodial States to effect arrests or direct international forces to carry them out. They stop short of authorizing such States or forces to launch incursions into third States in order to do so". See also Van Sliedregt 2001 B, p. 75 and Van der Wilt 2004, p. 295. Note, however, that international forces might have such powers when the UNSC has specifically authorised them to have them, when the State where the operation takes place has consented to the activities or where the international forces act in self-defence, *cf.* Scharf 1998, p. 382 (see also Subsection 2.1.1 of Chapter III).

the same vein, one can wonder whether a joint operation between the OTP and UNTAES as the present one can be seen as falling within the scope of their mandates.[266]

However, it must also be emphasised that even if there were a violation of the FRY's sovereignty, the FRY seemingly did not protest and request Dokmanović's return. However, even if that had been the case, the ICTY would not have been obliged to return Dokmanović.

This must be explained in more detail. Even if this situation had occurred at the inter-State level, it should be recalled that Chapter V has shown that the practice of States has established that *male captus bene detentus* must be rejected at any rate if the injured State of the person who has been the victim of an *abduction* (which was not the case here) has protested and requested the return of the suspect. In the context of a luring operation, a violation of international law will normally lead to less far-reaching forms of reparation.

In addition to this, one should take into account the specific context of the Tribunals here (see also above with respect to the remedy of release): if the ICTY decides that the luring operation is not so serious as to dismiss the case completely (that would in any case be so if the luring were accompanied by serious, *Toscanino*-like mistreatment) but that the violation of State sovereignty nevertheless requires that the person be returned to the State which protested the violation and has requested the return of the suspect, the ICTY would return the suspect, over whom it still has jurisdiction, to a State which then comes under an immediate new obligation to re-transfer the suspect back to the Tribunal (which, after all, still has jurisdiction to try the suspect). However, it can be argued that such a *pro forma* construction does not make much sense. In fact, one can wonder why the ICTY would return the suspect to a State which may not cooperate in bringing the suspect to justice. (Note, however, that this does not mean that the suspect should not be returned in the case of a serious violation of international law such as an abduction. However, in that case, the Tribunal can still make the return conditional on the injured State prosecuting the suspect itself. This point will come up again in the remainder of this study.) In such cases, it would be better for the judge to decide to continue the case, to hold the suspect in custody and to grant other forms of

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(Nevertheless, the construction used by Scharf (1998) on p. 378 of his article, where he argues that several more general UNSC resolutions, provisions from the ICTY Statute and RPE and non-cooperation on the part of the FRY taken together may also lead to a justified law enforcement operation in the territory of the FRY, is arguably too broad.) Scharf (1998, p. 376) further argues that "contrary to the implication of the Trial Chamber's opinion, abductions from the FRY may be legally justifiable" but it is not clear whether the Trial Chamber indeed disapproves of operations which can fall under the three above-mentioned scenarios. That it does not mention them does not necessarily have to mean that it does not recognise them.

[266] *Cf.* also Sloan 2003 A, pp. 107-108 (with respect to the still-to-discuss *Todorović* case) and p. 108 in particular: "[I]t would appear that the question that needs to be decided in this case is not whether the powers of the ICTY *in exercising its legitimate functions* prevail over traditional concerns of state sovereignty, but whether the ICTY is indeed exercising its legitimate functions [emphasis in original, ChP]."

reparation for the violation of State sovereignty which occurred in the context of the case.

The last point of issue D ('The method of arrest') has to do with the *male captus* case of Alvarez-Machain to which both the Defence (Court of Appeals) and the Prosecution (Supreme Court) referred. Here, the Trial Chamber simply stated that it did not have to look at this issue because both the arrest and detention of Dokmanović were justified and legal. Hence, the real *male captus bene/male detentus* discussion did not have to take place because, according to the Trial Chamber, there *was* no *male captus* in the first place.[267]

With respect to the final issue (E: 'Safe conduct'), the Trial Chamber found that "the testimony of Mr. Curtis, Mr. Hryshchyshyn, and Witness A, to the effect that no guarantees of safe conduct, either specific or general, were provided to the accused, is more credible than the testimony of Mr. Dokmanović".[268] In addition, "[e]ven if Mr. Dokmanović had been given the assurance which he claims he was given, these would not satisfy the criteria required for a legally binding guarantee of safe conduct".[269]

Although the ICTY in this case decided – arguably incorrectly – not to delve into the true *male captus* discussion, Scharf notes that if the question of the *male captus* were to be answered by the ICTY, it could choose – "[w]hile recognizing the appropriateness of the approach of the Human Rights Committee and the European Court of Human Rights[270] *for ordinary crimes* [emphasis added, ChP]"[271] – "to adopt an 'Eichmann exception', in the case of "universally condemned offenses", under which the issue of the fugitive's abduction should be "decoupled" from his subsequent trial [original footnote omitted, ChP]".[272]

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[267] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 78: "Given that the Trial Chamber has found that the particular method used to arrest and detain Mr. Dokmanović was justified and *legal*, we need not decide at this time whether the International Tribunal has the authority to exercise jurisdiction over a defendant *illegally* obtained from abroad [emphasis in original, ChP]."

[268] *Ibid*., para. 82.

[269] *Ibid*., para. 83. See also *ibid*., para. 84: "Only a Judge or Trial Chamber has the authority to provide a guarantee of safe conduct – this cannot be issued by the OTP or UNTAES. These orders are issued to witnesses in order to secure their testimony. In this case, Mr. Dokmanović was clearly not sought as a witness, but as an accused. The alleged assurances did not specify any temporal or territorial restrictions, nor did they specify the purpose for which they were allegedly issued."

[270] See Scharf 1998, p. 381: "The precedent of the Human Rights Committee and the European Court of Human Rights would (...) suggest that the ICTY should dismiss a case where the defendant has been abducted or lured from a state in contravention of the normal procedures." As has become clear from the previous chapter, although these supervisory bodies normally do not go into the question of jurisdiction and in principle only determine whether a certain act leads to a violation of the human rights instrument in question, certain decisions can indeed be seen as evidence for the idea that jurisdiction should be refused in cases of luring and abduction. However, certain decisions from the European institutions can also be seen as support for the reasoning behind the *male captus bene detentus* rule, see ns. 388 and 595 of Chapter III.

[271] Scharf 1998, p. 381.

[272] *Ibid.* Scharf hereby refers to the fact that UNSC Res. 138 of 23 June 1960 did not explicitly require Eichmann's return, which, indeed, may show that the Council took into account the seriousness of the

This study believes that the ICTY should not follow this reasoning[273] as this may lead to a carte blanche for law enforcement officials to do whatever they can to obtain custody over a person charged with international crimes. Although it can be justified that one should, if possible, opt for those remedies which do not jeopardise the trial of the suspect of international crimes, the pre-trial and trial phase should not be decoupled *altogether* as in that case, even the most extreme *male captus* situation – for example, a serious abduction orchestrated by the ICTY and involving serious mistreatment – would not jeopardise the consequent trial. That, of course, should not be tolerated. In very serious cases, divestiture of jurisdiction may very well be the only correct remedy, even if the court in question deals with a suspect charged with very serious crimes.[274] If the refusal to exercise jurisdiction is deemed to constitute too harsh a remedy, but it is nevertheless decided that a *male captus* has occurred which should be remedied, then one may apply other less far-reaching remedies, such as a reduction of the sentence.

Before turning to the next case, it must be pointed out that the Appeals Chamber did not look at this case because "Dokmanović's appeal from this decision was summarily rejected (…) on the ground that the defense argument was "ill-founded in

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crimes with which Eichmann was charged in approving that the trial in Israel would go ahead, see n. 521 and accompanying text of Chapter III. Note, however, that this *Eichmann* exception can arguably not be connected with the outcome of the *legal* process in Israel, see Subsection 3.1 of Chapter V.

[273] See also Van der Wilt 2004, p. 280, explaining that the *Eichmann* exception has a rather unsound legal basis as it is founded on the misconception arising from the fact that one confuses the authority (or obligation) to create universal jurisdiction with the physical enforcement of criminal law (enforcement power). See also n. 163 of Chapter III.

[274] See also Sluiter 2001, p. 153: "I agree with those who believe that the termination of the proceedings and the release of a person indicted should only be the ultimate remedy for violations of the rights of the accused. Such a remedy should not, however, be ruled out altogether on the basis of the *male captus bene detentus* argument, or on what has been called the "Eichmann" exception. The character and stature of the ICTY as an international tribunal may make the discontinuation of the proceedings an imperative remedy under certain circumstances, in spite of the magnitude of the crimes before it [original footnotes omitted, ChP]." In addition, one can wonder whether there will ever be such a serious case of Eichmann again, a case where many judges, due to the seriousness of Eichmann's charges, would probably continue to exercise jurisdiction, notwithstanding the *male captus*. (Note that the Israeli judges did not have to found their argument on this basis as *male captus bene detentus*, to their opinion, was an established rule of law, applicable to anyone.) After all, although suspects of international criminal tribunals may be charged with very serious crimes, it seems doubtful that a person will ever be held co-responsible for the deaths of millions of people again. See in that respect also Mann 1989, p. 414 where he writes about the "decisive" question, which "is not whether jurisdiction exists, but whether jurisdiction should be exercised." He continues: "In order to answer this question one should not think of a case such as *Eichmann*. This was so extreme, so unique, so horrendous a case that a court which had jurisdiction because the man stood before it could not possibly be expected not to exercise it or even ask whether it should be exercised. The singular character of the crime was such as to render the exercise of jurisdiction a duty, but at the same time should not in any sense be allowed to supply the standard applicable in other cases." Although Mann wrote this article before the ICTY and ICTR were established, one can imagine that Mann would still see the *Eichmann* case as an exception. *Cf*. also Michell 1996, p. 423 ("The case concerned crimes of such a unique and grave nature that it would be imprudent to abstract general principles from it [original footnote omitted, ChP].") and Lowenfeld 1990, p. 490: "I have tried throughout the article to stay away from cases that are bigger than law – Adolf Eichmann, for example." See finally Silving 1961, p. 323.

fact and law" [original footnote omitted, ChP]."[275] Sadly, a verdict could not be rendered in this case as Dokmanović hanged himself in his cell almost six months after the above-mentioned Appeals Chamber's rejection.[276]

3.1.2 *Todorović*

The second case to be addressed here is the rather mysterious case of Todorović. The initial indictment against the Bosnian Serb Stevan Todorović (and his (initially five)[277] co-accused) was confirmed by the ICTY on 21 July 1995, the day on which a warrant for his arrest was also issued.[278] Todorović was indicted for grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity, "all relating to events said to have taken place in the area of Bosanski Šamac, in the north-eastern part of Bosnia and Herzegovina, during the summer of 1992".[279] On 27 September 1998, Todorović was transferred by SFOR to the ICTY. Three days later, at his initial appearance before the ICTY, he "stated that he did not feel well because he had received a heavy blow from a baseball bat over his head 'during the kidnapping'".[280] What had happened here? Most probably, the exact details of Todorović's deprivation of liberty will stay a mystery for ever. In the words of Sloan:

> According to Todorović's version of events, as well as various media reports, on the night of 27 September 1998, four armed, masked men burst into Todorović's home in Zlatibor in western Serbia, gagged, blindfolded, and beat him with a baseball bat, then proceeded to smuggle him out of the country and into Bosnia and Herzegovina. Within a few minutes of Todorović's arrival in Bosnia and Herzegovina, a helicopter arrived to take him to the base of the NATO-led Stabilization Force (SFOR) at Tusla.

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[275] Scharf 1998, p. 371.
[276] See *ibid*., p. 371.
[277] Todorović's five co-accused were Blagoje Simić, Miroslav Tadić, Simo Zarić, Milan Simić and Slobodan Miljković. The indictment against the latter suspect was withdrawn as a result of his death on 7 August 1998.
[278] See ICTY, Trial Chamber III, *Prosecutor v. Stevan Todorović*, 'Sentencing Judgement', Case No. IT-95-9/1-S, 31 July 2001, para. 1.
[279] *Ibid*.
[280] Ph. Vallières-Roland, 'Prosecuting War Criminals: A Critique of the Relationship between NATO and the International Criminal Courts', Centre for European Security and Disarmament (CESD) – Briefing Paper, February 2002, available at http://www.isis-europe.org/pdf/2008_artrel_87_2002_archives_59_paper.natoandiccs.pdf, p. 3 (referring to "*Prosecutor v. Stevan Todorovi*[*ć*]*,* 'Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorovi[ć] and for Extension of Time to Move to Dismiss Indictment', 10 February 1999, Case [N]o. IT-95-9-PT").

Depending on which newspaper accounts (if any) are believed, those involved in his capture were either 'bounty hunters'[281] paid from a 'CIA slush fund',[282] or

[281] That bounty hunters should be used in the context of the international criminal tribunals is proposed by, for example, Supernor 2001, who argues (at p. 250) that "[t]he UNSC should pass a resolution that provides international bounty hunters with immunity from domestic laws for the forceful acts necessary to arrest an indicted war criminal." See also Kovac 2002 and n. 1174 and accompanying text (with respect to the case of Charles Taylor before the SCSL). However, even though the UNSC may condone a specific international arrest operation to maintain international peace and security (see n. 157 of Chapter III), it is very doubtful that it would also approve a more general immunity for bounty hunters with respect to acts which it has always condemned. One could think here not only of the condemnation in the *Eichmann* case, but also of UNSC Res. 579 of 18 December 1985 (see also n. 184 of Chapter III): "*Considering* that the taking of hostages and abductions are offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States, (…) 1. *Condemns unequivocally* all acts of hostage-taking and abduction; 2. *Calls for* the immediate safe release of all hostages and abducted persons wherever and by whomever they are being held; 3. *Affirms* the obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future; (…) 5. *Urges* the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism [emphasis in original, ChP]." In addition, even if the UNSC were to grant such immunity, many practical questions remain. For example, how does one regulate the 'quality' of these bounty hunters? How does one prevent the situation that, even if one has publicly stated that such operations can only be executed by professional, private military firms, amateurish fanatics – longing for the financial award – enter a foreign territory and create an international mess by, for example, killing the suspect in their effort of apprehending him? (See for the problems related to assassinations Scharf 2000, pp. 974-975: "While assassination may achieve a sense of "accountability," it is inconsistent with several of the other goals of international criminal justice, namely achieving truth telling, deterrence, and reconciliation. Without a living defendant, there can be no presentation of evidence at trial, and therefore no production of a historical record. Far from deterring acts of violence, assassination is likely to lead to escalated violence in revenge." Of course, a suspect may also be killed during the course of an arrest operation by international forces (see, for example, the cases of Simo Drljača, Dragan Gagović and Janko Janjić, see Harmon and Gaynor 2004, p. 410, n. 21), but one can assume that this risk will become far greater if amateurish individuals join the 'arrest' efforts because the UNSC, in a way, provides them this possibility.) Moreover, what would the consequences of such an event be for the (nationals of the) State of residence of these individuals? See for criticism also Kalinauskas 2002, p. 404: "One potential problem with this practice is that it could result in legal liability on the part of Western governments for the consequences of bounty hunters' actions. Furthermore, as a policy matter, it is unclear whether encouraging abductions for profit is an acceptable method of achieving the goals of international justice, peace, and stability in Bosnia [original footnote omitted, ChP]." See finally also Van der Wilt 2004, p. 295, arguing that the use of private bounty hunters is not to be recommended at all for the State's monopoly on violence must be spared as much as possible.

[282] On the DPI (Division of Public Information) site of UNMIK, one can find a news item from *Reuters*, dated 22 August 2000, where one can read that "[a] Serbian regional court charged seven men on Tuesday with terrorism, accusing them of abducting a war crimes suspect indicted by the United Nations from Serbia in 1998 and handing him over to NATO troops. (…) The court in Serbia's central town of Uzice named the accused as Ignjatije Popovic, Djordje Maksimovic, Djura Dragovic, Zivko Abasevic, Rodoje Erakovic, Branko Zivkovic and Milan Popovic. (…) On Tuesday, the Uzice court charged two more people, also belonging to the group accused of kidnapping Todorovic, Dragan Zivkovic and Nebojsa Suvajdzic, with illegal possession of firearms and ammunition and theft, [independent Yugoslav news agency] Beta said." (See http://www.unmikonline.org/press/wire/im2308pm.html.) A

> members of the British SAS and/or elite Delta units from the United States. According to one account, his captors had offered to let him go in return for the equivalent of £13,000. While some of these reports seem far-fetched and elements may be unfounded, because of the wall of secrecy erected by SFOR and strenuously defended by the OTP, untested allegations and unconfirmed press reports are all we have to inform us of what actually happened on the night of 27 September 1998 [original footnotes omitted, ChP].[283]

In any event, Todorović started to file numerous motions challenging the legality of his arrest and seeking his release and return to the FRY.[284]

The first motion[285] was filed on 10 February 1999 through which Todorović's Defence requested five things, one of them being an evidentiary hearing as to the circumstances of his arrest, detention and delivery to the Tribunal.[286] The Trial Chamber noted that Todorović alleged that he was illegally kidnapped by four unknown individuals in the FRY and that this point also raised the issue of the Prosecution's involvement in the kidnapping.[287] However, even if the Prosecution

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few months later, *The New York Times* reported, again referring to Beta, that "[a] Serbian regional court found nine men guilty today of kidnapping a war crimes suspect in Serbia who was later handed over to NATO peacekeepers in Bosnia". See '9 Convicted in Kidnap of War-Crimes Suspect', *The New York Times*, 12 December 2000, available at: http://www.nytimes.com/2000/12/12/world/9-convicted-in-kidnap-of-war-crimes-suspect.html?n=Top/Reference/Times%20Topics/Subjects/K/Kidnapping. This information was confirmed by the Helsinki Committee for Human Rights in Serbia's report *Annual Report 2000, Human Rights in Serbia 2000* (available at: http://www.helsinki.org.rs/reports_t10.html), in which one can read (under 'IV: International Humanitarian Law'): "Trial of 9 persons involved in abduction of Stevan Todorovic began in the Uzice District Court on 5 December 2000. According to the indictment in the early morning hours of 27 September 1998 they abducted Stevan Todorovic in Zlatibor village Rudine for a 50,000 dollar award and handed him over to the SFOR soldiers. (…) Trial Chamber of the Uzice District Court on 11 December 2000 sentenced the accused to a total of 45 years in prison. (…) For the said abduction Ignjatije Popovic (at large) was sentenced to 7 years in prison, Milan Popovic to 7 years, D[j]ordje Maksimovic to 6 years, Zivko Odabasic [the *Reuters* news item, see this footnote, speaks of Zivko Abasevic, ChP] to 8 years and 6 months in prison, Radoje Herakovic [the *Reuters* news item, see this footnote, speaks of Rodoje Erakovic, ChP] to 4 years and 11 months, Branko Zivkovic to 6 years, D[j]ura Dragovic to 4 years and 7 months (assistance in abduction), Dragan Zivkovic to 18 months (for hiding a stolen Todorovic's car) and Nebojsa Suvajdzic to 6 months in prison (illegal possession of Todorovic's pistol)."

[283] Sloan 2003 A, p. 86.

[284] See ICTY, Trial Chamber III, *Prosecutor v. Stevan Todorović*, 'Sentencing Judgement', Case No. IT-95-9/1-S, 31 July 2001, para. 2.

[285] This motion was entitled 'Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorovi[ć] and for Extension of Time to Move to Dismiss Indictment' and was supplemented by a 'Memorandum of Law in Further Support for an Evidentiary Hearing as to Abduction and Detention of Accused Todorovi[ć]'. See ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović', Case No. IT-95-9-PT, 25 March 1999, p. 2.

[286] See *ibid.* Next to this, it was also requested (see *ibid.*): "(2) that the accused be allowed to give evidence on this issue, (3) a discovery order directed to the Prosecution to make available to the Defence all documents in its possession as to the manner of, and individuals responsible for, the detention, arrest and delivery of the accused to the Tribunal, (4) that the accused be returned to the Federal Republic of Yugoslavia ("FRY") and (5) that the indictment against him be dismissed".

[287] See *ibid*.

had not been involved in his abduction, Todorović argued, he had still been illegally brought into the power of the ICTY.[288] Conversely, the Prosecution contended, among other things, that Todorović's right to liberty and security was not violated and that

> it was not involved in any activity relating to the accused's removal from the FRY, that it did not have prior information of any proposed operation to secure the arrest of the accused, and that it first learned of the accused's arrest on 27 September 1998 when it was contacted by SFOR (…).[289]

The Trial Chamber was not impressed by Todorović's arguments either and orally rejected his motion on 4 March 1999, issuing the reasons for this rejection in its decision of 25 March 1999.[290] In that decision, the Chamber considered that Todorović's motion "is only supported by a report posted by a private individual on an e-mail bulletin board based on an alleged newspaper report"[291] and hence, that it "does not contain sufficient factual and legal material, and in particular does not provide a statement as to the factual circumstances of his arrest, to warrant an evidentiary hearing".[292]

Todorović subsequently filed a motion for leave to appeal this decision,[293] which was granted by a bench of three judges of the Appeals Chamber.[294] The Appeals Chamber stressed that

> the issue before the Trial Chamber was not whether there was a kidnapping and, if so, what were its legal effects, but whether or not, as stated by the Trial Chamber in its decision of 25 March 1999, to grant the Accused's request for an evidentiary hearing as to the alleged kidnapping of the Accused[.] [295]

According to the Appeals Chamber, the Trial Chamber, in denying Todorović's motion, had not abused its discretion.[296] As a result, the Appeals Chamber noted that

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[288] See *ibid*., p. 3.
[289] *Ibid*.
[290] See ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović', Case No. IT-95-9-PT, 25 March 1999.
[291] *Ibid*., p. 3.
[292] *Ibid*.
[293] This motion (of 25 May 1999) was entitled 'Accused Stevan Todorovi[ć]'s Motion for Leave to Appeal From a Certain Oral Order Dated March 4, 1999 and a Decision Dated March 25, 1999 which Denied Motion for an Evidentiary Hearing on Abduction and Kidnapping and Thereafter for Leave to File a Motion to Repatriate the Accused to the Country of Refuge', see ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Appeal by Stevan Todorović Against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III', Case No. IT-95-9-AR73.2, 13 October 1999, p. 2.
[294] This decision (of 1 July 1999) was entitled 'Decision on Application by Stevan Todorović for Leave to Appeal Against the Oral Decision of Trial Chamber III of 4 March 1999', see *ibid*.
[295] *Ibid*.
[296] See *ibid*., p. 3.

"no ground appears on which the Appeals Chamber may intervene in respect of the Trial Chamber's finding"[297] and dismissed the appeal.[298]

Todorović, however, did not give up. Eight days after the dismissal of his appeal, he filed a 'Notice of motion for an order directing the Prosecutor to forthwith return the accused Stevan Todorovi[ć] to the country of refuge', to which he attached a statement clarifying what he believed had happened to him – now more than a year ago. Sloan explains: "Here again he based his request for relief on an assertion that his arrest was illegal, arguing that it was in violation of state sovereignty and contrary to customary international law [original footnote omitted, ChP]."[299] Furthermore, another (*habeas corpus*) motion was filed three weeks later, on 15 November 1999.

This time, Todorović had more success; on 23 November 1999, the Trial Chamber issued an oral decision "in which it found that Todorović's statement 'was a new circumstance such that it justified ordering an evidentiary hearing on the legality of the arrest and detention of the Accused' [original footnote omitted, ChP]".[300]

The day after, Todorović filed a new motion,

> seeking an Order from the Trial Chamber requesting the assistance of the Stabilisation Force ("SFOR"), or other military and security forces operating on the territory of Bosnia and Herzegovina, to provide documents and witnesses to the Defence in connection with the transfer of the accused from his residence in the Federal Republic of Yugoslavia (Serbia and Montenegro) to the Tuzla Air Force base in Bosnia and Herzegovina and the arrest of the accused, all alleged to have occurred between 26 and 28 September 1998, for use in the evidentiary hearings as to the legality of that arrest now before the Trial Chamber.[301]

The Prosecution filed its response, arguing that the motion and the related proceedings were "nothing more than a legalistic 'fishing expedition'".[302] Nevertheless, the Trial Chamber, after a request from the Defence for the Prosecution to provide similar material, ordered the Prosecution to provide material

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[297] *Ibid*., p. 3.
[298] See *ibid*. After this decision, the Trial Chamber also dismissed other motions filed by Todorović on 21 and 22 September 1999, which sought "orders from the Trial Chamber for the production of documents and witnesses by the Ministry of the FRY and by SFOR [original footnote omitted, ChP]." (Sloan 2003 A, p. 89.) (Todorović had filed these motions because "[h]e claimed that these materials would be necessary for the evidentiary hearing that would result if he was successful in his then pending appeal [original footnote omitted, ChP]." (*Ibid*.) Since his appeal was dismissed on 13 October 1999, these motions had become insignificant.)
[299] Sloan 2003 A, p. 90.
[300] *Ibid*.
[301] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 1.
[302] *Ibid*., para. 2.

on what had happened to Todorović.[303] After an unsuccessful appeal against this order, the Prosecution disclosed some information, but very little.[304] At the same time, Todorović, who was ordered by the Trial Chamber to try to obtain information from SFOR,[305] was told by the latter that "[i]t is the position of SFOR that the ICTY has no authority to order SFOR to disclose any information."[306] At this instance, the Trial Chamber itself came in action: it "ordered that the Motion be served on SFOR".[307] After SFOR was granted time to prepare its case,[308] it filed a written response on 10 July 2000, followed by new filings from the Defence and the Prosecution.[309] In one of these filings, the Defence specified for the first time that the relief it sought (related to these proceedings) also included a request for judicial assistance directed to the US.[310] Finally, a hearing on the motion was held on 25 July 2000 (at which SFOR failed to show up, incidentally).[311]

The Defence's main argument before this hearing was "that it is entitled to seek assistance in the production of evidence relating to the facts and circumstances of the detention and alleged arrest of the accused".[312] The relief sought was far-reaching, namely:

> (i) an order and *subpoena duces tecum* directed to the Commanding General of SFOR (…)[313]; (ii) a *subpoena ad testificandum* directed to the Commanding General Tuzla Air Force base, General Shinseki, and to the SFOR personnel involved in the seizure,

[303] See *ibid*., para. 3. In more detail, the Prosecution was ordered "to provide copies of relevant reports and other material, including disclosure of the identity of various individuals involved in the transportation to and arrest of the accused at the Tuzla Air Force base." (*Ibid*.)
[304] See *ibid*., para. 4. In fact, it "provided only a one-page report about the arrest of the accused, prepared by the investigator who effected the arrest on 27 September 1998, Mr. Ole Brøndum. The Prosecution asserted that, apart from this report, it had none of the designated material within its custody and control." (*Ibid*.)
[305] See *ibid*.
[306] *Ibid*., para. 5.
[307] *Ibid*., para. 6.
[308] See *ibid*., paras. 6-7.
[309] See *ibid*., para. 7.
[310] See *ibid*., para. 7.
[311] See *ibid*., para. 8.
[312] *Ibid*., para. 9. In particular, it sought: "(a) attendance of the individual or individuals who transported the accused by helicopter to the Tuzla Air Force base; (b) attendance of the individual who placed the accused under arrest and served the arrest warrant; (c) production of the audio and video tapes made on 27 September 1998 of the initial detention and arrest of the accused at the Tuzla Air Force base; (d) SFOR pre- and post-arrest operations reports relating to the arrest and detention of the accused." (*Ibid*.)
[313] Namely to produce: "(a) all pre- and post-arrest operational reports relating to the seizure, abduction and arrest of the accused, including orders as to the movement of personnel; (b) orders, approvals and logs for the movement of vehicles including helicopters used in such operations; (c) pre- and post-operation field, operational, movement and headquarters reports, notes, action reports and memoranda relating to the seizure, abduction and arrest of the accused; (d) audio and video tapes of the seizure, abduction and arrest of the accused; (e) orders authorising payment and proof of payment to SFOR personnel and to third parties; (f) names, rank and serial numbers of SFOR personnel involved in the seizure, abduction and arrest of the accused; and (g) names and last known addresses of non-SFOR personnel actually involved in the seizure, abduction and arrest of the accused". (*Ibid*., para. 10.)

> abduction and arrest of the accused; and (iii) a request for judicial assistance directed to the United States of America for the same materials.[314]

To support its claims, the Defence argued "that individuals serving with SFOR are amenable to compulsory attendance"[315] and that the involvement of SFOR in the abduction was shown by the fact that the helicopter which brought him to the SFOR base in Tuzla arrived minutes after he and his kidnappers arrived in Bosnia and Herzegovina.[316] Finally, the Defence maintained – and this also relates to the point already discussed at footnote 65 and accompanying text, namely if, and if so to what extent, SFOR must cooperate with the ICTY – that

> even if SFOR itself is not subject to the jurisdiction of the International Tribunal, the individual member States remain liable and obligated to fulfil all of the obligations undertaken as members of the United Nations and thus to cooperate with the International Tribunal.[317]

The Prosecution and SFOR, however, did not agree with all this.

They first argued, in essence: "(a) the Motion does not establish any prima facie basis for judicial enquiry; (b) even if any irregularity in the circumstances of the arrest did exist, it would not justify the relief sought."[318] It is clear that the latter argument "comes close to adopting the *male captus bene detentus* principle".[319] Because this point goes to the core of this book's subject, it will now be examined in more detail.[320]

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[314] *Ibid*.
[315] *Ibid*., para. 11.
[316] See *ibid*. One could argue, by the way, assuming for now that this story is accurate, that the sole fact that a helicopter picked him up from a group of kidnappers and brought him to the SFOR base (whether this happened within a few minutes after Todorović's arrival in Bosnia and Herzegovina or not) strongly points to at least *some* SFOR involvement in the operation.
[317] *Ibid*., para. 13.
[318] *Ibid*., para. 14.
[319] Sluiter 2003 A, p. 287.
[320] As the summary of the Prosecution's arguments in the Trial Chamber's decision of 18 October 2000 (see the end of this footnote) does not really go into this matter in detail, use has been made of a specific document from the Prosecution itself (ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999), including Sloan's article on the *Todorović* case (Sloan 2003 A). For the summary of the Prosecutor's arguments in the Trial Chamber's decision of 18 October 2000, see ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, paras. 15-17. In these paragraphs, the Chamber noted that the Prosecution argued, among other things, "that "some international laws are not binding on certain international institutions"" (*ibid*., para. 15), "that the territorial jurisdiction of the International Tribunal extends throughout the territory of the former Yugoslavia, and so there is no basis to assert any breach of sovereignty" (*ibid*., para. 15) and that "no credible evidence has been put forward to indicate that members of the Office of the Prosecutor or of any other institution, including SFOR, have violated the rights of the accused."

The Prosecution noted that "[t]he accused's Motion appears to proceed from the assumption that if there is any breach of the fundamental rights of an accused in the criminal process, the accused will be entitled to have the indictment dismissed and to be released".[321] However, this was not the case according to the Prosecution:

> Withdrawal of the indictment altogether would be required only in extreme cases, where *any* continuation of the trial proceedings would in all the circumstances be fundamentally incompatible with the right to a fair trial and the integrity of the justice system.[322]

However, in less serious cases, "other remedies may be available to cure any resulting injustice".[323] It is not hard to agree with this stance as it very much resembles the position taken in this study as well. Thus, it is important, the Prosecution continued, "to identify exactly which rights of the accused are said to

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(*Ibid*., para. 16.) The Prosecution also explained "that arrest operations conducted by SFOR "clearly involve serious security and other risks to the States concerned, including risks to the lives of personnel involved. The desire of the States and forces concerned to maintain the strictest confidentiality in respect of the operational details of these activities is readily understandable" [original footnote omitted, ChP]." (*Ibid*., para. 17.)

[321] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 27.

[322] *Ibid*., para. 28. See also Lamb 2000, pp. 241 and 243: "[W]ithdrawal of the indictment altogether and the release of the accused would be required only in extreme cases, where any continuation of the trial proceedings would in all the circumstances be fundamentally incompatible with the right to a fair trial and the integrity of the judicial process. (…) [I]n most cases, the extreme remedy of release of a person indicted for the commission of serious violations of international humanitarian law will not be seen to comport with justice. Nevertheless, the release of the accused must, *in extremis*, remain as the ultimate remedy on the grounds that it constitutes the strongest deterrent and sanction against the abuse of power by law enforcement personnel and serves as a remedy of last resort in those truly exceptional circumstances where the divestiture of its jurisdiction is thought by the Tribunal to be necessary to safeguard the integrity of the conduct of international criminal justice [original footnote omitted, ChP]."

[323] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 27. The Prosecution hereby referred, as a hypothetical example, to "the case of an accused in a national legal system charged with a serious crime such as murder [it is interesting to note that the Prosecution, not very surprisingly, deems the seriousness of the crimes with which the suspect is charged to constitute an important element to take into account here, ChP], who is illegally beaten by police during arrest or during pre-trial detention. International human rights norms would not necessarily require that the prosecution of the accused for murder be terminated in such a case. International norms may require that the accused have an appropriate legal remedy in respect of the unlawful beating (for instance, a civil action for damages). By virtue of the right to a fair trial, the accused may also be entitled to claim other remedies in the trial process (for instance, exclusion from the trial of evidence of anything said by the accused to the police following the beatings) [original footnote omitted, ChP]." (*Ibid*., para. 28.)

have been violated".[324] However, the problem in this case, the Prosecution complained, is that

> [t]he accused's Motion does not specify precisely which rights of the accused are alleged to have been violated in this instance, other than "the right not to be illegally kidnapped or illegally abducted". Nor does the accused's Motion specify the particular law which rendered the "abduction" illegal.[325]

The Prosecution therefore assumed that the claimed illegality in this case was "the alleged violation of the sovereignty of the FRY under international law, and/or an alleged violation of the municipal law of the FRY".[326]

The main question to be answered in this case would thus be "whether such illegalities in the accused's forcible removal from the FRY would require that the indictment against the accused be dismissed, and that the accused be released from custody".[327]

The Prosecution first noted that there were a number of cases and doctrinal support for the *male captus bene detentus* view[328] but that it "does not need to rely on these authorities, and does not seek to do so".[329] This was because, as will also

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[324] *Ibid*. It can be argued that this is indeed the route one should follow. As the Prosecution arguably did not follow this avenue itself, is is rather strange that the Prosecution now defends this position. See also Sloan's comment (Sloan 2003 A, p. 99, n. 101) that "[a]n argument that in order to determine the suitability of the accused's proposed remedy the potential fairness of the trial must be considered 'in all the circumstances' with a careful examination of 'exactly which rights of the accused are said to have been violated', is not easily reconciled with the OTP's earlier argument that disclosure from SFOR on the facts surrounding Todorović's arrest was unnecessary, as the matter could be decided on the limited facts available."

[325] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 29.

[326] *Ibid*.

[327] *Ibid*., para. 30. The Prosecution hereby noted that this point had not been examined yet by a Trial Chamber as in *Dokmanović*, the Trial Chamber decided that there was no *male captus* in the first place, see *ibid*. See also n. 267.

[328] See *ibid*., para. 31, ns. 9-10. The Prosecution hereby referred, among other things, to the *Eichmann* and *Alvarez-Machain* cases and to handbooks such as Brownlie's *Principles of Public International Law* (1998, p. 320) and Shaw's *International Law* (1997, p. 478). Sloan (2003 A, p. 101) notes that "[i]n its pleadings, the OTP led by arguing in favour of the *male captus bene detentus* principle" but that it, "despite this ostensible confidence in the *male captus bene detentus* principle in international law, (…) carefully avoided going down a path that would have required it to champion the principle [original footnote omitted, ChP]." (*Ibid*.)

[329] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 31. It may be interesting to note that the Prosecution, looking at the more specific context of the ICTY, had already earlier (see *ibid*., para. 26) noted "that there is some doctrinal support [the Prosecution here refers to Scharf 1998, pp. 376-379, see also n. 265, ChP] for the proposition that a person indicted by the

become clear in the following pages, the Prosecution was of the opinion that there was no *male captus* in the first place, or at least no *male captus* so serious (for example, because it could be attributed to the Tribunal) as to lead to a *male detentus* outcome: the refusal of jurisdiction. Hence, even if the ICTY were in favour of the *male captus male detentus* reasoning, this would, according to the Prosecution, not lead to a refusal of jurisdiction in this case because there was no *male captus* at all, or no *male captus* so serious that a refusal of jurisdiction would be justified.

It then turned to case law which can (more or less) be connected to the *male captus male detentus* reasoning, to cases where it was affirmed "that a court should decline to exercise criminal jurisdiction over an accused who has been brought within the jurisdiction of the court by means of an irregular rendition [original footnote omitted, ChP]".[330]

However, the Prosecution argued that this last category of cases could not be relied upon because "the basis of the reasoning in these cases affords no valid analogy to the situation under consideration by this Trial Chamber in the present case".[331] The reasons for this assertion in Todorović's case, the Prosecution argued, were threefold: 1) there was no circumvention of an extradition treaty, 2) his alleged *male captus* was not executed by the authorities of the now prosecuting forum and 3) his right to liberty and security was not violated.[332]

To start with the first reason, the Prosecution explained that "the decisions in some of these cases were premised on the fact that the removal of the accused from the other State involved a circumvention of applicable extradition procedures [original footnote omitted, ChP]"[333] but that in the context of the ICTY, "there are no extradition arrangements, or analogous arrangements, between the Tribunal and the FRY [original footnote omitted, ChP]".[334]

Tribunal may be forcibly arrested by agents of one State in the territory of another State, without the latter State's consent [original footnote omitted, ChP]." However, also here, the Prosecution stated that "this is not a matter that needs to be determined in the present proceedings." (*Ibid*.)

[330] *Ibid*., para. 33. Here, the Prosecution (*ibid*., para. 33, n. 13) referred to *Hartley*, *Ebrahim*, *Bennett*, *Toscanino*, *Stocké*, *Cañón García* and *Celiberti de Casariego*.

[331] *Ibid*., para. 33.

[332] See Sloan 2003 A, p. 102.

[333] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 34.

[334] *Ibid*. *Cf*. also Lamb 2000, p. 210, n. 150: "While certain cases decided by national courts have affirmed that a court should decline to exercise criminal jurisdiction over an accused who has been brought within the jurisdiction of a court by means of an irregular rendition, these cases generally do not afford a valid analogy to Tribunal arrests, on the grounds that such decisions were premised on the fact that the removal of the accused from the other State involved a circumvention of applicable extradition procedures. However, the regime of extradition is patently inapplicable to the case of the Tribunal". See also *ibid*., pp. 232-233.

This point was already discussed (and criticised) in the previous *Dokmanović* case and will therefore not be addressed here, except that it is worth mentioning that Sloan was not impressed by this reason either.[335]

With respect to the second reason, the Prosecution argued that it had "no involvement in any activity relating to the accused's removal from the FRY",[336] whereas some of the national cases were based on the fact that authorities from the prosecuting State were involved in the alleged *male captus*.[337] The Prosecution also noted that "[t]he conduct of States, and multi-State entities such as NATO and SFOR, cannot be imputed to the Prosecutor, when the Prosecutor was not involved in that conduct. They are not agencies of the Tribunal, and should not be treated as if they were."[338]

It has become clear from the examination of the inter-State cases in Chapter V of this book that it is indeed true that the participation of authorities of the now prosecuting forum is an important factor for the judges to take into consideration and that the involvement of other parties may indeed lead to another legal outcome.[339] However, one can have one's doubts whether States and entities such as SFOR cannot be seen as a sort of agencies of the Tribunal when they make arrests for the latter. Of course, they are not proper agencies or organs of the ICTY, but the moment they make arrests for the ICTY, they function as its enforcement arm. After all, it has been said earlier that the Tribunals do not have a police force of their own and hence are dependent on others to make arrests and such like. That also means that the moment States and multi-State entities such as SFOR make arrests for the ICTY, they form the latter's temporary police force.[340] This point was also

[335] See Sloan 2003 A, pp. 102-103: "[W]hile the reasoning in several of the cases cited was indeed based on the national court's concern at the state's ignoring an established extradition regime (thereby depriving the accused of guarantees afforded by that system), none of the courts held – or implied – that the existence of an extradition treaty was a sine qua non of the determination to refuse jurisdiction. The argument that national courts' reasoning – reflecting as it does a desire to protect the accused from illegal behaviour on the part of state agents, to prevent the abuse of the process of the court, to safeguard the rule of law, and to protect an accused's freedom in society – was contingent on the existence of an extradition regime was not convincingly made by the OTP [original footnotes omitted, ChP]."

[336] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 36.

[337] See *ibid*.

[338] *Ibid*., para. 39.

[339] See also Sloan 2003 A, p. 103.

[340] See also *ibid*., p. 104: "[T]he divide between SFOR and the Tribunal does not appear to be as great as the OTP and SFOR have represented it to be. The OTP and SFOR placed great emphasis on their assertion that the OTP alone – and not SFOR – was by analogy to represent the enforcement agents of the prosecuting state in the national cases, with SFOR being treated as analogous to a third party. However, the nature of the relationship between SFOR and the OTP and, more generally, between SFOR and the Tribunal as a whole, calls such an assertion into question. If one is to analogize the circumstances of Todorović's capture with the law of interstate capture, it would surely be more apt to liken SFOR to the role of the enforcement agents of the prosecuting state. They have, after all, been charged with effecting arrests on behalf of the Tribunal. (…) At a minimum, it would appear to be

addressed by Judge Robinson in his separate opinion to the 18 October 2000 decision, which will be briefly examined after discussion of this case.

Thus, even if it cannot be said that 'the Tribunal' abducted a person from another State if that abduction was perpetrated by entities such as SFOR (and not by staff from the ICTY itself), the Tribunal should take into account that an abduction has occurred in the context of its case and that this abduction was perpetrated by entities which can, to a certain extent, be connected to the Tribunal. In those cases, it is submitted, remedies for the suspect should still be granted. It may indeed go too far to refuse jurisdiction in such cases (although much will depend on the exact *male captus*) but then other, lighter remedies may be appropriate.

The third reason that the Prosecution gave for the cases which can more or less be connected to the *male captus male detentus* reasoning not being applicable here was that some of them "suggest that a forcible abduction by agents of one State in the territory of another, contrary to the domestic claw of the State where the abduction occurs, would be a denial of the accused's right to liberty and security",[341] whereas in the context of the ICTY, "[t]here is no rule that a person indicted by the Tribunal can be arrested only pursuant to the national law of the place where the person is located".[342]

Now, it is, of course, true that a person's arrest and surrender does not necessarily have to be based on the procedures of the State where that person resides. After all, it may very well be that other entities such as SFOR may also have the power to arrest that person. If SFOR, for example, makes the arrest, then, of course, it does not need to follow the procedures which are applicable to national police officials. However, what *is* arguably important is that, whatever entity makes the arrest, the proper procedures which are applicable to that entity are followed. That means that if the person in question is arrested by national police forces, these forces must follow their own arrest procedures. If, on the other hand, the person is arrested by SFOR, then SFOR does not need to follow those national arrest procedures but must follow its own arrest procedures. As already explained in the context of the *Dokmanović* case, it is difficult to see those arrest procedures being irrelevant to the person's deprivation of liberty. Hence, if the proper procedures of the national police force or SFOR's own rules are not followed in the arrest, for example, if SFOR abducts a person from a territory where it does not have jurisdiction to make arrests (or has such an abduction executed by third parties), then it is difficult to argue that that person's right to liberty and security has not been

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fitting to consider SFOR to be a co-enforcement official, alongside the OTP, given that each has a role in the execution of arrest warrants [original footnotes omitted, ChP]."

[341] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 40. The words "more or less" have been chosen here as a violation of this right in principle only leads to a 'normal' release and not necessarily to a *male detentus* outcome.

[342] *Ibid*.

violated, simply because all the rules of the ICTY have been adhered to. The fact that the ICTY has issued a valid indictment (so that there are grounds for arrest) and an arrest warrant (one of the elements leading to an arrest which can be seen as being in accordance with a procedure), important as they are, say nothing about the question of how the arrest was factually executed on the ground, which is arguably an important, if not, crucial, part of one's right to liberty and security.[343] As earlier explained, although a national judge cannot 'use' a violation of a person's right to liberty and security to refuse the transfer of the suspect to the ICTY and although such a violation does not necessarily have to lead to a refusal to exercise jurisdiction by the ICTY itself,[344] it may very well be appropriate for the ICTY to accord other remedies in such cases. At a certain moment, the Prosecution made the statement that "[g]iven this lawful authority [this is the authority of other States to detain Todorović for transfer to the ICTY, even if they have not received a warrant of

[343] See, however, Lamb (2000, p. 228, n. 220), who is of the opinion that "[t]he fact that an arrest may violate the law of the State where the arrest took place is of no consequence, owing to the explicit subordination of national law to the provisions of the ICTY Statute." (See also *ibid*., p. 240.) See also Sloan 2003 A, p. 105: "[I]f the OTP is to look to jurisprudence setting out the right to liberty and security at the national level and distil the requirement that the deprivation of liberty must comport with the procedural guarantees where this deprivation takes place, surely the apposite question for the Trial Chamber is whether Todorović had been afforded his procedural rights under the international law governing the functioning of the ICTY, not whether he had been afforded his procedural rights under the law of the FRY." Nevertheless, a little later, Sloan also stresses the importance of the regularity of the arrest on the ground (which arguably implies that one should also be able to review whether the arresting entity has complied with its own procedures), see Sloan 2003 A, pp. 105-106: "[The OTP] described issues relating to the procedure surrounding the arrest warrant – including the fact that it had not been issued to the states involved in the detention and had not specifically authorized an arrest in the country to which the accused had fled – as 'immaterial', and appeared content to overlook whether excessive force had been used. In short, the OTP appeared to be asserting that neither the particulars of the arrest warrant nor the nature of the apprehension were relevant to the issue of the right to liberty and security – so long as the indictment was valid. Consideration of the right to liberty and security of person by international bodies both at the European level and the wider international level suggests that the OTP's approach may be overly deferential to the Tribunal [original footnotes omitted, ChP]."

[344] Again, the remedy in the case of an unlawful arrest/detention is release and not necessarily the refusal of jurisdiction. It can be maintained that judges should indeed only refuse jurisdiction in the most extreme cases and not in cases where it is clear that uncooperative States, executing arrests for the Tribunal, have violated procedures on purpose, even if these violations are rather serious, in an effort to ensure that a person's trial would not continue because of these violations. In that respect, one must agree with the Prosecution that "it could defeat the purposes of justice if every illegality by a State authority, over which the Tribunal has no control, could vitiate a prosecution altogether. Indeed, any such doctrine might potentially encourage certain States, which have hitherto failed to fulfil their obligations of co-operation with the Tribunal, to hand accused persons over to the Tribunal but to ensure that there are serious irregularities in the process. The States concerned could thus claim that they are fulfilling their obligation to co-operate, while at the same time ensuring that the prosecution against the accused cannot proceed." (ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 51.) See also Lamb 2000, p. 211, n. 154. This concern was also expressed by the Prosecutor in the still-to-discuss *Nikolić* case, see n. 476.

arrest, ChP], the arrest of the accused by States who were not the addressees of an arrest warrant cannot be considered arbitrary, or a violation of the accused's right to liberty and security of person".[345] However, this is a rather narrow interpretation of what constitutes a violation of the right to liberty and security.[346] As explained before, the fact that certain actors are allowed to make an arrest does not mean that the arrest itself can be considered legal/non-arbitrary. One should also take into account other elements, such as whether the execution of this specific arrest was non-arbitrary.

Going back to the Trial Chamber's decision of 18 October 2000 itself and the position of SFOR, the judges noted that the NATO force maintained that first, "further disclosure is unnecessary because the accused would not be entitled to the relief sought even if the allegations are proven"[347] and secondly, that "compelling

[345] ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 47. See also *ibid*., para. 48: "Here, the Tribunal has indicted the accused, and had issued warrants for his arrest. There was lawful authority for his detention by the authorities of any State. (…) Thus, even if the forcible removal of the accused from the FRY as part of his transfer to the Tribunal violated rights of the *FRY* under international law, it cannot be said to have violated any right of the *accused* to liberty or security of person [emphasis in original, ChP]." This is arguably also a rather strange claim. If SFOR, or a State would indeed have kidnapped Todorović by entering the sovereignty of the FRY without the latter's consent, one can assume that the normal arrest procedures of SFOR or that State were not followed. After all, they do not have enforcement authority in the FRY. And that in turn leads to a violation of a person's right to liberty and security because the arrest was not executed according to the proper procedures.

[346] See also Sloan 2003 A, pp. 105-106.

[347] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 18. This was because, according to SFOR, "(a) relevant case law does not mandate release of the accused, (b) the accused is not entitled to the remedy of release from custody, and (c) the accused should not be returned to a State which defies its legal obligations to the International Tribunal". (*Ibid*.) It hereby referred, for example, to the still-to-discuss second *Barayagwiza* decision, in that that decision supports the idea "that release is not justified where the misconduct is not attributable to the Prosecution" (*ibid*., para. 19). However, as will be discussed in the examination of that case, one can have one's doubts with respect to that conclusion. In addition, SFOR relied on the already discussed *Dokmanović* case and stated that this case, "in which an arrest involving deceptive "luring" was held to be lawful, does not support the accused's claim for relief [original footnote omitted, ChP]." (*Ibid*.) That assertion is arguably also rather odd as Todorović's case involved an alleged abduction and not a luring operation. See also Sluiter 2003 A, p. 287: "It is (…) a "classical" abduction case". Nevertheless, SFOR also turned more specifically to abduction cases and argued that "[i]n cases addressing the lawfulness of cross-border abductions, some cases uphold a principle that abduction in violation of the law of one State does not divest another of jurisdiction, while others suggest that the courts have a discretion to decline to exercise jurisdiction where the State's own agents have been complicit in the abduction." (ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 18.) However, "SFOR points out that, in the current case, it is the Office of the Prosecutor, not SFOR, that stands analogous to the agents of a prosecuting State [original footnote omitted, ChP]." (*Ibid*., para. 19.) This point has already been discussed earlier in the main text: even if SFOR cannot be seen as an agent

requirements of operational security preclude further disclosure by SFOR concerning the detention of the accused [original footnote omitted, ChP]".[348]

After presenting the final reaction from the Defence to these arguments,[349] the Chamber looked at the submissions of the parties during the previously mentioned hearing of 25 July 2000[350] and the post-hearing submissions.[351] There is no need to examine all of these here, but one remark by the Defence may nevertheless be interesting to note, namely that the Defence acknowledged that,

> if it were successful in challenging the validity of the arrest, and the accused were returned to the Federal Republic of Yugoslavia (Serbia and Montenegro), there were two possibilities: either the accused would be returned to the custody of the International Tribunal immediately; or that country would not honour its commitments. However, that issue was "beyond the interests of the International Tribunal and has to be dealt with in a political forum" [original footnote omitted, ChP].[352]

As will also be explained in the 2002 *Nikolić* case, this reasoning is arguably fallacious: if, for example, employees of the OTP are responsible for a serious *male captus*, for instance, an abduction which violated the sovereignty of a State, the regular transfer procedures and the human rights of the suspect, the judges will have no option but to refuse jurisdiction and to release the person. That might very well lead to a return of that suspect to his State of residence/the injured State. If that happens, one can wonder why that State would have a renewed obligation to return

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of the ICTY, this does not mean that irregularities committed by third parties might not lead to remedies or even a dismissal of the case (see also the still to *Barayagwiza* case). SFOR also argued that an alleged violation of the domestic law of the FRY "does not vest in the accused a right to be released from the custody of the International Tribunal, especially as the accused "deliberately created a situation in which what he would consider a procedurally regular arrest and transfer was impossible" [original footnote omitted, ChP]." (*Ibid*., para. 20.) (As explained earlier: even though irregularities in the national arrest procedures may not lead to a refusal from the national judge to surrender the suspect to The Hague, such irregularities do arguably have an effect on the lawfulness of one's deprivation of liberty.) Finally, it stated "that a ruling that the International Tribunal will not exercise jurisdiction over a person apprehended in the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) unless the apprehension is conducted in accordance with its domestic law could have far-reaching consequences for the ability of the International Tribunal to try indictees and would, in effect, afford legal recognition to the Federal Republic of Yugoslavia (Serbia and Montenegro) as a sanctuary for war crimes indictees." (*Ibid*., para. 21.) (As stated, although these national irregularities may be taken into account by the judge reviewing one's deprivation of liberty, the refusal of jurisdiction should only be reserved for the most serious *male captus* cases. National procedural irregularities will normally not lead to that result.)

[348] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 18. See also *ibid*., para. 22.

[349] See *ibid*., paras. 23-26.

[350] See *ibid*., paras. 27-33.

[351] See *ibid*., paras. 34-36.

[352] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 32.

the suspect to the ICTY. That would make no sense. After all, the Tribunal has stated that it has no jurisdiction to try the case. How can a State have an obligation to return a suspect to a forum which has stated that it can no longer try the suspect? It would be better if the Tribunal made the return conditional, for example, on the State of residence prosecuting the suspect for his alleged crimes itself.[353] The Tribunal must not forget that it also has a responsibility to fight impunity, even if it is of the opinion that the suspect can no longer be tried before its own judges. (This was a correct point of criticism vented against the first *Barayagwiza* case, which will be discussed in Subsection 3.2.1 of this chapter.) Hence, if it is uncertain whether the suspect will be genuinely prosecuted in the injured State, the judges should transfer the suspect to another jurisdiction which is willing and able to try the suspect and repair the violation of the injured State's sovereignty in another way. [354]

In less serious *male captus* cases, where the judge has not refused jurisdiction but where he may nevertheless be of the opinion that a violation of, for example, the sovereignty of the FRY strictly speaking demands that the suspect is released and returned to that injured State (see also the discussion of this point in the context of the *Dokmanović* case), it would be better for the Tribunal not to return the suspect at all. After all, in such a situation, the suspect would be returned to a State which has an immediate obligation to re-transfer the suspect to the ICTY (which is, after all, still capable of trying the suspect). In such a case, the Tribunal could argue that the return has repaired the initial *iniuria* and that one can restart the trial as if nothing had happened. However, that would constitute an absurd *pro forma* remedy. Furthermore, one could also argue that it would be rather ridiculous to return a suspect to a State which may not cooperate with the ICTY.[355]

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[353] It must be noted that such a new national trial would probably not violate the principle *ne bis in idem* for suspects making *male captus* claims have normally not been tried on the merits of the case yet in the context of the Tribunal. *Cf.* also Sluiter 2001, p. 154, n. 29 and accompanying text (writing on the context of the ICTY).

[354] This point was already made at the inter-State context, see Fawcett 1964, pp. 199-200 (see also n. 570 of Chapter III): "[I]t might perhaps be said, in the case of irregular capture and removal for trial of a criminal *jure gentium*, that the State, from which he is taken, may only demand his reconduction if two conditions are satisfied: that that State is the *forum conveniens* for his trial, and that it declares an intention to put him on trial. If these conditions are not satisfied, then the State must accept reparation in another form, since otherwise the interest of justice would be defeated." See also n. 381 of the present chapter.

[355] *Cf.* also the UK submission in the *Todorović* case where it was argued: "It follows that even if Todorovic were to be released and returned to the FRY, the FRY would be under an absolute obligation immediately to hand him back to the Tribunal. The United Kingdom submits that it would be absurd for the Tribunal to hold that international law required it to release Todorovic and return him to the FRY while also requiring the FRY to hand him straight back to the Tribunal. It would be even more absurd to hold that there was a duty to return him to the FRY if there were any chance that the FRY would not comply with its obligations to the Tribunal." (ICTY, Appeals Chamber, *The Prosecutor* v. *Blagoje Simi*[*ć*]*, Milan Simi*[*ć*]*, Miroslav Tadi*[*ć*]*, Stevan Todorovi*[*ć*] *and Simo Zari*[*ć*], 'Submissions of the United Kingdom Regarding Review of the Decision of Trial Chamber III, 18 October 2000', Case No. IT-95-9-AR108 *bis*, 15 November 2000, para. 31.)

Hence, it would arguably be better in such a situation to hold the suspect in the custody of the Tribunal, to continue the case and to accord other remedies for the wrongs which occurred in the context of the case.

The Trial Chamber, after having referred to the relevant legal provisions,[356] first presented the question as to whether the ICTY can issue an order to SFOR pursuant to Article 29 of the ICTY Statute, now that that article in principle speaks only of States.[357]

There is no need to discuss this issue in more detail because it has already been explained *supra*, see footnote 71 and accompanying text, that the ICTY in this case was of the opinion that a purposive reading of Article 29 of the ICTY Statute indeed allows it to issue such an order.

It then turned to the motion of the Defence, explained what its purpose was[358] and rejected the argument of the Prosecution and SFOR that the motion had to be dismissed because Todorović would not be entitled to the relief sought anyway, even if Todorović's allegations were true.[359]

> This argument proceeds on the assumption that the evidence is complete. That assumption is erroneous, as what Todorović is seeking is further evidence from SFOR which will assist him to obtain the relief which he seeks. Only when Todorović has had the opportunity to present all the available evidence will it be possible for the Trial Chamber to determine whether he is entitled to the relief he seeks.[360]

In the US brief on review of this decision, it was argued, while referring to this – according to the US – "glaringly circular" and "plainly erroneous" reasoning, that

> [i]n view of the compelling operational security concerns raised by SFOR, the Trial Chamber erred or abused its discretion in ordering the production of the requested information, when the OTP and SFOR concurred that, in the absence of that information, the accused's assertions of fact could be taken as established for the purposes of his requests for release, and that those requests could then be decided as a matter of law [original footnote omitted, ChP].[361]

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[356] See ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 37.

[357] See *ibid*., para. 38.

[358] See *ibid*., para. 59: "The purpose of the Defence Motion is to secure certain information and documents, which the accused believes to be in the custody and control of SFOR, and which will assist him in his motions challenging the legality of his arrest [original footnote omitted, ChP]."

[359] See *ibid*.

[360] *Ibid*.

[361] ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Brief of the United States of America on Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 15 November 2000, p. 7. See also *ibid*., p. 8: "If all the accused's allegations can be taken as established, and these allegations still will not support the relief he seeks as a matter of law, then there is no conceivable "further evidence . . . which will assist him to obtain the relief which he seeks." To persist in ordering

Although the US seems to have a point here, one can wonder whether full disclosure of the *male captus* of Todorović would not lead to an even more serious account than the one alleged by Todorović himself.

This is the point observed by Sloan. He explains that the Chamber "correctly observed that it would only be appropriate to turn to the issue of the suitability of the remedy where the evidence was complete [original footnote omitted, ChP]"[362] because

> [e]ven if Todorović's allegations were accepted 'at their highest' by the OTP and SFOR for the purposes of the motions – something which was by no means clear[363] – he was, nevertheless, not in a position to make fuller or further allegations without having the requested disclosure. Without the full story of what happened surrounding his arrest (information presumably possessed by SFOR and its contributing states, and, perhaps, the OTP), Todorović was disadvantaged; he was only in a position to make allegations relating to conduct of which he had first-hand knowledge. There was nothing to say that disclosure of the full story of his arrest would not show treatment that was significantly worse than he had alleged [original footnotes omitted, ChP].[364]

The Trial Chamber also looked at the argument by SFOR that requirements of operational security do not allow further disclosure of what happened to Todorović but this "blanket objection"[365] was not accepted by the Chamber either.[366] As a result, the Chamber found

> that it has been adequately demonstrated that there is material in the custody or control of SFOR which is likely to assist Todorović in obtaining the relief he seeks, and that there is a legitimate forensic purpose in having it produced. The Trial Chamber is also satisfied that, as the Prosecution has not been able to produce copies

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the production of such "further evidence," in the face of SFOR's well-founded security concerns, is futile, erroneous, and an abuse of discretion." See for this brief also Murphy 2001.

[362] Sloan 2003 A, p. 98.

[363] Sloan (*ibid*., pp. 97-98, n. 95) notes here that "[t]he OTP's assertion that it was willing to assume Todorović's allegations to be true, and to take them 'at their highest' was quite misleading. Instead of taking his allegations at their highest, the OTP referred to a carefully drawn list of facts that it was willing to admit for the purposes of the motions and made no concessions additional to these (…). Important omissions from the OTP's list included the accused's allegations of collusion between the OTP and SFOR, as well as allegations that the accused was beaten by the forces that captured him."

[364] *Ibid*., pp. 97-98. At the end of this quotation, Sloan (*ibid*., p. 98, n. 96) explains that "[i]t might, for example, have come to light upon full disclosure of the facts that there was an extreme disregard of national or international law by SFOR of an even more egregious nature than that alleged by the accused, or that there had been collusion between the OTP and SFOR."

[365] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, para. 60.

[366] SFOR could have chosen "to make specific objections to the disclosure of particular documents or other material at the hearing (…) but (…) chose not to do so." (*Ibid*.)

> of the material, it is appropriate that SFOR now be required to disclose that material.[367]

In conclusion, the Trial Chamber granted the motion of the Defence and ordered "what to some was the unthinkable",[368] namely that SFOR, its responsible authority (the North Atlantic Council) and all the participating States in SFOR (including the US) disclose all the relevant material concerning the arrest and detention of Todorović to the Defence.[369] In addition to this, it also noted that "[a] subpoena shall be issued in due course to General Shinseki requiring him to provide evidence in the ongoing evidentiary hearing in this matter at a date and time to be specified".[370]

In his separate opinion to this case, Judge Robinson, also referring to the still-to-discuss *Barayagwiza* case,[371] underscored the importance of a person's right to challenge the legality of his arrest, including its remedy of release.[372] Even though this right is not explicitly mentioned in the ICTY Statute, it can be found in all the major human rights instruments, has customary international law status[373] and can without a doubt be seen as "one of the "internationally recognised standards regarding the rights of the accused" which the Secretary-General indicates that the Tribunal must "fully respect"".[374] He argued that

> a judicial body, whether domestic or international, (…) must be in a position to require the arresting authority[375] to provide material relevant to an arrest; failing

[367] *Ibid*., para. 61.
[368] Sloan 2003 A, p. 91.
[369] See ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-PT, 18 October 2000, disposition.
[370] *Ibid*.
[371] See ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, para. 3.
[372] See *ibid*.
[373] See *ibid*., para. 2.
[374] *Ibid*., para. 3. See also n. 130 and accompanying text. See further Zappalà 2002 A, p. 1195, n. 27.
[375] As clarified earlier (see the text following n. 340 and accompanying text), Robinson also looked at the relationship between the ICTY and SFOR and concluded that the "extension of SFOR's function gives SFOR a role comparable to that of a police force in some domestic legal systems, and creates, as between itself and the Tribunal, through the Office of the Prosecutor, a relationship of which the analogue in such systems is the relationship between the police force, the prosecuting authority and the courts. This quasi police function of SFOR, whereby it virtually operates as an enforcement arm of the Tribunal, clearly impacts on the work of the Tribunal in the discharge of its fundamental purpose to prosecute persons responsible for serious violations of international humanitarian law. (…) There is clearly a strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor." (ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, para. 6.) Although it can indeed be argued, as was done *supra*, that the moment SFOR makes arrests for the ICTY, it functions as the latter's enforcement arm, one must also agree with Sluiter who notes that the ICTY is in principle not in a hierarchically higher position than SFOR. See Sluiter 2003 A, p. 289: "Although one may sympathise with this position [of Robinson, ChP], it is exclusively concerned with the Tribunal's mandate and needs. Of course, it would

> such a competence, the right to challenge the legality of one's arrest, which is a right under customary international law, may well be rendered nugatory and without substance.[376]

The decision of the Trial Chamber "caused considerable consternation in NATO",[377] which "hinted that the co-operation with the Tribunal might be brought to a halt if the Appeals Chamber did not review the Trial Chamber's orders".[378] It may also be interesting to refer in that respect to the brief of the US, which qualified the decision as "both erroneous and an abuse of discretion [original footnote omitted, ChP]".[379] Furthermore, in the German request for review, the *male captus bene detentus*

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be best if the Tribunal could dispose of all relevant evidence, including that of a privileged nature, like information in the hands of the ICRC. However, Judge Robinson's approach in particular fails to provide legal analysis of the relationship with SFOR, which is, contrary to the relationship between States and the ICTY, not of a hierarchical nature, but rather one between equals, with both having their own Security Council mandate." See also Sluiter's already-mentioned criticism in n. 71. See for a detailed analysis of this issue also Henquet 2003, who concludes (at p. 155) that SFOR is not an agent of the Tribunal "since it appears that the Tribunal does not exercise control over SFOR." However, note that Henquet (at *ibid*.) is also of the opinion that "the "agency test" seems to have been incorrectly derived from the case law." (See also n. 71.) The US was also of the opinion that SFOR could not be seen as the agent of the Prosecution and hence that, "in the absence of a connection between the OTP and the alleged abduction, the accused's requests for release fail as a matter of law." (ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Brief of the United States of America on Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 15 November 2000.) The US hereby referred to the second *Barayagwiza* decision but as will be shown *infra*, this decision does not overrule the first *Barayagwiza* decision with respect to the point that the Tribunal seems to be willing to take its responsibility for violations in the context of its case, irrespective of the entity responsible. Nevertheless, one can assume that the Tribunal will not quickly refuse jurisdiction in case its own people were not responsible for the *male captus*, even though that point cannot be excluded either.

[376] ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, para. 4. For even stronger words, see *ibid*., para. 7: "No legal system, whether international or domestic, that is based on the rule of law, can countenance the prospect of a person being deprived of his liberty, while its tribunals or courts remain powerless to require the detaining or arresting authority to produce, in proceedings challenging the legality of the arrest, material relevant to the detention or arrest; in such a situation, legitimate questions may be raised about the independence of those judicial bodies."

[377] Ph. Vallières-Roland, 'Prosecuting War Criminals: A Critique of the Relationship between NATO and the International Criminal Courts', Centre for European Security and Disarmament (CESD) – Briefing Paper, February 2002, available at http://www.isis-europe.org/pdf/2008_artrel_87_2002_archives_59_paper.natoandiccs.pdf, p. 4.

[378] *Ibid*.

[379] ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Brief of the United States of America on Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 15 November 2000, A 99. See also *ibid*., A 100 – A 99: "Refusing to consider whether the accused's allegations could possibly entitle him to the relief he seeks, the Trial Chamber ordered the production of information that is neither relevant nor necessary to that relief, but whose disclosure – or indeed, even further litigation over such disclosure – has grave potential to damage future detention efforts."

principle was explicitly defended.[380] Finally, the UK authorities submitted that the seriousness of Todorović's alleged crimes had to play a role.[381]

[380] See ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simi*[*ć*]*, Milan Simi*[*ć*]*, Miroslav Tadi*[*ć*]*, Stevan Todorovi*[*ć*] *and Simo Zari*[*ć*], 'Request of the Federal Republic of Germany for Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 2 November 2000: "Even a decision departing from the facts as they are put forward by the accused must come to the conclusion that the relief sought by the accused, namely his release, cannot be reached under any legal aspect whatsoever. a) Even if the information which the Tribunals orders to provide proved an illegal nature of his arrest, this would in no way affect the legality of his detention. In other words, even if the accused was "male captus", he is in any case "bene detentus". b) In the sense of the "male captus, bene detentus"-principle, the accused may not invoke a breach of any [sovereignty] in his favor, since all States are obliged to cooperate with the Tribunal and to surrender alleged war criminals by a resolution of the UN-Security-Council acting under Chapter VII of the Charter. Furthermore, such a breach of a State sovereignty would not affect the rights of the accused as such. No rule of customary international law provides that in the sense of "male captus, bene detentus" a forced abduction of a hereafter legally detained person would hinder his/her trial before a criminal court or would entail his/her release out of a legally maintained detention." See also ICTY, Appeals Chamber, *The Prosecutor v. Blagoje Simi*[*ć*]*, Milan Simi*[*ć*]*, Miroslav Tadi*[*ć*]*, Stevan Todorovi*[*ć*] *and Simo Zari*[*ć*], 'Request of the Federal Republic of Germany for Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 15 November 2000. As has become clear from the previous chapter, one could argue that this is a rather blunt statement, which does not take into account the fact that the exact nature of the *male captus* may affect the question whether or not *male detentus* must/should follow. This point was also confirmed in 2003 by the German Federal Constitutional Court in *Al-Moayad*.

[381] See ICTY, Appeals Chamber, *The Prosecutor* v. *Blagoje Simi*[*ć*]*, Milan Simi*[*ć*]*, Miroslav Tadi*[*ć*]*, Stevan Todorovi*[*ć*] *and Simo Zari*[*ć*], 'Submissions of the United Kingdom Regarding Review of the Decision of Trial Chamber III, 18 October 2000', Case No. IT-95-9-AR108 *bis*, 15 November 2000, paras. 26-28: "It is not necessary for the Tribunal to resolve the question (on which different views have been expressed) whether a State which has abducted a person from the territory of another State to stand trial in respect of crimes under its own domestic law is required by international law to return that person to the State from which he or she was abducted. The present case is different, because Todorovic is charged with crimes under international law and before an international tribunal. It is not clear that international law requires that in every case where the accused has been abducted or brought before the courts outside normal processes of extradition a State is deprived of jurisdiction in respect of international crimes (see, in particular, the decisions of the French Court of Cassation in *Barbie* 78 ILR 125, the District Court of Jerusalem and the Supreme Court of Israel in *Attorney-General of Israel* v. *Eichmann* 36 ILR 5 (especially pp. 305 et seq.)). In addition, a number of decisions of a more general character have suggested that the nature of the crime charged is a factor to be taken into account (see, in particular, the decision of the House of Lords in *R.* v. *Horseferry Road Magistrates' Court,* ex parte *Bennett* [1994] 1 AC 42 and the Court of Appeal in *R.* v. *Mullen* [1999] 3 WLR 777). [Note that the examination of these cases in the previous chapter of this book does not always agree with these observations presented by the UK authorities, ChP.] Juristic commentary is also far from unanimous in supporting the existence of a blanket rule requiring restitution of the defendant and denying jurisdiction to the courts of the State to which a person has been abducted (see, e.g. Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992) vol. I, pp. 388-90 and Brownlie, *Principles of Public International Law* (5th ed., 1998), p. 320). Moreover, a number of commentators who consider that there is normally a duty of restitution in such a case consider that there are exceptions where the accused is charged with crimes under international law and the State from which he was abducted is not prepared to prosecute him." This point was already earlier discussed (see n. 570 and accompanying text of Chapter III and n. 354 and accompanying text of the present chapter) and it is arguably indeed so that the State of residence should have no right to demand the return of the suspect if it cannot guarantee that it will prosecute the suspect itself (a return is not the same as impunity), but that does not mean that the abducting State could then exercise jurisdiction. It has been argued that if the prosecuting forum itself is

After the Trial Chamber had issued its decision, the Prosecution took a drastic step: even *before*[382] the decisions of the Appeals Chamber were issued (which rejected the appeals of the Prosecution), it filed a motion containing a plea agreement with Todorović by which 1) the latter would plead guilty to one count and would withdraw all the motions pertaining to his alleged unlawful arrest and 2) the Prosecution would drop the other 26 counts against him.[383] As a result of this, Todorović pleaded guilty to one count and, on 31 July 2001, Trial Chamber III sentenced him to ten years' imprisonment (minus the almost three years Todorović had spent in pre-trial detention).[384] Consequently, the ICTY did not – again – have to look at the real *male captus* discussion (namely at the question as to the effect of a *male captus* on the jurisdiction of the court) for the allegation of the *male captus* was dropped.[385] Nevertheless, as probably has become clear in the previous pages, the *male captus* issue *was* discussed in the proceedings leading up to this decision,[386] and furthermore, the case has produced much interesting material which can be connected to the *male captus* discussion and which will hopefully elucidate the examination of the cases still to be addressed.[387]

When journalists asked Graham Blewitt, Deputy Prosecutor of the ICTY, "what had been sacrificed in the interest of justice to remove the issue of the involvement of SFOR in the arrest of Todorovic, Blewitt replied that absolutely nothing as far as the OTP was concerned had been sacrificed".[388] Blewitt hereby pointed to the fact that "the negotiations leading up to the plea agreement had been ongoing for some months. They stemmed from the desire of the accused to enter this plea of guilty."[389] Nevertheless, he also "recognised that a consequence of this plea removed a particular problem that had been confronting the Tribunal for some months, particularly if the problem had anything to do with the recent lack of apprehensions by SFOR in the last six months".[390]

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involved in an abduction, it should refuse jurisdiction. The problem of impunity (if the State of residence is not able or willing to prosecute the suspect itself) could then be solved by transferring the suspect to a jurisdiction which *is* able and willing to prosecute the suspect.

[382] This may be explained by the fact that the Prosecution did not have much faith in the outcome of its appeals, see, for example, Sloan 2003 A, p. 92.

[383] See *ibid*., pp. 92-93.

[384] See *ibid*., p. 93.

[385] See also Sluiter 2003 A, p. 288.

[386] See, for example, ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999.

[387] *Cf.* also Sloan 2003 A, p. 85 (abstract).

[388] Summary of the ICTY Weekly Press Briefing, 13 December 2000, available at: http://www.icty.org/sid/3672.

[389] *Ibid*.

[390] *Ibid.* See also *ibid*: "For that reason alone, the OTP saw that today's plea was a significant one and hoped that if there was a log jam being created by the Todorovic proceedings involving SFOR this plea would now remove that log jam."

Although it may indeed be the case that Todorović was interested in making this plea earlier on – that would in any case explain the motion containing the plea agreement being filed even before the decisions of the Appeals Chamber concerning the legality of arrest were issued – it is hard to believe that the Prosecution was really of the opinion that "absolutely nothing" had been sacrificed in this case.[391] Sloan also notes in this respect that, "in view of the gravity and extent of his crimes, it is fair to say that Todorović got off relatively lightly".[392] That may indeed be the case, but Todorović could nevertheless not enjoy the life of a free man for long: on 3 September 2006, he died, a little more than one year after being granted early release.

3.1.3 *Milošević*

The third alleged *male captus* case under examination here is the case of Milošević. Almost a year after four Dutch nationals, two Canadian nationals and two British nationals were detained by the Yugoslav authorities on suspicion "of operating on behalf of Western intelligence agencies with instructions to enter its territory and kidnap, among others, Milosevic",[393] the former President of Serbia and the FRY was apprehended on 1 April 2001 for corruption and abuse of power in a more successful operation by Serbian authorities at his home in Belgrade.[394]

Almost two years earlier, on 24 May 1999, an ICTY indictment against Milošević (and four co-accused) had been confirmed for alleged crimes committed

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[391] See also Cogan (2002, p. 127), who finds the statement of Blewitt "rather unconvincingly". See further Sridhar 2006, p. 362: "The non-cooperation of states could have a potentially crippling effect on the day-to-day operations of the Tribunal, undermining the institution by depriving it of its defendants. As a result, the Prosecutor was likely anxious to strike a deal with Todorovic. The Tribunal, for its part, was likely happy to accept such a plea and be relieved of any duty to examine the matter further."

[392] Sloan 2003 A, p. 87. See also *ibid*., p. 93: "The ultimate result in the case (26 out of 27 of the charges against Todorović being dismissed in return for his renouncing his right to access SFOR information) appears to be a vindication of Todorović's strategy and may be an indication that the OTP's desire to ensure that SFOR did not have to disclose any information relating to the capture of Todorović was its primary concern, surpassing all else, including its desire to ensure the accused did not escape justice [original footnote omitted, ChP]." This could also be discerned from the following document, in which the Prosecution hinted that it might withdraw the whole indictment if necessary, see ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 53: "Should the Trial Chamber decide in any case that knowledge of such operational facts were necessary to ensure the integrity of a trial (and for the reasons given, that is not the case here), it is submitted that the Prosecution should be given prior notice. This would enable the Prosecution to consider whether in the circumstances it would be in the public interest to apply to withdraw the indictment, rather than to embark upon such an enquiry." (See also Sloan 2003 A, p. 93, n. 70.)

[393] Magliveras 2002, p. 671. This example again shows the importance of addressing the role of (actual?) private individuals in *male captus* cases, see also the *Nikolić* case which will be discussed in Subsection 3.1.4.

[394] See *ibid*., p. 663.

in Kosovo.[395] Three days later, on 27 May 1999, copies of the warrants of arrest were issued.[396]

Now that Milošević was in custody (albeit for other crimes), the pressure from Western States to transfer him to the ICTY began to grow. On 23 June 2001, after efforts to have a law on cooperation with the ICTY passed by the Yugoslav Parliament had failed, Yugoslav President Koštunica adopted a governmental decree with a similar purpose.[397] This decree was subsequently challenged by Milošević's attorneys on legal grounds (in that the decree was unconstitutional) and on procedural grounds.[398] Wedgwood explains what happened then as follows:

> This decree was suspended by the Yugoslav constitutional court on June 28, pending further hearing, and President Kostunica of Yugoslavia stated that he would await the outcome of the court's proceeding. Thereafter, Zoran Djindjic, the prime minister of Serbia, asserted that Serbia had power to nullify the Yugoslav decision, and ordered the transport of Milosevic by helicopter to the Bosnia airbase at Tuzla, where the former president was flown to The Hague.[399]

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[395] At that time, he was the first head of State in function that was charged by an international criminal tribunal.

[396] It may be interesting to note that these copies were transmitted not only to the FRY, but also to all UN Member States and the Confederation of Switzerland. However, it is important to stress that here, the procedure envisaged by the already discussed (see ns. 85-86 and accompanying text) Rule 61 (D) of the ICTY RPE (the international arrest warrant) was *not* used; what *was* used was a broad interpretation of Rule 55 (D) of the ICTY RPE which states that "[s]ubject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed, including the national authorities of a State in whose territory or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found." See also ICTY, Judge David Hunt, *Prosecutor v Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić & Vlajko Stojiljković*, 'Decision on Review of Indictment and Application for Consequential Orders', Case No. IT-99-37-I, 24 May 1999, paras. 21-22: "21. In the light of the possibility that some or all of the accused may seek refuge outside the territory of the Federal Republic of Yugoslavia, the Prosecutor also seeks an order, pursuant to Rule 55(D), that certified copies of each of the warrants are to be transmitted by the Registrar to all States Members of the United Nations and to the Confederation of Switzerland. 22. Rule 61(D) permits the issue of *international* arrest warrants to be transmitted to all such States, but only where the arrest warrant issued pursuant to Rule 55 has not been executed within a reasonable time, and such international warrants may be issued only by a Trial Chamber. It is nevertheless argued that the power to transmit certified copies of the arrest warrant pursuant to Rule 55(D) is a wide one, and that it is expressly not limited to transmission only to those national authorities of the States or territories where the accused resides or is believed to reside. In any event, it is argued, the procedure permitted by Rule 55(D) of transmitting certified copies of the original arrest warrant is not the same as the issue of international arrest warrants pursuant to Rule 61(D). Rule 54 permits a judge of the Tribunal to issue such orders as may be necessary for the purposes of the preparation or conduct of the trial. There can be no trial until the accused is arrested. The orders sought would assist in ensuring the arrest of the accused [emphasis in original, ChP]."

[397] See Magliveras 2002, p. 663.

[398] See *ibid*.

[399] R. Wedgwood, 'Former Yugoslav President Slobodan Milosevic To Be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo', *ASIL Insights*, July 2001 (available at: http://www.asil.org/insigh76.cfm). It may be interesting to note that ICTY OTP investigator Kevin Curtis – a by now hopefully familiar name (see the (alleged) *male captus* case of Dokmanović) – took part in the transfer of Milošević. See, for example, the following words from

Đjinđić admitted afterwards that the sudden transfer of Milošević was the consequence of great pressure from in particular the US and the EU, which threatened Yugoslavia with a financial boycott if it did not comply with the requests for transfer in this case.[400] That Yugoslav President Koštunica labelled the transfer as illegal may not come as a surprise, but also Magliveras, in his article in the *European Journal of International Law*, concludes straightforwardly "that the Serbian Government's decision to surrender Milosevic to the ICTY lacked any legal basis"[401] and that "[h]is arrest and detention were clearly illegal".[402]

Milošević himself at p. 672 of the transcripts of the 20 February 2002 session of his case (available at: http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020220IT.htm): "THE ACCUSED: [Interpretation] Well, then I have another thing to say. I heard a name mentioned, Kevin Curtis. If I understood the name correctly, it was Kevin Curtis. Kevin Curtis is an individual who committed a crime, the crime of my unlawful arrest in Belgrade. He was the perpetrator of that." That Curtis was indeed involved in the operation can be found in Carla Del Ponte's memoirs, see Del Ponte 2009, pp. 118-119, where one can read an interesting 'inside' account of Milošević's transfer into the custody of the ICTY: "On the Thursday that was Vidovan in 2001 [28 June 2001, ChP], the Serbian government turned over Slobodan Milošević to face trial. A little after seven in the evening, the Belgrade government made a public announcement that Milošević had been placed in the tribunal's custody. Kevin Curtis, a British police officer and former Olympic-caliber swimmer, was shown to an area behind a government building where three helicopters awaited. After a few minutes, Milošević arrived in a prison van. The sight of the helicopters appears to have alarmed him, as if he did not know that any deals he might have struck with Koštunica no longer held. He raised his arm. He asked the prison warden what was going on. And the warden explained that he would soon be departing for The Hague. Milošević protested. He complained that he did not recognize the tribunal's authority. He said he would not leave. The warden led him toward Curtis, who read Milošević his rights and formally placed him under arrest. Milošević refused to acknowledge or accept any of the paperwork offered to him. A security officer searched Milošević's person. Then the security officer, Curtis, their translator, and Milošević boarded a helicopter that set off toward Bosnia and Herzegovina and the NATO military base outside the city of Tuzla. Against the engine scream and beating chopper blades, Milošević attempted to converse with Curtis in English. Stepping off the aircraft at Tuzla, he asked Curtis to put a handkerchief on the ground so he would not have to set foot on Bosnian soil; and he tried without success to exchange small talk with the soldiers who were guarding him. Sometime after ten o'clock, handcuffed and ordered to remain silent, he boarded a C-130 transport aircraft and flew to Eindhoven, a small airport east of Rotterdam. There he boarded a Dutch helicopter that flew him to a landing pad inside the penitentiary in Scheveningen, where he would reside until his dying day."

[400] See Strijards 2003, pp. 750-751, n. 5 and Magliveras 2002, p. 676. See also Van Sliedregt 2001 A, p. 635, who states that it was the power of money and not the power of justice that made Milošević end up in a prison in Scheveningen, and R. Wedgwood, 'Former Yugoslav President Slobodan Milosevic To Be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo', *ASIL Insights*, July 2001 (available at: http://www.asil.org/insigh76.cfm): "Critics of the decision argued that Serbia was under pressure to act because an international donors' conference was scheduled for June 28 [this must be 29, ChP] to consider $1.2 billion in aid for the reconstruction of Serbia." See finally also 'Milosevic extradition steps closer', *CNN*, 23 June 2001 (available at: http://www.cnn.com/2001/WORLD/europe/06/23/milosevic.decree/index.html): "An international donors' conference is due to be held next week at which Serbia hopes to raise over one billion dollars in much needed aid. The United States has made clear it will only attend the donors' conference in Brussels on June 29 if it has seen signs of progress in Belgrade's cooperation with the tribunal. A White House spokesman said: "This is a good step in the right direction. We'll be watching to see when he's [extradited]. But this is a potentially positive step.["] "The international community regard his extradition as a moral imperative. It is an oft-stated and important goal.""

[401] Magliveras 2002, p. 667.

[402] *Ibid*.

In The Hague, Milošević raised his concerns, including those pertaining to his transfer, in two motions (of 9 and 30 August 2001) which were considered by the Trial Chamber in its decision of 8 November 2001.[403]

Paragraphs 35-51 of this decision deal with the argument 'Lack of competence by reason of his unlawful surrender'.

Milošević presented the following grounds as to why his transfer had to be seen as unlawful:

> (a) The International Tribunal sent the arrest warrants to the authorities of the Federal Republic of Yugoslavia, not to the government of the Republic of Serbia. However, it was the latter that transferred the accused to the International Tribunal. That government had no power to act in such a manner.
> (b) The Serbian government had no international obligation to cooperate with the International Tribunal.
> (c) Article 18 of the Federal Constitution does not provide for the extradition or transfer of Yugoslav citizens to an international body.
> (d) In the circumstances set out in (a), (b) and (c) above, his transfer is an abuse of process in that the procedures of the Federal Republic of Yugoslavia were bypassed and he was unlawfully transferred to the International Tribunal.[404]

The Prosecution countered this by saying that it is a "well-established principle of law that States may not rely on their national legislation to defeat their international obligations"[405] and that the FRY was under an international obligation to cooperate with, and transfer Milošević to, the ICTY.[406]

As already asserted in the *Dokmanović* case, a suspect could invoke 'real' irregularities related to his national deprivation of liberty and transfer but he cannot invoke an irregularity which originated from a State's failure to cooperate with the Tribunal. Thus, Milošević cannot claim that his transfer was illegal because his national Constitution does not provide for the transfer of nationals to the ICTY.

The Trial Chamber first underscored the importance of a provision to which considerable attention has already been paid in this book: the *habeas corpus* right of Article 9, paragraph 4 of the ICCPR. The Chamber noted that this right was not included in the Statute but that, "as one of the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and indeed, has been acted upon by this International Tribunal".[407]

After having made this statement, it turned to the above-mentioned arguments of the Defence and the Prosecution and clarified that

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[403] See ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001.
[404] *Ibid*., para. 35.
[405] *Ibid*., para. 36. See also Section 2 of this chapter.
[406] See *ibid*.
[407] *Ibid*., para. 38. The Trial Chamber referred here to the still-to-discuss *Barayagwiza* case before the ICTR, see *ibid*., para. 39.

> notwithstanding the fact that the surrender was made by the government of the Republic of Serbia, rather than the Federal Republic of Yugoslavia to whom the request was made, the provisions of Rule 58[408] apply and, consequently, the transfer was effected in accordance with the provisions of the Statute.[409]

There is something strange about this reasoning. It is indeed so that Rule 58 of the ICTY RPE stipulates that States may not use (problems in) their national law to refuse cooperation with the ICTY but that is, it is submitted, something quite different from the question as to whether the transfer was executed procedurally correctly and whether the suspect can invoke the fact of his unlawful transfer (if that is the case). However, the Chamber clarified this point when it subsequently noted the relevance of Article 27 of the Vienna Convention on the Law of Treaties, which provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". It explained:

> The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply. Although it is the accused, and not the Federal Republic of Yugoslavia that is seeking to rely on the internal constitutional system of the Federal Republic of Yugoslavia, it follows that if the Federal Republic of Yugoslavia itself cannot rely on internal laws, then, *a fortiori,* neither can the accused. Accordingly, this ground is dismissed.[410]

This can be accepted: it may indeed be the case that the transfer was made by the Government of the Republic of Serbia, rather than the FRY to whom the request was sent, but this irregularity originates from the fact that the FRY had apparently not clearly regulated how this State (including its constituent parts) was to cooperate with the Tribunal. Such an irregularity, it has been argued earlier, cannot be invoked by the suspect before the ICTY.

The Chamber then turned to the abuse of process doctrine. It clarified that an abuse of process does not necessarily have to lead to a lack of jurisdiction, but that the judges have a discretion to refuse jurisdiction.[411] Nevertheless, the Trial

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[408] This rule, which has already been discussed earlier, see n. 22 and accompanying text, provides that "[t]he obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned." The Chamber held that this "Rule should be given an interpretation that takes full account of its purpose" (*ibid*., para. 46), which is "is to ensure that domestic procedures relating to the surrender and transfer of a person, from a State in respect of whom a request for arrest and transfer has been made, are not used as a basis for not complying with the request." (*Ibid*., para. 45.)

[409] *Ibid*., para. 46.

[410] *Ibid*., para. 47.

[411] *Ibid*., para. 48. It hereby referred to the *Bennett* case (see Subsection 1.2 of Chapter V) and the observation in that case that "[a] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be

Chamber also clarified that the ICTY "*will* exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused [emphasis added, ChP]."[412] This means that the ICTY may refuse jurisdiction under certain circumstances but that, in any case, jurisdiction *will* be refused in the case of an egregious breach of the suspect's rights.

Applying these observations to the case at bar, the Chamber held:

> In light of that jurisprudence, the Chamber holds that the circumstances in which the accused was arrested and transferred – by the government of the Republic of Serbia, to whom no request was made, but which is a constituent part of the Federal Republic of Yugoslavia, to whom the request for arrest and transfer was made – are not such as to constitute an egregious violation of the accused's rights. (…) Consequently, the doctrine of the abuse of process is inapplicable, and this ground is dismissed.[413]

This quotation also shows that the ICTY may connect the most extreme consequence (namely the refusal of jurisdiction) to violations committed by third parties, violations for which the ICTY is not responsible. This can certainly be applauded. However, it is submitted that the ICTY should also grant less far-reaching remedies for less serious violations, irrespective of the question of whether the ICTY was responsible for them. After all, if the ICTY takes the *ultimate* responsibility for violations committed in the pre-trial phase of its case, whoever committed them, it should also take 'normal' responsibility for less serious violations. It would be very strange if the ICTY took responsibility for a suspect

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impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case* [emphasis added by the ICTY and original footnote omitted, ChP]." See *ibid*., para. 49.

[412] *Ibid*., para. 48. The Chamber here referred again to the *Barayagwiza* case, where, according to the ICTY Trial Chamber, the ICTR Appeals Chamber "stressed that the discretionary power to dismiss a charge is exercised "in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity"." (*Ibid*., para. 50.) Besides the fact that this sentence does not flow properly, the Trial Chamber also presents the ICTR observation as if it means that judges *must* exercise their power to dismiss the charge under these circumstances ("is exercised"), whereas the ICTR decision speaks of a discretion. The exact sentence of the ICTR decision namely reads: "It is a process by which Judges *may* decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity [emphasis added, ChP]." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.) However, perhaps this difference only exists on paper; one can imagine that if judges determine that to exercise jurisdiction under certain circumstances would prove detrimental to the court's integrity, that there is only one option left, namely to refuse jurisdiction. (In any case, it would be very difficult for judges to explain why they would nevertheless continue to exercise jurisdiction if they have previously determined that to continue to exercise jurisdiction would prove detrimental to the court's integrity.) *Cf.* also Jones and Doobay 2004, p. 95 (discussed in the context of the *Bennett* case in Chapter V): "Although the majority use the framework of the abuse of process doctrine, in which the word "discretion", rightly or wrongly, is frequently employed, the trenchant words of Lord Griffiths and Lord Bridge, and to a lesser extent Lord Lowry, appear to leave little or no room for the operation of a discretion or balancing exercise, where an abduction abroad in breach of extradition procedures has been found."

[413] ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 51.

who suffered egregious violations, but refused to do so when the suspect suffered less serious violations for the reason that these violations could not be attributed to the ICTY. That does not matter with respect to serious violations in the context of the abuse of process doctrine and arguably should not matter with respect to 'normal' violations which do not lead to the ending of the case.

The Chamber explains here that the fact that Serbia made the arrest and transfer – whereas the request was sent to the FRY – are not *such as to* constitute an egregious violation. That seemingly implies that the Chamber is nevertheless of the opinion that there *was* a violation in this case, even if it was not so serious as to lead to a refusal of jurisdiction.[414] Although one can readily agree with the fact that the circumstances of this case should not lead to a refusal of jurisdiction, this statement also appears to confirm the views of Koštunica and Magliveras that the transfer was illegal. However, the fact that the Chamber does not accord other, less far-reaching, remedies here may be explained by the point mentioned above, namely that Milošević cannot invoke the illegality of his transfer as it originates from a failure from the FRY to regulate the cooperation with the ICTY in such a way that such problems would not occur. Nevertheless, Magliveras has argued that there were also other violations discernible in the arrest, detention and transfer of Milošević to The Hague, violations which may have a weaker connection with the internal organisational problems of the FRY.[415] If that were indeed the case here, if actual violations did occur, then remedies should arguably have been granted, depending on the seriousness of the violations. (Which, in this case, given the fact that the ICTY was involved in the case, but not in the violations, may, of course, be very light.)

As will also be explained in Chapter VIII, Milošević also "brought summary civil proceedings (*kort geding*) against the Netherlands State before the President of the Regional Court (*arrondissementsrechtbank*) of The Hague".[416] He asked the Court primarily to order the defendant, namely the Dutch State, to release him unconditionally because, among other things, "[t]he so-called Tribunal, elements in the Serbian government and the defendant blatantly kidnapped and abducted him in a coordinated action, which must be regarded as a flagrant breach of his human

[414] See also Magliveras 2002, p. 669.

[415] See *ibid*., p. 668. For example, he writes that "the Yugoslav Constitution confers upon an arrested person a number of procedural rights that must be strictly observed, for instance, the right to appeal against the arrest order, which must be decided by the competent court within 48 hours. From what one can ascertain, these procedural rights were not applied in the case of Milosevic. The same conclusion is reached if we examine the position under the relevant stipulations of the Serb Constitution [original footnote omitted, ChP]."

[416] ECtHR (Second Section), 'Decision as to the admissibility of Application No. 77631/01 by Slobodan Milošević against the Netherlands', 19 March 2002, p. 3. For the Dutch *kort geding*, see Arrondissementsrechtbank 's-Gravenhage, Sector Civiel Recht – President, Vonnis in kort geding van 31 augustus 2001, gewezen in de zaak met rolnummer KG 01/975 van: Slobodan Milošević tegen de Staat der Nederlanden, LJN: AD3266. The English translation can be found at: http://icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/012854276cd2950dc1256da20051ac68!OpenDocument. See finally also Strijards 2001, p. 97.

rights".[417] However, the President of the District Court in The Hague determined that the Netherlands had transferred its jurisdiction to hear an application for release from detention to the Tribunal and hence that this, or any other, Dutch court did not have jurisdiction to decide on Milošević's application for release.[418] After this decision, Milošević "lodged an appeal against this judgment, but withdrew it again as of 17 January 2002",[419] apparently because he believed that it would be to no avail since the District Court had stated that the Dutch *courts* (plural!) have no jurisdiction to decide on the application. Finally, on 20 December 2001, Milošević's counsel lodged a series of complaints with the ECtHR,[420] but the European Court quickly declared his entire application inadmissible, explaining that domestic remedies had not been exhausted. Although Milošević claimed that the judgment of the District Court (which stated that Dutch *courts* have no jurisdiction to decide on the application) showed that no adequate and effective domestic remedies were available, the ECtHR stated that

> the applicant did not make use of the opportunities offered by Netherlands law to challenge this finding; he withdrew his appeal to the Court of Appeal and in so doing also deprived himself of the possibility of lodging a subsequent appeal on points of law to the Supreme Court. The Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (...).[421]

3.1.4 *Nikolić*

The most important *male captus* case in the context of the international criminal tribunals is arguably the 2002 (Trial Chamber) and 2003 (Appeals Chamber) *Nikolić* case.

Dragan Nikolić was indicted on 1 November 1994 for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions.[422] Most of these crimes, it was alleged, were committed in the detention camp Susica (eastern Bosnia), where Nikolić was allegedly the camp commander.[423]

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[417] The English translation of the Dutch *kort geding* at: http://icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/012854276cd2950dc1256da20051ac68!OpenDocument.
[418] See *ibid*.
[419] ECtHR (Second Section), 'Decision as to the admissibility of Application No. 77631/01 by Slobodan Milošević against the Netherlands', 19 March 2002, p. 4.
[420] Milošević claimed that the following rights of the ECHR had been violated: Art. 5, paras. 1 (among other things, because of his unlawful transfer from the FRY to The Hague), 2 and 4, Art. 6, paras. 1, 2 and 3 (c), Artt. 10, 13 and 14. See *ibid*, pp. 4-6.
[421] *Ibid*., p. 6.
[422] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 2. It may be interesting to note that Nikolić was the very first person to be indicted by the ICTY.
[423] See *ibid*.

As explained earlier,[424] Nikolić was the first defendant in whose case the Rule 61 proceedings were used; after it became clear that the two arrest warrants for Nikolić (issued to the Federation of Bosnia and Herzegovina and to the Bosnian Serb administration in Pale)[425] would not be executed,[426] in May 1995 Judge Odio Benito ordered that the case be submitted to the Trial Chamber to review the indictment pursuant to Rule 61 (A) of the ICTY RPE.[427] As this Trial Chamber was of the opinion that there were reasonable grounds to believe that Nikolić had committed the crimes with which he was charged, an international arrest warrant was issued.[428]

After these Rule 61 proceedings, the Prosecution amended the indictment (which now contained no less than 80 (!) counts of crimes against humanity, violations of the laws and customs of war and grave breaches of the Geneva Conventions), which was confirmed by Judge Claude Jorda on 12 February 1999.[429] After that, a new arrest warrant was issued to the FRY.[430]

Then, a little more than a year later, on or about 20 April 2000, Nikolić was arrested and detained by SFOR in Bosnia and Herzegovina and transferred to The Hague.[431] Although he made no complaint about the way he was brought into the jurisdiction of the ICTY during his first appearance on 28 April 2000,[432] his counsel advised the Tribunal during a Status Conference almost six months later that the legality of Nikolić's arrest and detention pursuant to that arrest would be challenged.[433] Subsequently, on 17 May 2001, Nikolić filed his first motion challenging his *male captus*.[434] Interestingly but perhaps not very surprisingly,

[424] See n. 78 and accompanying text.
[425] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 10.
[426] See *ibid*., para. 11. The Federation of Bosnia and Herzegovina notified the ICTY that it could not execute the warrant whereas the Bosnian Serb administration in Pale did not respond at all.
[427] See *ibid*., para. 12.
[428] See *ibid*. The Trial Chamber also noted "that the failure of the Prosecution to effect service of the Indictment was due wholly to the failure or refusal of the Bosnian Serb administration in Pale to co-operate. In accordance with the procedure of Rule 61(E), the Presiding Judge of the Trial Chamber requested the President of the Tribunal to notify the Security Council of this failure. The President of the Tribunal complied with this request and sent a letter dated 31 October 1995 to notify the Security Council [original footnotes omitted, ChP]." (*Ibid*., para. 13.) This was the first time the ICTY notified the UNSC of such a lack of cooperation.
[429] See *ibid*., para. 14.
[430] See *ibid*.
[431] See *ibid*., para. 15
[432] See *ibid*., para. 3.
[433] See *ibid*., para. 4.
[434] See *ibid*., para. 6. See for this motion: ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001.

Nikolić had heard from the rather successful tactics used in the *male captus* case of Todorović and argued that he would also use that method if necessary:[435]

> In this Motion Nikolić reserves his right to rely upon the decision of a Trial Chamber of this Tribunal in the case of *Todorović* ("*Simić* Decision") so that, if this present Motion failed, he would seek an evidentiary hearing to establish the facts surrounding his arrest as an alternative challenge to the Tribunal's exercise of jurisdiction [original footnotes omitted, ChP].[436]

Although the Prosecution acknowledged this reservation on the part of Nikolić, it also made clear that this case was different as all the material in its possession pertaining to Nikolić's arrest had already been disclosed to Nikolić.[437]

After a number of appeals from the judges to reach an agreement to narrow the issues in dispute, an agreement was indeed reached between the Defence and the Prosecution after another Status Conference held on 29 August 2001.[438] In addition to this, a second motion with the exact issues to be resolved was filed by the Defence on 29 October 2001.[439]

Finally, in February 2002, the indictment was again amended, meaning that at the time the Trial and Appeals Chamber's decisions with respect to Nikolić's *male*

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[435] That Nikolić did not use the successful *Todorović* method right away (but only as a safety net) was, of course, much to the OTP's relief, see Sloan 2003 A, pp. 109-110 (who finalised his article at a time when the Trial Chamber had not yet issued its decision of 9 October 2002): "Given that the Trial Chamber's decision that Todorović was entitled to disclosure from SFOR and its participating states was the ace in the hole that resulted in his negotiating a favourable plea agreement with the OTP, it might have been expected that Nikolić would follow a similar path and seek potentially embarrassing disclosure from SFOR and its participating states. Surprisingly, he did not. Instead, his counsel requested that the Trial Chamber determine the jurisdictional consequences that would flow from a successful challenge to the legality of the arrest *as a preliminary matter*. Of course the OTP, which along with SFOR had been agitating for this approach in the *Todorović* case, was only too pleased to follow this course. Under this approach, SFOR and its contributing states are safely out of reach of any embarrassing requests for disclosure from the Tribunal – at least until the complicated issues related to remedy are considered. Presumably, if the Trial Chamber finds that the requested remedy is inappropriate, Nikolić will request the Tribunal – which by then may very well be losing patience with the matter – for an order requiring disclosure from SFOR; if the remedy *is* found to be appropriate, the OTP still has the option of making a deal with Nikolić [emphasis in original and original footnotes omitted, ChP]." See also Sloan 2003 B, p. 544.

[436] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 6.

[437] See *ibid*.

[438] See *ibid*., para. 8.

[439] See *ibid*., para. 9. See for this second motion: ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001.

captus challenges were issued, he was 'only' charged with eight counts of crimes against humanity.[440]

In the above-mentioned agreement between the Defence and the Prosecution, it was stipulated that "[t]he relief sought by the Accused is his release and the dismissal of the Indictment against him or such other relief that the Court deems appropriate".[441] In addition, the two parties agreed that,

> [i]n order to determine whether the relief should be granted (…) the following issues would require resolution by way of hearing; 1. If it can be established by the accused that the accused's arrest was achieved by any illegal conduct committed by, or with the material complicity of; (a) any individual or organisation (other than SFOR, OTP or the Tribunal), (b) SFOR, (c) OTP or (d) the Tribunal would the accused be entitled to the relief sought[?] 2. Does SFOR act as an agent of the OTP and/or the Tribunal in the detention and arrest of suspected persons?[442]

These issues had to be resolved on the basis of the following facts, although it was also agreed that if, on the basis of these *assumed* facts, the judges were indeed of the opinion that the relief requested by Nikolić could be granted, that "a further hearing would be held to determine the *factual* circumstances of the Accused's arrest [emphasis added, ChP]".[443] Hence, the parties were operating in a legal framework, to which – perhaps – the 'real' facts of the case would be applied later. The assumed facts of the case were:

> - that the Accused at the time of his apprehension was living in the Federal Republic of Yugoslavia; - that the Accused was taken forcibly and against his will and transported into the territory of Bosnia and Herzegovina; - that the apprehension and transportation into the territory of Bosnia and Herzegovina was undertaken by unknown[444] individuals having no connection with SFOR and/or the Tribunal; - that

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[440] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 16. See also *ibid*., para. 2. After the Appeals Chamber's decision in June 2003, the indictment was amended again. In the end, the indictment was brought back to four counts to which Nikolić pleaded guilty. On 4 February 2005, he was sentenced to 20 years' imprisonment.

[441] *Ibid*., para. 18. Note that in the decision of 9 October 2002, the Trial Chamber *itself* does not mention the arguably important element "or such other relief that the Court deems appropriate": "By way of relief, Nikolić seeks a stay, dismissal or negation of the Indictment, his release from the custody of the Tribunal and a return to his place of residence prior to his arrest [original footnote omitted, ChP]." (*Ibid*., para. 2.) This was the relief sought in the first Defence motion of Nikolić, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 1.

[442] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 18.

[443] *Ibid*.

[444] One can wonder whether the identities of these individuals were really such a mystery when the Trial and Appeals Chamber made their decisions in October 2002 and June 2003, respectively. (The Appeals Chamber decision, which will be discussed after the Trial Chamber's decision, also referred to

> the Accused in his interview with the Prosecution asserted that he was handcuffed and in the trunk of a car, when the unknown individuals handed him over to SFOR; - that in Bosnia and Herzegovina the Accused was arrested and detained by SFOR; - that subsequently the Accused was delivered into the custody of the Tribunal and transferred to The Hague; - that certain individuals have been tried and sentenced in the Federal Republic of Yugoslavia[445] for the acts relating to the apprehension of the Accused [original footnote omitted, ChP].[446]

The submissions of the parties were as follows. The Defence claimed that because a kidnapping, like the one in this case, is such a serious *male captus*,[447] "a judicial body set up with, *inter alios*, the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances [original footnote omitted, ChP]".[448] That also means that it is not necessary to check whether a kidnapping will, for example, jeopardise the fairness of the subsequent trial because that is a different matter.[449] This *male detentus*

"unknown individuals", see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 3.) After all, already in the spring of 2001, the Helsinki Committee for Human Rights in Serbia released the (already-mentioned, see the *Todorović* case) *Annual Report 2000, Human Rights in Serbia 2000* (available at: http://www.helsinki.org.rs/reports_t10.html), in which one can read (under 'IV: International Humanitarian Law', after the account of the trial of the kidnappers of Todorović): "In mid-May police arrested 9 men on suspicion that "in the early morning hours of 21 April 2000 they abducted [Dragan] Nikolic in the territory of Serbia and handed him over to SFOR in Bosnia, for his further extradition to the Hague." (…) After the main hearing, held between 24 October-24 November, the trial chamber of the Smederevo District Court pronounced the following sentences for commission of the criminal offense of abduction under article 64 of the Penal Code of Serbia: Amir Morenkovic (sentenced in absentia) - 6 years in prison, Branko Stupar, Zeljko Mitrovic, Goran Dimitrijevic - three years in prison each, Zivorad Trajkovic - three years and four months, Jadranka Kovacevic - 2 years and 6 months, Slavoljub Antunovic - 6 months, while Miroljub Vasic and Boris Nestorovic were cleared of charges." It may also be good to point out that the Defence, in the first Defence motion, also spoke of "known individuals", see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 3. With respect to the nationalities of the kidnappers, different news reports show that these persons were from Serbia (like Nikolić was). See also Sloan 2003 B, p. 541 ('abstract'). Note finally, to return to the possible dangers of rewards (see also n. 115), that Nikolić's counsel had implied that Nikolić "had been arrested as part of the US State Department's Rewards Program for Former Yugoslavia War Criminals." (Magliveras 2002, p. 673.)

[445] See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 6.

[446] *Ibid*., para. 21.

[447] See *ibid*., para. 24: "[I]n this case, and any case involving, in effect, kidnapping, the taint of that degree of illegality and breach of fundamental human rights is so pernicious, and the dangers of the appearance of condoning it to any degree so much a hostage to unpredictable consequence and fortune that [… see the main text for the remainder of this quote, ChP]".

[448] *Ibid*.

[449] *Cf.* ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional

outcome, Nikolić's Defence continued, which, among other things, is necessary to protect and maintain the integrity of the ICTY, would have to be entertained *a fortiori* where the breach of international law "was committed by or with the material complicity of an agent and/or alternatively, by a recipient of an order of the Tribunal itself".[450]

With a greater focus on this specific case, the Defence had, according to the Trial Chamber, basically two lines of reasoning to challenge the exercise of jurisdiction by the ICTY.[451] The first submission brought in the previously discussed (see Subsection 3.3 of Chapter III) matter of attribution:

> [B]y taking over the accused from the unknown individuals, SFOR and/or the Prosecution have acknowledged and adopted the alleged illegal conduct of those individuals. The illegality of the acts of the individuals thereby becomes attributable to SFOR and to the Prosecution. In turn, such attribution leads to the conclusion that the Tribunal is barred from exercising jurisdiction over the accused.[452]

This argument must be clarified in more detail. First, how can certain conduct from private individuals be attributed to SFOR and/or the Prosecution? This was because, according to the Defence, SFOR "had knowledge, actual or constructive, that the accused had been unlawfully apprehended and brought from Serbia against his free will".[453] Secondly, the argument states that the illegality becomes attributable to

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Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 11: "It is not the thrust of this motion to assert that the accused could not have a fair trial simply because of the nature of his initial arrest or that in every case (…) the rights of an accused should take unlimited precedence over all other considerations; to do so would be intellectually and jurisprudentially barren. The fairness of proceedings once started depends upon different criteria." See also the already discussed *Bennett* case where these two points were also clearly separated: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.) This quotation was also referred to in ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 15.

[450] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 24.

[451] See *ibid*., para. 29.

[452] *Ibid*.

[453] *Ibid*., para. 25. In more detail, the Defence argued that "[i]n spite of being aware that the rendition was tainted with illegality and knowing that, but for the breach of international law and fundamental human rights principles, Nikolic would not have been in their presence SFOR personnel opted to "take advantage" of the situation by taking custody of the accused, alerting the International Tribunal of his presence and proceeding with the arrest procedures as agreed with the Tribunal. It is submitted that, by not only ignoring the illegality but, by actively taking advantage of the situation and taking into custody the accused, SFOR's exercise of jurisdiction over Nikolic was an adoption of the illegality – of which they were aware – and thus, an extension of the unlawful detention." (ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the

SFOR *and to the Prosecution*. This idea, that certain conduct can be attributed to SFOR *and hence also* to the OTP/the ICTY, implies that the Defence is of the opinion that there is a strong relationship between SFOR on the one hand and the OTP/the ICTY on the other in matters of arrest. This was indeed asserted by the Defence, which argued "that SFOR must be considered both the *de facto* and *de jure* agent of the Prosecution and of the Tribunal in apprehending indictees and that, consequently, the illegal conduct can be attributed to the Tribunal [original footnote omitted, ChP]".[454] If this agency argument were not accepted, the Defence continued, then one could argue "that the subsequent conduct of the Prosecution and the Tribunal "was such that the conduct of SFOR was in effect ratified and made as if it had been previously authorised" [original footnote omitted, ChP]".[455]

The second submission cleared the technical attribution hurdle: "[T]he illegal character of the arrest *in and of itself* should bar the Tribunal from exercising jurisdiction over the accused [emphasis added, ChP]."[456] It thus argued that *even if* the abduction could not be attributed to SFOR or the Prosecution, the simple fact that there was a kidnapping involved, *by definition* a serious[457] *male captus*

Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 12.)

[454] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 25.

[455] *Ibid*.

[456] *Ibid*., para. 29.

[457] The alleged seriousness of the *male captus* can be found in the following words of the Defence: "It is not the thrust of this motion to assert (…) that in every case (…) the rights of an accused should take unlimited precedence over all other considerations (…). The central argument is that in this case, and any case involving, in effect, kidnapping, the taint of that degree of illegality and breach of fundamental human rights is so pernicious, and the dangers of the appearance of condoning it to any degree so much a hostage to unpredictable consequence and fortune that a judicial body set up with, *inter alios*, the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 11.) See also the following summary by the Trial Chamber of the Defence's arguments: "that the forcible removal of the Accused from the FRY entailed a breach of both the sovereignty of the FRY and the Accused's individual due process guarantees; and that although such breaches occurred *prior* to the delivery of the Accused into the custody of SFOR and the Tribunal, *these breaches were of such magnitude* that even absent the involvement of SFOR or Prosecution, the release of the Accused from the custody of this Tribunal and the dismissal of the indictment against him is the only appropriate remedy [emphasis added and original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 25.) Nevertheless (and as already explained in n. 442 of Chapter III), note that the footnote after these words of the Trial Chamber (n. 34, referring to para. 9 of the first Defence motion) does not lead to these words/ideas of the Defence.

situation, violating State sovereignty, human rights and the rule of law,[458] can mean but one thing, namely that the Tribunal is not to exercise its jurisdiction.

[458] To be very precise, these three elements indeed played an important role in the arguments of the Defence (and hence should also be mentioned here), but, strictly speaking, the words of the Trial Chamber in para. 71 of its decision ("The central submission of the Defence is that unlawful rendition of a defendant to the Tribunal should lead to the conclusion "[t]hat international law has to some degree been breached and that the violation of some fundamental principle – whether it be state sovereignty and/or international human rights and/or the rule law of law – needs to be protected above all other considerations [original footnote omitted, ChP]".") are incorrect because the words "[t]hat international law has to some degree been breached and that the violation of some fundamental principle – whether it be state sovereignty and/or international human rights and/or the rule law of law – needs to be protected above all other considerations [original footnote omitted, ChP]" were not presented as a submission of the Defence, but 'merely' as an explanation of the reasoning of earlier *male captus male detentus* cases, see ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 14: "The decision by both national courts and international tribunals to deny jurisdiction where the defendant can show that there has been an unlawful rendition, has been justified on the grounds that international law has to some degree been breached and that the violation of some fundamental principle – whether it be state sovereignty and/or international human rights and/or the rule law of law – needs to be protected above all other considerations [original footnote omitted, ChP]." Nevertheless, it is also clear that the Defence used these reasonings of other *male captus male detentus* cases in this case as well. Note finally that the Defence and the Prosecution are officially still operating in a theoretical framework, working with *assumed* facts; strictly speaking, the Defence is not arguing that these elements *have* been violated in the case of Nikolić; it only argues that if that were to be established, that this must lead to a *male detentus* outcome, see, for example, ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 18: "It is submitted that *if the accused does establish* that his arrest was achieved by illegal conduct committed by or with the material complicity of any individual or organization and/or SFOR and/or the OTP and/or the Tribunal, such conduct or complicity, entailing a breach of international law, would entitle the accused to relief that is meaningful, effective and substantial. As such, the only appropriate remedy must be that the indictment is stayed, dismissed or otherwise negated followed by the return [of] the injured party, Dragan Nikolic, to the *status quo ante* [emphasis added and original footnote omitted, ChP]." Hence, it is arguably not correct of the Trial Chamber to write that the Defence alleges that these violations *have* occurred in this case, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 96: "The Chamber must now address the allegations of the Defence that, in the present case, violations of international law occurred. Such violations relate to: (i) a violation of the State sovereignty of the injured State, (ii) a violation of international human rights, in particular the rights of the accused, and (iii) a violation of the rule of law." However, it must also be admitted that the line between the assumed facts and the allegations of the Defence is sometimes blurry, see, for example, ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 17: "[B]y proceeding with the trial, the manifestly unlawful means by which the

Because the Defence suggested that the *male captus male detentus* outcome had to be preferred in this case implies that the Defence looked at the *male captus* topic more generally and, especially in its second Defence motion, the Defence did indeed examine it. It is appropriate to now pay some more attention to that discussion of the Defence, which not only looked at the inter-State context but, of course, also at the context of the Tribunals.

First, the Defence noted that the *male captus bene detentus* principle had lost much of its relevance today, a statement which is true if one follows the old-fashioned rationale of the maxim, but which is also, see the outcome of Chapter V, perhaps rather shallow given the fact that courts around the world still issue decisions which can be qualified as *male captus bene detentus* decisions:

> It is acknowledged that traditionally, the principle *male captus, bene detentus* has applied and that in some civil law jurisdictions, the maxim may still remain good law. However, it is submitted that the principle can no longer be considered good law, or at least the most consistent with the flow of human rights legislation, in most common law jurisdictions and that moreover, under international law, the maxim *male captus, male detentus* is preferred [original footnotes omitted, ChP].[459]

It subsequently explained that the different *male captus male detentus* courts had used the following general justification for reaching their *male detentus* outcomes, namely

> that international law has to some degree been breached and that the violation of some fundamental principle – whether it be state sovereignty and/or international human rights and/or the rule law of law – needs to be protected above all other considerations [original footnote omitted, ChP].[460]

These three elements, which were also presented and discussed in Chapter III of this book, were then examined in more detail.

With respect to State sovereignty, the Defence noted:

> While evidence of direct or material complicity by a state in the abduction of an individual can, it is submitted, raise a legitimate action for the violation of state sovereignty, where the abduction has been perpetrated by private individuals, the law

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accused has been brought into the Tribunal's jurisdiction seriously taints and undermines the integrity of the judicial process, not simply in the instant case but in the eyes of the international community at large."

[459] ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 14.

[460] *Ibid*. See also n. 458.

> remains unsettled and thus, the remedy for (…) such a breach also remains unresolved.[461]

Although this quotation is not entirely clear (see also footnote 442 of Chapter III), it appears that the Defence is claiming that private individuals *can* violate the sovereignty of another State, but that it is unclear whether an abduction, executed by private individuals, can also be used to *raise a legitimate action* with respect to this violation.[462] As a result, it is also unclear what kind of remedy for the violation of State sovereignty (the words "for (…) such a breach" also imply that private individuals can violate a State's sovereignty) should be granted.

However, in any case, it was asserted that "subsequent ratification of the illegal act does establish state responsibility [original footnote omitted, ChP]"[463] and that the appropriate remedy in such cases would be the return of the abducted individual.[464] Although the Defence does not clearly explain how this point is to be transposed into the context of the Tribunals, it can be argued that it is of the opinion that if the Tribunal were to ratify the conduct (and given the sources to which the Defence refers, such ratification could already be established if the Tribunal would simply continue with the case)[465] the Tribunal would become responsible for the act, as a result of which the remedy of the return would have to be granted.

Turning to international human rights law, the Defence, referring to "some of the most recent and pertinent rulings by regional and international human rights

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[461] ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 15.

[462] Such an interpretation would be in conformity with the first Defence motion, where it was stated that "the assumptive facts must amount to a violation of sovereignty". (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 11.)

[463] ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 15.

[464] See *ibid*., n. 24.

[465] See *ibid*., where the Defence refers to, among other things, the words of Mann (1989, p. 408) which were already mentioned earlier in this book, see n. 527 of Chapter III. The Defence also referred to the following words from Shen 1994, p. 23 (this must, by the way, be p. 63): "Whether the captors are government officials or private citizens, and whether the abduction is originally authorized or sponsored by the government, the State whose unauthorized agents or private citizens engage in extraterritorial captures assumes its responsibility as soon as it adopts, sanctions, or takes advantage of the private or unauthorized kidnapping activities. A State that fails to return the abducted individual and then arrests and prosecutes the individual has the same responsibilities as in a State-sponsored abduction."

tribunals on forcible abductions [original footnotes omitted, ChP]",[466] submitted "that where a defendant has been the victim of an abduction, his rights under customary international human rights law have been violated"[467] and that "[w]here a forcible abduction has been established in fact, international tribunals have consistently called for the return of the defendant to the *status quo ante* as the appropriate remedy [original footnote omitted, ChP]".[468] The Defence explained here as well that the fact that the initial wrong may have been caused by private individuals does not change this point:

> It is further submitted that because an unlawful rendition not only seriously curtails the basic inalienable rights of the individual, but must also necessarily involve the irregular exercise of jurisdiction over an individual by the adjudicating court, the issue of whether or not the perpetrators of the abduction were state-sponsored or acting in a private capacity, is irrelevant. Therefore, any attempt to distinguish

[466] ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 16. Reference was made here (in ns. 25-26) to the now well-known cases of *Stocké*, *Bozano*, *Velásquez Rodríguez*, *Celiberti de Casariego*, *Lopez Burgos*, *Almeida de Quinteros* and *Cañón García*.

[467] *Ibid*.

[468] *Ibid*. The Defence refers here (in n. 30) to *Celiberti de Casariego*, *Lopez Burgos*, *Almeida de Quinteros*, *Cañón García* and *Barayagwiza*. Some critical comments should be made here. To start with *Barayagwiza* (which will be discussed in Subsection 3.2.1), that case did not involve a forcible abduction. Furthermore, it must be noted that in *Cañón García*, the HRC *could* not ask for the release or the return to the *status quo ante* as the State holding the suspect (the US) "had not ratified, or acceded to, the Covenant or the Optional Protocol." (HRC, *Cañón García v. Ecuador*, Communication No. 319/1988 (5 November 1991), UN Doc. CCPR/C/43/D/319/1988 at 90 (1991), available at: http://www1.umn.edu/humanrts/undocs/html/dec319.htm, para. 5.1.) In this case, the Committee was of the opinion that the State co-responsible for the abduction (Ecuador) had nevertheless violated, among other things, Art. 9 of the ICCPR and concluded that: "the State party is under an obligation to take measures to remedy the violations suffered by Mr. Cañón García. In this connection, the Committee has taken note of the State party's assurance that it is investigating the author's claims and the circumstances leading to his expulsion from Ecuador, with a view to prosecuting those held responsible for the violations of his rights. The Committee would appreciate receiving from the State party, within ninety days of the transmittal to it of this decision, all pertinent information on the results of all its investigations, as well as on measures taken to remedy the situation, and in order to prevent the repetition of such events in the future." (*Ibid*., paras. 6.2 and 7.) However, in the other three cases (which, it must be noted, also involved other human rights violations), the HRC indeed ordered the release of the suspect. Although, as explained, a release as such would not exclude a new trial, the HRC explicitly stated in the cases of *Celiberti de Casariego* and *Lopez Burgos* that the suspect also had to be permitted to leave the forum State, which arguably means the *de facto* ending of the case. In *Almeida de Quinteros*, it was not necessary to mention this permission to leave the forum State as the latter State (Uruguay) was also the suspect's home State. Given the serious *male captus* involved here (see n. 251 and accompanying text of Chapter III), one can assume that the HRC would not accept a release followed by an immediate new arrest on the spot. Hence, in that case, the release would arguably also constitute the real ending of the case.

> between the categories of violator of the human rights of the accused is, it is submitted, a superfluous exercise [original footnote omitted, ChP].[469]

This study agrees with the point that the Tribunal should look at all violations, whether they have been committed by OTP staff or private individuals. However, the entity responsible for the violation may and should certainly play a role in determining the most appropriate remedy for the violation, including whether or not the ultimate remedy, the refusal of jurisdiction, should follow.

With respect to the final element, the rule of law, the Defence submitted that the still-to-discuss *Barayagwiza* case before the ICTR and a series of national cases require "that a court consider divesting itself of jurisdiction over the defendant where there has been a serious violation of the rule of law or an abuse or process [original footnote omitted, ChP]",[470] for example, because it wants "to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process [original footnote omitted, ChP]",[471] and that, while an abduction *per se* is both an abuse of process and a breach of the rule of law, a transfer, as a direct consequence of such an abduction, of a suspect to a jurisdiction so that that suspect can be tried is (also) an abuse of process.[472]

The Defence emphasised that an irregular rendition does not necessarily deprive a suspect of a fair trial.

However, that is not important. What *is* important is that

> by proceeding with the trial, the manifestly unlawful means by which the accused has been brought into the Tribunal's jurisdiction seriously taints and undermines the integrity of the judicial process, not simply in the instant case but in the eyes of the international community at large.[473]

Like the other elements, State sovereignty and human rights, the Defence submitted that here also, the fact that the abduction may have been executed by private individuals would not make a difference.[474] Finally, the Defence made a sort of general appeal that

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[469] ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 16.

[470] *Ibid*., para. 17.

[471] *Ibid*.

[472] See *ibid*.

[473] *Ibid*.

[474] This was because such conduct could be ratified by the Tribunal, see *ibid*.: "[E]ven where private parties are the initial perpetrators of the abuse of process and/or breach of the rule of law, the illegality can be imputed to SFOR and/or the OTP and/or the Tribunal, on subsequent ratification [original footnote omitted, ChP]." As the Defence refers back to n. 24 of its Motion (see n. 465 and accompanying text), one can assume that the Defence is here also of the opinion that such ratification can already be established if the Tribunal would simply continue with the case. See also *ibid*.: "[A]s

> it cannot be that in war crime cases a resort to the *male captus bene detentus* maxim is an automatically acceptable surrogate procedure for circumventing procedures of apprehension that comply with human rights principles and the central tenets of the rule of law. As an organ of the United Nations, the cradle for international human rights norms, the ICTY should promote and develop those rights within the framework of international law and turn its face from what could be seen to be encouraging or accepting lawlessness.[475]

Before turning to the Trial Chamber's observations, it should be noted that the Prosecution basically focused on the availability of the remedies and argued that the far-reaching remedies sought by Nikolić may only be warranted in extreme cases (which was not the case here), namely in situations which involve at a minimum:

> a) [u]nambiguous, advertent[476] violations of international law which can be attributed[477] to the Office of the Prosecutor; and/or b) a residual category of cases

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with a violation of the accused's human rights, any attempt to distinguish between the illegal conduct – abuse of process or breach of the rule of law – committed by or with the material complicity of an individual or organization and such conduct by SFOR personnel, the OTP or the Tribunal is, once again, a superfluous exercise." See finally *ibid*. for a more general statement, which could be applied to all three situations: "It is submitted that if the accused does establish that his arrest was achieved by the illegal conduct committed by or with the material complicity of any individual or organization and/or SFOR and/or OTP and/or the Tribunal, such conduct or complicity, entailing a breach of international law, would entitle the accused to relief that is meaningful, effective and substantial. As such, the only appropriate remedy must be that the indictment is stayed, dismissed or otherwise negated followed by the return [of] the injured party, Dragan Nikolic, to the *status quo ante* [original footnote omitted, ChP]."

[475] *Ibid*., para. 20.

[476] A synonym of this word is 'mindful', a word which clarifies that there must have been a real *intent* from the Prosecution to violate international law. *Cf*. in that respect also Chapter V where intent played a considerable role in the different *male captus* cases. See also Swart 2001, p. 206, where he writes: "Dismissal of criminal cases as a result of official misconduct is a remedy accepted by the courts of many States. There is, of course, considerable variation in the way national legal systems make use of that remedy. Among other things, the choice will depend on the availability of other effective remedies for correcting the wrongs done to the accused. Usually, a relevant consideration is also whether unlawful conduct on the part of law officers shows an *intent* to prejudice the rights of the accused or instead constituted negligence [emphasis added, ChP]." The above-mentioned words of the Prosecution stem from para. 17 of ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001 (this is the response of the Prosecutor to the second Defence motion of Nikolić). In an earlier response (the response to the first Defence motion of Nikolić), the Prosecution had used comparable words, words which also show that the violations must have been committed consciously/intentionally, see ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, para. 31: "At a minimum, cases in which such extreme remedies may be warranted will involve either: a) unambiguous, *conscious* violations of international legality which can be attributed to the Office of the Prosecutor (i.e. the Prosecution's *own* conduct would have to be in some way egregious); and/or b) a residual category of case[s] where the violations in question are of such egregiousness or

> where the violations in question are of such egregiousness or outrageousness that, irrespective of any lack of involvement on the part of the Prosecution, the Trial Chamber could not, in good conscience, continue to exercise its jurisdiction over the Accused [original footnote omitted, ChP].[478]

The Trial Chamber focused on the two central submissions of the Defence mentioned above: one related to attribution and one making a more direct relation between the *male captus* and the *male detentus* outcome, namely that jurisdiction should be refused even if the *male captus* could not be attributed to SFOR/the OTP.

The Chamber first examined whether the (assumed) acts of the individuals could be attributed to SFOR/the OTP.

After having explained the legal framework in which SFOR, the OTP and the Tribunal operate,[479] it first confirmed the *Todorović* case with respect to the question of whether SFOR has a legal obligation to arrest suspects for the ICTY – this point was already discussed earlier, see footnote 71 and accompanying text[480] –

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outrageousness that, irrespective of any lack of involvement on the part of the Prosecution, the Trial Chamber could not, in good conscience, continue to exercise its jurisdiction over the accused. In such circumstances, his or her release may therefore be ordered so as to safeguard the integrity of the entire judicial process [first emphasis added, ChP]." The Prosecution formulated this test relying on Lamb 2000. See also Sloan 2003 A., p. 110, n. 183. In this context, the Prosecution also submitted "that any irregularities committed by the authorities of another State or individuals prior to the delivery of the accused to the jurisdiction of the Tribunal should not suffice to divest this Tribunal of its jurisdiction over the accused [original footnote omitted, ChP]" (ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, para. 34), among other things, because it would entail an inducement for certain States "to ensure that serious irregularities were committed in the arrest process before handing the accused to the Tribunal, being confident that after review, the indictment would be dismissed and the defendant released because the defendant's rights had been violated by the authorities in the FRY. Under this scenario, the States concerned could claim that they were fulfilling their obligations of co-operation while, at the same time, knowingly sabotaging the Prosecution by violating the accused's fundamental rights in the process of transferring him to the Tribunal." (*Ibid*., para. 34, n. 31.) See also *ibid*., para. 35 and ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 6. This – justified – concern was also identified in the *Todorović* case, see n. 344.

[477] The Prosecution was of the opinion that "[t]he mere subsequent acceptance by the Prosecution of custody of the Accused is not sufficient in and of itself to satisfy the required level of "collusion" and/or "official involvement." According to the Prosecution, at least some form of adoption and approval by the Prosecution of such violations is required [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 27.)

[478] *Ibid*., para. 28.

[479] See *ibid*., paras. 35-47.

[480] See *ibid*., paras. 49 ("The question that may arise is whether the duty to co-operate, as laid down in Article 29, applies to States only, or also to other entities or collective enterprises, such as SFOR. Read literally, Article 29 seems to relate to States only. This question had been discussed previously, *inter alia*, by the Trial Chamber in the *Simić* Decision. This Trial Chamber sees no reason to take a different

and explained that "in the particular circumstances of this case the relevant SFOR forces had no other option than to detain the Accused and to set the standard procedures in motion in order to have the Accused transferred to The Hague".[481] In other words, it was not up to SFOR to release Nikolić. The Trial Chamber then turned to the question as to whether the *male captus* of Nikolić, allegedly committed by these private individuals, could be attributed to SFOR. It hereby looked at the (already discussed in Chapter III) ILC's DARS, although it immediately warned that "any use of this source should be made with caution".[482] This was because these Draft Articles

> are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the Draft Articles are primarily directed at the responsibilities of States and not at those of international organisations or entities.[483]

Notwithstanding this caveat, the Chamber examined whether Article 11 of the DARS ('Conduct acknowledged and adopted by a State as its own')[484] could be relevant here.[485]

The Trial Chamber referred to the ILC's commentary to this article,[486] which explains that

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view") and 67 ("Once a person comes "in contact with" SFOR, (…) SFOR is *obliged* under Article 29 of the Statute and Rule 59 *bis* to arrest/detain the person and have him transferred to the Tribunal [emphasis added, ChP]."). It may be interesting to note that the Trial Chamber also concurred with another (and also already discussed) *male captus* case before the ICTY, the *Dokmanović* case, namely with respect to that decision's reasoning that Rule 59 *bis* of the ICTY RPE should be read as providing a mechanism additional to that of Rule 55 of the ICTY RPE, see *ibid*., para. 50.

[481] *Ibid*., para. 55.

[482] *Ibid*., para. 60.

[483] *Ibid*. It may be interesting to note that the ILC is now in the process of preparing draft articles on the responsibility of international organisations, see, for example, Chapter IV ('Responsibility of International Organizations') of the *Report of the International law Commission*, Sixty-first session (4 May-5 June and 6 July-7 August 2009), UNGA OR, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10, pp. 13-183. On pp. 77-78 of this report, one can even find a reference to the ICTY Trial Chamber's decision in the *Nikolić* case, after which the ILC commented (at p. 78): "No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption." (See for the acknowledgement and adoption topic the remainder of the main text.) *Cf*. also Acquaviva 2007, p. 634.

[484] "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." See also n. 482 and accompanying text of Chapter III.

[485] Another DARS article which is often relied upon in comparable cases (Art. 8: 'Conduct directed or controlled by a State', see n. 481 and accompanying text of Chapter III) was not examined here for it was not argued or suggested in any way that SFOR instructed, directed or controlled the acts of the private individuals, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 64.

[486] See also Subsection 3.3.3 of Chapter III.

> as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. (…) [T]he term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgment of a factual situation, but rather that the State identifies the conduct in question and makes it its own.[487]

The Trial Chamber was of the opinion that SFOR had not acknowledged and adopted the *male captus* of the private individuals as its own.[488] In fact, "SFOR did nothing but implement its obligations under the Statute and the Rules of this Tribunal".[489]

As the conduct of the private individuals could not be attributed to SFOR, the Trial Chamber found it unnecessary to examine whether certain conduct by SFOR could be attributed to the OTP/the Tribunal.[490]

Now that the attribution submission of the Defence was rejected, the Trial Chamber looked at the submission as to whether the *male captus* should lead to a *male detentus* anyway, even if the *male captus* could not be attributed to SFOR/the OTP/the Tribunal. And in doing so, the judges of the ICTY, for the first time ever,[491] explicitly examined the *male captus bene/male detentus* discussion.[492] However, before going into this discussion, it warned that "[c]are needs to be applied"[493] with respect to the *male captus* case law of the various national jurisdictions. This was because this case law 1) "is far from uniform"[494] and 2) was

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[487] *Yearbook of the International Law Commission 2001, Vol. II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session*, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 53.

[488] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 67.

[489] *Ibid*.

[490] See *ibid*., para. 69.

[491] The judges noted that "[t]he Trial Chamber is aware that in answering the central legal question (…) it finds itself in uncharted waters." (*Ibid*., para. 75.)

[492] The Trial Chamber used the following *male captus bene detentus* definition: "The maxim *male captus, bene detentus* expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court." (*Ibid*., para. 70.) It also noted, apparently with approval, the following *male captus male detentus* definition used by the Defence: "In the view of the Defence, this Tribunal should instead apply the principle of *male captus, male detentus*, meaning that an irregularity has occurred in the arrest of the Accused and therefore should bar any further exercise of jurisdiction by the Tribunal [original footnote omitted, ChP]." (*Ibid*.)

[493] *Ibid*., para. 75.

[494] *Ibid.* See also *ibid*.: "In some national jurisdictions, the maxim *male captus, bene detentus* is more closely followed than in others. Furthermore, the case law on this particular issue is still developing and such developments are more advanced in some jurisdictions. In addition, the concept of forced cross-border abductions is not always interpreted the same way. Case law often differs also in that the facts on which decisions have to be taken are not at all identical." Although it cannot be denied, of course, that

decided in the context between sovereign States, on a horizontal level, whereas the relation between States and the ICTY is of a vertical nature.[495] Hence, "the national case law must be "translated" in order to apply to the particular context in which this Tribunal operates".[496] However, notwithstanding these two caveats, the Chamber noted that it "still regards it useful to provide an overview of his case law although the overview will not and cannot be exhaustive".[497]

The overview of the Trial Chamber consisted of 15 paragraphs,[498] addressing 19 national cases,[499] all of which have been discussed or at least briefly mentioned earlier in this book (where it was also argued that the Trial Chamber was sometimes not entirely accurate in its analysis).[500]

After its examination, the Trial Chamber first correctly observed "that the case law described above is rather diverse"[501] and that it involved many different *male captus* situations.[502] However, after repeating the warning made earlier that these cases stem from a context other than that in which the ICTY operates,[503] the Trial Chamber nevertheless distilled the following core elements (one might better say: core questions) from the overview:

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the case law from the previous chapter was very diverse and involved many different *male captus* cases, leading to many different outcomes, this does not mean that there are not some common features discernible. See in that respect, for example, the point mentioned in the *Al-Moayad* case that in two specific *male captus* situations, State practice appears to indicate that jurisdiction must be refused. Nevertheless, it is clear that much depends here on the exact circumstances and therefore, that one should also be wary of making general statements on the (customary international law) status of *male captus bene detentus*. See, for example, Strijards 2001, pp. 96-97, Goldstone and Simpson 2003, p. 19, Hamid 2004, pp. 70, 78 and 86 and Loan 2005, p. 284. (Note that Goldstone and Simpson (2003, p. 19, n. 33) even qualify the *male captus bene detentus* rule as "a principle of extradition law". This peculiar statement has also been noted by Currie 2007, p. 359, n. 43. See for the same oddity Knoops 2002, p. 253, writing about "the principle of international extradition law *male captus bene detentus*".)

[495] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 76. See also *ibid.*, paras. 95, 100 and 103. In addition, the Chamber warned that caution is required with respect to its own decision when referring to the *debates* on the *male captus bene detenus* principle at the national level, just like "caution is needed to interpret the outcome of this case in its vertical context to the debates in that horizontal context." (*Ibid.*, para. 78.)

[496] *Ibid*., para. 76.

[497] *Ibid*., para. 77.

[498] See *ibid*., paras. 79-93.

[499] Namely: *Ker v. Illinois*, *Frisbie v. Collins*, *United States v. Toscanino*, *United States, ex rel. Lujan v. Gengler*, *United States v. Alvarez-Machain*, *United States v. Matta-Ballesteros*, *United States v. Noriega*, *Eichmann*, *ex p. Scott*, *ex p. Elliott*, *ex parte Mackeson*, *re Bennett*, *Regina v Hartley*, *Levinge*, *State v. Ebrahim*, *re Jolis*, *re Argoud*, an untitled case by the German Constitutional Court from 17 July 1985 [this is the *Stocké* case, see ns. 503 *et seq*. of Chapter V, ChP] and *State v. Beahan* (Trial Chamber's own notation). Short references to cases in footnotes are not included here.

[500] See, for example, the ICTY Trial Chamber's statement that "[t]he rule of law is clearly interpreted here as demanding only a fair trial for an accused" (in the *Bennett* case) and its remark that "[t]he Court used its discretionary power to stay the case as it considered the conduct of the police to be an abuse of power" (in the *Hartley* case).

[501] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 94.

[502] See *ibid*.

[503] See *ibid*., para. 95.

- Was a member of the executive of the forum State involved in the illegal transfer of the accused from the State where he was found (the injured State) to the forum State?[504] (...) - Was the accused a national of the injured State (...) or of the forum State (...)?[505] - Did the injured State protest in some way against the fact that the accused was taken out of its territory? (...)[506] - Did an extradition treaty exist between the forum State and the injured State and, if so, was there first an attempt to apply that treaty? (...)[507] - How was the accused treated during the period between the moment of his deprivation of liberty in the injured State and the moment of his

[504] Chapter V has shown that this is indeed an important element: if a prosecuting forum's own authorities are involved in the *male captus*, it is more likely that a *male detentus* will follow. An exception is the Swiss case of X (but it is to be noted that that was 'only' a *male deditus* decision). *Cf.* also Sluiter 2003 B, p. 946. One of the factors he presents which can be used in the determination whether a *male detentus* must follow is the "degree of attribution of the violation to the Tribunal".

[505] One can imagine that States may protest the violation of their sovereignty, irrespective of the nationality of the abducted person, see Fawcett 1964, p. 199: "[W]here there is an international issue in the form of a breach of the territorial jurisdiction of another State by the capture and abduction of an offender, neither his nationality nor the reason for his presence in that State are material to the right of that State to demand his return. In other words, such a demand is in effect an assertion by the State, not of a right of protection of the offender, but of its exclusive jurisdiction over persons and property in its territory. The offender therefore need not be a national of that State, or domiciled, or even legally resident within its territory." Nevertheless, one can assume that a protest will be more likely if the suspect is a national of the injured State. See, for example, *Alvarez-Machain* (Mexican national, *male captus* in Mexico, protest from Mexico), *Jolis* (Belgian national, *male captus* in Belgium, protest from Belgium) and *Al-Moayad* (Yemeni national, *male captus* in Yemen, protest from Yemen). Conversely, if the suspect is a national from the forum State and not from the State where the *male captus* took place, there may not be a protest, see, for example, *Scott* (English national, *male captus* in the Netherlands) and *Ebrahim* (South African national, *male captus* in Swaziland).

[506] Chapter V has shown that State practice indicates that an abduction followed by a protest and request for the return of the suspect must lead to the *male detentus* outcome. However, in other *male captus* situations, of which it is less clear whether they lead to a violation of international law in the first place, such as luring, a protest may not help, see *Al-Moayad*.

[507] This point may be invoked by the forum State, in that a *male captus* technique would be more justified in case it is resorted to as an *ultimum remedium*. However, it is unclear whether the judges trying the case will be more willing to refuse jurisdiction if the Executive has not tried other legal possibilities first before turning to the *male captus* technique. Although cases like *Bennett* and *Hartley* (where the judges refused jurisdiction, among other things, because the Executive had not turned first to the possibility of having the suspect extradited in a normal way) and *Matta-Ballesteros* (where the judges did not refuse jurisdiction in a case where the prosecuting authorities had first tried to have the suspect extradited from Honduras to the US before they abducted him) may point to such an element, there are also cases where judges continued to exercise jurisdiction, even if the Executive had not resorted to the available extradition possibilities first, see, for example, *Alvarez-Machain*. Conversely, even if the circumvention of extradition treaties may constitute a factor in refusing jurisdiction, it is not so that such circumvention is necessary before a judge can stop the case. See in that respect also Sloan 2003 B, p. 549, n. 63: "The most that may be said is that the violation of an extradition treaty (…) *may* be a factor in the decisions of national courts [emphasis in original, ChP]". See also n. 335 where Sloan (2003 A, pp. 102-103) argues: "[W]hile the reasoning in several of the cases cited was indeed based on the national court's concern at the state's ignoring an established extradition regime (thereby depriving the accused of guarantees afforded by that system), none of the courts held – or implied – that the existence of an extradition treaty was a sine qua non of the determination to refuse jurisdiction."

official arrest in the forum State?[508] (...) - Finally, for which crimes was the accused sought?[509]

Now that the core elements/questions from the national *male captus* case law had been identified, the Trial Chamber turned to the allegations of the Defence that in this case, violations of 1) the sovereignty of the injured State and 2) human rights and the rule of law/due process of law[510] had occurred.[511]

With respect to the alleged violation of State sovereignty, the Trial Chamber, mentioning the elements which should be taken into account here,[512] was of the opinion that no such violation had occurred in this case. The reasons for this were threefold.

First, the Trial Chamber recalled the previously mentioned fact that in the vertical context of the ICTY/ICTR (international criminal tribunals established on the basis of Chapter VII of the UN Charter), "sovereignty by definition cannot play the same role"[513] as in the horizontal context of equal, sovereign States, where "it is of utmost importance that any exercise of (...) national jurisdiction be exercised in full respect of other national jurisdictions"[514] because "[o]bservance of this

[508] Chapter V has shown that State practice indicates that courts will refuse jurisdiction in case an abduction is accompanied by serious mistreatment. In fact, one can assume that courts will do so in any *male captus* situation, see, for example, the following reasoning from the luring case of Yunis: "In this action, there is no dispute that United States law enforcement officers were fully involved in the planning and execution of defendant's arrest. However, defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction. The record in this proceeding has been reviewed with care and the Court fails to find the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920.) *Cf.* also Sluiter 2003 B, p. 946. One of the factors he presents which can be used in the determination whether a *male detentus* must follow is the "nature of the violation of individual rights". He continues (*ibid*., pp. 946-947): "violation of individual rights of an egregious nature, such as subjecting the individual to inhuman or degrading treatment, may constitute a legal impediment to exercise of jurisdiction by the Tribunal, regardless of whether or not the Tribunal, in particular the Prosecutor, had anything to do with that violation".

[509] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 95. Chapter V has indeed shown that judges may more easily continue the case because of the seriousness of the crimes with which the suspect is charged, see, for example, *Latif*.

[510] The Trial Chamber decided to address the concepts of 'human rights' and 'the rule of law'/'due process of law' together, see *ibid*., para. 106: "In relation to the question of whether a violation of human rights has occurred, the following factors in particular may play a role: how was the accused arrested, how was he treated, who was involved in the arrest and treatment? As regards the question of whether a violation of the principle of due process of law occurred, the same factors may play a role. In addition, the question may arise as to whether the Accused can still be considered to receive a fair trial. As both arguments are closely connected to each other, they will be discussed here together."

[511] See *ibid*., para. 96.

[512] See *ibid*., para. 97: "[T]he role the executive authorities of the forum State played in the transfer of the accused, the nationality of the accused, the role of the injured State itself and any treaty obligations that may exist between the injured State and the forum State, especially as to extradition."

[513] *Ibid*., para. 100.

[514] *Ibid*.

fundamental principle forms an important asset of peaceful co-operation between States".[515] This argument appears to be valid, although it should, of course, not constitute a carte blanche for the Tribunals to violate the sovereignty of States at will.[516]

Secondly, the Trial Chamber noted that Nikolić was deprived of his liberty by unknown individuals and that neither SFOR nor the Prosecution had been involved in his transfer from the FRY to Bosnia and Herzegovina or had offered incentives to these individuals.[517] This point was deemed to be very important as the national case law had shown "that in every case in which a court decided not to exercise jurisdiction the facts of the case demonstrated that executive authorities of the forum State had been involved in the disputed operation to transfer an accused from one State to another".[518] It is indeed true that Chapter V has shown that courts will generally continue with the case if the prosecuting State's own authorities were not involved in the *male captus*.[519]

Although the first two arguments are very reasonable, the third reason much resembles the argument already made and criticised in the context of the *Dokmanović* and *Todorović* cases, namely that

> no issue arises as to possible circumvention of other available means for bringing the Accused into the jurisdiction of the Tribunal. As follows *inter alia* from the vertical relationship between the Tribunal and national States, no extradition treaties are applicable. Instead, States are obliged to surrender indicted persons in compliance with any arrest warrants. Such warrants are *de jure* orders of this Tribunal directed to all Member States of the United Nations.[520]

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[515] *Ibid*.

[516] *Cf*. also Sloan 2003 B, pp. 549-550: "While it is, of course, true that different considerations must apply as regards relations between the Tribunal and member states of the UN (clearly the Tribunal could not function if its relations with states were constrained in the same manner as between states), it is submitted that there must nevertheless be *some* limits on the ICTY's power to intervene in a state. Indeed the Decision would have benefited from consideration of whether there are such limits on the ICTY, and, if so, what they are and whether Nikolić's capture in violation of the law of the FRY violated them [emphasis in original and original footnote omitted, ChP]." See also (again, see n. 265) Lamb 2000, p. 223, n. 201: "Potentially at least, a State may plead lawful excuse, on the grounds that the ICTY (and hence by implication its orders) was instituted by the UN Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter. (…) However, such a plea appears unlikely to succeed, on the grounds that while arrest warrants may constitute enforcement measures, these oblige custodial States to effect arrests or direct international forces to carry them out. They stop short of authorizing such States or forces to launch incursions into third States in order to do so".

[517] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 101.

[518] *Ibid*.

[519] An exception in that respect, see also n. 504, is the 1982 Swiss case of X (where no Swiss authorities were involved in the luring operation and the judge nevertheless halted the case), although it must also be admitted that this Court did not refuse jurisdiction to try the case (*male detentus*) but refused to extradite the person to the State involved in the luring operation (*male deditus*).

[520] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 103.

Although it is true that extradition treaties do not apply in the context of the Tribunals, this does not mean that one cannot circumvent the procedures applicable in the context of a State and the Tribunal and that such a circumvention of the normal rules can be compared with a circumvention of the extradition procedures in the horizontal context of States.[521]

The Chamber also made an *obiter dictum*, namely that "[e]ven if this Chamber would have concluded that a violation of State sovereignty had taken place in this case, the maxim "*dolo facit qui petit quod [statim] redditurus est*" would still have applied [original footnote omitted, ChP]."[522]

This maxim means that "a person acts with deceit who seeks what he will have to return [immediately]".[523] Thus, a person/State cannot ask what he/it is not entitled to, what he/it must return straightaway.

In this case, it would mean that "if a violation of State sovereignty had taken place, the Accused should first have been returned to the FRY, whereupon the FRY would have been immediately under the obligation of Article 29 of the Statute to surrender the Accused to the Tribunal".[524]

A few critical remarks can be made about this reasoning.

As already explained earlier, if, for example, employees from the OTP are responsible for orchestrating an abduction, violating the sovereignty of a State, the regular transfer procedures and the human rights of the suspect, the judges will have no option but to refuse jurisdiction and to release the person. That might very well lead to a return to that suspect's State of residence/the injured State.

Now, of course, the *male captus* discussion must not be used in such a way that the fight against impunity is brought to a standstill. The fact that *this* court will refuse the case does not mean that the suspect cannot be tried *elsewhere*. As a result, the return can be made conditional, for example, on the State of residence being willing and able to prosecute the suspect for his alleged crimes. If the injured State cannot guarantee this, the suspect should be transferred to another jurisdiction which *is* willing and able to prosecute him.

However, all this does not mean that the suspect or the injured State cannot claim that the suspect should be returned to the injured State. They can. The argument of the Tribunal – in that they cannot do so because the injured State would have a renewed obligation to transfer him to the Tribunal – overlooks the fact that such a new transfer would make no sense if the Tribunal has earlier refused jurisdiction in this case. The fact that, for example, the OTP has forfeited its right to prosecute the suspect will not simply disappear because of the return and the immediate new transfer. In short, there is no point in transferring a person to a Tribunal which has earlier determined that it cannot try the person. If there is no point in transferring the person, the injured State arguably has no obligation to do so. Thus, a maxim which

[521] See for criticism on this point of the Trial Chamber also Sloan 2003 B, p. 549.
[522] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 104.
[523] *Ibid*., n. 114.
[524] *Ibid*., para. 104.

assumes that the complaining actor cannot complain because it has a duty to re-transfer cannot be applied.

However, in less serious *male captus* cases, where the judge has not refused jurisdiction but where he may nevertheless be of the opinion that a violation of State sovereignty, strictly speaking, demands that the suspect is released and returned to the injured State (note that this would only be so if the injured State protested the violation of its sovereignty and requested the return of the suspect), then the maxim *would* make sense, see also the discussion of this issue in the *Dokmanović* and *Todorović* cases. After all, in such a case, the Tribunal can still try the person. If that is so, and taking into account the injured State's obligation to cooperate with the Tribunal, it would indeed be strange if the suspect/the injured State sought the suspect's return. After all, that would mean that the suspect would be returned, after which the injured State would have to immediately transfer the suspect back to the Tribunal (which would (still) be competent to try him). Such a *pro forma* and ridiculous 'return-immediate re-transfer construction' would make no sense, especially in the context of a State which is not very willing to cooperate with the Tribunal. Hence, in such a case, it would be better if the Tribunal does not return the suspect but continues the case and repairs the violation of State sovereignty in another way, for instance, through an apology.

With respect to the alleged violation of human rights and the rule of law/due process of law, the Trial Chamber, mentioning the elements which should be taken into account here,[525] first of all noted that it attached great importance to these two concepts.[526]

For example, it considered that it had "a responsibility to fully respect "internationally recognized standards regarding the rights of the accused at all stages of its proceedings"",[527] standards which can be found in Articles 5 and 6 of the ECHR.

Although Article 5 of the ECHR could be interpreted strictly, meaning that the Tribunal would only look at how the suspect was formally arrested and detained by ICTY officials when the suspect came into the power of these officials, the Tribunal has rightly rejected this approach and has opted for a much broader interpretation:

> There exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. Ensuring that the Accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses

[525] See *ibid*., para. 106: "In relation to the question of whether a violation of human rights has occurred, the following factors in particular may play a role: how was the accused arrested, how was he treated, who was involved in the arrest and treatment? As regards the question of whether a violation of the principle of due process of law occurred, the same factors may play a role. In addition, the question may arise as to whether the Accused can still be considered to receive a fair trial."
[526] See *ibid*., para. 110.
[527] *Ibid*.

> more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and *how an Accused has been brought into the jurisdiction of the Tribunal* [emphasis added, ChP].[528]

Thus, the Trial Chamber continued, the Prosecution must come to court with clean hands (*cf.* the reasoning in *Ebrahim*).[529]

In addition, it concurred with the still-to-discuss *Barayagwiza* case of the ICTR Appeals Chamber in that "the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice"".[530]

However, according to the Trial Chamber, this doctrine can only be used if it is "clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]".[531]

Importantly, the Trial Chamber noted, after having – carefully – referred to a number of cases from the UN Human Rights Committee,[532] that in such cases, the entity responsible for such an egregious violation is irrelevant (*cf.* also the previously discussed *Milošević* case):

> [I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated.[533]

This version of the abuse of process test clearly goes much further than the national abuse of process doctrine, where the involvement of the authorities of the prosecuting forum appears to be required. Nevertheless, even if it does not follow

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[528] *Ibid*., para. 111.
[529] See *ibid*.
[530] *Ibid*.
[531] *Ibid*.
[532] See *ibid*., para. 113: "The Defence makes reference to several decisions of the Human Rights Committee relating to forced abductions in the 1980's in some Latin-American countries [namely the cases of *Almeida de Quinteros*, *Lopez Burgos*, *Celiberti de Casariego* and *Cañón García*, see *ibid*., n. 122 and Subsection 2.2.2 of Chapter III, ChP]. In these decisions, the persons concerned were considered victims of violations of the right to liberty and security of the person. The Chamber hesitates to apply this case law automatically mutatis mutandis to the issue at hand. Those cases were decided in the specific context of whether a State should be held responsible for the violation of the human rights it was duty-bound to respect. Furthermore, in all those cases, the States against which the applications were lodged were themselves involved in the forced abductions of the victims. As already discussed above, this aspect is an important factor in the assessment of the legal and factual issues in the case at hand [original footnote omitted, ChP]."
[533] *Ibid*., para. 114.

the national abuse of process doctrine, it can be argued that this Tribunal's version of the doctrine is to be welcomed and in fact may also be very appropriate for the inter-State context. The abuse of process doctrine, in the words of Lord Lowry, means that

> a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[534]

Thus, and focusing now on the second element, which for this study is the most interesting (see also Subsection 4.3 of Chapter III), there may be pre-trial circumstances which are so serious that it would undermine the court's sense of justice/integrity/propriety to proceed with the case. Although the national abuse of process doctrine focuses on the pre-trial irregularities committed by authorities which can be linked to the prosecuting forum, the above-mentioned words of Lord Lowry are so generally formulated that they could also encompass irregularities committed by others. For example, national courts may also be confronted by an abduction by private individuals during the course of which the suspect is seriously mistreated. This may seem far-fetched, but when the stakes are considered to be high enough, such a situation may not be excluded at the national level either. The fact that national courts are prosecuting more and more international crimes themselves may contribute to such situations. If it can be established that such an abduction took place in the context of the national court's case, one can imagine that a judge may also refuse jurisdiction because the irregularity which occurred in the context of his case may be deemed to be so serious that he cannot continue with the case, even if entities which cannot be connected with the prosecuting forum were responsible for the irregularity.

Nevertheless, this broad version of the abuse of process doctrine is arguably *especially* interesting for the Tribunals because they do not have their own police force. That means that, besides the fact that they may be confronted by irregularities committed by private individuals (a situation which may occur in the context of *any* court, even a court which *has* a police force at its disposal), the Tribunal may be confronted by irregularities committed by, for example, national police forces and international troops working for them. Normally, there is nothing wrong with arrests/detentions/transfers executed by those entities at the request of the Tribunal. In those cases, the Tribunal may profit from the actions of third parties. However, there may also be instances where the consequences of the Tribunal's dependence on others are negative, namely when something goes wrong in the pre-trial arrest and detention phase. It would be very easy but not a sign of real legal 'maturity' for the Tribunal to only accept the positive side of the fact that it has no police force of

[534] See n. 610 and accompanying text of Chapter III and ns. 300 and 310 and accompanying text of Chapter V.

its own. In addition, if the Tribunal – and this also goes for a national court – did not remedy violations committed in its pre-trial phase, whichever entity committed those violations, the suspect would fall into a legal vacuum, a situation which must, of course, be prevented by the court which is ultimately prosecuting the case.

Having said that, it must also be noted that the above-mentioned words of the ICTY Trial Chamber focus on the mistreatment dimension of the abuse of process doctrine. That is, of course, very well possible: if a person is seriously mistreated in the context of his case, a judge may feel that he cannot continue the case. However, it must also be understood that the abuse of process doctrine is not a 'torture test'.[535] It is not *only* about (physical)[536] mistreatment. It may very well be that a suspect's rights are seriously violated, even if he is not mistreated. In such cases, the abuse of process doctrine can, of course, also be invoked. In that respect, it may be good to know that the *Nikolić* Trial Chamber, when it wrote that "in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]",[537] referred to the (still-to-discuss) *Barayagwiza* case,[538] a case in which the suspect was *not* seriously mistreated. In that case, the suspect 'only' suffered such serious violations of his rights that the Appeals Chamber was of the opinion that a *male detentus* verdict was in order.[539] To use the example of the abduction: it can be argued (as has been done earlier and as will be done later in this book) that if the Tribunal were responsible for an abduction, the judges should resolutely refuse jurisdiction under the abuse of process doctrine. In such a situation, it should not matter whether or not the suspect was seriously mistreated during his abduction. The mere fact that an international criminal tribunal would resort to an abduction should be seen as such a serious irregularity that the judges, in good conscience, can no longer proceed with the case. It should be noted that the Trial Chamber may indeed be in favour of this stance. It is true that the judges have focused on serious mistreatment in their explanation that the abuse of process doctrine can also be applied to third parties, but they only did so in the context of private individuals' conduct.[540] Hence, this does not exclude the

[535] *Cf.* also Michell 1996, p. 403 (commenting on the interpretation of the *Toscanino* case by later courts): "[T]hese later interpretations suggest incorrectly that *Toscanino* was primarily a "torture" case rather than a "forcible abduction" case [original footnote omitted, ChP]."

[536] In the context of *male captus* cases, mistreatment normally means physical mistreatment/bodily harm. See, for example, the torture suffered by Toscanino (see ns. 53 and 79 of Chapter V). However, even though the term (serious) mistreatment/torture in this book is thus mainly used in a physical sense, the term *as such* may, of course, also encompass mental mistreatment.

[537] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.

[538] See *ibid*., n. 121. See also *ibid*., para. 114 where the Trial Chamber notes that its view "is in keeping with the approach of the Appeals Chamber in the *Barayagwiza* case, according to which in cases of egregious violations of the rights of the Accused, it is "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights." [original footnote omitted, ChP]"

[539] See also the *Bennett* case as discussed in Chapter V, where the judges refused jurisdiction under the abuse of process doctrine in a case where the prosecuting authorities were involved in a deliberate circumvention of the extradition possibilities and during which Bennett was not mistreated in any way.

[540] See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para.

Trial Chamber from also applying the abuse of process doctrine in, for example, the above-mentioned case of an abduction organised by Tribunal staff and without any serious mistreatment. In fact, the following (and partly already presented) words constitute clear support for that stance:

> [T]his Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case [where, it should be remembered, the suspect was the victim of a 'normal' abduction, without any serious mistreatment, ChP][541] that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal.[542]

Moreover, one can also imagine that in cases in which the Tribunal was not involved, a certain *male captus* may be deemed to be so serious, even if the suspect was not seriously mistreated, that judges may refuse jurisdiction.

Applying the Trial Chamber's reasoning to the facts of the case, the judges assessed the level of violence against Nikolić and found "that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals (…) was of such an egregious nature."[543] As a result, the final conclusion was that

> on the basis of the assumed facts, the Tribunal must exercise jurisdiction over the Accused. The allegations that his human rights have been violated or that proceeding with the case would violate the fundamental principle of due process of law are rejected.[544]

There is something strange about this conclusion.

Although the Trial Chamber may be perfectly right in concluding that, on the basis of the assumed facts, the *male captus* of Nikolić was not so egregious as to divest jurisdiction – it can be argued that this should indeed be reserved for the truly serious cases – and hence that proceeding with the case would not violate the

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113: "The Chamber has already concluded that, as such, the acts of the unknown individuals, i.e. bringing the Accused against his will from the territory of the FRY into the territory of Bosnia and Herzegovina, cannot be attributed to SFOR or the Prosecutor."

[541] Of course, an abduction will always contain *some* force/threat of force. For the *Ebrahim* case, see n. 657 of the previous chapter, where reference is made to Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 890: "He was bound, blindfolded and gagged". In 95 *International Law Reports* (1994), where one can find more details on the abduction itself, one can read that Ebrahim's kidnappers "pointed guns at him and warned him that they would kill him if he screamed or made a noise." (95 *International Law Reports* (1994), p. 420.)

[542] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.

[543] *Ibid*., para. 114.

[544] *Ibid*., para. 115.

fundamental principle of due process of law/the rule of law, it was nevertheless also concluded, again within the context of the assumed facts, that Nikolić was kidnapped and mistreated during his abduction. However, how does that conclusion comport with the Trial Chamber's findings that no human rights have been violated?

This can probably only be explained by the fact that the Trial Chamber must be of the opinion that private individuals *cannot* violate human rights, see also the discussion of this topic in Chapter III of this book.[545] After all, how else can one conclude – on the basis of the assumed facts – that, on the one hand, there was a kidnapping during which course Nikolić was mistreated (but not so seriously as to divest jurisdiction) and, on the other hand, there was no violation of human rights?

A reason for this potential inconsistency could be that the ICTY was afraid of the possible consequences of a finding that there was a violation of Nikolić's rights, namely that in that case, it would be logical to grant remedies.[546] (As explained in the context of the *Milošević* case, if the Tribunal is prepared, in the context of the abuse of process doctrine, to take the ultimate responsibility (namely the refusal of jurisdiction) for violations committed by other entities, one can argue that it should also take responsibility more generally and repair less serious violations committed in the context of its case, whether or not these violations can be attributed to the Tribunal.)

It is also interesting to point to the fact that the ICTY 'safely' speaks about Nikolić's rights, which arguably refers to his *rights under the ICTY Statute*, and not more broadly about Nikolić's *human rights*, which term the Defence seemed to embrace (see footnotes 442-443 of Chapter III and 448, 457-458 and accompanying text of the present chapter). There may be a reason for this. It could be that the Tribunal is afraid that if it were to speak more broadly about human rights such as the right to liberty and security, that a finding that a violation of that right had occurred would lead to the remedies of this human right, such as release and compensation. However, as the ICTY Statute does not refer to these remedies (or to the right to liberty and security), the Tribunal may have thought that if it did not to

[545] *Cf.* again (see also n. 532) *ibid*., para. 113: "The Defence makes reference to several decisions of the Human Rights Committee relating to forced abductions in the 1980's in some Latin-American countries [namely the cases of *Almeida de Quinteros*, *Lopez Burgos*, *Celiberti de Casariego* and *Cañón García*, see *ibid*., n. 122 and Subsection 2.2.2 of Chapter III, ChP]. In these decisions, the persons concerned were considered victims of violations of the right to liberty and security of the person. The Chamber hesitates to apply this case law automatically mutatis mutandis to the issue at hand. Those cases were decided in the specific context of whether a State should be held responsible for the violation of the human rights it was duty-bound to respect. Furthermore, in all those cases, the States against which the applications were lodged were themselves involved in the forced abductions of the victims. As already discussed above, this aspect is an important factor in the assessment of the legal and factual issues in the case at hand [original footnote omitted, ChP]."

[546] See also Sloan 2006, p. 341: "[A]lthough the facts – limited though they were – clearly implied that illegality had occurred, the Trial Chamber concocted several arguments to the effect that there had been no breach of sovereignty or human rights and therefore no illegal capture. By making such improbable findings (…) the Trial Chamber was able to sidestep the difficult issue of what remedy would be required." See further Sloan 2005, p. 492, arguing that the illegal capture "violated state sovereignty and the human rights of the accused."

refer to general human rights, it would have more discretion in finding the most appropriate remedy in the case of a violation and as such would have been able to evade the rather 'automatic' sanctions in the case of a violation of the right to liberty and security, namely release and compensation. However, even if that was the reasoning of the ICTY, this would not have helped the Tribunal as it has already been shown that the Tribunal must not only adhere to (the rights from) its own Statute but also to the more general human rights (such as the right to liberty and security, which arguably also includes the remedies of this right).

Hence, although the fundamental principle of due process/the rule of law might still have been violated if Nikolić's mistreatment by the private individuals were more serious (because for that violation to materialise, it is irrelevant which entity is responsible for the violation), the Chamber's conclusion that no violation of State sovereignty or Nikolić's human rights had occurred appears to have been triggered by the assumed fact that Nikolić was kidnapped and mistreated by private individuals. And because the Trial Chamber seems to be of the opinion that private individuals cannot violate the sovereignty of a State or human rights, Nikolić's arguments were rejected. In that respect, one can only agree with Sloan who notes in his commentary to this decision that

> Nikolić's lack of success in the motions appears to have been linked in no small way to the decision on the part of the defence counsel to agree to assumed facts and, in particular, to agree that Nikolić's captors in the FRY were 'unknown individuals having no connection with SFOR and/or the Tribunal' [original footnotes omitted, ChP].[547]

One cannot deny that there seems to be some friction in the outcome of this decision, a friction which is caused by the fact that the Trial Chamber, on the one hand, concludes that the assumed facts show that Nikolić was abducted and mistreated during his abduction and, on the other hand, does nothing with that conclusion. As explained above, one could argue that the Tribunal, now that it has admitted that it will take the ultimate form of responsibility (namely by divesting jurisdiction) in very serious cases, is also perfectly able to take responsibility for less serious violations committed in the pre-trial phase (by unknown individuals). Thus, perhaps the judges could also have stated that the assumed facts mean that Nikolić is entitled to lighter, less far-reaching remedies (than the *male detentus* remedy) for the abduction and his (not so serious) mistreatment, and that it now only needs to be determined, via an evidentiary hearing, whether the assumed facts have in fact occurred in reality. If the Chamber had taken such a stance, it would have met Nikolić's very reasonable request that the Chamber, if it did not grant him the (ultimate) relief sought (namely his release and the dismissal of the indictment

[547] Sloan 2003 B, p. 551.

against him), would grant him "such other relief that the Court deems appropriate".[548]

A final point which must be made before turning to the Appeals Chamber's decision is that the Trial Chamber is clearly not in favour of the *male captus bene detentus* rule as interpreted by the Trial Chamber itself, namely "that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court".[549] After all, the words "regardless of" entail that the judges can *always* exercise their jurisdiction, *no matter what* happened during the proceedings of bringing a person into the power of the court. It is clear that this idea is not supported by the Trial Chamber for it has stated that "[d]ue process of law also includes questions such as (…) how an Accused has been brought into the jurisdiction of the Tribunal".[550] This means that the circumstances of how an accused came into the power of the court may influence the decision as to whether or not jurisdiction should be exercised in this specific case. Therefore, a maxim which *automatically* upholds the exercise of jurisdiction, *no matter what* had happened during the pre-trial phase, is arguably not endorsed here. In fact, the Trial Chamber, while neither following the strict *male captus male detentus* reasoning of the Defence,[551] seems nevertheless more interested in the ideas behind this latter maxim when it writes, referring to *the male captus male detentus* case (*Ebrahim*), that the Prosecution must come to court with clean hands, implying that if the Prosecution did not do so, the Trial Chamber would follow the *male detentus* route.[552]

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[548] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 18. See also Sluiter 2003 B, p. 947: "I agree with the Chamber that in such circumstances, release of the accused would be a disproportionate remedy. However, one wonders why the Trial Chamber, as the Appeals Chamber did in *Barayagwiza*, did not consider alternative remedies. In this respect, one can envisage the reduction of the sentence, in case of conviction, or financial compensation, in case of acquittal."

[549] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 70 and n. 492.

[550] See ns. 528 and 542 and accompanying text.

[551] After all, a *male captus* situation ("an irregularity has occurred in the arrest of the Accused") does not *automatically* lead ("and therefore") to a *male detentus* situation ("should bar any further exercise of jurisdiction"). See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 70. Only a *serious male captus might* lead to the dismissal of jurisdiction. Hence, there are two 'buts' here. First of all, there must be not just any irregularity but a serious *male captus*. Although the Defence alleged that this was the case here, the Trial Chamber did not concur. Furthermore, *even if* there was such a serious *male captus*, then this does not *automatically* lead to the verdict *male detentus*. (Although the Trial Chamber should, of course, come up with extremely good reasons to entertain jurisdiction in such a case.)

[552] See also Sloan 2003 B, pp. 547-548: "While not explicitly endorsing the *male captus, male detentus* approach over that of *male captus, bene detentus*, the trial chamber did appear to disapprove of the latter approach given its clear willingness to look into the nature of the accused's capture. Moreover, it specifically applied aspects of some of the national decisions which followed the *male captus, male detentus* approach [original footnote omitted, ChP]." See also *ibid*., p. 552: "[T]he trial chamber's emphasis on its obligation to ensure due process of law and its endorsement of some of the principles expressed by the national courts following the *male captus, male detentus* approach – specifically its

However, many will also argue that despite all these theoretical deliberations and commendable ideas, the factual outcome of the case is still that the court continues to exercise its jurisdiction (*bene detentus*), notwithstanding the (assumed) fact that Nikolić was kidnapped – and mistreated during his kidnapping – before being brought to the ICTY (*male captus*). The Trial Chamber could perhaps have distanced itself even more from the rather old-fashioned *male captus bene detentus* reasoning if it had remedied the assumed violations suffered by Nikolić, even if those remedies had not led to a *male detentus* outcome. Such an approach would have brought more flexibility into a system which sometimes seems too much focused on the two ultimate and extreme remedies: *bene detentus* or *male detentus*.

Nikolić appealed the decision of the Trial Chamber, thus ensuring that the Appeals Chamber of the ICTY had for the first time to give its opinion on the *male captus* discussion.[553]

Reading the Appeals Chamber's central question[554] and its strategy on how to tackle the problem at hand,[555] it is apparent that the judges – in contrast to their colleagues in the Trial Chamber – wished to address the issue of the remedies first, before turning to the specifics of the case.[556] They started with a theoretical framework – in which cases of violations of State sovereignty and human rights in general is the remedy of setting aside jurisdiction appropriate? – to which they later wanted to apply the facts of this specific case. If these facts indeed warranted the requested remedy, then it also had to be determined whether these violations could

comment that the prosecution is obliged to come before a trial chamber of the ICTY with 'clean hands' – might be taken as an indication of how it would rule if the OTP and/or SFOR were implicated in the capture [original footnotes omitted, ChP]."

[553] The following examination of the ICTY Appeals Chamber's decision in *Nikolić* has, to a large extent, been taken from Paulussen 2008.

[554] See ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 3: "The question presented in this appeal is whether the International Tribunal can exercise jurisdiction over the Appellant notwithstanding the alleged violations of Serbia and Monten[e]gro's sovereignty and of the Accused's human rights committed by SFOR, and by extension OTP, acting in collusion with the unknown individuals who abducted the Accused from Serbia and Montenegro."

[555] See *ibid*., para. 18: "The Appeals Chamber observes that the basic assumption underlying the Defence submissions is that setting aside jurisdiction by the International Tribunal is the appropriate remedy for the violations of State sovereignty and/or human rights that allegedly occurred in this case. That assumption requires further scrutiny. For, if the setting aside of jurisdiction is not the appropriate remedy for such violations, then, even assuming that they occurred and that the Defence is correct that the responsibility for the actions of the Accused's captors should be attributed to SFOR, jurisdiction would not need to be set aside. Thus, the first issue to be addressed is in what circumstances, if any, the International Tribunal should decline to exercise its jurisdiction because an accused has been brought before it through conduct violating State sovereignty or human rights. Once the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine whether the facts of this case are ones that, if proven, would warrant such a remedy. If yes, then the Appeals Chamber must determine whether the underlying violations are attributable to SFOR and by extension to the OTP."

[556] The judges of the Trial Chamber did not (really) have to go into the matter of the remedies since, in their opinion, the facts of the case did not indicate violations of the sovereignty of Serbia and Montenegro, the human rights of Nikolić and the principle of due process in the first place.

in fact be attributed to SFOR and by extension to the OTP. At least two comments can be made here.[557]

First, as with the Trial Chamber, the Appeals Chamber seemed too focused on the ultimate remedy of setting aside jurisdiction. Admittedly, that is the remedy the Defence is aiming for, but Nikolić's basic objective is arguably that the injustice of his abduction is addressed and repaired – for example, by other, less drastic remedies if the desired remedy is not granted.[558] By formulating its strategy as such, the Appeals Chamber limited the issue of the remedies to an 'all-or-nothing' formula, which leaves no room for differentiation and which will ensure that the suspect will rarely come off best. After all, bearing in mind that an international criminal tribunal has the task not only of protecting the human rights of the suspect but also of prosecuting very serious crimes, it will – and within the limits of the law, it should – do everything in its power to prevent the termination of the proceedings.

Secondly, a crucial element in the argumentation of the Defence was that a kidnapping as such (irrespective of who was responsible for it and how much violence was used) constitutes an egregious violation of the accused's rights

[557] A further comment is that the central question does not contain the allegation that the abduction violated due process of law – even though that allegation is correctly mentioned in the paragraph preceding the one containing the central question, where the Appeals Chamber provides a summary of the Trial Chamber's conclusions. A short remark like the one made by the Trial Chamber in para. 106 of that Chamber's decision, see also n. 510 ("As both arguments [relating to the issues of human rights violations and violations of due process of law, ChP] are closely connected to each other, they will be discussed here together.") would probably have been enough to at least diminish the somewhat hasty and incomplete impression one gets when reading the Appeals Chamber's decision. Several small (spelling) errors contribute to that feeling. An example can be found in para. 19, where the Appeals Chamber states that Nikolić is charged with war crimes and crimes against humanity. However, even though Nikolić was indeed initially indicted for war crimes and crimes against humanity (see also ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 2), he was 'only' charged with crimes against humanity at the time of the proceedings, see also n. 440 and accompanying text.

[558] See again ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 18: "The relief sought by the Accused is his release and the dismissal of the Indictment against him *or such other relief that the Court deems appropriate* [emphasis added, ChP]." In fact, Sluiter (2004 C, pp. 245-246) explains that the judges are not even bound by the submissions of the parties. When writing on the UK and US briefs in the *Todorović* case, he notes: "The briefs also harbour a misconception as to the role of the judiciary when it comes to the question of relief. The shared argument is that even if the facts asserted by the defence are true, they do not warrant the relief the defendant seeks, namely release and return to the Federal Republic of Yugoslavia. One notices here the apparent position, that the Trial Chamber has no option other than to either grant or refuse the *requested* relief. However, in the ICTY procedure, the Chamber is not limited to the application of the parties. The Chamber may, on the basis of presented evidence, rule that release is not an appropriate remedy and instead order alternative remedies. (...) Taking account of Rule 5 (C), the Trial Chamber decides independently on an appropriate legal remedy [emphasis in original and original footnotes omitted, ChP]." Rule 5 (C) of the ICTY RPE reads: "The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness." Sluiter (*ibid.*, p. 246, n. 19) clarifies: "Although Rule 5 applies to violations of the Rules or Regulations, it offers a good starting point when dealing with violations of other applicable law." *Cf.* also Lamb 2000, pp. 242-243 and Henquet 2003, p. 124.

justifying a bar to the exercise of jurisdiction.[559] The Appeals Chamber was aware of this argument.[560] Indeed, as will be shown *infra*, under certain circumstances, the Appeals Chamber seemed to concur with the more specific view that an abduction, irrespective of who was responsible for it, can lead to a refusal of jurisdiction.[561] However, if that is indeed the Appeals Chamber's position on this, then both its central question and strategy are confusing, since they give rise to the impression that the Tribunal will only set aside its jurisdiction if the violations requiring that remedy can be connected to the Tribunal.[562]

Leaving aside that matter for now, it is time to look at the two questions founding the Appeals Chamber's theoretical framework: 1) under what circumstances does a violation of State sovereignty require jurisdiction to be set aside; and 2) under what circumstances does a human rights violation require jurisdiction to be set aside?

With respect to the first question, the Appeals Chamber started by saying that this is "a novel issue for this Tribunal"[563] and that "[i]n the absence of clarity in the Statute, Rules and jurisprudence of the International Tribunal, the Appeals Chamber will seek guidance from national case law, where the issue at hand has often arisen, in order to determine State practice on the matter".[564] This approach, which was

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[559] See ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 15: "The Defence contends that the Trial Chamber erred in finding that the circumstances of the Accused's arrest were insufficiently egregious to justify a discretionary stay of the proceedings. The Defence argues that, following the reasoning of the Appeals Chamber of the International Criminal Tribunal [for Rwanda, ChP] ("ICTR") in *Barayagwiza*, a court may decline to exercise its jurisdiction in cases where violations of an accused's rights are so egregious that to exercise jurisdiction would be detrimental to the court's integrity. The Defence contends that kidnapping constitutes such an egregious violation. In order to deter future kidnappings, the Defence stresses that the International Tribunal should only exercise jurisdiction over indictees who were transferred to the International Tribunal through lawful means. Exercising jurisdiction in this case amounts to condoning kidnappings that are executed with minimal violence."

[560] See *ibid*. With respect to the position that it should be irrelevant as to who is responsible for the abduction, see also the following and more general sentence in *ibid*., para. 18, where the connection with the Tribunal is also not mentioned: "[T]he basic assumption underlying the Defence submissions is that setting aside jurisdiction by the International Tribunal is the appropriate remedy for the violation of State sovereignty and/or human rights that allegedly occurred in this case."

[561] It is, however, doubtful whether the Appeals Chamber also agrees with the idea that an abduction, irrespective of how much violence was used during the seizure (this may include an abduction with minimal violence), can lead to the ending of the case, see *infra*.

[562] After all, the central question reads: "The question in this appeal is *whether the International Tribunal can exercise jurisdiction* over the Appellant *notwithstanding the alleged violations* (…) *committed by SFOR, and by extension OTP*, acting in collusion with the unknown individuals [emphasis added, ChP]". (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 3.) Furthermore, the last part of the strategy states: "Once the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine whether the facts of this case are ones that, if proven, would warrant such a remedy. *If yes, then the Appeals Chamber must determine whether the underlying violations are attributable to SFOR and by extension to the OTP* [emphasis added, ChP]." (*Ibid*., para. 18.)

[563] *Ibid*., para. 20.

[564] *Ibid*.

reapplied when addressing question two, reflects the Trial Chamber's approach to seeing which of the elements of the inter-State discussion on *male captus bene/male detentus* might play a role in the case at hand. However, whereas the Trial Chamber examined the inter-State context rather comprehensively,[565] the theoretical framework of the Appeals Chamber *prima facie* seemed less impressive: it warranted just four paragraphs,[566] addressing nine national cases.[567]

Besides this quantitative aspect, which admittedly is not necessarily a reliable criterion for the quality of the overview, one can focus on the *sort of cases* the judges reviewed in order to find the principles from the inter-State context. The Appeals Chamber appeared to use a specific criterion here: almost all the cases the judges referred to were decided by the highest judicial authorities of a State.[568] Such a criterion might very well be justifiable, since these institutions and their cases have *de iure* and *de facto* great legal authority.[569]

Continuing this line of reasoning, it is understandable that the Appeals Chamber also paid some – albeit perhaps too little – attention in its overview to inter-State *male captus* case law decided by institutions with perhaps even greater legal authority: the ECmHR and the ECtHR (obviously taking into account that these institutions, in contrast to national courts, do not have to decide whether they can try the suspect notwithstanding the *male captus*).[570]

However, it is a pity that the Appeals Chamber, in contrast to the Trial Chamber, did not refer to decisions from, for example, the HRC.[571]

Admittedly, being a quasi-legal institution, its decisions might not have the same authority as those from genuine international human rights courts, but its international perspective on inter-State *male captus* cases would nevertheless be of value to the ICTY judges.

Returning to question one, the Appeals Chamber referred on the one hand to the French *Argoud*, German *Stocké* and US *Alvarez-Machain* cases to show that several (supreme) courts "have held that jurisdiction should not be set aside, even though

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[565] See ns. 498-499 and accompanying text.

[566] See ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, paras. 21-23 (concerning the issue of State sovereignty) and para. 29 (concerning the issue of human rights).

[567] *Argoud*, *Stocke*, *United States v. Alvarez-Machain*, *Jacob-Salomon*, *State v. Ebrahim*, *Bennet*, *Eichmann*, *Barbie* and *Toscanino*. (Appeals Chamber's own (and not always correct) notation.) Short references to cases in footnotes are not included here.

[568] Exceptions are the *Jacob-Salomon* and *Toscanino* cases. As already explained in n. 407 of Chapter V, *Jacob-Salomon* was not decided by a judicial body. This kidnapping case was settled directly between the Governments of Switzerland and Germany after the latter proposed the termination of the initiated arbitral procedure. Furthermore, *Toscanino* was 'merely' decided by a US Court of Appeals.

[569] See also Chapter IV.

[570] Although only the reference to the *Stocké* case (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 21) could be found in the Appeals Chamber's overview (*ibid*., paras. 21-23 and 29), the *Öcalan* (*ibid*., para. 26, n. 30) and *Soering* (*ibid*., para. 30, n. 36) cases were also mentioned in the decision. (Note, however, that the *Soering* case cannot be seen as a *male captus* case.)

[571] See n. 532 and accompanying text.

there might have been irregularities in the manner in which the accused was brought before them".[572]

On the other hand, the Appeals Chamber noted that "there have been cases in which the exercise of jurisdiction has been declined",[573] referring to the Swiss-German *Jacob-Salomon*, (which, it should be remembered, did not involve a court declining jurisdiction),[574] South African *Ebrahim* and the British *Bennett* cases.

It then turned to two cases which concerned "the same kinds of crimes as those falling within the jurisdiction of the International Tribunal":[575] the Israeli *Eichmann* and French *Barbie* cases.

From these eight cases, the Appeals Chamber, while rightly warning that "it is difficult to identify a clear pattern in this case law, and caution is needed when generalising",[576] distilled two principles, which "seem to have support in State practice as evidenced by the practice of their courts":[577]

> First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such ("Universally Condemned Offences"), courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction. The initial *iniuria* has in a way been cured and the risk of having to return the accused to the country of origin is no longer present.[578]

To begin with the latter (and not very carefully formulated)[579] principle: Chapter V has shown that there is indeed evidence in the practice of courts that if two States have resolved the problem of an alleged violation of State sovereignty amongst themselves (not resulting in a request for the return of the suspect), or if the injured State does not complain at all about the violation, there is no duty for the prosecuting State to return the suspect to the injured State.[580]

That would also mean that there is in principle no reason for a judge, as an element of that prosecuting State, not to proceed with the case. As explained earlier, a suspect should, of course, have *ius standi* to plead an alleged violation of State

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[572] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 21.
[573] *Ibid*., para. 22.
[574] See n. 568 of this chapter and n. 407 of Chapter V.
[575] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 23.
[576] *Ibid*., para. 24.
[577] *Ibid*.
[578] *Ibid*.
[579] To take the example of the State sovereignty violating abduction: in many cases where the injured State complained about an abduction by the forum State, the problem was solved diplomatically by the return of the abducted person from the forum State to the injured State (see, for example, the *Jacob-Salomon* case). If such a diplomatic resolution took place, it was not "easier" for a court to assert jurisdiction: it was in fact impossible (because there was not going to be a trial at all).
[580] See also Michell 1996, p. 422.

sovereignty,[581] but arguably, if there is no request by the injured State for the return of the suspect, the suspect's argument for returning him to the injured State is doomed to failure.[582]

That does not mean that the judge in such cases should proceed with the case – there might be other reasons to refuse jurisdiction, for example, in relation to human rights/due process considerations – but the hurdle of an alleged violation of State sovereignty, which could prevent him from exercising jurisdiction, will have been overcome.

Turning now to the Appeals Chamber's first principle, one can wonder how the deduction of a principle, which "seem[s] to have support in State practice as evidenced by the practice of their courts", is achievable in the first place from only two cases.[583] However, even if that were possible, a few remarks are in order with respect to the way the Appeals Chamber uses these cases.

As was explained in the previous chapter[584] and as Sloan has correctly previously observed,[585] it is true that the Israeli Supreme Court proceeded with Eichmann's case (*bene detentus*) notwithstanding the fact that Eichmann was abducted from Argentina (*male captus*).

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[581] It seems that the Appeals Chamber is not defending the idea that a person has no *ius standi* to raise a violation of State sovereignty, but only that it might be easier for courts to assert their jurisdiction if the injured State does not protest and demand the return of the suspect. However, Sloan does not agree with that. He is of the opinion that the Appeals Chamber *does* support the idea that a person has no standing to raise such a violation (thus contradicting its own views in the *Tadić* case), see Sloan 2006, p. 331.

[582] See also n. 178 of Chapter III.

[583] This point is also criticised by Sloan (2006, pp. 328-329): "It is, of course, perfectly appropriate for the ICTY to turn to national law where there are gaps in international criminal law – a relatively young part of international law – and it has done so many times in the past. But it must be acknowledged that this gap-filling process vests in the ICTY judges a tremendous discretion in deciding what national jurisdictions to consult (it would be impractical to consult the national jurisdictions of each and every state in the world), what the characteristics of national law in the jurisdictions consulted are and which particular aspects of this national law are applicable to the ICTY in view of its many differences from a national system. While this discretion is necessary and desirable, with it must come a duty on the part of the judges to be balanced and comprehensive (or at least relatively so) in their analysis of the national law and clear in their reasoning as to why the law of one national jurisdiction is apposite – and why that of another is not. Unfortunately, in the *Nikolić* decision the Appeals Chamber's treatment of national case law was flawed; it was neither comprehensive – giving the impression of selectivity – nor clearly reasoned, at times relying on cases that are either inappropriate or controversial, and at times failing to cite a source at all. Despite its acknowledgement that 'it is difficult to identify a clear pattern in [the national criminal] case law' on the question of the exercise of jurisdiction in the face of an illegal or irregular interstate capture, and that 'caution is needed when generalising', the Appeals Chamber appeared to disregard its own good advice and proceeded to generalise based on a small number of cases, several of which were of only limited value to the ICTY. Based on a perfunctory review of *Eichmann*, *Barbie* and a handful of other cases, the Appeals Chamber reduced the detailed and complex jurisprudence on the subject of irregular capture from the world's national courts to two principles and a balancing test [original footnotes omitted, ChP]." (See also n. 1 of Chapter IV.) For another (and arguably rather strange) opinion on this, see Acquaviva 2007, p. 630, who writes about the Appeals Chamber's "meticulous analysis of the domestic case law on the seizure of suspects without authorization by local authorities".

[584] See n. 626 and accompanying text of that chapter.

[585] See n. 625 and accompanying text of Chapter V.

However, the judges did not apply this *male captus bene detentus* rule *because* Eichmann was accused of very serious crimes; it should be remembered[586] that the judges in the District Court of Jerusalem were of the opinion that "[i]t is *an established rule of law* that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State [emphasis added, ChP]".[587] Hence, according to them, the rule was applicable to *any* person standing trial, not necessarily a person charged with very serious crimes.

Admittedly, the seriousness of Eichmann's crimes *did* play a role for the Israeli judges, but *not* to defend the "established rule of law" summarised by *male captus bene detentus*; it played a role to defend the judges' usage of the universality principle,[588] whose rationale is that some crimes are so serious that even a State with no direct jurisdictional link can try a suspect charged with these serious crimes so that the latter can never escape justice. By using the universality principle, the Israeli Supreme Court claimed that it had the laws enabling it to exercise jurisdiction over Eichmann. However, as explained in Subsection 1.2 of Chapter III, to start a trial, one must have not only the legal means, but also the person himself (jurisdiction *ratione personae*).[589] These are two separate issues and it is only in relation to the second where the problem of *male captus bene/male detentu*s comes in.[590]

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[586] See n. 15 of Chapter I.

[587] District Court of Jerusalem, *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61, para. 41 (36 *International Law Reports* 1968, p. 59). This observation was confirmed by their colleagues in the Israeli Supreme Court, see again n. 15 of Chapter I of this book. See also the last sentence of the quotation in n. 590 of the present chapter.

[588] See Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 12 (36 *International Law Reports* 1968, p. 304): "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, *pursuant to the principle of universal jurisdiction* and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant [emphasis added, ChP]."

[589] Except, of course, in the case of a trial *in absentia*.

[590] See Supreme Court of Israel, *Adolf Eichmann v. The Attorney-General of the Government of Israel*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61, para. 13 (36 *International Law Reports* 1968, pp. 306-307): "The appellant is a "fugitive from justice" from the point of view of the law of nations, since the crimes attributed to him are of an *international* character and have been condemned publicly by the civilized world (…) and therefore, by virtue of the principle of universal jurisdiction, every country has the right to try him. This jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign State. Accordingly, in bringing the appellant to trial, it has functioned as an organ of international law and has acted to enforce the provisions of that law through its own laws. (…) Indeed, counsel for the appellant has here confused the question of the *substantive* penal jurisdiction of the State of Israel with the question whether his client enjoys immunity from the exercise of that jurisdiction against him by reason of the fact of his abduction. These two questions are entirely separate from one another. As has been indicated, the moment it is conceded that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, the Court is no longer bound to investigate the manner and legality of the appellant's detention, as indeed may be gathered from the judgments upon which the District Court has rightly relied [emphasis in original, ChP]."

It is almost ironic that the ICTY judges explicitly (and correctly) state that the discussion in their decision centres on the issue of jurisdiction *ratione personae*,[591] but then negate their own warning by using quotations from the *Eichmann* case which have nothing to do with that matter – particularly since these quotes can be found in the very same paragraph in which the Israeli Supreme Court corrects Eichmann's counsel for making exactly the same mistake.[592]

Looking at the facts of the second case, that of Klaus Barbie, one wonders why the Appeals Chamber includes this case in the part of its decision entitled "Under what circumstances does a *violation of State sovereignty* require jurisdiction to be set aside [emphasis added, ChP]?" After all, *Barbie* involved an alleged disguised extradition, which cannot lead to a violation of a State's sovereignty.[593] However, perhaps one should look beyond this fault in classification and see what the Appeals Chamber is trying to clarify, namely that the French Supreme Court upheld jurisdiction notwithstanding (alleged) irregularities in the arrest – a disguised extradition – because the suspect was accused of very serious crimes. As already explained in the previous chapter, that might indeed be the case.[594] Nevertheless, even if that were the outcome of the *Barbie* case, one can seriously doubt whether one can conclude, on the basis of that case only, that there is a principle, "seem[ingly] (…) [having] support in State practice as evidenced by the practice of their courts"[595] advocating the idea that, notwithstanding irregularities in the arrest proceedings, courts have not refused jurisdiction because of the seriousness of the crimes involved. With respect to the more specific irregularity of an abduction violating another State's sovereignty (which did not occur in the *Barbie* case), one can wonder, on the basis of the Appeals Chamber's analysis, if there is any supporting State practice as evidenced by the practice of courts at all.

However, as was shown in the previous chapter, there are more cases – not mentioned by the Appeals Chamber – in which one may find (implicit) evidence for the idea that judges seem to take the seriousness of the alleged crimes into account in deciding that jurisdiction/extradition to a third State should not be refused in the case of a pre-trial irregularity.[596] (The previous chapter has also shown that after the

[591] See ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 19.
[592] See n. 590.
[593] See n. 77 and accompanying text of Chapter III. See also n. 499 of Chapter V where the same mistake is made by Conforti. (Note that the Appeals Chamber also referred to Conforti, see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 23, n. 28.)
[594] See n. 499 and accompanying text of Chapter V.
[595] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 24.
[596] This can most clearly be discerned from cases such as *Schmidt* (luring) and *Latif* (luring). In *Mullen*, such a balancing exercise was also used, but in that case, the English judges felt that it was more important to legally *disapprove* of the *male captus* (a disguised extradition in which the British authorities were involved) by refusing jurisdiction, even if Mullen was charged with (and in fact already convicted for) serious crimes, namely IRA terrorism. The idea that the seriousness of the alleged crimes should play a role in deciding whether or not jurisdiction/extradition has to be refused may also be

ICTY Appeals Chamber's decision in *Nikolić*, other inter-State decisions were issued which support this idea, but obviously, the Appeals Chamber could not have taken those cases into account.)[597]

Notwithstanding this, the Appeals Chamber added its own observations regarding this matter.[598]

It stated that there is a legitimate expectation that persons accused of 'Universally Condemned Offences' are quickly brought to justice[599] and that this expectation "needs to be weighed against the principle of State sovereignty and the fundamental rights of the accused".[600] With respect to State sovereignty, it observed:

> [T]he damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. This is all the more so in cases such as this one, in which the State whose sovereignty has allegedly

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found in the Australian *Levinge* case, where the judges stated more generally that "it is necessary to balance the public interest in preventing the unlawful conduct against the public interest in having the charge or complaint determined. This is not to say that the end can justify the means and that the more serious the charge the greater is the scope for the prosecution to engage in unlawful conduct. But conduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter", see n. 158 and accompanying text of Chapter V. See further the German case from 1986 (BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48), where even an abduction by German agents did not lead to a refusal of jurisdiction. For older cases, one may refer to the *Ker* case (see n. 26 and accompanying text of Chapter V) and, perhaps, the *Argoud* case. Although the judges in this latter case adhered to a rather strict *male captus bene detentus* reasoning, comparable with the one of the *Eichmann* case, the words of rapporteur Comte may reflect what the judges may have thought when they issued their decision, see n. 410 and accompanying text of Chapter V.

[597] One could mention here the German case *Al-Moayad* (luring) and the Namibian case *Mushwena* (alleged disguised extradition/irregular transfer). These cases also referred to the *Nikolić* case. As already explained in the context of these two cases, one could argue, now that the ICTY Appeals Chamber's reference to the *Eichmann* case (as support for the idea that the seriousness of the alleged crimes must be taken into account in the *male captus* discussion), is incorrect, that the references in *Al-Moayad* and *Mushwena* to *Nikolić* (to support this idea) are also incorrect. However, as will now be shown in the main text, the ICTY Appeals Chamber also made some observations of its own concerning this issue (after it had discussed the inter-State context). And to those observations, these two cases can, of course, safely refer (as long as they do not qualify them as evidence of *State* practice, see *Al-Moayad*).

[598] See ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 24: "Drawing on these indications from national practice, the Appeals Chamber adds the following observations."

[599] See *ibid*., para. 25.

[600] *Ibid*., para. 26.

> been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction [original footnote omitted, ChP].[601]

After having stated that this observation, which, incidentally, is somewhat reminiscent of the ECtHR's statement that "[i]nherent in the whole of the Convention is a search for a fair balance between the demands of the community and the requirements of the protection of the individual's fundamental rights",[602] would count *a fortiori* with respect to abductions carried out by 'real' private individuals,[603] because those actions "do not necessarily in themselves violate State sovereignty",[604] the Appeals Chamber concluded that "even assuming that the conduct of the Accused's captors could be attributed to SFOR and that the latter is responsible for a violation of Serbia and Montenegro's sovereignty, the Appeals Chamber finds no basis, in the present case, upon which jurisdiction should not be exercised".[605]

To better understand the possible implications that follow from these observations, it is appropriate to first look at question two of the Appeals Chamber's theoretical framework: under what circumstances does a human rights violation require jurisdiction to be set aside?

With respect to this second question, the Appeals Chamber, after a short review of the Trial Chamber's decision in *Nikolić*, the US *Toscanino* case and two other cases from the UN *ad hoc* Tribunals (the previously discussed ICTY *Dokmanović* case and the still-to-discuss ICTR *Barayagwiza* case), concluded that it "agrees with these views".[606] That does not, however, clarify what the Appeals Chamber's position is, as these views are arguably not identical. The differences can be found between the *Toscanino* and the *Dokmanović* cases on the one hand and the *Nikolić* and *Barayagwiz*a cases on the other.

In *Toscanino*, and only focusing now on the first reason of the judges of that case to dismiss jurisdiction, namely the reason related to constitutional law/due process/the rights of the suspect,[607] the US Second Circuit Court of Appeals stated that

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[601] *Ibid*.
[602] ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 88. See also ECtHR (Plenary), *Case of Soering v. The United Kingdom*, Application No. 14038/88, 7 July 1989, para. 89.
[603] Namely private individuals whose actions are not instigated, acknowledged or condoned by a State, international organisation or other entity, see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 26.
[604] *Ibid*. See also the discussion of this point in the context of the Trial Chamber's decision and Subsection 3.2.2 of Chapter III.
[605] *Ibid*., para. 27.
[606] *Ibid*., para. 30.
[607] It should be remembered that one could identify three reasons why the Court in *Toscanino* dismissed jurisdiction in this case. The other two are: supervisory power over the administration of criminal justice and international law. See Subsection 1.2 of Chapter III for more information.

> we view due process as now *requiring a court to divest itself of jurisdiction* over the person of a defendant where it has been acquired as the result of the *Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights* [emphasis added, ChP].[608]

Hence, *Toscanino* shows that there is an obligation for a court to refuse jurisdiction, but only if the prosecuting forum (*in casu* the US Government) is responsible for the violations of the suspect's rights. Furthermore, those violations must be very serious. Although the words of the *Toscanino* case itself ("deliberate, unnecessary and unreasonable") are still rather general, and although one may also find support in the case for the idea that a forcible abduction *as such* (without serious mistreatment) must lead to the ending of the case, it was shown earlier that cases after *Toscanino*, such as *Lujan* (see Subsection 1.2 of Chapter V), have interpreted the case as a very narrow exception to the *male captus bene detentus* rule because of the extreme facts involved.[609] Another such case is the luring case of Yunis, see again Subsection 1.2 of Chapter V. In this case, the judges stated that their case did not involve "the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*".[610] The ICTY judges in the *Dokmanović* case, where the prosecuting forum (the Tribunal, *in casu* the OTP) was involved in a luring operation, followed *Yunis* and stated that, in the context of the *male captus* situation of luring, "there was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not mistreated in any way (…). There was nothing about the arrest to shock the conscience [original footnote omitted, ChP]."[611]

Conversely, the *Nikolić* and *Barayagwiza* cases, explicitly discussing the (from the common law system stemming) abuse of process doctrine,[612] held that *even without involvement of the prosecuting forum* (the Tribunal), serious[613] and

[608] US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 275.
[609] It should be remembered that Toscanino, in the context of his abduction, was tortured for nearly three weeks. Note that Circuit Judge Anderson in the *Lujan* case also asserted that the *Toscanino* judges themselves would only divest jurisdiction in the case of an abduction accompanied by serious mistreatment (and not in the case of a 'normal' forcible abduction). See n. 97 of Chapter V.
[610] US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920. See also n. 177 and accompanying text of the previous chapter.
[611] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 75. See also n. 255.
[612] Note, however, that the *Toscanino* and *Dokmanović* cases also made some brief references to this doctrine, see US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 276 (in its discussion of the second reason to dismiss jurisdiction (supervisory power over the administration of criminal justice)) and ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, paras. 68, 73 and n. 104.
[613] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.

egregious[614] violations of the suspect's rights/(very) serious or egregious[615] mistreatment could lead to the refusal of jurisdiction.[616] Furthermore, these tests seem – at least in theory – not to be as high as the *Toscanino* standard ("cruel, inhumane and outrageous"). The Trial Chamber's judges in the *Nikolić* case, for example, referred to an accused being "very seriously mistreated, *maybe even* subjected to inhuman, cruel or degrading treatment, or torture [emphasis added, ChP]".[617] The *Nikolić* and *Barayagwiza* cases also differ in another aspect: they held

[614] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111. See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.

[615] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114.

[616] See *ibid.*, paras. 111 and 114: "[T]his Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of the particular case, proceeding with the trial of the accused would contravene the court's sense of justice". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]." "[T]he Chamber holds that, in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated* [emphasis added, ChP]." (Note that in the Appeals Chamber's decision (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 28), the first words of this quotation are not correctly printed.) See further ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 73-74: "[U]nder the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. (…) It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." It must be noted, however, that the ICTY Appeals Chamber does not mention the arguably most important words of the *Nikolić* and *Barayagwiza* cases, namely where they explicitly state that it is irrelevant which entity was responsible for the mistreatment/the violations. This may be seen as proof of the idea that the Appeals Chamber is of the opinion that the Tribunal will only refuse jurisdiction if the Tribunal *itself* is responsible for the mistreatment/the violations. However, one can also argue – and this is probably the better view – that the fact that the Appeals Chamber refers to these two cases is enough proof that it follows (the core of) these cases, especially now that it *does* mention the Trial Chamber's words earlier quoted in this footnote that "[t]his would certainly be the case where…" (see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 28); this shows that the Appeals Chamber is aware of the Trial Chamber's view that the latter will also consider refusing jurisdiction in case SFOR/OTP was/were not involved in the *male captus*. In addition, the Appeals Chamber does not explicitly disapprove of the judges' view in *Nikolić* and *Barayagwiza* that it is irrelevant which entity was responsible for the mistreatment/the violations either.

[617] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114. Two sentences later, the Trial Chamber even deleted the word "very": "if that person was brought into the

that there is no obligation, but rather a discretion for judges to decide whether or not jurisdiction should be refused.[618]

It appears that the *Nikolić* Appeals Chamber picked the most far-reaching elements from those four cases when it observed that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined".[619] After all, that could be interpreted as meaning that the Appeals Chamber does not necessarily require the involvement of the Tribunal in the violations to refuse jurisdiction in certain cases.[620] Furthermore, by choosing the verb "require", the Appeals Chamber states that some human rights violations are so serious that jurisdiction *must* (and not may) be refused. Finally, the Appeals Chamber followed the (at least in theory) lower 'serious and egregious' violation standard.[621]

However, the Appeals Chamber promptly warned that these would be "exceptional cases"[622] and that "the remedy of setting aside jurisdiction will (…) usually be disproportionate"[623] because "[t]he correct balance must (…) be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law".[624]

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jurisdiction of the Tribunal after having been seriously mistreated." After stating that it concurred with the judges in the *Barayagwiza* case (who used the adjectives "serious" and "egregious"), the Trial Chamber also referred to the word "egregious" (see *ibid.*). See also *ibid*., para. 111.

[618] Nevertheless, it must also be stated that the discretion mentioned in *Nikolić* and *Barayagwiza* is relative in nature. For instance, in *Nikolić* (see n. 616), one can read: "[T]his Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of the particular case, proceeding with the trial of the accused would contravene the court's sense of justice"." One can imagine that if the Tribunal is of the opinion that to proceed with the case, in view of certain serious circumstances, contravenes its sense of justice, it *will* not exercise jurisdiction, even if it officially has a discretion. The same can be said about the *Barayagwiza* case, where it was stated (see *ibid.*): "It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." Again, if the court is of the opinion that to proceed with the case, in view of the serious *male captus*, proves detrimental to the court's integrity, it *will*, of course, not continue with the case (unless it wants to undermine its own integrity). *Cf*. in that respect also Jones and Doobay 2004, p. 95 (commenting on the *Bennett* case), see n. 412.

[619] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30.

[620] See Sluiter 2004 C, pp. 246-247: "The court's integrity is, of course, more obviously damaged in case of involvement of the Prosecutor, who is expected to come with "clean hands" to the Trial Chamber. However, in Nikolić it has also been established that serious human rights violations prior to trial may in and of themselves require that the exercise of jurisdiction is declined [original footnotes omitted, ChP]." (Sluiter refers here to ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30.)

[621] For the "egregious" term, see *ibid*., paras. 31-32.

[622] *Ibid*., para. 30.

[623] *Ibid*.

[624] *Ibid*.

As explained earlier, one can argue that it seems indeed reasonable that under certain circumstances, for example under the abuse of process doctrine, judges should be able to balance all the different interests at stake and to use their discretion to decide what the most appropriate remedy in a specific case is (and that, in that balancing exercise, he can very well take into account that a suspect is charged with very serious crimes and that the trial, if possible, should continue). However, there is also a risk in this discretion, a risk that clearly reprehensible *male captus* situations are in a way approved *because* one is dealing with a suspect of very serious crimes. This can never be the case. A court can never continue to exercise jurisdiction if it is clear that members of the OTP have, for example, orchestrated an abduction in clear violation of international law and human rights. Those cases are arguably so serious and so devastating to the court's integrity that, in the words of the Appeals Chamber, "they require that the exercise of jurisdiction be declined". In that respect, one can argue that the idea of the Appeals Chamber that such *male detentus* cases would be exceptional cases should only be read to mean that one can hope that employees of the Tribunal will never resort to such *male captus* techniques. However, one cannot argue that these cases would be exceptional because, even if they occur, a court can still decide to continue the trial because of the seriousness of the crimes with which the suspect is charged; it is submitted that if they occur, they should lead to the ending of the case.

After determining that Nikolić's rights were not egregiously violated,[625] the Appeals Chamber concluded the examination of question two by stating that "even assuming that the conduct of Accused's captors should have been attributed to SFOR and that the latter was responsible for a breach of the rights of the Accused, the Appeals Chamber finds no basis upon which jurisdiction should not be exercised".[626]

The final conclusion was therefore that Nikolić's appeal had to be dismissed.[627] Putting the outcome of questions one and two together, the Appeals Chamber's decision can be summarised as meaning that jurisdiction would not be refused if, in the process of bringing a suspect of very serious crimes to justice, the sovereignty of a State is violated (even if that State were to complain about the violation and

[625] See *ibid*., para. 32. The Appeals Chamber explained (see *ibid*., para. 31) that it had reviewed *proprio motu* all the facts of the case but the decision, unfortunately, does not elaborate on this issue any further. Sloan (2006, p. 340) notes that "[t]he Appeals Chamber did not indicate whether this *proprio motu* review involved the issuance of subpoenas or orders for the attendance of additional witnesses, as is arguably permitted under the Rules. Nor does the decision of the Appeals Chamber shed even a glimmer of light on what its *proprio motu* review might have turned up [original footnote omitted, ChP]." However, importantly, this review was one of the reasons why Nikolić, after this decision, could not ask for an evidentiary hearing in the style of *Todorović* to find out what had actually happened to him, see Sloan 2006, pp. 340-341.

[626] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 33.

[627] See *ibid*., para. 34.

request the return of the suspect),[628] on the condition that the suspect's rights are not violated during that process to such an extent that jurisdiction must be refused.

Now, it is not hard to agree with the Appeals Chamber that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined". However, because it was assumed that Nikolić was the victim of an abduction, because the Appeals Chamber was apparently not very impressed by the value of State sovereignty and because the Appeals Chamber refers to passages from cases which are particularly interested in the serious mistreatment dimension,[629] it could be argued that the Appeals Chamber's *male detentus* test appears to be mainly interested in the seriousness of the mistreatment inflicted on the suspect.[630] This could mean that the Appeals Chamber would not be

[628] Although the Appeals Chamber distils the principle that it is easier for a court to assert its jurisdiction when the international imbalance or *iniuria* has been resolved (for example, by not complaining about the (alleged) violation), it does not state that *if* the injured State complains (and requests the return of the suspect), jurisdiction would be set aside. In fact, the observations in *ibid*., para. 26, where the principle is discussed in the context of the Tribunal, seem to hint that even if an injured State complains and requests the return of the suspect, jurisdiction would not be set aside: "[T]he Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State (…). *This is all the more so* in cases such as this one, in which the State whose sovereignty has allegedly been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction [emphasis added and original footnote omitted, ChP]." The emphasis shows that as the injured State has not complained about the (alleged) violation, there is no reason *at all* why jurisdiction should be refused. However, that does not mean that jurisdiction would be refused if the injured State *has* complained.

[629] See also Sloan 2006, pp. 340-341.

[630] This important point needs to be clarified in further detail. Although the reference to the *Barayagwiza* case (where there was no mistreatment of the suspect) and the test mentioned in that case ("It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74)) would not exclude a 'normal' abduction (without serious mistreatment), the Appeals Chamber's other references are particularly focused on the mistreatment aspect. First of all, the Appeals Chamber refers to the *Nikolić* Trial Chamber's words which specifically focus on the question whether Nikolić was seriously mistreated: "[W]here an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment." (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 28.) See also *ibid*., para. 31: "In the present case, the Trial Chamber examined the facts agreed to by the parties. It established that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. (…) [T]he Appeals Chamber concurs with the Trial Chamber that the circumstances of this case do not warrant, under the standard defined above, the setting aside of jurisdiction." The Appeals Chamber also referred to a passage from the *Toscanino* case dealing with the national concept of due process. These words could, in itself, encompass a 'normal' abduction but the *Toscanino* test has later been interpreted as a very restricted *male detentus* possibility. An abduction as such is not enough. What is required is in fact serious mistreatment. For example, the judges in the *Yunis* case stated that their case did not involve "the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920.) That the Appeals Chamber prefers that interpretation of the *Toscanino* case

concerned about an abduction, as long as that abduction was not accompanied by serious mistreatment.[631]

Although the Appeals Chamber may very well be right in arguing that the abduction in this case (which after all, was 'merely' executed by private individuals) was not so serious as to divest jurisdiction, the *male detentus* test of the Appeals Chamber can be interpreted as meaning that the judges would be obliged neither to refuse jurisdiction if the Tribunal *itself* were involved in an abduction (as long as that abduction was not accompanied by serious mistreatment).

It can be argued that the Appeals Chamber should have stated (at least more clearly)[632] that the judges would also refuse jurisdiction if employees of the Tribunal itself intentionally[633] committed serious (procedural) irregularities in the process of bringing a suspect to trial, such as an abduction. In such a case, it should not matter whether or not the accused was seriously mistreated.[634] The mere fact that the OTP

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can also be derived from its reference to the paragraphs in the *Dokmanović* case where one can read: "[T]here was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not mistreated in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 75.)

[631] See also Currie 2007, p. 372, writing about the "fairly stark" "logical implications" of the "test put forward by the court": "For example, if State A sends its police or agents into the territory of State B where they violently abduct a fugitive, then so long as State A can present the individual to the Tribunal there will be no jurisdictional problems (absent serious physical abuse). That A has violated the territorial integrity of B is of no moment, even supposing relations between these states are already fractious and the abduction might provoke an international incident."

[632] It may be interesting to note that the Defence was apparently also not very sure about the exact content of the Appeals Chamber's *male detentus* test and therefore asked the Chamber for clarification, see ICTY, Appeals Chamber, *The Prosecutor v. Dragan Nikoli*[*ć*], 'Motion Requesting Clarification of the Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 20 June 2003, para. 5: "[T]he defence respectfully requests clarification of exactly what test is contemplated by 'the standard defined above' [see para. 31 of the Appeals Chamber's decision, ChP], and where that *above* (…) is to be found in the instant judgement. The facts agreed by the parties encompassed kidnapping and the forcible removal by a person against his will from a sovereign jurisdiction to another jurisdiction without the leave of either, such having involved the prosecution and conviction of some of the perpetrators in Serbia. If it be the case that the defence is correct in interpreting the 'standard' simply thus, that the agreed subjective facts were not sufficient to establish an egregious violation, then the defence respectfully requests what 'standard' is applicable so as to form the watershed between illegality that, on the one hand is egregious and, on the other, is not. That, with respect cannot be an abstraction, as the use of the phrase 'the standard defined' implies just that, a *defined* test [emphasis in original, ChP]." However, the Appeals Chamber, declaring the request "frivolous", considered that no clarification was required, see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Motion Requesting Clarification', Case No. IT-94-2-AR73, 6 August 2003, A 69. See also Sloan 2006, pp. 333-334.

[633] *Cf.* n. 476 and accompanying text.

[634] In that respect, it can be argued that the Tribunal should follow the lower *male detentus* standards which can, for example, be found in cases like *Bennett*. See also Sloan 2006, p. 337: "The Appeals Chamber made no effort to reconcile the approach in the *Toscanino* case [perhaps it is better to speak here of the interpretation of this case by subsequent courts, ChP] with the jurisprudence of other states which did *not* require an egregious element to the violation of human rights of an accused in order for

is, for example, orchestrating an abduction should make the judges refuse jurisdiction.[635] It is not so much the harm inflicted on the suspect (which might be minimal) or the harm inflicted on the sovereignty of a State[636] which should lead to the refusal of jurisdiction here, it is above all the integrity and credibility of the

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the court to reject jurisdiction [emphasis in original and original footnote omitted, ChP]." *Cf.* also Sluiter 2003 B, pp. 946-947: "Crucial factors, in determining whether or not this remedy [this is the termination of the proceedings, ChP] should be provided for are the following: 1. The degree of attribution of the violation to the Tribunal, in particular the Prosecutor (…); 2. The nature of the violation of individual rights (violation of individual rights of an egregious nature (…) may constitute a legal impediment to exercise of jurisdiction by the Tribunal, regardless of whether or not the Tribunal, in particular the Prosecutor, had anything to do with that violation)."

[635] It can be argued that the cases to which the Appeals Chamber refers would not exclude this. However, as explained, the Appeals Chamber seems particularly interested in the serious mistreatment passages of some of these cases, see also n. 630. The *Barayagwiza* case (where there was no mistreatment of the suspect) and the test mentioned in that case ("It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74)) would not exclude a 'normal' abduction (without serious mistreatment). See also *ibid.*: "Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued *if improper or illegal procedures are employed in pursuing an otherwise lawful process* [emphasis added, ChP]." Furthermore, one can also find evidence in the *Toscanino* case itself that a normal abduction would fall under its *male detentus* test, although the case has not been interpreted as such in subsequent cases. (See also Michell 1996, p. 403: "[T]hese later interpretations suggest incorrectly that *Toscanino* was primarily a "torture" case rather than a "forcible abduction" case.") In addition, the *Nikolić* and *Dokmanović* cases arguably also include passages which can be seen as supporting a *male detentus* test, which could include a normal abduction, without serious mistreatment. In the Trial Chamber's decision in *Nikolić*, the judges stated more generally: "Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal. In addition, this Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]." In addition, neither should it be forgotten that the passage from the *Dokmanović* case, to which the Appeals Chamber refers, was (only) made in the context of luring. However, before the Trial Chamber in *Dokmanović* turned to this *male captus* situation, it had distinguished this situation from the *male captus* situation forcible abduction. This may mean that the Trial Chamber might have dismissed the case of Dokmanović if the OTP was not involved in a mere luring operation, but in an abduction operation. See also Scharf 1998, p. 371: "[T]he Trial Chamber focused on the distinction between "luring" (the means used to arrest Dokmanović) and "forcible abduction", reckoning that the former was acceptable while the latter might constitute grounds for dismissal in future cases [original footnote omitted, ChP]."

[636] That might indeed be of less importance to an international criminal tribunal whose relationship with national States is of a superior, vertical and not of an equal, horizontal nature. However, as already explained, the fact that the sovereignty aspect "by definition cannot play the same role" (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 100) in the context of the Tribunals does not mean that the Tribunal has a 'carte blanche' in violating the sovereignty of domestic States.

Tribunal as an institution based on (international) law which would be harmed if the trial continued.[637] In that sense, neither should it matter whether a State has, for example, protested and requested the return of the suspect. An abduction as such (without any further qualification) should lead to the ending of the case if the Tribunal wants to be taken seriously as a court of law. One could also mention practical considerations here; such an approach would arguably also be damaging to the entire mission of the Tribunal.[638] In addition, neither should one forget that the negative consequences of proceeding with the case in such a situation might not be limited to the context of the Tribunals. For national States/courts, these international institutions may be seen as examples to follow. If employees of a Tribunal are involved in an abduction and, in a way, get away with it (because the judges do not decline jurisdiction), then national States/courts can refer to the Tribunal's approach to defend their own (potentially) dubious methods of bringing suspects to trial or to defend the 'approval' of such methods by proceeding with the case.[639] That, in turn,

[637] *Cf.* also Sloan 2006, pp. 342-343: "If all the facts were brought to light and it became clear that SFOR had been involved in illegal behaviour, the nature of the violation of human rights and sovereignty would appear in a different light. Indeed, it is not beyond the realm of possibility that a thorough examination of the facts might even have shown foreknowledge on the part of the OTP of SFOR's intention to carry out illegal capture operations (...). Were such findings to have been made, the arrest process would have been found to be contaminated. The obligation of the Appeals Chamber, therefore, would have been to provide a remedy that reflected the ICTY's intolerance of such conduct by making it clear that such behaviour in the future would be unlikely to lead to the prosecution of the accused. This might very well have taken the form of ordering the release of Nikolić".

[638] See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 65: "Both SFOR and the Tribunal are involved in a peace mission and are expected to contribute in a positive way to the restoration of peace and security in the area. Any use of methods and practices that would, in themselves, violate fundamental principles of international law and justice would be contrary to the mission of this Tribunal." *Cf.* also Henquet 2003, p. 146: "The purpose of the Tribunal, indeed the legal basis for its establishment, is to contribute to the restoration of peace and security in the former Yugoslavia. Thus, it might be argued, if the Tribunal is to succeed in this task it must be perceived as credible and just. This requires it to uphold the highest standards of justice." See also Van Sliedregt 2001 B, pp. 82-83.

[639] *Cf.* the already-mentioned words of Swart and Schomburg at n. 127 and accompanying text (writing on the context of respect for international human rights). See further Carcano 2005, p. 91 ("[N]ational courts, when called to decide cases involving crimes of international concern or raising certain aspects of international criminal law, may be influenced by the content of international decisions") and Sluiter 2006 C, pp. 629-630, writing about Dutch war crimes courts which "proved not to be insensitive towards ICTY jurisprudence, also in the field of international criminal procedure. The rationale lies in the lack of relevant case law of human rights supervisory organs in relation to those complex cases." See also *ibid*., p. 635: "International criminal procedure may in spite of all its flaws fulfil an important gap-filling function and serve as important point of reference for participants in domestic war crimes trials with an open eye and mind for procedural solutions and approaches coined in other systems. In this light, the 'legislator' in the field of international criminal procedure should become aware of its relevance and impact beyond the scope of international criminal trials." See finally Smeulers 2007, p. 108 (writing about the concepts of human rights and due process of law: "The tribunal fulfills an important and exemplary function") and Starr 2008, pp. 713-714: "At least some of the ICTs' judges see the Tribunals as models for other courts' treatment of defendants and point out that respecting due process is crucial to that mission. Indeed, the ICTs' procedural rules and jurisprudence have repeatedly been cited by scholars discussing human rights in the context of domestic proceedings, by other

would harm the integrity of these States/courts, the human rights of their suspects and – what is far more important for the horizontal context than for the context of the Tribunals – the very foundation of the inter-State level itself, namely respect for another State's sovereignty.[640] Furthermore, the Appeals Chamber's 'carte blanche' approach towards State sovereignty[641] could also have consequences for the ICC, the context of which will be discussed in the next part of this book.[642]

One could counter the suggestion that the Appeals Chamber should have mentioned this second situation (at least more clearly), by arguing that the judges did not need to address that situation at all, as Nikolić was not abducted by employees of the Tribunal but by private individuals. However, as almost all the generally formulated observations in this decision are not so much related to the case itself but more to the theory behind it, this important aspect should not have been left out. In addition, there are even indications that the Tribunal is of the opinion that jurisdiction should not be refused, even if the Tribunal itself were involved in the irregularity – as long as the accused is not seriously mistreated. After all, the Appeals Chamber also bases its 'serious violation' criterion on cases such as *Toscanino* and *Dokmanović*, cases in which the prosecuting forum itself was involved in the (alleged) irregularity.[643] Moreover, the Appeals Chamber, in its central question and last sentence from its strategy, makes use of the combination "violations (…) committed by SFOR, *and by extension OTP* [emphasis added,

international courts and commissions and advocates before those bodies, and by domestic courts interpreting their own international legal obligations [original footnotes omitted, ChP]." One could here think, for example, of the *Al-Moayad* and *Mushwena* cases discussed in Chapter V.

[640] See again (see also n. 519 of Chapter III) UNSC Res. 138 of 23 June 1960 (S/4349), in which the Council, dealing with the Israeli abduction of Eichmann in Argentina, stated "that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace". *Cf.* also Van der Wilt 2004, p. 295, who explains that if the Tribunal would knowingly make use of States carrying out violations of State sovereignty for the Tribunal, it would also jeopardise the peaceful coexistence. See finally Currie 2007, p. 373: "Under the *Nikolić* test, the threat to international peace and security that these offenders pose is more significant than the inter-state conflict their arrest might engender, even though that inter-state conflict might itself threaten peace and security."

[641] See also *ibid*., p. 384: "The Appeals Chamber's approach in *Nikolić* has a certain carte blanche, "hang the consequences" flavour, adopting as it does the view that international crime in the form of universally-condemned offences represents a greater threat to international peace and security than the prospect of states invading each others' territory to abduct wanted individuals."

[642] See also Sloan 2006, p. 333: "[T]o simply observe that the violation [of State sovereignty, ChP] may lead to 'consequences for the international responsibility of the State or organization involved', without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice. If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperating member states, the ramifications could be very damaging to international peace and security [original footnotes omitted, ChP]."

[643] In addition, one could argue that the Appeals Chamber does not explicitly mention the important words of the ICTY Trial Chamber in *Nikolić* and the ICTR Appeals Chamber in *Barayagwiza* that it is irrelevant which entity is responsible for the mistreatment/the violations. However, it seems that this point is not decisive, see n. 616.

ChP]"/"violations (…) attributable to SFOR *and by extension to the OTP* [emphasis added, ChP]".[644] That could mean that the conclusion of the Appeals Chamber, namely that the remedy of setting aside jurisdiction will almost never be appropriate, is also applicable to situations where the violations can be attributed to the OTP.[645]

However, even if the Tribunal only refers to situations where it is not itself involved in the irregularity,[646] the outcome, or at least the way it is formulated, is unfortunate. The Appeals Chamber's 'all-or-nothing' formula with respect to the issue of remedies leads to a 'not-unless' answer ('jurisdiction will not be set aside, unless...'). As a result, the judges focus on what irregularities may *not* cause, thus in a way reassuring the parties involved in the pre-trial arrest and detention phase that they should not worry too much if irregularities are committed in the process of bringing a suspect of very serious crimes to justice. However, if the Tribunal wants to deter such irregularities, it should emphasise what they may in fact lead to. The Appeals Chamber could also have stated that violations will not be tolerated and that, if they occur, they will be remedied.[647] This might neither lead to the ultimate remedy – the refusal of jurisdiction/dismissal of the indictment – (that should indeed be reserved for the more serious *male captus* cases), but then less drastic remedies would have to be granted.[648] By formulating it in this way, the Appeals Chamber

[644] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, paras. 3 and 18.

[645] The Appeals Chamber did not need to consider the question of whether the violations in this case could be attributed to SFOR or the OTP, as it concluded that the requested remedy was not going to be granted in any event.

[646] The fact that in paras. 27 and 33 of its decision, the Appeals Chamber – in contrast to its central question and strategy – suddenly leaves out the part "and by extension (to) the OTP", might be proof of this possibility.

[647] *Cf.* also Sluiter 2003 B, pp. 941-942: "From a practical point of view, the most vital question is, to what extent the ICTY should bear responsibility (in the sense of providing remedies) for human rights violations that have occurred in the framework of its proceedings. (…) [T]he trial forum must take account of every human rights violation that occurs in the framework of the criminal proceedings. This view finds its ultimate basis in simple fairness and in the nature of the relationship between the accused and the trial forum."

[648] *Cf.* also M. Federova, S. Verhoeven and J. Wouters, 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings', Working Paper No. 27 – June 2009, Leuven Centre for Global Governance Studies (available at: http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp27.pdf), p. 23. One could think here of a reduction of the sentence and financial compensation, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 74-75. The time or amount of these remedies can then depend on factors like the seriousness of the irregularity and the (perceived – see n. 154 of Chapter V) 'closeness' of those responsible for the irregularity in relation to the Tribunal. One may argue that the remedy for an abduction committed by SFOR should be more significant than the remedy for an abduction committed by private individuals having no connection with the Tribunal or an entity cooperating with the Tribunal whatsoever. *Cf.* also Carcano 2005, p. 88 (who is, however, of the opinion that the Appeals Chamber did not have to address this issue in this case): "[W]hile the Appeals Chamber has clearly stated that it will not tolerate egregious human rights violations in the process of arresting individuals, it did not discuss whether there should also be a remedy for lesser violations. This is understandable because the issue had become moot and, in any case, there was no apparent linkage between SFOR and the kidnappers so that

would have shown more clearly that it is not only focusing on the prosecution of very serious crimes but also on respect for law in general.[649]

The main justification for the Appeals Chamber not to give up jurisdiction too readily is, arguably, the seriousness of the crimes with which its suspects are charged.[650] Although the Appeals Chamber's overview of national case law does not provide solid support for that justification, the previous chapter has shown that there are more cases – cases not mentioned by the Appeals Chamber – in which one may find (implicit) evidence for the idea that judges seem to take the seriousness of the alleged crimes into account in deciding that jurisdiction/extradition to a third State should not be refused. However, even if clear support in national case law were lacking, one can argue that such a justification, to a certain extent (see *infra*), is quite reasonable[651] for courts (both at the national and at the international level) which have to prosecute suspects of serious crimes.

Several aspects of this reasoning were already mentioned in Subsection 4.4 of Chapter III and the *Dokmanović* case, but it is worth now clarifying this important issue in further detail. It must first be stressed that, apart from the possible rule of customary international law that jurisdiction must be refused in the case of an abduction perpetrated by the prosecuting forum and followed by a protest and request for the return of the suspect,[652] there is no clear international rule for courts

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the latter's actions remained acts of private individuals with no relevance at the international level. Nevertheless, the International Tribunal, in order to avoid the impression that it condones them, should also have ways to remedy non-egregious human rights violations. Such a system may provide, for instance, for the granting of monetary compensation or a reduction of the sentence when a Chamber finds that the accused has been the victim of human rights violations."

[649] In that respect, it is difficult to agree with Carcano (2005, p. 88) when he states that the decision "is arguably well balanced and sufficiently protective of the accused's human rights".

[650] As already explained in the context of the *Dokmanović* case, there is an even stronger proposition that the illegal method of apprehending a suspect charged with international crimes should be 'decoupled' from the exercise of jurisdiction. That means that in such cases, jurisdiction must never be refused, see Higgins 1994, pp. 72-73. Michell, referring to Higgins, calls this the "Eichmann exception". (Michell 1996, pp. 423-424.) However, one can wonder why this is called the *Eichmann* exception, as the Israeli courts – it was already shown earlier – did not use the seriousness of Eichmann's alleged crimes as a reason for applying the *male captus bene detentus* rule. However, the reference to Eichmann might be explained by the fact that the UNSC arguably *did* take Eichmann's alleged crimes into account to, in a way, condone the trial in Israel, a trial which was made possible by the abduction, see n. 521 and accompanying text of Chapter III. One may notice that the *Eichmann* exception from Higgins is not followed by the *Nikolić* Appeals Chamber, as at least one *male captus* situation must lead to the dismissal of jurisdiction (namely when the accused's rights are seriously violated). Note, however, that Van der Wilt (2004, p. 279) writes that the *Eichmann* exception appears in the case law of the ICTY. Nevertheless, as can be deduced from his article (in which he correctly states that the *Nikolić* decisions recognise that jurisdiction would be refused in very serious cases), he apparently uses another concept of the *Eichmann* exception, namely that the Tribunals take into account the seriousness of the suspect's alleged crimes when determining the consequences of a *male captus*, which is indeed correct).

[651] See also Carcano 2005, p. 87.

[652] This will be further explained in Chapter VII. However, assuming for now that such a rule indeed exists at the inter-State level – founded on the idea that courts refuse jurisdiction in such cases to protect the fragile international legal order based on the equality of States (and to repair what the Executive has not done) – one can wonder whether it can also be applied *mutatis mutandis* to the context of the Tribunals. After all, even though the ICTY/ICTR do not have a carte blanche *vis-à-vis* the sovereignty

to refuse jurisdiction in a certain case. For example, there is no human rights provision which states that jurisdiction must be refused in the case of a violation. Admittedly, courts may refuse jurisdiction if they are of the opinion that the *male captus* is so serious (for example, because the prosecuting authorities resorted to clearly illegal means, entailing serious violations of human rights) that the court cannot proceed with the case. However, courts have a discretion here, *cf.* the abuse of process doctrine; they can (and should) take *every* aspect of the case into account in deciding whether or not jurisdiction should be refused. One of those aspects may be that the suspect is charged with international crimes, crimes of which the international community demands that they be prosecuted. There is nothing strange about taking this important element into account. It is certainly rational that, because of the seriousness of the alleged crimes involved, a court should do everything within the limits of the law to prevent the termination of the proceedings.[653]

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of States, the latter concept does arguably play a less important role. In that respect, it could be argued that a protest from a State will have less influence in the vertical context of the Tribunals than it will have in the horizontal context of the States. Perhaps it could be argued that in such circumstances, there would be no *obligation* for a Tribunal to transfer the suspect back. Notwithstanding this however, it has already been submitted that in the case of an abduction orchestrated by the Tribunal, the latter *should* return (conditionally, see n. 354 and accompanying text) the suspect back, whether or not there has been a protest from the injured State.

[653] *Cf.* also the following words from the Prosecution in the still-to-discuss (see Subsection 3.2.2) *Semanza* case before the ICTR when it made a comparison with US Code, Title 18 ('Crimes and Criminal Procedure'), Section 3162 ('Sanctions'), under (a)(1): "18 USC 3162(a)(1) sets out factors that are to be considered, among others, in deciding whether a dismissal shall be with or without prejudice. The factors are: 1. the seriousness of the offense; 2. the facts and circumstances of the case which led to the dismissal; and 3. the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. (...) [I]n *U.S. v. Taylor*, 487 U.S. 326 (1988), the U.S. Supreme Court characterized as "serious" the charges of conspiracy to distribute cocaine and possession of 400 grams of cocaine with intent to distribute. In that case the Supreme Court reversed the dismissal with prejudice, finding that the trial court had abused its discretion. While drug-related crimes are certainly serious, there is simply no comparison between the illegal possession of sale of drugs and the 14 counts of genocide, crimes against humanity and war crimes with which the Accused is charged in this case. These are among the most serious crimes with which a person may be charged in any jurisdiction, national or international, in the world. The seriousness of these crimes, by itself, should preclude a dismissal with prejudice. (...) A dismissal with prejudice would be devastating to the administration of justice under international law. Dismissal with prejudice would not only prevent a trial on the merits for an accused mass murderer but would also foster the belief that political and military leaders can act with impunity in committing crimes against their own population in their territory. This practice of impunity is exactly what United Nations Resolution 955 sought to end when it adopted the Statute of the Tribunal." (TPIR, Chambre d'Appel, *Le Procureur contre Laurent Semanza*, 'Réponse du Procureur au Mémoire Préalable [à] l'Appui de l'Acte d'Appel du 12 Octobre 1999 contre l'Ordonnance du 6 Octobre 1999 de la Chambre de Premi[è]re Instance III Relative [à] la Requête de la Défense en Annulation de la Procédure d'Arrestation et de Détention de Laurent Semanza pour Cause d'Illégalité', Affaire No. ICTR-97-20-I, 21 janvier 2000, pp. 28-29, 208*bis* – 207*bis*.) A final remark is that these observations may very well be correct with respect to this specific case, but it must be clearly understood that the words "[t]he seriousness of these crimes, by itself, should preclude a dismissal with prejudice" may not necessarily apply to *any* case of suspects of international crimes. As will now also be explained in the main text, the seriousness of the crimes should definitely play a role in deciding whether jurisdiction must be refused or not, which may imply that a *male detentus* verdict/dismissal/release with prejudice should be avoided in the context of international crimes if

However, what is not justified – and what the Appeals Chamber should have disapproved of more clearly – is that the seriousness of the alleged crimes may be used as an excuse to commit irregularities in the process of bringing suspects of such crimes to justice;[654] it must be stressed that the view that one may take the seriousness of the crimes into account in deciding whether or not jurisdiction must be refused in a certain situation cannot in any way be seen as a green light for using *male captus* techniques in the context of international crimes.[655] On the contrary: as has already been argued, if the Tribunal discovers that its employees have orchestrated an abduction, it should resolutely refuse jurisdiction. That would be the only avenue to avoid further damage to the integrity of the proceedings. However, if less serious wrongs have been committed in the pre-trial phase of their case, judges should opt for less far-reaching remedies which do not jeopardise the trial.

Of particular interest in this discussion is the remedy of release in the case of an unlawful arrest/detention. As previously explained, there is no human right stating that in the case of a violation, jurisdiction must be refused. Because of that, a judge should take every single aspect of the case into account (including the seriousness of the crimes with which the suspect is charged) in deciding whether or not jurisdiction must be refused. However, that discretion is lacking in the context of the remedy of release in the case of an unlawful arrest/detention. This remedy is applicable to anyone. *Any* arrested/detained person, whether that any person is charged with fraud or with genocide, must, strictly speaking, be released if the judge finds his (arrest and) detention unlawful. However, even though that is true, it was also argued in Chapter III and in the context of the *Dokmanović* case that this remedy is not without its problems. Release in the case of an unlawful arrest/detention does not preclude re-arrest and being brought to trial. Although a person released by the ICTY/ICTR (in the Netherlands/Tanzania) cannot be re-arrested for 15 days, one can imagine that the ICTY/ICTR will then demand from all UN Member States (which must cooperate with these Tribunals) to immediately transfer the suspect back to the ICTY/ICTR the moment he sets foot on their soil. Thus, one can assume that it is highly likely that after those two weeks, the person is immediately re-arrested and brought to the jurisdiction of the Tribunal in question. In such a case,

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possible, but that does not mean that this remedy is entirely excluded from this context. On the contrary, if ICTY/ICTR authorities are involved in a kidnapping, the ICTY/ICTR *should* refuse jurisdiction/dismiss the case with prejudice if it still wants to be taken seriously as a court of law.

[654] See also Sloan 2006, p. 334: "The Appeal Chamber's focus on the serious nature of the crimes and the indignation of the international community, and its willingness to balance it against violations of human rights or sovereignty (and, in the case of sovereignty, to find a good basis for not setting aside jurisdiction in the 'universally condemned' nature of the alleged offences) leaves the impression that the graver the alleged crime, the less troubled an international judicial body should be by the violation."

[655] In that respect, this study cannot disagree more with views such as the one expressed by Mohit (2006, p. 144), who writes on the inter-State context: "It would be absurd to hold that terrorists and serious human rights violators should not be brought to trial by irregular means, for example, by abduction. The interests of society require that such offenders be brought to trial." (Mohit (*ibid*.) stresses that "[t]hese methods should (…) be utilized by states only once they have exhausted all possible routes to secure the fugitive's return by normal processes", but even then, prosecuting authorities should not debase themselves by resorting to illegal means in obtaining custody over a suspect.)

the prosecuting authorities could assert that this 'remedy' (the 'release') has repaired the initial *iniuria* of the irregularity and that the trial can continue as normal. However, in that case, the suspect would only be granted a *pro forma* remedy, comparable with the one at the national level (only extended over a longer period), which does not comport with the idea that a remedy must be real and effective. In addition, the *pro forma* release does not take account of the exact seriousness of the irregularity. In other words: it is not only a *pro forma* remedy but also an over-simplified remedy.

Thus, it was and is argued that it would be better for a judge, when he determines that a person's arrest/detention was unlawful, to avoid this problematic remedy of release and instead simply grant the most appropriate remedy which takes into account all the specifics of the case, including the seriousness of the suspect's alleged crimes and the importance of having the case continued. If one follows that route, which much resembles the abuse of process doctrine (where the seriousness of the alleged crimes can be taken into account without any problems since the remedy 'refusal of jurisdiction' is discretionary), then one can still satisfy the common sense idea behind the immediate re-arrest mentioned above, namely that cases involving suspects of serious crimes must be continued if possible – although it should neither be forgotten that a truly serious *male captus* situation can lead to one remedy only, namely the ending of the case before that particular court, that is, a 'real' release (without the possibility of re-arrest) – but one will also avoid the strange *pro forma* release and immediate re-arrest and replace it with *real* remedies, such as a reduction of the sentence and/or compensation.

The judge can then take the exact seriousness of the irregularity into account in determining how much time to reduce from the sentence or how much compensation to accord the suspect.

For example, one could hereby look at the involvement of the Tribunal in the *male captus* situation or the mistreatment suffered by the suspect during the operation. Such a solution would arguably be fairer to the suspect and better capable of putting flexibility into the system.

Furthermore, this solution also avoids the (justified) criticism one may expect from various actors if a suspect of serious crimes is released for an irregularity which is not so serious as to lead to the ending of the case (in such serious cases, the public must understand that the court has no option but to refuse jurisdiction and to release (but now in a 'real' way) the suspect), but which nevertheless entails that the detention must be qualified as unlawful and that, strictly speaking, the suspect must be released.

In fact, whereas at the national level, one can expect that a suspect of serious crimes will be immediately re-arrested, the Tribunal level may engender more problems because of the two-week immunity period.

As already stated, all UN Member States (which must cooperate with the Tribunals) will probably do everything in their power to ensure that a suspect of serious international crimes will be immediately re-arrested and brought to the jurisdiction of the Tribunals, but one cannot exclude the possibility that the suspect

may flee to a non-UN Member State (which, in principle, does not have an obligation to cooperate with the Tribunals) or to a State which, even though it has an obligation to cooperate with them, will not do so.

This could mean that a suspect of international crimes, fleeing to such a State, could effectively evade prosecution because of an irregularity which will, strictly speaking, demand the release of the suspect, but which is not considered to be so serious that jurisdiction must be refused.

This is to be avoided. This constitutes another reason to continue to exercise jurisdiction in these kinds of (less serious) *male captus* cases and to grant other remedies which do not jeopardise the trial itself.

Critics of this reasoning may assert that taking into account the seriousness of the alleged crimes of the suspect (and hence the importance of prosecution) within the examination of what the consequences must be of certain irregularities is not in conformity with the presumption of innocence, as the quality of the *suspect* (who is, of course, innocent until proven guilty) plays a role in the judge's balancing exercise.[656]

And indeed, it cannot be denied that there is some tension here. For example, under the abuse of process doctrine, a suspect of less serious crimes may be better off than a suspect of serious crimes. Imagine the situation in which a suspect of minor domestic crimes becomes the victim of a kidnapping by private individuals in which the authorities of the now prosecuting forum were not involved and during which he was not mistreated before being brought to the national judge. In such a situation, it would not be surprising if the national judge would refuse to exercise jurisdiction and to release the suspect because of, on the one hand, the rather serious *male captus* and, on the other, the low importance of having this person prosecuted. However, if the person is charged with genocide, one can imagine that the judge (whether it be a judge at the national or at the Tribunal level) would continue the case and grant the person other remedies instead. Although the seriousness of the *male captus* is the same in both cases, the importance of having this person prosecuted will probably tip the balance, ensuring that the trial will continue and that the suspect will receive other less far-reaching remedies for the wrongs he suffered.

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[656] See, for example, Oehmichen 2007, pp. 230-231 (criticising the German case from 1986 in which the German judges did not refuse jurisdiction in the aftermath of an abduction executed by the German police). See also n. 523 of Chapter V. It must, however, also be emphasised that this study agrees with Oehmichen with respect to that particular case as discretion to balance all the different elements and taking into account the seriousness of the suspect's alleged crimes must have *some* boundaries: some *male captus* situations, such as the one of the German case, are arguably so serious that jurisdiction should be refused. The same would go for the Tribunals: if the OTP is involved in an abduction, the judges should refuse jurisdiction, even if that suspect was charged with very serious crimes. Note finally that even though it was explained in the inter-State context that Oehmichen has serious reservations as concerns the element 'seriousness of the alleged crimes' in general (see n. 523 of Chapter V), she nevertheless admits that the abuse of process doctrine, in the context of the international criminal tribunals, has been limited to exceptional human rights violations, "was in Anbetracht der Delikte, die bei den Internationalen Strafgerichten in Frage stehen, in gewisser Weise nachvollziehbar erscheint." (*Ibid*., p. 243.)

However, as explained earlier, because of the discretionary nature of the abuse of process doctrine, the judge is able to take every single aspect of the case into account in determining whether it would contravene the court's integrity/sense of justice to continue the case, notwithstanding the irregularities. And one of these aspects is that the person standing before him is charged with very serious crimes of which the international community demands that they be prosecuted. There is no reason as to why this important element should not be taken into account here. In fact, the judge may be of the opinion that it would contravene the court's sense of justice and other goals of its institution, such as, in the case of the ICTY, contributing to the restoration and maintenance of peace,[657] if he were *not* to take the importance of prosecution into account.[658]

However, this stance may be more complicated with respect to a violation of the human right to liberty and security as the remedy of release in the case of an unlawful arrest/detention is not discretionary; it applies to any suspect unlawfully

[657] See UNSC Res. 827 of 25 May 1993: "The Security Council, (…) Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law (…) would contribute to the restoration and maintenance of peace [emphasis in original, ChP]". This is indeed true, but it should neither be forgotten (see also n. 638 and accompanying text) that it would in fact contravene the Tribunal's mission if it were to resort itself to illegal methods in obtaining custody over persons.

[658] *Cf.* also Ryngaert 2008, p. 731, who notes with respect to the still-to-discuss (see Subsection 5.1) *Duch* case: "[S]erious concerns may be raised over the use of the gravity of the crime as a free-standing criterion (...) in terms of the presumption of innocence. While Duch may be accused of grave and heinous crimes, he should remain innocent until a trial judge has determined his guilt – even if he is ready to confess and reveal the crimes committed by the Khmer Rouge. It would therefore appear unfair to rely on a presumption of his having committed grave crimes, a presumption that may tip the balance in favour of not staying the proceedings. Irrespective of the gravity of his crime(s), should not every suspect be entitled to the same due-process protection?" However, in the end, Ryngaert concurs with the vision of this study, see *ibid*., p. 732 (writing on the abuse of process doctrine): "Because the tribunal's decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them." Note that Ryngaert, after the quotation at the beginning of this footnote, writes: "Sluiter, however, has submitted, precisely in the context of the ECCC (but well before the *Duch* order), that it is not unfair, pointing out that '[w]hen prosecuting the most serious crimes, mandatory release [in case of blatant violations of important protections, including unlawful arrest and/or detention] may appear disproportionate to the human rights violations of which the suspect is accused.' [original footnote omitted, ChP]" However, it must be clarified that Sluiter is not writing here about the abuse of process doctrine in which one has a discretion to decide the most appropriate remedy, but about a provision which dictates a certain remedy (*cf.* Art. 9, para. 4 of the ICCPR). In addition, it can be argued that Sluiter takes a more subtle standpoint here, see Sluiter 2006 B, pp. 317-318: "When prosecuting the most serious crimes, mandatory release may appear disproportionate to the human rights violations of which the suspect is accused. At the same time, expectations of the CEC [Cambodian Extraordinary Chambers, ChP]'s role as a model of criminal justice should not be underestimated, and may require faithful application of these mandatory release provisions [original footnote omitted, ChP]." See also *ibid*., p. 317. n. 14: "One could argue that mandatory release in respect of an individual indicted for genocide is not always consistent with international standards, bearing in mind the duty to bring such persons to justice. However, this argument is difficult to reconcile with the specific purpose of those remedies to enhance respect for international (human rights) standards."

detained. For example, in his commentary on the ICTY Appeals Chamber's decision in *Nikolić*, Sloan notes:

> The Appeal Chamber's focus on the serious nature of the crimes and the indignation of the international community, and its willingness to balance it against violations of human rights or sovereignty (and, in the case of sovereignty, to find a good basis for not setting aside jurisdiction in the 'universally condemned' nature of the alleged offences) leaves the impression that the graver the alleged crime, the less troubled an international judicial body should be by the violation. On the question of human rights, at least, such an approach must surely be misguided: it does not appear to comport with the presumption of innocence. Indeed, if our human rights are to be meaningful, the opposite approach would appear fitting. That is to say, when an accused is charged with a very serious crime – one of the type that is likely to engender severe public outrage, or in the words of the Appeals Chamber one that triggers the 'legitimate expectation' of 'the international community' – a judicial body must be *most* scrupulous in ensuring that the accused's human rights are observed. For a court to provide no remedy for a human rights violation where the accused is charged with a traffic offence and subject to a fine would be regrettable; to provide no remedy where the accused is charged with mass murder or war crimes and subject to life imprisonment would be unconscionable [emphasis in original, ChP].[659]

[659] Sloan 2006, p. 334. *Cf.* also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 140: "Issues of unlawful arrest and transfer to an international tribunal have been raised in the cases of Todorovic, Nikolic and Krajisnik [see for this last case the end of this footnote, ChP] before the International Criminal Tribunal for the former Yugoslavia (ICTY). The tribunal found itself with a fundamental dilemma; namely, whether to encourage the apprehension of suspects and the bringing to justice of individuals who had engaged in serious crimes, on the one hand; or the safeguard of international legality and fundamental human rights, on the other. It seems that administration of justice considerations have prevailed in the reasoning of the ICTY, which, as mentioned above, poses certain questions concerning the presumption of innocence; an obligation found in Article 6 of the European Convention on Human Rights [original footnote omitted, ChP]." As concerns the *Krajišnik* case: although this case has been included in this chapter for other purposes (see ns. 97, 99 and 103), no actual *male captus* claims were found in its proceedings, hence making it unnecessary to include this case in the overview of *male captus* cases. That the report of the Council of Europe nevertheless mentions this case in the context of cases like *Todorović* and *Nikolić* may, however, be explained by the fact that the report, in the paragraph where this remark is made, refers to Lamb 2001, pp. 39-40. Although one will not find any reference on these pages to the *Krajišnik* case, on p. 34, n. 32 of Lamb's article, one can read: "The modalities in which the accuseds Dragan Nikolić and Momčilo Krajišnik were apprehended raise similar issues to Todorović and the lawfulness of these arrests may thus also in future be challenged; see infra." Although Lamb does not re-examine the case "infra", these words clarify that there was *something* special about the arrest of Krajišnik. And indeed, it was quite robust, see M. Simons, 'Nato Troops Seize a Top Serb Facing War Crime Charge', *The New York Times*, 4 April 2000 (available at: http://www.nytimes.com/2000/04/04/world/nato-troops-seize-a-top-serb-facing-war-crime-charge.html?pagewanted=1): "NATO and tribunal officials said Mr. Krajisnik was at his elderly parents' home in Pale when French troops blew open the door with explosives shortly after 3 a.m. today. They briefly detained his parents, tied the hands of his two sons and hustled Mr. Krajisnik, still in his pajamas, out the door." Hence, because of this robust arrest, Lamb was justified to write in 2001 that Krajišnik *may* challenge the lawfulness of his arrest in the future. However, apparently, he chose not to do so.

Many of these words are to be welcomed; as stated earlier, it can indeed not be the case that "the graver the alleged crime, the less troubled an international judicial body should be by the violation". Furthermore, it is also not hard to agree with the idea that "a judicial body must be *most* scrupulous in ensuring that the accused's human rights are observed" and that remedies are provided when violations occur.[660]

However, it is submitted that neither should the – indeed very important – presumption of innocence be used in such a way as to lead to absurd results. One must not forget that the Tribunals are prosecuting not just *any* suspects, but suspects charged with the most serious crimes known to the international community as a whole. For example, a judge at the ICTY cannot issue an arrest warrant unless he has confirmed the indictment of the Prosecution, an indictment which can only be prepared if the Prosecutor is of the opinion that a *prima facie* case exists. Although this fact does not, of course, mean that the person is guilty of the international crime – that would constitute a clear violation of the presumption of innocence – there is no reason why one should not take into account the fact that one is not dealing with a normal suspect here, but with a suspect of whom the independent Prosecutor and an impartial judge are of the opinion that a *prima facie* case exists against him and hence that there are reasons to assume that the person may be involved in extremely serious crimes of which the international community demands that they be prosecuted. This is not nothing. This is an important element which should be taken into account, not only in the context of the abuse of process doctrine, but also in the context of determining what to do with the consequences of an unlawful arrest/detention. It is submitted that negating this important element and strictly applying the remedy of release in the case of an unlawful arrest/detention, a remedy which was already criticised for the fact that it can be used in a mere *pro forma* way and for the fact that it totally disregards the specifics of the exact *male captus*, can possibly lead to absurd results which no longer have anything to do with the concept of justice. For example, if a suspect of the ICTY/ICTR is not promptly informed of the reasons for his arrest, this would, strictly speaking, mean that his detention is unlawful and that he is to be released. However, if the suspect is released, the Netherlands/Tanzania would not be able to re-arrest the suspect for 15 days. In that time, he could flee to a non-UN Member State (which, in principle, does not have an obligation to cooperate with the Tribunals) or to a State which, even though it has an obligation to cooperate with them, will not do so. That could mean that a suspect of international crimes, fleeing to such a State, could effectively evade prosecution because of an irregularity which is not considered so serious that jurisdiction must be refused but which, strictly speaking, would demand the release of the suspect. This is to be avoided. As explained, although the law should obviously be obeyed, one must also be careful not to apply the law in such a strict way that it leads to great injustice: *summum ius, summa iniuria*.

[660] See also Van Sliedregt 2001 B, p. 82, noting that one can argue that "the more serious the allegation, and therefore the potential sanction, the more assiduous any court or Tribunal should be with regard to taking into account any material illegality, and the more reluctant it should be to adopt any 'tainted' jurisdiction." See further Oehmichen 2007, p. 231, agreeing with Van Sliedregt.

A final word on the ICTY Appeals Chamber's decision in *Nikolić* is that the Appeals Chamber, like the Trial Chamber, does not explicitly support the definitions of *male captus bene/male detentus* as used in the Trial Chamber's decision.

That should be welcomed as these versions are the height of simplicity, leaving no room for differentiation at all.[661] However, neither is that much-needed differentiation provided by the Appeals Chamber, because it limits the issue of remedies to an 'all-or-nothing' formula: should jurisdiction be set aside or not? Even if termination of the proceedings is not the appropriate remedy here (which might very well be the case), the Appeals Chamber should have granted other, less drastic remedies to repair the abduction suffered by Nikolić.[662]

As argued before: now that the Chambers have admitted that they will take the ultimate responsibility (namely by refusing jurisdiction) in very serious cases, it is submitted that they should also have the power to remedy less serious violations committed in the pre-trial phase of their case, irrespective of the entity responsible. Furthermore, the unsatisfactory 'all-or-nothing' formula leads to an equally unsatisfactory 'not-unless' answer, which may be interpreted as authorising parties involved in the pre-trial arrest and detention phase to use (potentially) dubious methods in bringing a suspect of serious crimes to justice rather than deterring them from using such methods.[663] As a result, even though it does not explicitly support *male captus bene detentus*, the Appeals Chamber's decision may be viewed as backing the idea behind that principle, as only a serious mistreatment of the accused – which arguably will almost never occur[664] – will lead to *male detentus*.[665] The Appeals Chamber could have lessened this (unpopular) *male captus bene detentus* image by clearly stating that jurisdiction should also be refused if the prosecuting forum, the Tribunal, is involved in serious, intentional (procedural) irregularities in the process of bringing a suspect to trial, even if that suspect is not seriously mistreated.[666]

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[661] After all, a court should not continue to exercise jurisdiction irrespective of what has happened during the process of bringing a suspect to court ("a court may exercise jurisdiction over an accused person *regardless of how* that person has come into the jurisdiction of that court [emphasis added, ChP]"), nor should it refuse jurisdiction any time an irregularity occurs, because that could include a simple procedural, non-intentional fault by a third party as well ("an irregularity has occurred in the arrest of the Accused and therefore should bar any further exercise of jurisdiction by the Tribunal").

[662] See also Sluiter (2003 B, pp. 945 and 947) when addressing the Trial Chamber's decision in *Nikolić*.

[663] See also Sloan 2006, p. 344: "[T]he decision of the Appeals Chamber will allow future international criminal decision-making bodies to turn a blind eye to violations of human rights and state sovereignty in pursuit of the 'greater good'. More worryingly, the absence of guidance and a tolerance of illegality means that there is nothing to give pause to SFOR, its successor or other such forces before they engage in illegal behaviour – or commission criminals or bounty hunters to do so on their behalf – so long as it doesn't exceed what appears to be a very wide margin of appreciation [original footnote omitted, ChP]."

[664] See Sloan 2005, p. 492: "The appeals chamber's rejection of Nikolić's claims sends a clear message to other defendants before the ICTY that jurisdiction will not be set aside in the face of an illegal capture in any but the most egregious situations." See also the words from Sloan in the previous footnote.

[665] See also Sloan 2006, p. 334: "The Appeals Chamber (...) favoured the *male captus*, *bene detentus* approach over the *male captus*, *male detentus* approach." See also *ibid*., p. 342.

[666] See again the quotation from the Trial Chamber – which arguably seems more in favour of the idea behind *male captus male detentus* (see also Sloan 2003 A, pp. 547-548) – in n. 542 and accompanying

3.1.5 *Tolimir*

The penultimate case which will be discussed in the ICTY context is that of Zdravko Tolimir.

Tolimir, who was charged with genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war, was arrested on 31 May 2007 and transferred to The Hague on 1 June 2007.

In The Hague, Tolimir argued that he had been kidnapped by "illegal groups and individuals"[667] in Belgrade (Serbia) and taken to Bijeljina (Republika Srpska/Bosnia and Herzegovina)[668] where he met a patrol from the Ministry of the Interior of the Republika Srpska.[669]

From there, he was allegedly brought to Bratunac, another location in the Republika Srpska/Bosnia and Herzegovina which can also be found in Tolimir's indictment.

Tolimir claimed that he

> was kept there for half a day and recorded secretly or not secretly for reasons unknown to me and the entire public was deceived into believing that I was arrested in Bratunac, which seemed to have the effect of incriminating me in the sense that the criminal was arrested at the scene of the crime.[670]

After these events, he was allegedly taken back to Bijeljina, brought to Banja Luka (also located in the Republika Srpska/Bosnia and Herzegovina), handed over to

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text: "The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal."

[667] ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Preliminary Motions on the Indictment in Accordance with Rule 72 of the Rules' (Public Filing), Case No. IT-05-88/2-I, 30 October 2007 (Translation: 7 November 2007), p. 4 (under 1.15).

[668] See *ibid*., p. 3: "1.5 I was abducted at 0315 hours on 31 May from an apartment at Vajara Živojina Lukića Street number 7, Bežanijska Kosa in Belgrade, Serbia, when the armoured door was blown in by explosives without previous warning. The abduction was carried out by a well-equipped and organised group of 20 men. They introduced themselves both to me and to my neighbours as policemen. Denying me a lawyer, and putting a sack over my head, they put me in a van which, under heavy security, accompanied by escort vehicles, took me to Belgrade, to a prison facility where cells were secured by doors with bars. 1.6 Around 0800 hours on 31 May I was taken from the detention facility to a BMW passenger car. Under escort and accompanied by a vehicle of the same colour and make, against my will, I was taken to the Pavlovića Ćuprija border crossing, near Bijeljina, on the border between Serbia and Republika Srpska. 1.7 We went through border crossings between the Republic of Serbia and Republika Srpska without waiting or any checks, and we were given priority passage, which points to the organisation, official relations, and links between the persons who abducted me and the state customs organs of Serbia and Bosnia and Herzegovina, which is responsible for the borders of Republika Srpska."

[669] See *ibid*., p. 3 (under 1.8).

[670] ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Public Transcript of Hearing 03 July 2007', Case No. IT-05-88/2-I, p. 27.

NATO officers and OTP representatives, helicoptered to the NATO base in Sarajevo and from there flown to The Hague.[671]

In his first submission, Tolimir argued that his abduction violated the Constitution and national laws of Serbia and a number of rights accorded to him by the ICTY Statute and RPE[672] and that "[t]he International Criminal Tribunal for the Former Yugoslavia has no jurisdiction to try abducted persons, set precedents, or legalise such legal practice in international law and relations".[673]

The Prosecution responded that it had "no knowledge of, and had no involvement in, the alleged abduction"[674] and that, even if Tolimir had indeed been abducted – in the meantime, namely on 17 September 2007, the OTP had "submitted a formal request for information from the Serbian government concerning the Accused's allegations [original footnote omitted, ChP]"[675] – this did not deprive the ICTY of jurisdiction.[676] The OTP referred to the decisions of the Trial and Appeals Chamber in the *Nikolić* case and argued, with respect to the concept of State sovereignty, that "[e]ven if a violation of Serbia's sovereignty had occurred, this merely would have resulted in the Accused being returned to Serbia, whereupon his extradition to The Hague would be required".[677] With respect to the concept of human rights, the OTP noted that Tolimir had "not raised any human rights violations that are of such a serious nature that the Tribunal should decline to exercise jurisdiction".[678] On 3 December 2007, the OTP filed a supplement to its response, which contained, among other things, a report from the authorities of the Republika Srpska on Tolimir's arrest (no response was received on the part of the Serbian Government).[679] According to this report, Tolimir was not deprived of his liberty in Belgrade but in the Republika Srpska/Bosnia and Herzegovina following a coordinated operation in the border region of the Republika Srpska/Bosnia and

[671] See ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Preliminary Motions on the Indictment in Accordance with Rule 72 of the Rules' (Public Filing), Case No. IT-05-88/2-I, 30 October 2007 (Translation: 7 November 2007), p. 4 (under 1.12 and 1.13).
[672] *Ibid*., pp. 4-5 (under 1.16).
[673] *Ibid*., p. 2 (under 1.1).
[674] ICTY, Pre-Trial Chamber, *The Prosecutor v. Zdravko Tolimir*, 'Prosecution Response to the Accused's Preliminary Motion on the Indictment' (*Public with Confidential Appendices*), Case No. IT-05-88/2-PT, 21 November 2007, para. 6 (p. 2). According to the Prosecution, it "first became involved in the arrest of the Accused on 31 May 2007, when the Prosecutor was contacted by the Prime Minister of Republika Srpska and informed that the Accused was in the custody of the Republika Srpska police. On the evening of 31 May 2007, the Accused was formally arrested in Banja Luka by Mr. Don King, head investigator for the Office of the Prosecutor's Sarajevo office, and subsequently transferred to The Hague [original footnote omitted, ChP]." (*Ibid*., para. 5 (p. 2).)
[675] *Ibid*., para. 9 (p. 3).
[676] See *ibid*.
[677] *Ibid*., para. 14 (p. 4). See also *ibid*.: "To decline jurisdiction on this ground would be senseless."
[678] *Ibid*., para. 15 (p. 5).
[679] See ICTY, Pre-Trial Chamber, *The Prosecutor v. Zdravko Tolimir*, 'Supplement to Prosecution Response to the Accused's Preliminary Motion on the Indictment' (Confidential), Case No. IT-05-88/2-PT, 3 December 2007, D735-D724.

Herzegovina and Serbia, in which authorities from these two entities were involved.[680]

On 14 December 2007, Trial Chamber II of the ICTY issued its decision. In this decision, it followed the Prosecution in applying the *Nikolić* jurisprudence to the case at hand. Approving the (not uncriticised, see *supra*) Appeals Chamber's distillation of the two 'principles' which "seem to have support in State practice as evidenced by the practice of their courts", the Trial Chamber rejected a possible claim related to the concept of State sovereignty:

> In the present case, the Accused is charged with genocide, crimes against humanity and war crimes. Assuming, without deciding, that a violation of state sovereignty occurred in the instant case, the Trial Chamber finds that given the serious crimes involved such a violation is not sufficient to justify the setting aside of jurisdiction by this Tribunal. Moreover, the Trial Chamber notes that Serbia did not lodge a complaint. Therefore, any alleged violation of state sovereignty is not a basis to decline jurisdiction in this instance.[681]

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[680] See *ibid*., Appendix, D729-D727: "In the early hours of 31st May 2007, members of the Security and Information agency of the Republic of Serbia phoned authorized employees of the Criminal Police Administration from the Team for locating and apprehending [T]he Hague indictees and informed them that they had the intelligence information according to which, in the course of that same day, some of [T]he Hague indictees, most probably Ratko Mladić or someone close to him, will try to cross over from the Republic of Serbia to Bosnia and Herzegovina, that is to the territory of the Republic of Srpska, between Zvornik and Ljubovija, most probably on the territory bordering with Ljubovija, to the municipality of Bratunac. According to this information, deputy head of the Criminal Police Administration of the RS Ministry of Interior, with six members of this Administration of the Team for locating and apprehending of [T]he Hague indi[c]tees, headed to the area of the Bijeljina Public Security Centre in order to prepare for blocking and controlling of the mentioned terrain, that is coordinating of simultaneous action of the blockade, both from the territory of the Serbian Republic and the territory of the Republic of Srpska. (...) The action implicated a discrete control of all vehicles and persons on the blocked road directions, and it fully started around 14.00 hours on the same day with coordination of activities of the Republic of Serbia Ministry of Interior members, who used helicopters in the action of blocking in their [border] area. Members of the Team of the Criminal Police Administration, with three unmarked official vehicles, took part in mobile observation of road communication along the Drina river, especially the road communication which from the [border] crossing towards Ljubovija leads along the Drina river towards Sopotnik, and then towards Drinjača and Zvornik. At about 14.15, while taking a detour from the road communication in the direction of Sopotnik, on the part of the cobbled road the mobile team of the Criminal Police Administration intercepted movement of one person, who was moving on foot towards the settlement of Sopotnik, on the left side of the road. This person was stopped and an attempt to identify him was made. He said he had no id whatsoever and he introduced himself as General Zdravko Tolimir, officer of the Republic of Srpska army, to whom he did resemble in some of his features, although had lost a lot of weight. Following this, since the person was in poor health and had difficulties moving, he was asked where he was heading, what direction he came from and if anyone else was with him, that is, if anyone else drove him, but he did not wish to answer the questions posed. (...) The person was immediately put into the official vehicle, and then transported to Banja Luka with escort of the entire team of the Crime Police."

[681] ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, 'Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules' (Public), Case No. IT-05-88/2-PT, 14 December 2007, para. 19.

With respect to the concept of human rights,[682] the Trial Chamber was, "[f]or the purpose of the present analysis only, (...) prepared to accept the factual allegations of the Accused related to the initial phase of his arrest",[683] even though "the only information concerning the very initial phase of the Accused's arrest is the description of the events given by the Accused himself".[684] However, this was not of any help to Tolimir:

> What is before the Trial Chamber – with reference to each phase of the arrest individually and cumulatively – does not amount to a human rights violation of such a serious nature so as to require that the exercise of jurisdiction be declined. In fact, the only irregular aspect of the arrest is the alleged circumstances surrounding the Accused's removal from his apartment in Belgrade. Assuming those allegations to be true, even that scenario however is not so egregious as to merit declining jurisdiction over this Accused in relation to the grave crimes charged against him.[685]

In this context, the Trial Chamber noted a not unimportant point, namely the fact that no evidence was provided that NATO/the OTP were involved in the initial phase of Tolimir's arrest.[686] In fact, it found that "the Prosecution has provided evidence to the contrary".[687]

Although at the time the Trial Chamber issued its decision, the Prosecution had not yet received a response from the Serbian Government regarding the circumstances of Tolimir's arrest,[688] the Serbian Government finally reacted on 9 October 2008, more than a year (!) after the Prosecution had submitted a formal request for information. This reaction, which was received on 13 October, can be found in a submission from the Prosecution dated 15 October and explains that the Serbian Ministry of Internal Affairs has informed the Ministry of Foreign Affairs "that it was not in possession of either records or any documents in relation to the arrest of Zdravko TOLIMIR, as well as that the officials of that Ministry did not participate in the arrest of Zdravko TOLIMIR".[689] However, the reaction *does*

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[682] See *ibid*., para. 23: "The Accused submits that the manner in which his abduction, transfer to the RS and ultimately transfer to the Tribunal were conducted resulted in a violation of his rights. According to the Accused, the NATO forces and the representatives from the Prosecution involved in the abduction acted in collusion with his captors and therefore the unlawful conduct of his capture, detention and transfer to The Hague are imputable also to them [original footnote omitted, ChP]."

[683] *Ibid*., para. 25.

[684] *Ibid*., para. 24. It must be noted that at the time the Trial Chamber issued its decision, there was still no response from Serbia regarding the OTP's request to provide information on Tolimir's arrest. See *ibid*.

[685] *Ibid*., para. 25.

[686] See *ibid*., para. 26.

[687] *Ibid.* The Trial Chamber also noted that "[o]nce the Accused came into contact with NATO and the Prosecution his arrest was carried out in a lawful manner and without any violations of his rights." (*Ibid*.)

[688] See also n. 675 and accompanying text.

[689] ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Submission Pursuant to the Direction of the Trial Chamber Concerning the Accused's Arrest, With Appendix' (Public), Case No. IT-05-88/2-PT, 15 October 2008 (filed: 16 October 2008, D 2079 – D 2070), Appendix A, D 2075.

confirm the already-mentioned[690] joint operation in the border region on 31 May 2007.[691]

On 22 October 2008, Tolimir challenged the authenticity and truthfulness of the document in which one can read the Serbian reaction and argued, among other things, that the reaction contradicts the statement of Carla Del Ponte in her memoirs that "a Serbian special unit took Tolimir into custody after he had refused to surrender voluntarily".[692] Two days later, Tolimir wrote another submission in which he noted that on 22 October 2008, "the Minister of Interior [of the Republic of Serbia, ChP] accused the former Government of the Republic of Serbia of having arrested me in Serbia and of handing me over to Hague Tribunal".[693]

The Prosecution was, however, not impressed by these new assertions as Trial Chamber II, in its 14 December 2007 decision, had already concluded "that even if the Accused's allegations concerning the circumstances of his arrest were true, they do not justify declining the exercise of jurisdiction [original footnote omitted, ChP]".[694]

Tolimir, in his reaction of 4 December 2008, emphasised, however, that he had not requested a reconsideration of the 14 December 2007 ruling in his submissions because he was simply unable to make such a request.[695] The reason for his inability to do so was that he was "not familiar with the content of this ruling, because it has not been translated to a language the Accused understands or has been entered in the Tribunal's judicial data base".[696] The aim of Tolimir's present submissions was

> that it be established that Zdravko Tolimir was arrested in the Republic of Serbia (and not in Republika Srpska) and that he was denied the right to have the competent court

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[690] See n. 680.

[691] See ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Submission Pursuant to the Direction of the Trial Chamber Concerning the Accused's Arrest, With Appendix' (Public), Case No. IT-05-88/2-PT, 15 October 2008 (filed: 16 October 2008, D 2079 – D 2070), Appendix A, D 2075 – D 2073.

[692] ICTY, [Trial] Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Submission by the Accused Concerning the Prosecution's Submission of 15 October 2008' (Public), Case No. IT-05-88/2-PT, 22 October 2008 (translation filed: 29 October 2008), D 2163, under 9. See also *ibid*., under 10: "In her book, Carla del Ponte also states that "the Bosnian Serb authorities later told me they would never again participate in such a charade just so Koštunica could say that none of the Tribunal's accused had been arrested on Serbian soil" [original footnote omitted, ChP]."

[693] ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Supplementary Submission by the Accused Concerning the Prosecution's Submission of 15 October 2008' (Public, Urgent), Case No. IT-05-88/2-PT, 24 October 2008 (translation filed: 29 October 2008), D 2173, under 2.

[694] ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Response to Submission, Supplementary Submission and Attachment by the Accused Concerning the Prosecution's Submission of 15 October 2008' (*Public*), Case No. IT-05-88/2-PT, 6 November 2008, para. 1.

[695] See ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Reply to the Prosecution's Response to Submission, Supplementa[r]y Submission and Attachment by the Accused Concerning the Prosecution's Submission of 15 October 2008' (Public), Case No. IT-05-88/2-PT, 4 December 2008 (translation filed: 16 December 2008), D 2593, under 2.

[696] *Ibid.* (It is arguably rather strange that a suspect is not familiar with a decision concerning his case almost a year after that decision has been issued.)

> decide about handing him over to the Tribunal in accordance with the Law on Cooperation with the Hague Tribunal.[697]

According to Tolimir, writing about himself, "the truth about his arrest has been covered up (...) as this can have an impact on the Tribunal's final judgement and Zdravko Tolimir's position after and before the final judgement".[698]

On 18 December 2008, Trial Chamber II, having examined all these submissions, decided:

> The Accused requests that the Trial Chamber make inquiries and take other measures in order to investigate and establish the circumstances of his arrest. Specifically the Accused asks the Trial Chamber to rule that he was arrested in Serbia and denied his right to call on "a competent court" with regard to his arrest. He requests this without seeking a specific legal remedy as a result and on the basis of the Tribunal's "inherent right" to do so. This Tribunal does not entertain arguments – factual or legal – in the abstract. While the Accused may have remedies to pursue in national courts in relation to an alleged illegal arrest, it is not for this Trial Chamber to examine the circumstances of the Accused's arrest for the purpose of providing some form of declaration. The circumstances surrounding the arrest of the Accused are relevant to the Trial Chamber to the extent that they may affect the jurisdiction of the Tribunal over him. For this reason the Trial Chamber will consider the arguments of the Accused related to his arrest only in the context of the impact on the jurisdiction of the Trial Chamber to adjudicate on this case.[699]

Before going to examine the Trial Chamber's observations regarding the issue of jurisdiction, some attention must be paid to the Trial Chamber's remarks that "it is not for this Trial Chamber to examine the circumstances of the Accused's arrest for the purpose of providing some form of declaration" because these circumstances are only "relevant (...) to the extent that they may affect the jurisdiction of the Tribunal over him".

This, it can be argued, is again a rather restricted view of the consequences of an illegal arrest. The Trial Chamber focuses only on the ultimate remedy, the refusal of jurisdiction.[700] However, as explained earlier, there is another remedy which can be

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[697] *Ibid*., under 3.
[698] *Ibid*., D 2592, under 9.
[699] ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, 'Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2-PT, 18 December 2008, para. 12.
[700] As already explained in the context of the *Nikolić* case, this focus on the ultimate remedy alone, in a way, reassures the parties involved in the pre-trial arrest and detention phase that they should not worry too much if irregularities are committed in the process of bringing a suspect of very serious crimes to justice. *Cf*. also ICTY, Trial Chamber II, *The Prosecutor v. Zdravko Tolimir*, 'Reply to the Prosecution's Response to Submission, Supplementa[r]y Submission and Attachment by the Accused Concerning the Prosecution's Submission of 15 October 2008' (Public), Case No. IT-05-88/2-PT, 4 December 2008 (translation filed: 16 December 2008), D 2592, under 10: "If the Trial Chamber fails to issue a ruling that Tolimir's arrest was unlawful, the Tribunal will send out an unambiguous signal that the law does not apply to those accused before the Tribunal and that every measure, including unlawful arrest, can be undertaken against them." It may not seem strange that the Trial Chamber only looked at the ultimate remedy here because Tolimir, in his very first submission, see n. 673 and accompanying text, had indeed

linked to the establishment of an illegal arrest/detention and which is, because of its (at least) customary international law status, also applicable to the context of the Tribunals, namely the right of every arrested and detained person to have the lawfulness of his (arrest and) detention reviewed and to be released if his (arrest and) detention is deemed unlawful.

However, as stated, because this remedy is not without its problems, see Subsection 4.4 of Chapter III and the discussions of the cases of *Dokmanović* and *Nikolić supra*, it would be better if the judge would avoid this remedy and would grant, in the case of an unlawful arrest/detention, the most appropriate remedy for the wrong suffered, taking every aspect of the case at hand into account, whether that remedy consists of a declaration[701] that a person's arrest was unlawful (for example, with respect to minor violations (not committed by ICTY/NATO personnel)), of a reduction of the sentence or financial compensation,[702] or of the (final!) release of the suspect and the ending of the case (in truly serious cases). However, before one can grant the most appropriate remedies, one must, of course, determine, among other things, how serious the violations are. Hence, it is important that the judge knows how the suspect in question was arrested/detained and whether the process was accompanied by any irregularities, irrespective of the question of whether these irregularities should have any effect on the exercise of jurisdiction.

Returning now to the Trial Chamber's observations regarding the jurisdiction issue, the judges, who were of the opinion that Tolimir, despite his submission to the contrary, in fact wanted to have a reconsideration of the 14 December 2007 ruling,[703] felt that the new information revealed after 14 December 2007 had no influence on that decision; there was "no basis to doubt the authenticity of the Serbia report"[704] and even if Carla Del Ponte's statements and the allegations of the Serbian Minister of Interior were correct in that Tolimir was arrested by Serbian forces in Serbia, "this would not add anything new to the original allegations advanced by the Accused and decided upon by the Trial Chamber in the 14 December 2007 Decision".[705]

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argued that the ICTY had no jurisdiction to try him. However, the Trial Chamber, in this passage, clearly responds to Tolimir's suggestions that the circumstances of his arrest must be established and that this may entail lighter remedies, such as a declaration that his arrest was unlawful. (In addition, it can be argued that any judge should consider for himself whether the suspect is not entitled to other less far-reaching remedies if the ultimate remedy is not granted.)

[701] In contrast to the Trial Chamber's position, there is arguably no reason why this cannot be seen as a "specific legal remedy" as well.

[702] *Cf.* the still-to-discuss *Barayagwiza* case.

[703] See ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, 'Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2-PT, 18 December 2008, para. 13.

[704] *Ibid*., para. 16.

[705] *Ibid*., para. 17. See also *ibid*.: "The comments of the former Chief Prosecutor alleged by the Accused and the remarks of the Minister of the Interior are both submitted in support of the Accused's original allegation that he was arrested in Serbia and illegally transferred to the Republika Srpska and that Serbian authorities were involved. Given that the Trial Chamber's original decision assumed these allegations to be true for the purpose of its determination, no new circumstances have been presented so as to justify revisiting that decision."

Tolimir appealed the 18 December 2008 and not the 14 December 2007 decision (about which Tolimir clarified that a "translation (...) into a language which the accused understands was not filed until on 31 December 2008")[706] as he found this senseless, given the fact that the 2007 decision was, in effect, incorporated into the 2008 decision.[707]

He asserted, as was done *supra*, that "[t]he Trial Chamber erred in limiting its consideration of the circumstances under which the accused was arrested to the "context of the impact on the jurisdiction of the Trial Chamber to adjudicate" [original footnote omitted, ChP]."[708]

It is hard not to agree with Tolimir's argument that "the very least that is expected of the International Tribunal is to establish the circumstances under which the accused was arrested and whether or not he was deprived of his freedom in a lawful or unlawful manner".[709] Only then can one properly look at what kinds of remedies would be appropriate to heal possible violations.[710] It was asserted *supra* that a simple declaration that the person was unlawfully arrested could very well constitute an appropriate remedy if the nature of the unlawfulness were minor. This point was, not surprisingly, also raised by Tolimir.[711]

However, Tolimir – possibly inspired by the formula used by the Trial Chamber in *Nikolić* – also hinted that more far-reaching remedies would perhaps be appropriate in this case because, in his opinion, the circumstances of his apprehension were also rather serious:

> It is not merely that the arrest was made in an illegal manner because, *inter alia*, he was *subjected to torture and other forms of inhumane conduct* (putting a sack over his head during the arrest, failure to inform him of the charges against him, unlawful transfer to the territory of Republika Srpska without the appropriate or binding

[706] ICTY, Appeals Chamber, *Prosecutor v. Zdravko Tolimir*, 'Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2, 23 January 200[9] (translation filed: 29 January 2009), A 22, under 1.
[707] See *ibid*., A 22, under 2.
[708] *Ibid*., A 21, under 6.
[709] *Ibid*., A 20, under 10. See also *ibid*., A 20 – A 19, under 13: "It cannot be claimed that the Tribunal has no jurisdiction to establish the circumstances of the arrest of an accused, considering that the Tribunal is actively involved in the procedure to arrest the accused and that actual acts, in whose legality the Tribunal as a judicial organ must have an interest, are carried out by organs of states which are legally obliged to cooperate with the Tribunal. The Tribunal must be the guardian of the principles of the rule of law and therefore must also take account of whether the arrest was made legally, either when raised by the accused or on its own initiative." *Cf.* also Sloan 2006, p. 342 (writing on the ICTY Appeals Chamber's decision in *Nikolić*): "The first obligation of a decision-making body in these circumstances should be to get to the heart of what actually happened".
[710] *Cf.* again (see also n. 202) Henquet 2003, p. 155: "If the Tribunal must remedy a violation of the rights of an accused during his or her arrest, it must have access to information pertaining to the arrest."
[711] See ICTY, Appeals Chamber, *Prosecutor v. Zdravko Tolimir*, 'Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2, 23 January 200[9] (translation filed: 29 January 2009), A 19 – A 18, under 15-17. See also *ibid*., A 15, under 32: "Simply making a declaration is not mere abstract deliberation without any consequences; establishing certain relevant circumstances and their legal qualification constitute a form of satisfaction and a measure to protect the legal system."

> procedure, forcing the accused to "come to an understanding" whereby he renounced his citizenship of the Republic of Serbia, etc.), but also that his arrest was presented in a way which calls into question the integrity of the Tribunal and makes the accused the subject of manipulation and propaganda activities in the context of cooperation with the Tribunal and the Republic of Serbia avoiding taking responsibility for arresting people accused before the Tribunal [emphasis added and original footnote omitted, ChP].[712]

Tolimir also hinted that one of those more far-reaching remedies could, for example, be a reduction of his sentence: "[t]he circumstances under which he was arrested are important, for example, for his provisional release, *sentencing decision*, etc. [emphasis added, ChP]".[713]

In fact, in the final words of his appeal, Tolimir confirmed the point he also made in his very first submission,[714] namely that the ICTY must actually grant him the ultimate remedy available:

> [T]he accused Zdravko Tolimir hereby requests that the Appeals Chamber amend the decision of the Trial Chamber, and establish: A) that, considering the circumstances under which Zdravko Tolimir was arrested and those which followed upon his arrest, it is not within the Tribunal's jurisdiction to continue proceedings against Zdravko Tolimir.[715]

Only if that remedy were rejected, Tolimir requested that the ICTY establish:

> B) That Zdrvako Tolimir was arrested in the territory of the Republic of Serbia. C) That he was arrested in an unlawful manner. D) If it considers there is insufficient information to render a decision on applications B) and C), that it order the Prosecution to use the instruments of cooperation to investigate further with the Republic of Serbia the circumstances relating to the manner and location of Zdravko Tolimir's arrest, and to take a statement from the former Chief Prosecutor, Ms Carla Del Ponte, to confirm the claims regarding intelligence related to his arrest. E) To draw to the attention of the President of the Tribunal and the Chief Prosecutor the circumstances under which Zdravko Tolimir was arrested in order that this information be included in the reports submitted to the Security Council.[716]

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[712] *Ibid*., A 18 – A 17, under 20.
[713] *Ibid*., A 16, under 30.
[714] See n. 673 and accompanying text.
[715] ICTY, Appeals Chamber, *Prosecutor v. Zdravko Tolimir*, 'Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2, 23 January 200[9] (translation filed: 29 January 2009), A 14, under 36. In that respect, the word "establish" in the following passage in *ibid*., A 15, under 34 must be considered a clear mistake: "The accused hereby sets out for the Appeals Chamber applications on which the Trial Chamber has ruled. The first is to establish its jurisdiction due to the serious violations of Zdravko Tolimir's rights, and due to the prolonged consequences of these violations, which have been made manifest not only in the violation of his rights but also because the acts which followed his arrest (...) have done serious damage to the Tribunal's integrity."
[716] *Ibid*., A 14, under 37.

The Prosecution, in its response, was of the opinion that Tolimir's appeal had to be dismissed for a number of procedural reasons. However, even if that were not accepted by the Appeals Chamber, the substantive arguments of Tolimir had to be rejected as well. This was because,

> [t]he Appeal fails to demonstrate that the Trial Chamber committed any discernible error of law or fact, or that it weighed either relevant or irrelevant considerations in an unreasonable manner, irrespective of whether the Accused is requesting the Appeals Chamber to decline jurisdiction based on the circumstances of his arrest, or whether he is simply seeking a declaration. Furthermore, the Accused similarly has failed to show that the Trial Chamber has abused its discretion [original footnotes omitted, ChP].[717]

On 12 March 2009, it fell to the Appeals Chamber to shed light on these issues. However, unfortunately, it did not go into the merits of the case as it dismissed both the appeal of Tolimir and the Prosecution's response to this appeal on procedural grounds alone: according to the judges, Tolimir should have asked the Trial Chamber's permission to file an appeal against the 2008 decision (which was not done)[718] and the Prosecution filed its response to Tolimir's appeal too late.[719]

Although it is, of course, unfortunate that the Appeals Chamber did not go into the merits of this case, the case remains interesting for a number of issues which have been reviewed during the examination of this case. One could refer here not only to the discussion as to whether the ICTY should not put too much emphasis on the ultimate remedy of setting aside jurisdiction, but also to the fact that the Trial Chamber's decision of 14 December 2007 confirmed the findings of the Appeals Chamber in *Nikolić* with respect to the element of 'seriousness of the alleged crimes'. Hence, even if the legal foundation for the Appeals Chamber's observations on that point is not without its flaws, one can assert that the Appeals Chamber's decision in *Nikolić* appears to incorporate *the* ICTY view on the *male captus* issue.

3.1.6 *Karadžić*

On 31 July 2008, the world could see one of the 'biggest fish' of the ICTY, Radovan Karadžić, being brought into the courtroom of the Tribunal. During this initial appearance, Karadžić wished to inform Judge Orie – who presided over this session – of the "procedural irregularities in my arrival here",[720] a point which he further

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[717] See ICTY, Appeals Chamber, *The Prosecutor v. Zdravko Tolimir*, 'Prosecution's Motion for Extension of Time to File a Response and Response to Tolimir's "Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest"' (*Public*), Case No. IT-05-88/2-AR72.2, 10 February 2009, para. 13.

[718] ICTY, Appeals Chamber, *Prosecutor v. Zdravko Tolimir*, 'Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest (*Public*), Case No. IT-05-88/2-AR72.2, 12 March 2009, para. 13.

[719] *Ibid*., paras. 9-10.

[720] See ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, Transcripts of 31 July 2008, p. 20. See also Sluiter 2008 A, p. 624.

developed in his first motion where he recounted the circumstances of his apprehension in Serbia as follows:

> The next irregularity occurred in Belgrade. Unknown civilians showed me a badge so quickly that I could not identify it, took me out of a public transport vehicle and held me in an unknown place for 74 hours. During this time I was not informed of the rights to which I am entitled if they abducted me in the name of international justice. Nor did they tell me who they were or what they intended to do with me. Nor did they allow me to speak with one of their chiefs or allow me to make a telephone call. They did not even allow me to send a single SMS message to one of my new friends so that they would not go round the hospitals and mortuaries looking for me. Nor would they send such a message on my behalf. For those 74 hours I did not exist, and after that they handed me over to the Special Court and an investigating judge, after which everything was regular.[721]

On 4 August 2008, the Prosecution stated that it did not see this submission of Karadžić, who was defending himself, as an official motion and hence that it would not respond to it.[722] As a result, two days later, Karadžić filed an "[o]fficial submission concerning my first appearance and my immunity agreement with the USA".[723] Remarkably, this submission, even though it very much resembles the earlier one, leaves out the most interesting point from the perspective of this study, namely the circumstances pertaining to his actual apprehension in Belgrade. As a result, the proceedings continued with respect to Karadžić's alleged immunity agreement with the US, the so-called Holbrooke Agreement, but the point of his alleged *male captus* faded into the background. Nevertheless, it is clear that Karadžić had not forgotten it; on 4 August 2009, he filed a motion through which he returned to this topic.

Before going to examine that motion however, it is worth pointing out that in the aftermath of the alleged immunity agreement proceedings, Trial Chamber III and the Appeals Chamber made some interesting remarks about the abuse of process doctrine. In the context of these proceedings, Karadžić had argued that, if the Chamber were to decide that the agreement was not binding on the ICTY, it then had to

> consider whether it should dismiss the Indictment or stay the proceedings as an abuse of process "so as not to taint the integrity of the Tribunal by prosecuting someone

[721] See ICTY, Pre-Trial Chamber, *Prosecutor v. Karadžić*, 'Irregularities Linked to My Arrival Before the Tribunal', Case No. IT-95-5/18-I, 31 July 2008 (filed on 1 August 2008), p. 3.
[722] See ICTY, Trial Chamber I, *The Prosecutor v. Radovan Karadžić*, 'Prosecution's Notice Regarding Accused's Communication with the Pre-Trial Chamber' (Public), Case No. IT-95-5/18-I, 4 August 2008, para. 1.
[723] See ICTY, Pre-Trial Chamber, *Prosecutor v. Karadžić*, 'Official submission concerning my first appearance and my immunity agreement with the USA', Case No. IT-95-5/18-I, 6 August 2008.

> who, through no fault of his own, relied upon an agreement which was based on deception [original footnote omitted, ChP]."[724]

The judges indeed decided that the agreement was not binding on the ICTY,[725] thereby assuming for the moment – and only for the purpose of first deciding the legal issues[726] – that Karadžić's allegations concerning the agreement were true. As a result, the judges turned to the abuse of process argument. After having examined the observations of the judges in the *Barayagwiza* (to be discussed in the next subsection) and *Nikolić* cases on this doctrine, they rejected Karadžić's claim:

> First, proceeding with his case, even in light of the Agreement, would not affect any of the Accused's fair trial rights, including as a suspect or an accused. In addition, the Chamber recalls its finding that Holbrooke did not act with actual or apparent authority of the UNSC. Thus, he was essentially a third party, unconnected to the Tribunal, promising immunity years before the Accused's transfer to the Tribunal. It is difficult to see how, in those circumstances, to proceed with the case can be said to be such an abuse of process that the Tribunal would be obliged to stay the proceedings.[727]

Two remarks can be made here.

First, the test used by the Trial Chamber – "proceeding with his case (...) would not affect any of the Accused's fair trial rights" – is not, as will also be shown in the next subsection, the test used by the ICTR *Barayagwiza* case, even though the ICTY judges referred earlier[728] to this correct test:

> [T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[729]

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[724] ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 11.

[725] See *ibid*., para. 80.

[726] See *ibid*., paras. 46-47: "If the Accused cannot obtain the relief he seeks as a matter of law, then the issue of whether the Agreement was ever made is irrelevant to any issue other than sentence, on which evidence may be led at trial. (...) The Chamber notes that the Trial Chamber in *Nikolić* followed the same approach: the parties there agreed to proceed without an evidentiary hearing and, instead, submitted a list of agreed facts on which the Chamber was to rely while making its determination on the law. The fact that in this case there is no such agreement, nor any agreed facts, does not preclude the Chamber from taking a similar approach. Instead of relying on agreed facts, the Chamber will make its determination on the basis that the evidence submitted by the Accused is accepted *pro veritate* for this purpose. Thus, the Accused's argument that the facts surrounding the Agreement are all disputed does not prevent the Chamber from deciding the legal issues first [original footnote omitted, ChP]."

[727] *Ibid*., para. 84.

[728] See *ibid*., para. 80.

[729] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 77. See also *ibid*., para. 74: "It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."

Hence, the judges can use the abuse of process doctrine, even if continuing with the trial would *not* affect the person's right to fair trial (in the strict sense of the word), namely "where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct". In that latter case, one could argue that the broader concept of a fair trial, the fairness of the entire proceedings of bringing a suspect to justice, has been affected, entailing that it would be unfair to try the suspect in the first place. (See also Subsection 4.3 of Chapter III.)

The second remark that can be made here is that the Trial Chamber's emphasis on the fact that Holbrooke cannot be connected to the Tribunal may not necessarily make any difference. It is true that the 'national' abuse of process doctrine, even though it is sometimes formulated in such a general way that it could also encompass the actions of third parties,[730] focuses on the actions of the prosecuting forum's own authorities, but the cases of *Milošević* and *Nikolić* (and the same goes for other still-to-discuss cases, such as *Barayagwiza*) have shown that the Tribunal's version of this doctrine entails that the judges may refuse to exercise jurisdiction in very serious *male captus* cases, *irrespective* of the entity responsible for the serious *male captus*. Now, the judges of Trial Chamber III did in fact acknowledge that in the *Nikolić* case, the judges of Trial Chamber II had held "that the Tribunal should not exercise its jurisdiction over persons who have been "seriously mistreated" by a party not acting for the Tribunal and before being handed over to the Tribunal",[731] but they also expressed "some doubts that this statement is applicable to every situation involving a third party not connected to the Tribunal".[732] They explained their reservation as follows:

> The *Nikolić* Trial Chamber based this part of its decision on two examples, namely (i) the events in *Barayagwiza*, where there was a considerable delay by state authorities before the accused's transfer to the Tribunal, and (ii) a hypothetical situation of torture or cruel or degrading treatment of the accused by a third party just before his

[730] See the following words of Lord Lowry in *Bennett*, see n. 610 and accompanying text of Chapter III and ns. 300 and 310 and accompanying text of Chapter V: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.) See also the following words of Lord Steyn in *Latif* (see n. 346 and accompanying text of Chapter V): "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." (House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996].) Not very surprisingly, these quotations were also referred to by the ICTR Appeals Chamber in *Barayagwiza*, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 74-75.

[731] ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85.

[732] *Ibid*.

> transfer to the Tribunal. However, those two situations are hardly applicable to a case such as the one before the Chamber. First, in *Barayagwiza*, the prosecution was stayed partly also because of the delays caused by the ICTR's Prosecutor upon the transfer to the Tribunal, which compounded the serious delays caused by the state authorities that captured Barayagwiza. In addition, the state authorities in question were explicitly held to have been acting on behalf of the ICTR Prosecutor and thus were not completely unconnected to the Tribunal. As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or degrading treatment, there is no indication that the Accused suffered such serious mistreatment or that there was any other *egregious* violation of his rights, including his right to political activity. In any event, in the opinion of this Chamber, it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed. Where an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party [emphasis in original and original footnotes omitted, ChP].[733]

The last point is connected with the previously mentioned – and criticised – abuse of process test of the Trial Chamber that even serious mistreatment, such as torture, may not lead to the ending of the case *because his fair trial rights may not be in danger*. However, as mentioned above, the abuse of process doctrine is also about stopping a case, not when the fairness of the trial in court is in jeopardy, but where it would be unfair to start a trial in the first place in view of certain circumstances. In that latter case, one could say that because of certain circumstances, the broad fair trial concept (meaning the entire process of bringing a person to justice), the judges' sense of justice in general, has become infected. Recall the abuse of process doctrine from the *Bennett* case:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[734]

Judges may and should also refuse jurisdiction in the case of serious pre-trial irregularities, even if these irregularities do not jeopardise a person's fair trial in the restricted sense of the word. It is not only the fair trial for the suspect which is at stake, but also the integrity of the court in question. That integrity will, of course, be more easily harmed if the authorities of the prosecuting forum itself are involved in the serious *male captus*, but the court may also be of the opinion that its integrity as a court of law is undermined if it were to try a person who, in the context of the court's proceedings, has been seriously mistreated.

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[733] *Ibid*.
[734] See n. 730.

Having that said, one can, however, generally agree with the Trial Chamber's other observations that the irregularities in this case are definitely not so severe as to divest jurisdiction. What is required is such a serious *male captus* (irrespective of the entity responsible) that the judges cannot, in good conscience, decide to continue with the case. However, what constitutes such a serious *male captus* depends on the circumstances, for example on who was involved in it. In that respect, one can concur with the Chamber that some third parties can be seen as being more connected with the Tribunal than others. For example, irregularities caused by a State which is acting on the Prosecutor's behalf may be deemed to be more serious than the same irregularities committed by third parties which have a less strong connection with the Tribunal, such as private individuals acting on their own.[735] Another aspect which could be taken into account is the question as to how much violence was used against the person.

As will be shown in the *Barayagwiza* case, the seriousness of the irregularities related to that person's pre-trial detention were caused by the several violations of the person's rights in which the Prosecution, but also a third party, had its share. In this context, one could also think of this study's suggestion presented in the context of the *Dokmanović* and *Nikolić* case, namely that a court should refuse jurisdiction if employees of the Tribunal itself were, for example, involved in serious, intentional irregularities related to a person's apprehension, such as a kidnapping. In that latter situation, however, the person may not been mistreated (that was also not the case in *Barayagwiza*). Nevertheless, one can imagine that a court may also be of the opinion that it should refuse jurisdiction where it has become clear that a suspect was tortured in the context of its proceedings, even if the Prosecution was not in some way involved in that irregularity. (It is, of course, clear that if the Prosecution were involved in such serious mistreatment – which probably/hopefully will never happen – the court has *no proper option but* to refuse jurisdiction.)

Karadžić appealed the decision and argued, with respect to the Trial Chamber's use of the abuse of process doctrine, and referring to the *Barayagwiza* and *Nikolić* cases, that "the Trial Chamber improperly concluded that there were two different standards for abuse of process – one for Tribunal actors and one for non-Tribunal actors".[736] However, as clarified, although there are two situations possible, there is arguably only one test:

[735] Although it is true that Barayagwiza was being held for a long time at the request of the ICTR in Cameroon, the ICTR also stated that even if Barayagwiza was not in the constructive custody of the Tribunal, the fact that he had "spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him" (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 85, see also n. 856 and accompanying text) had to be taken into account. This is a point which the Trial Chamber does not mention here.

[736] ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadzic*, 'Appeal of Decision of Holbrooke Agreement' (*Public*), Case No. IT-95-05/18-AR73.4, 27 July 2009, para. 101.

> [T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay[737] has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[738]

Hence, if the judge is of the opinion that the suspect can no longer enjoy a fair trial (in the strict sense of the word) or that some pre-trial circumstances mean it would be contrary to the integrity of the court/his sense of justice to have a trial in the first place (one could call this the concept of a fair trial more broadly perceived),[739] he can refuse jurisdiction.

Hence, there is only one test, consisting of two *male detentus* avenues. However, and focusing now on the avenue which is most interesting for this study (the second one), in taking all the elements into account in this exercise, the nature of the actor responsible for the impropriety/misconduct is, it can be argued, *of course*, an important element which should be taken into account here.[740] It can certainly be

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[737] Or other circumstances, see the test from *Bennett* (see n. 734 and accompanying text) to which the judges in the *Barayagwiza* case referred, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 75.

[738] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 77. See for the second *male detentus* avenue also *ibid*., para. 74: "It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." With respect to these particular words, requiring serious violations of the suspect's rights, it is submitted that the judge should take a liberal stance. Hence, even if he is of the opinion, for example, that private individuals *cannot* violate (human) rights (see the *Nikolić* case), he should ask himself whether what happened to the suspect is nonetheless so serious that jurisdiction must be refused. In that respect, one can agree with the following words from the Appeals Chamber in *Karadžić*: "[T]he question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct *amounting to* serious and egregious violations of the Appellant's rights [emphasis added, ChP]." (ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 51.) In any case, one can always refer here to the more general words of the *Barayagwiza* decision as mentioned in para. 77: "pre-trial impropriety or misconduct".

[739] This was also very clearly explained in the *Latif* case (see also n. 346 and accompanying text of Chapter V): "The speeches in *Ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." (House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996].) See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74. (See also n. 730.)

[740] In this context, it is also to be remembered that at the national level, the abuse of process doctrine, even though one will find rather general definitions of his concept, seems to require the involvement of the prosecuting forum's own authorities. *Cf.* also Sloan 2006 p. 342 (writing on the ICTY Appeals Chamber's decision in *Nikolić*): "If the full facts were set out and it became clear that there was no link to SFOR, then many of the bases on which national courts have favoured the *male captus, male detentus* approach (e.g., a desire to control an overzealous executive, avoiding the perception of impropriety, etc.) would be mitigated or would become inapplicable."

maintained that the integrity of a Tribunal will more easily be affected by the pre-trial impropriety/misconduct if it can be attributed to the Tribunal. It can be asserted that the *Barayagwiza/Nikolić* cases 'only' support the idea that serious impropriety/misconduct can lead to the ending of the case, irrespective of the entity responsible,[741] but not that actions from a third party may not be given less weight than actions from parties which can be connected to the prosecuting forum, when the judge has to determine whether the impropriety/misconduct is *so* serious that it must lead to the ending of the case. In other words, although one can agree with Karadžić that "[t]he *Barayagwiza* Appeals Chamber never purported to exclude third-party conduct from scrutiny under the abuse of process doctrine or to limit such scrutiny only to extreme cases of severe physical mistreatment or torture",[742] one can imagine that a Tribunal, given its important responsibility to also prosecute suspects of international crimes, will not refuse jurisdiction too readily and certainly not when the entities which can be connected to the prosecuting forum have done nothing wrong. Hence, only in extreme cases, *such as* (but indeed not limited to) serious mistreatment of the suspect, will a Tribunal probably refuse jurisdiction if the impropriety/misconduct was committed by third parties having no link with the Tribunal (and arguably rightly so). However, it appears that the Trial Chamber did not deny this when it stated (see also footnote 733 and accompanying text):

> As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or degrading treatment, there is no indication that the Accused

[741] Arguably, the Tribunal should apply a broad concept of abuse of process doctrine here, see also the discussion on this point in the context of the *Nikolić* case. *Cf.* also ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadzic*, 'Appeal of Decision of Holbrooke Agreement' (*Public*), Case No. IT-95-05/18-AR73.4, 27 July 2009, paras. 109-111: "Within national jurisdictions, it will almost always be a single state authority which creates the criminal law, investigates and arrests individuals for breaches of it, and establishes the courts in which to hear the criminal case. It is also the same state authority which is represented by the prosecution that proceeds with the case. In these circumstances, it will be exceedingly rare for an actor unrelated to the state to be involved in the law enforcement and adjudication. As such, it is perhaps rational for an abuse or process doctrine operating in this context to look primarily or solely to misconduct attributable to the state – reserving only an extraordinary or residual category for abusive misconduct attributable to other unrelated actors. The exact opposite is true of international tribunals. These are highly decentralized institutions. Only the actors which create the criminal law (the UNSC) and which hear and prosecute cases for breaches of its (the Tribunal/OTP) are exclusively related to the central authority (the UN). As the Tribunal itself frequently points out, "the International Tribunal has no enforcement arm of its own – it lacks a police force." As such, it is entirely dependent on a diverse range of actors to fill this critical role. A whole host of states, inter-state organizations and international agencies – as well as diplomats, special envoys, local authorities, and military personnel, – routinely fill the key roles of investigating crimes, sharing intelligence, and arresting and transferring suspects. This involvement may be formal or informal, and it may occur with or even without the Tribunal's knowledge. Where so many diverse actors may be involved in creating, enforcing and adjudicating international criminal law – sometimes even without one another's knowledge or consent – it is essential that the doctrine of abuse of process in this setting not be applied in a restrictive or technical manner. (…) A Court operating in these circumstances must have the discretionary authority to look at *all* the events that have led to the proceedings and decide, regardless of whom they are attributable, whether *on the whole* they breach the Accused's rights or contravene the Court's sense of justice [emphasis in original and original footnotes omitted, ChP]."

[742] *Ibid*., para. 104.

> suffered such serious mistreatment *or that there was any other* egregious *violation of his rights*, including his right to political activity. In any event, in the opinion of this Chamber, it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed [emphasis added and emphasis (of the word "egregious") in original, ChP].[743]

The Appeals Chamber, which repeated its balancing exercise from the *Nikolić* case,[744] agreed with this position when it held:

> [T]he Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one, by considering whether the Appellant suffered a serious mistreatment *or if there was any other egregious violation of his rights* [emphasis added, ChP].[745]

Finally, it may also be worth mentioning that the Appeals Chamber, in contrast to the Trial Chamber, correctly checked whether one of the *two* situations triggering the abuse of process doctrine was met[746] (which was not the case here).[747]

Returning to the actual *male captus* discussion, in his motion filed on 4 August 2009, Karadžić first repeated (see his first submission filed a year earlier) what had in fact happened to him.

He claimed that he was arrested in Belgrade on Friday 18 July 2008 by unknown men and taken to a location where he was held *incommunicado* for three days.[748] "During that time, he was never advised of the reason for his arrest, the identity of

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[743] ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85.

[744] See ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 49: "The Appeals Chamber recalls that the Appellant is charged with genocide, crimes against humanity and war crimes. The public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong. Against the legitimate interest of the international community in the prosecution of the Appellant for Universally Condemned Offences stands the alleged violation of the Appellant's expectation that he would not be prosecuted by the Tribunal, pursuant to the alleged Agreement [original footnote omitted, ChP]."

[745] *Ibid*., para. 47.

[746] See *ibid*., para. 51: "The Appeals Chamber observes at the outset that none of the Appellant's allegations qualify as a situation making a fair trial impossible, pursuant to the first prong of the test set out in the *Barayagwiza* Decision. The Appellant's allegations point instead to the second prong of the test set out in the *Barayagwiza* Decision. In other words, the question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights [original footnotes omitted, ChP]."

[747] See *ibid*., para. 53.

[748] See ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 4.

his captors, or brought before a judicial officer. He was refused access to a telephone to inform anyone that he had been arrested."[749]

After the weekend, Karadžić continued, the Serbian authorities improperly announced that he was arrested on Monday 21 July 2008, three days after his actual apprehension on the Friday.[750] On Tuesday 22 July 2008, Karadžić was brought before a judge.[751] Thus, he had allegedly been held without seeing a judicial officer for four days.

According to Karadžić, these four days, which thus also encompassed three days of *incommunicado* detention, had violated his rights,[752] namely 1) his right to liberty; 2) his right to be informed of the reasons for his arrest and 3) his right to be promptly brought before a judge.

With respect to the first right, Karadžić argued that "[t]he practice of incommunicado and unacknowledged arrest and detention is 'an obvious example' of arbitrary arrest and detention [original footnote omitted, ChP]".[753] This argument, supported by Nowak, was mentioned earlier in this book,[754] but it was there also explained that this statement should be refined:

> Brief *incommunicado* detention, that is, deprivation of liberty for a short period of time in complete isolation from the outside world, including family and lawyer, does not per se appear to be illegal under international human rights law, but it cannot be used in order to bar the detainee from exercising his or her rights as an arrested or detained person.[755]

Next to the element of arbitrariness, Karadžić looked at the procedural dimension of the element of legality and correctly asserted that "human rights instruments require compliance with the national procedures during arrest and detention in order for the deprivation of liberty to be lawful".[756] Hence, the relevant Serbian provisions had to be examined.

In Karadžić's view, an examination of these provisions (including relevant human rights provisions) showed that they had been infringed.[757] Given these

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[749] *Ibid*.
[750] See *ibid*., para. 5.
[751] See *ibid*.
[752] See *ibid*.
[753] *Ibid*., para. 6.
[754] See n. 225 of Chapter III.
[755] Office of the High Commissioner for Human Rights and International Bar Association 2003, p. 211.
[756] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 7.
[757] See *ibid*., para. 11. See also *ibid*.: "First, an apprehension was effectuated by individuals acting as police officers failing to identify themselves to Dr. Karadžić, as well as to announce the reasons for his arrest and his right in connection therewith. Second, no warrant for compulsory appearance was served to him during and right after his apprehension, instead he was simply abducted. Third, Dr. Karadžić was taken to an unidentified location and detained in a secret house, instead of being taken to official detention facilities as prescribed by law. And finally, as a result of this intimidating apprehension and

violations of the elements of procedural legality and non-arbitrariness, it had to be concluded that his right to liberty and security had been breached.[758]

Karadžić asserted that his second right, the right to be informed of the reasons for his arrest (and of the charges against him), was also violated[759] but arguably, he had already done this in the context of the more general right to liberty, a right which includes this more specific right.[760]

The third right, the right to be promptly brought before a judge, can also be seen as a sub-right of the more general right to liberty and security.[761]

According to Karadžić, this (sub)right was also violated[762] because he "was brought before the national judicial authority on 22 July 2008, that is on the fifth day after his arrest of 18 July 2008. Such time period is clearly contrary to the relevant international human rights standards."[763]

Because of these human rights violations, Karadžić argued, he was entitled to an effective remedy.

This had been earlier stressed in cases such as *Delalić et al*.[764] and the four still-to-discuss ICTR cases of *Barayagwiza*,[765] *Kajelijeli*,[766] *Semanza*[767] and *Rwamakuba*.[768]

The fact that these violations were not committed by authorities which can be linked to the Tribunal did not change this – a statement which, as will also be shown in the remainder of this chapter, can certainly find support in the above-mentioned cases:

> In light of the above jurisprudence it is not necessary to address the question whether or not the violations of Dr. Karadzic's rights can in some way be attributed to the ICTY, or one of its organs. It follows from the highly authoritative case law from the Appeals Chamber in *Barayagwiza*, *Kajelijeli*, *Semanza* and *Rwamakuba*, that

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unacknowledged incommunicado detention until 21 July 2008, Dr. Karadžić was prevented from contacting the outside world, in particular his family and his legal counsel as guaranteed by the law."

[758] See *ibid*., para. 12.

[759] See *ibid*., para. 21.

[760] See n. 757: "First, an *apprehension was effectuated by individuals acting as police officers failing* to identify themselves to Dr. Karadžić, as well as *to announce the reasons for his arrest and his right in connection therewith* [emphasis added, ChP]."

[761] See, for example, para. 3 of the ICCPR's right to liberty and security (Art. 9). See also ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 25: "Dr. Karadžić was denied his right to be brought promptly before a judge or other officer authorized by law to exercise judicial power. This is yet another breach of the right to liberty and security of a person."

[762] See the previous footnote.

[763] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 25.

[764] See n. 136.

[765] See n. 919 and accompanying text.

[766] See n. 1081 and accompanying text.

[767] See n. 997 and accompanying text.

[768] See ns. 1124, 1144 and 1164 and accompanying text.

> attribution or any involvement of the ICTY in aforementioned violations cannot be a condition for Dr. Karadzic's entitlement to an effective remedy.[769]

Karadžić concluded his submission by requesting the Trial Chamber to first, "find that Dr. Karadzic's rights to liberty, to be informed of the reasons for his arrest, and to be taken promptly before a judicial officer, were violated during his arrest, and to hold an evidentiary hearing if necessary"[770] and secondly – invoking the remedies formula used in the still-to-discuss cases of *Barayagwiza*[771] and *Semanza*[772] – "order that an appropriate remedy, namely financial compensation in the event of an acquittal or reduction in sentence, in the event of a conviction, be fixed by the Trial Chamber as part of the final judgement in this case".[773]

The Prosecution responded on 18 August 2009. It argued, among other things, that "Karadžić's request should be denied because the Tribunal is under no obligation to provide him with a remedy unless the alleged violations can be attributed to the Tribunal".[774] The Prosecution was of the opinion that Karadžić could not rely on *Barayagwiza*, *Kajelijeli*, *Semanza* and *Rwamakuba* in that respect as in those cases, "the accused were granted a remedy because those violations were attributed to the ICTR through one of its organs, *i.e.* the ICTR Prosecution".[775] However, as will be explained in the remainder of this chapter, all cases contain reasonings which can be interpreted as meaning that the ICTR will take responsibility for violations, even if they cannot be clearly attributed to the Prosecutor. The *Rwamakuba* case is the weakest case in that respect and the *Barayagwiza* case, where the judges even looked at irregularities beyond the period of constructive custody (see footnotes 828-829 and accompanying text for this term), the most far-reaching.

The Prosecution in *Karadžić* clarified its point, referring to different statements from these four cases. For example, with respect to the first *Barayagwiza* decision, it noted that the Appeals Chamber

> found that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence." The Appeals Chamber ordered the release of the accused as

[769] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 44.
[770] *Ibid*., para. 45.
[771] See n. 922 and accompanying text.
[772] See n. 1004 and accompanying text. *Cf.* also the cases *Kajelijeli* (see n. 1082 and accompanying text) and *Rwamakuba* (see n. 1154 and accompanying text).
[773] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 3 August 2009 (filed 4 August 2009), para. 45.
[774] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Prosecution Response to Karadžić's "Motion for Remedy for Violation of Rights in Connection with Arrest"' (*Public*), Case No. IT-95-5/18-PT, 18 August 2009, para. 1.
[775] *Ibid*., para. 4. This paragraph only focused on the cases of *Barayagwiza*, *Kajelijeli* and *Semanza* but the reasoning of the Prosecution also extends to the *Rwamakuba* case, see *ibid*., paras. 3 and 5.

> "the only remedy available for such prosecutorial inaction and the resultant denial of his rights [original footnotes omitted, ChP]."[776]

However, what do these words say?

They arguably only say that because the Prosecution failed to such an extent in this case, the case had to be dismissed with prejudice to the Prosecution. Thus, because of serious flaws in the Prosecution's handling of the case, the remedy had to be far-reaching.

However, that does not mean that the Tribunal would not have granted lighter, less far-reaching remedies if the suspect suffered violations which were not caused by serious failures on the part of the Prosecution. As will be shown in the next subsection, the *Barayagwiza* case arguably supports the idea that *any* violation occurring in the context of the case must be remedied, even if the violation, strictly speaking, cannot be attributed to the Prosecution/Tribunal. This point is clear with respect to the abuse of process doctrine (see the first *Barayagwiza* decision),[777] but it seems that the Tribunal would also take responsibility and remedy the (less serious) violations which do not trigger the *male detentus* outcome (and rightly so), see the second *Barayagwiza* decision.

The Prosecution in *Karadžić* noted with respect to this second decision that

> the Appeals Chamber found that even though the accused's rights had been violated by the Cameroonian authorities, those violations "were not attributable to the Prosecutor." The Appeals Chamber consequently altered the remedy because it found that "new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violations of the rights of the Appellant." A remedy was nevertheless granted because of the violations of the accused's rights once he had been transferred to the ICTR [original footnotes omitted, ChP].[778]

However, as will also be shown in the discussion of that decision, the fact that certain violations were not attributable to the Prosecutor does not mean that the judges would not take these violations into account when determining the appropriate remedies for these violations.

It seems that the Appeals Chamber *did* take (just as it arguably *should* take) *all* the violations into account when determining the remedies, including those which cannot be attributed to the Prosecution, when it stated more generally "that the Appellant's rights were violated, and that all violations demand a remedy".[779]

This point was also made in the *Semanza* case, where the judges stated "that any violation, even if it entails only a relative degree of prejudice, requires a

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[776] *Ibid*., para. 4.

[777] See ns. 841 and 856 and accompanying text.

[778] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Prosecution Response to Karadžić's "Motion for Remedy for Violation of Rights in Connection with Arrest"' (*Public*), Case No. IT-95-5/18-PT, 18 August 2009, para. 4.

[779] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 74.

proportionate remedy".[780] The Prosecution in *Karadžić* noted that this statement was only made "in the circumstances of the case where there were violations attributable to the Prosecution and the ICTR".[781]

However, as will be shown in the discussion of that case, one can wonder whether this is so. The decision also contains a remark which can be seen as evidence for the idea that the statement "that any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy" must be viewed broadly, an idea which is reinforced by the declaration of Judge Lal Chand Vohrah in this case, see footnotes 834 and 985.

The fact that there was some delay in transferring Semanza to the ICTR and that this delay "was not attributable to the Prosecutor and consequently that the Tribunal did not violate Rule 40 *bis*"[782] does not jeopardise this reasoning. It only says that the Tribunal itself did not violate Rule 40 *bis* of the ICTR RPE because the delay could not be attributed to it. However, that does not mean that the judges may not view such a delay as a human rights violation nonetheless (which, by the way, does not seem to be the case here) which must be remedied, even if it could not be attributed to the Tribunal.[783]

The Prosecution in *Karadžić* also referred to the statement in the *Kajelijeli* case that "[t]he Prosecution failed to effect its prosecutorial duties with due diligence out of respect for the Appellant's rights following its Rule 40 request to Benin. Thus, the Appellant is entitled to a remedy from the Tribunal."[784] As will also be explained in the context of the *Kajelijeli* case, this is a tricky remark as it indeed seems to connect the granting of remedies with the attribution of certain violations to the Prosecutor, note the word "[t]hus". Of course, it is obvious that if certain violations can be attributed to the Prosecutor, then the suspect is entitled to a remedy. However, the more interesting question is whether these words imply that the suspect is *only* entitled to a remedy if certain violations can be attributed to the Prosecutor. As will become clear from the discussion of this case, the decision seems to provide enough room for the interpretation that the Tribunal is of the opinion that *all* violations in the context of a certain case must be remedied, even if those violations cannot be attributed to the Prosecutor.[785]

Finally, with respect to the *Rwamakuba* case, the Prosecution in *Karadžić* opined that "the Appeals Chamber based its conclusion that Rwamakuba was entitled to an

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[780] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 125.
[781] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Prosecution Response to Karadžić's "Motion for Remedy for Violation of Rights in Connection with Arrest"' (*Public*), Case No. IT-95-5/18-PT, 18 August 2009, para. 4.
[782] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 104. See also ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Prosecution Response to Karadžić's "Motion for Remedy for Violation of Rights in Connection with Arrest"' (*Public*), Case No. IT-95-5/18-PT, 18 August 2009, para. 4.
[783] *Cf.* again Judge Lal Chand Vohrah's declaration in this case, see ns. 834 and 985.
[784] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 252.
[785] See ns. 1060, 1065-1066, 1070, 1079 and 1081 and accompanying text.

effective remedy for violations following his transfer to the ICTR on the fact that these violations were "attributable to the Tribunal." [original footnote omitted, ChP]"[786] It is indeed correct that in this case, the ICTR only looked at violations which occurred after the suspect's transfer to the Tribunal. (According to the ICTR, the violations at the national level did not occur in the constructive custody of the ICTR.) However, this does not necessarily negate the general connotation of the statement that every violation must be effectively remedied. Here, the same point can be made as that made *supra* in the context of the *Kajelijeli* case; of course, the ICTR must remedy violations which are clearly attributable to it. However, the more interesting question is whether this case can also be seen as support for the idea that the ICTR will remedy violations occurring in the context of its case (for example, violations occurring in the context of the constructive custody) which cannot be clearly attributed to it. As will be shown in the discussion of that case, the judges in *Rwamakuba*, referring to *Barayagwiza* and *Semanza*, also seemed to accept responsibility for parts of the constructive custody, although it is also clear that this case does not go as far as those two cases.

The Prosecution in *Karadžić* also had another point, namely that "[t]he *Barayagwiza*, *Semanza*, and *Kajelijeli* cases are further distinguishable from Karadžić's case because, in the former, no confirmed indictments and no arrest warrants had been issued prior to the accused's detention in the detaining state".[787] Although the issuance of indictments and arrest warrants may lead to additional obligations on the part of the national State,[788] this does not change the basic idea suggested in this study, a suggestion which arguably finds support in the ICTR cases, that the Tribunal will remedy violations committed in the context of a certain case, whether or not the suspect has received an indictment or arrest warrant.

Finally, the Prosecution in *Karadžić* stated that "[t]he requirement that violations be attributed to the Tribunal does not deprive Karadžić of his right to an effective remedy since he may seek relief for the alleged violations elsewhere, *e.g.* in Serbia [original footnote omitted, ChP]".[789] This is a rather easy remark for the Prosecution to make. However, the Prosecution cannot seriously be of the opinion that Karadžić can get an effective remedy for these violations elsewhere (if they are established as such). After all, if it is established that Karadžić's detention was unlawful pursuant to national law, the normal remedy in such a case would be the release of the suspect, see the *habeas corpus* provision of, for example, Article 9, paragraph 4 of the ICCPR. However, how can Karadžić be released by the Serbian authorities if he is in the ICTY's custody?

[786] ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadžić*, 'Prosecution Response to Karadžić's "Motion for Remedy for Violation of Rights in Connection with Arrest"' (*Public*), Case No. IT-95-5/18-PT, 18 August 2009, para. 5.
[787] *Ibid.*
[788] See also *ibid.*, para. 7.
[789] *Ibid.* para. 9.

As argued before, it would be a sign of real legal 'maturity' on the part of the ICTY if it takes the full responsibility for all violations occurring in the context of its cases, simply because it is the ICTY that is now trying this suspect.

In providing the remedies for certain violations, the judges can then, of course, take into account the fact that their own people were not involved in the violations. As a result, the remedies can be very light. However, that is better than simply ignoring the problems which are inherently linked with the cooperation system of the ICTY, namely that the Tribunal is dependent on other actors for arresting and detaining suspects and thus that it should not only accept the fortunate, but also the less fortunate consequences of this dependence.

In his reply to these arguments, Karadžić first of all pointed to the decision of 8 July 2009 concerning the Holbrooke Agreement (see *supra*),[790] which supported the abuse of process idea in the *Nikolić* case that serious violations may lead to a refusal of jurisdiction, even if these violations were not committed by organs which can be connected to the Tribunal. As argued earlier in this book, the fact that the Tribunal would take the ultimate responsibility (by refusing jurisdiction) for serious actions of third parties, should indeed be seen as additional evidence for the idea that the Tribunal must remedy every violation in the context of its cases, irrespective of the entity responsible for these violations.

Alongside that, Karadžić rejected the views of the Prosecution with respect to the ICTR cases mentioned above. Much of his criticism resembles the remarks briefly mentioned above and examined in greater detail in the remainder of this chapter. For example, with respect to the *Barayagwiza* case, Karadžić stated, among other things:

> The fact that violations of rights not directly attributable to the ICTR still entitle the accused to a remedy follows from two basis elements of the Decision: (i) the violations by the Cameroonian authorities not directly attributable to the ICTR were fully taken into consideration; (ii) the unequivocal concluding statement that all violations demand a remedy [original footnote omitted, ChP].[791]

Likewise, Karadžić pointed to passages in the *Semanza*[792] and *Kajelijeli*[793] cases which will be further addressed in the remainder of this chapter and which indeed seem to support the idea that the Tribunal will remedy *any* violations in the context of its case, whether or not these violations could be attributed to the Prosecutor.

The last point to be discussed here is that Karadžić was, of course, also not of the opinion that the way a case is brought within the context of a Tribunal should influence the basic idea that the Tribunal should take responsibility for violations committed in this context.

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[790] See ICTY, Trial Chamber III, *The Prosecutor v. Radovan Karadzic*, 'Reply Brief: Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-05/18-PT, 24 August 2009, para. 4.
[791] See *ibid*., para. 6.
[792] See *ibid*., para. 8. See also ns. 977-978 and accompanying text.
[793] See *ibid*., para. 10. See also ns. 1070-1072 and accompanying text.

Hence, in that respect, it would not matter whether that case was brought within the context of the Tribunal via the issuance of an indictment/arrest warrant or otherwise.[794]

On 31 August 2009, the Trial Chamber issued its decision on these matters. The judges were very brief: they decided that these matters were premature and would have to be resolved at the end of the substantive case.[795] However, the judges nevertheless already noted

> that there is substance in the Prosecution's submission that, before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal.[796]

As has – and will – become clear in this study, although it may seem very logical that the Tribunal would only have to remedy those violations which can be attributed to it or for which it can be held legally responsible (to a certain extent), and although it is true that in the cases mentioned by Karadžić, "the major discussions and findings ultimately revolved around the Prosecution's responsibility for violations, rather than the responsibility of state authorities [original footnote omitted, ChP]",[797] there are still several passages in these cases which also provide room for another interpretation, namely that the Tribunal will take a more general responsibility, even if violations cannot be clearly attributed to it or of which it cannot be said that the Tribunal was, strictly speaking, legally responsible (to some extent) for them, and that it will remedy *all* violations in the context of its cases.

The fact that judges, under the abuse of process doctrine, will take even the ultimate responsibility (namely the refusal of jurisdiction) for actions of other entities in very serious situations (which was not the case here)[798] arguably constitutes additional evidence for this idea.

One can assume that if the trial of *Karadžić* reaches its final stage, these points will be re-litigated, probably up to the Appeals Chamber. It remains to be seen how those judges will respond, although it seems clear that both interpretations can be found in the jurisprudence of the Tribunals.

It is submitted that this study is, in any case, of the opinion that the interpretation which does not demand the attribution of certain violations to the Tribunal is the better one.

Simple fairness (among other things – this point will be returned to) demands that the now prosecuting forum remedies all the violations which have been committed in the context of its case. In the words of Zahar and Sluiter:

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[794] See *ibid*., paras. 12-13.
[795] See ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 31 August 2009, para. 5.
[796] *Ibid*., para. 6.
[797] *Ibid*.
[798] See also *ibid*., para. 7.

> When other entities bear primary responsibility for violations of human rights, what matters is the duty of every tribunal bench to protect the fairness and integrity of the trial by determining an appropriate remedy. Obviously, the trial does not start at the seat of the tribunal but extends to every act connected with it. While this may be a heavy and seemingly unfair burden on the tribunals – they interact with a wide variety of actors, not all of whom may apply the highest standards of justice, and the tribunals are not in a position to change this – the reverse is even more unfair.[799]

The judges in *Karadžić* also agreed with the Prosecution that the authorities used by Karadžić

> are not directly applicable to cases where an arrest warrant has been issued and executed pursuant to Rule 55 as they concerned facts where suspects were detained by various states pursuant to requests from the Prosecution under Rule 40, and then were left to languish in those states for months, while the Prosecution was preparing to issue an indictment against them.[800]

That is, of course, true, but it can again be argued that this does not necessarily jeopardise the idea mentioned above, namely that violations which occur in the context of a Tribunal case must be remedied by the final prosecuting forum, whether that "in the context of a Tribunal case" concept has been triggered by an indictment, arrest warrant, request for provisional arrest or otherwise.

3.2 Cases in the context of the ICTR

3.2.1 *Barayagwiza*

It was stated earlier in this book that this study would particularly focus on those *male captus* cases which have to do with irregular arrests as the word *captus*, of course, refers to the capture/apprehension. The previous cases from the ICTY have confirmed this. However, it is now time to look at a case which is also very often mentioned in the *male captus* discussion and which has to do with the question of the effect of an irregular pre-trial *detention* on the exercise of jurisdiction: the – already very often alluded to – case of Barayagwiza. In this case,

> [t]he Appeals Chamber of the *ad hoc* Tribunals was confronted with the impossible task of striking the right balance between two interests that had equal dignity and deserved equal consideration. On the one hand, the right of the accused not to be arbitrarily detained; on the other, the effective functioning of international criminal justice [original footnotes omitted, ChP].[801]

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[799] Zahar and Sluiter 2008, pp. 285-286. See also n. 859.

[800] ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest' (*Public*), Case No. IT-95-5/18-PT, 31 August 2009, para. 6.

[801] Zappalà 2003, p. 256. This extremely interesting dilemma, which plays a central role in this book, did arguably not come to the fore in many other ICTR cases where the suspect claimed that his

In 1997, Jean-Bosco Barayagwiza was charged with genocide, complicity in genocide, incitement to commit genocide, conspiracy to commit genocide and crimes against humanity (murder and persecution).[802] Schabas notes that "[t]aking everything into account, and assuming the allegations in the indictment can be even partially established, Barayagwiza stands out as one of the most heinously evil of those responsible for the Rwandan genocide – and not for want of competitors".[803]

The problems related to the pre-trial detention of this 'big fish' are rather complicated but may be summarised as follows.

On 15 April 1996, thus before he was indicted by the ICTR, Barayagwiza (and several other suspects) were arrested in Cameroon by the authorities of Cameroon "on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994 [original footnote omitted, ChP]".[804] Barayagwiza claimed that "he was arrested by Cameroon on the basis of a request from the [ICTR] Prosecutor, while the Prosecutor contend[ed] that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities".[805]

Although Goldstone, the then ICTR Prosecutor, was at first interested in investigating Barayagwiza and had therefore requested on 17 April 1996, pursuant to Rule 40 of the ICTR RPE,[806] that Barayagwiza be detained,[807] he "informed

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arrest/detention/transfer had to be considered as unlawful. See, for example, ICTR, Appeals Chamber, *Jean Kambanda* v *The Prosecutor*, 'Judgement', Case No. ICTR[-]97-23-A, 19 October 2000 or the cases mentioned in n. 138. These cases arguably do not shed new light on the main topics of this study, for example, because the suspect's arguments were quickly rejected, see, for example, the above-mentioned *Kambanda* decision where the Appeals Chamber held (in para. 48): "As the Appellant has failed to establish any reason for which he should exceptionally be allowed to raise the question of the legality of his detention for the first time on appeal, this ground of appeal is rejected." *Cf.* also ICTR, Appeals Chamber, *The Prosecutor v. Jean-Paul Akayesu*, 'Judgment', Case No. ICTR-96-4-A, 1 June 2001, paras. 364-375. See in that respect also ICTR, Trial Chamber II, *The Prosecutor Versus Gratien Kabiligi*, 'Decision on the Defence Motion to Lodge Complaint and Open Investigations into Alleged Acts of Torture under Rules (40)(C) and 73(A) of the Rules of Procedure and Evidence', Case No. ICTR-97-34-I, 5 October 1998. In this case, the Trial Chamber dismissed a motion of the suspect who claimed to have been tortured in the context of his arrest and detention. A subsequent appeal was dismissed for procedural reasons, see ICTR, Appeals Chamber, *Prosecutor v. Gratien Kabiligi*, 'Decision Rejecting Notice of Appeal', Case No. ICTR-97-34-A, 18 December 1998. As a result, these kinds of cases will not be examined here in their entirety, although some observations stemming from them may, of course, be reviewed. (See also n. 3 of Chapter IV.)

[802] See ICTR, Judge Lennert Aspegren, *The Prosecutor versus Jean*[-]*Bosco Barayagwiza*, 'Decision Confirming the Indictment', Case No. ICTR-97-19-I, 23 October 1997. The charges in the final, amended, indictment of 13 April 2000 were genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity and serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II, see ICTR, Office of the Prosecutor, *The Prosecutor against Jean-Bosco Barayagwiza*, 'Amended Indictment', Case No. ICTR-97-19, 13 April 2000.

[803] Schabas 2000, p. 564.

[804] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 5.

[805] *Ibid.*, Appendix A: Chronology of Events, p. 65.

[806] Which at that time read: "(A) In case of urgency, the Prosecutor may request any State: (i) to arrest a suspect provisionally; (ii) to seize physical evidence; (iii) to take all necessary measures to prevent the

Cameroon [on 16 May 1996, ChP] that she [this must be "he", ChP][808] only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant [emphasis in original and original footnote omitted, ChP]".[809]

That the new Prosecutor, Louise Arbour, was also not interested in a prosecution became clear from the fact that "[o]n 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest [original footnote omitted, ChP]".[810]

However, on 21 February 1997, the day that the Court of Appeal of Cameroon rejected a request from Rwanda to have the remaining suspects extradited to Rwanda and ordered their release, the ICTR Prosecutor nevertheless reacted and "made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order [original footnote omitted, ChP]".[811]

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escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence. The State concerned shall comply forthwith, in accordance with Article 28 of the Statute. (B) Upon showing that a major impediment does not allow the State to keep the suspect under provisional detention or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country and the Registrar. (C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application. (D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer."

[807] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 5. See also *ibid*.: "On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant [original footnote omitted, ChP]."

[808] At the time, Richard Goldstone was still the Chief Prosecutor of the ICTR. The new Prosecutor, Louise Arbour, replaced Goldstone on 1 October 1996, see UNSC Res. 1047 of 29 February 1996, UN Doc. S/RES/1047 (1996).

[809] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 5.

[810] *Ibid*., para. 7. The delay between May and October was, according to Barayagwiza, caused by the fact that "on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute [original footnotes omitted, ChP]." (*Ibid*., para. 6.) Art. 8, para. 2 of the ICTR Statute reads: "The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

[811] *Ibid*., para. 7.

In addition, she requested an Order for transfer and provisional detention pursuant to Rule 40 *bis* of the ICTR RPE,[812] which was signed by Judge Aspegren on 3 March 1997 and filed on 4 March 1997.[813]

However, it was only on 19 November 1997, more than eight months later, that Barayagwiza was transferred to the ICTR pursuant to this Order.[814]

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[812] Which at that time read: "(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies. (B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met: (i) the Prosecutor has requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect is otherwise detained by a State; (ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and (iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation. (C) The provisional detention of a suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal. (D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the application made by the Prosecutor under Sub-rule (A), including the provisional charge, and shall state the judge's grounds for making the order, having regard to Sub-rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43. (E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar. (F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a period not exceeding 30 days. (G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days. (H) The total period of detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State. (I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention relative to a suspect. (J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected. (K) During detention, the Prosecutor and the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release. (L) Without prejudice to Sub-rules (C) to (H), the Rules relating to the detention on remand of (…) accused persons shall apply [*mutatis mutandis*] to the provisional detention of persons under this Rule."

[813] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 7.

[814] See *ibid*. See also *ibid*., para. 9: "The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment, and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon [original footnotes omitted, ChP]."

Another remarkable point is that Barayagwiza filed a writ of *habeas corpus* on 29 September 1997 to challenge the legality of his detention but his application was never considered.[815]

In addition, it also took quite some time before Barayagwiza appeared in the courtroom for the first time: his initial appearance was on 23 February 1998,[816] more than three months after he was transferred to the ICTR and more than 22 months after his arrest in Cameroon.

The following day, Barayagwiza filed his 'Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect' in which he submitted, among other things, that a number of his rights had been violated[817] and that as a result, he requested the Trial Chamber to declare: "1. The arrest and provisional detention unlawful, null and void. 2. The entire proceedings are a nullity. 3. The accused be set free. 4. In the alternative, that the accused be released on bail pending further hearing."[818]

This motion was dismissed by Trial Chamber II on 17 November 1998. In doing so, it held, among other things, that "the accused was arrested at the behest of the Rwandan and Belgian governments",[819] that "the Defence failed to show that the accused was kept in custody because of the Prosecutor (...) before 21 February 1997",[820] that "detention under rule 40 for a period between 21 February 1997 and 3 March 1997 (...) does not violate the rights of the accused under rule 40"[821] and that neither did the long period between 3 March 1997 and 19 November 1997 violate Rule 40 *bis* of the ICTR RPE because

> [t]he maximum time periods for provisional detention provided for under rule 40 *(bis)* take effect from *the day after the accused is transferred*. At the end of the maximum time periods provided for under rule 40 *(bis)*, if the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or delivered to the authorities of the State to which the request was initially made. In the instant case the indictment of the accused was confirmed before the accused was even transferred [emphasis in original, ChP].[822]

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[815] See *ibid*., para. 8.
[816] See *ibid*., para. 9.
[817] See ICTR, Trial Chamber II, *The Prosecutor versus Jean-Bosco Barayagwiza*, 'Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect', Case No. ICTR-97-19-I, 17 November 1999, p. 2: "In the Motion, the Defence submit[s]; 1. That the accused rights, liberties and freedoms under article 20 of the Statute have been violated because: the provisional detention was a miscarriage of justice under rule 5 (Non-co[m]pli[a]nce with Rules); the Prosecutor's request for provisional detention was unprocedural and unwarranted; Rule 40*(bis)* (Transfer and Provisional Detention of Suspects) was not satisfied regarding the provisional detention; and there was no justification for the arrest or provisional detention. 2. Rule 40*(bis)* breaches the provisions of article 17, 18 and 19 of the Statute. 3. The provisional charges were illegal."
[818] *Ibid*., p. 2.
[819] *Ibid*., p. 4.
[820] *Ibid*.
[821] *Ibid*.
[822] *Ibid*., p. 5.

The fact that Cameroon had waited so long after 3 March 1997 for the transfer of Barayagwiza could not lead to a violation of the RPE by the Prosecution.[823]

Barayagwiza appealed this decision and on 3 November 1999, the Appeals Chamber issued its controversial decision which will now be considered in greater detail.

The Appeals Chamber examined two main issues, namely 1) whether the rights of Barayagwiza were violated and 2) the abuse of process doctrine.

With respect to the first main issue, it looked at the right to be promptly charged under Rule 40 *bis* of the ICTR RPE and the period of time between the transfer of Barayagwiza and his initial appearance.

Focusing on the first element, the Appeals Chamber found that there were "two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal".[824]

The first ran from 17 April 1996 to 16 May 1996[825] and the second ran from 4 March 1997 to 19 November 1997.[826] With respect to the second period of time[827] (when Barayagwiza was only held at the behest of the Tribunal – it is to be recalled that from 17 April 1996 – 16 May 1996, Barayagwiza was also detained because of the inter-State extradition procedures), the judges clarified that "Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority".[828] This means that the ICTR was detaining Barayagwiza pursuant to lawful authority but in the absence of physical control.[829] The judges also clarified: "This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody."[830]

That may, of course, be the Appeals Chamber's opinion (see, however, *infra*), but it is submitted that the Tribunal, even if it is not, strictly speaking, responsible for certain wrongs, should *take* responsibility for them. If actors involved in the arrest/detention of suspects (such as national States and international forces) arrest and detain a suspect for and at the behest of the Tribunal, the Tribunal should bear

[823] See *ibid*.
[824] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 43.
[825] On 17 April 1996, two days after Barayagwiza's initial arrest on the basis of the Rwandan and Belgian extradition requests, the Prosecutor made his first Rule 40 request for provisional detention and on 16 May 1996, he indicated that he was no longer interested in pursuing the case, see *ibid*.
[826] 4 March 1997 is the day when the Rule 40 *bis* Order was filed and 19 November 1997 the day when Barayagwiza was transferred to the ICTR, see *ibid*., para. 44.
[827] See also *ibid*., para. 100.
[828] *Ibid*., para. 61.
[829] See *ibid*., para. 58. One wonders why the ICTR does not conclude then that Barayagwiza was also in the constructive custody of the ICTR between 17 April 1996 and 16 May 1996. After all, also in that period, it could be argued that the ICTR was detaining Barayagwiza pursuant to lawful authority (namely pursuant to the request based on Rule 40 of the ICTR RPE) but in the absence of physical control. The fact that Barayagwiza by that time was *also* held in custody by Cameroon because of the inter-State extradition procedures does not seem to change this. It is submitted that to detain a person at the behest of the ICTR/to have a suspect in the constructive custody of the ICTR is the same.
[830] *Ibid*., para. 61.

the ultimate responsibility for every aspect of this process. As explained, although the Tribunal may not, strictly speaking, be responsible for certain violations (for example, if the suspect is mistreated by a State official while the former is in pre-transfer detention pursuant to a request from the Tribunal), one could argue that this entire constructive custody period falls under the more general responsibility of the Tribunal.[831] Hence, even if certain violations occurring in this context cannot, strictly speaking, be attributed to the Tribunal, one can argue that the entire constructive custody period/detention at the request/behest of the Tribunal is attributable to the Tribunal in a more general sense. In fact, one can even make a more general submission, see also the final words from the discussion of the *Karadžić* case, namely that simple fairness – among other things, this point will be returned to – towards the suspect demands that every wrong/irregularity/violation[832] committed *in the context of the Tribunal's case* more generally (whether this occurred in the constructive custody period or not) should be remedied by the Tribunal, even if that Tribunal was – strictly speaking – not responsible for it.[833]

It is, of course, difficult to define the exact meaning of "wrongs/irregularities/violations committed *in the context of a Tribunal case*" but one clear example which should definitely fit this definition – besides the obvious example of organs of the Tribunal having committed the violations themselves – are irregularities in the arrest and detention executed by States/international forces if the Tribunal has requested that the suspect be arrested and detained by these parties, see *supra*. Other situations may very well also fit the "in the context of" criterion, but these should be considered on a case-by-case basis.[834] For example, in the ICTY

[831] *Cf.* also DeFrancia 2001, p. 1438: "Protections of the international system should, as far as possible, apply at the moment of the suspect or accused is in the constructive custody of the international court."

[832] Again taking into account that certain errors are so small and insignificant that they cannot be seen as actual wrongs/irregularities/violations in need of a remedy. *Cf.* the *Brima* case and the question when one can speak of an unlawful arrest/detention, see n. 603 of Chapter III and ns. 205 and 242 of the present chapter.

[833] *Cf.* also Sluiter 2003 B, p. 942: "[T]he trial forum must take account of every human rights violation that occurs in the framework of the criminal proceedings. This view finds its ultimate basis in simple fairness and in the nature of the relationship between the accused and the trial forum."

[834] See also Judge Lal Chand Vohrah's declaration to the still-to-discuss 2000 decision in *Semanza* (see also n. 985) where he stated: "If an accused is arrested or detained by a state at the request or under the authority of the Tribunal, even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible, and this remedy must be proportional to the violations. (…) I would also like to note my apprehension of certain language employed in the present Decision, which states that the "Appeals Chamber emphasises that, in any case, the Tribunal is not responsible for the period of time which elapsed before the Appellant was transferred to the Detention Facility of the Tribunal." [It must be noted that this is not an entirely accurate reproduction of the Appeals Chamber's words. The original Appeals Chamber's words go as follows: "[T]he Appeals Chamber emphasizes that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal's Detention Facility.", ChP.] (…) I do not take it to imply nor should it be interpreted as implying, that the Tribunal has no responsibility to an accused before he is transferred to the Detention Facility of the Tribunal when the accused has been arrested or detained at the behest of the Tribunal. This accords with the position taken in the *Barayagwiza Review Decision*, that the cumulative effects of all violations – even those occurring prior to transfer into Tribunal custody – are to be considered in

Nikolić case, the Trial Chamber held that the ICTY would find it very hard to continue the case if a person was seriously mistreated before being handed over to the Tribunal (irrespective of who was responsible for this mistreatment).[835] It was argued in the context of that case that if the Tribunal takes the ultimate responsibility (namely by refusing jurisdiction) for serious *male captus* cases, it should also definitely have the authority to take responsibility for less serious irregularities committed against a person before that person is handed over to the Tribunal, irrespective of which entity committed those irregularities. Although "before (…) handed over" may encompass huge time periods, the ICTY does not, of course, have to take responsibility for irregularities committed against the person which occurred 50 years ago and which cannot be connected in any way to the proceedings of the ICTY. Thus, one could assert that the ICTY is referring here to irregularities which are in some way related to the way a person was brought into its jurisdiction. Hence, alongside the more specific 'at the request/behest' situations (involving States and international forces), one may also look at this more generally formulated and thus broader situation, namely that the Tribunal will take responsibility for irregularities in some way related to the way a person was brought into its jurisdiction, irrespective of the question as to which entity (States/international forces/private individuals) committed these irregularities.[836] In addition to these two situations, there may be other situations which could fall within the notion of "committed in the context of a Tribunal case", but that would have to be determined on the basis of the exact circumstances.

Returning to the judges' clarification that "[t]his finding does not mean (…) that the Tribunal was responsible for each and every aspect of the Appellant's detention,

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fashioning an appropriate remedy [original footnotes omitted, ChP]." (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, paras. 6-7.) Judge Lal Chand Vohrah further notes that "[r]esponsibility and authority to redress violations occurring at a time when the accused was not detained under Tribunal request or authority would need to be considered on a case by case basis." (*Ibid*., para. 7, n. 7.)

[835] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114: "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated."

[836] See *ibid*., para. 111: "Ensuring that the Accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. *Due process of law also includes questions such as* how the Parties have been conducting themselves in the context of a particular case and *how an Accused has been brought into the jurisdiction of the Tribunal* [emphasis added, ChP]." Mohan 2009, p. 22 notes here: "Although the Chamber's decision was far from perfect, it acknowledged that violations of Nikolic's rights at the pre-trial stage could undermine the fairness of the proceedings and must be redressed as a matter of fairness [original footnotes omitted, ChP]."

but only for the decision to place and maintain the Appellant in custody", one could argue that the ICTR is actually in favour of taking a broader responsibility when it later concluded "that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects".[837] Hence, the Tribunal is concerned that the suspect's pre-transfer detention is not in conformity with human rights case law concerning the detention of suspects. That may mean that the Tribunal is in fact interested in (and may take responsibility for) more elements of the pre-transfer period than just "the decision to place and maintain the Appellant in custody", even if the Tribunal itself is, strictly speaking, not responsible for them. As was previously clarified in discussed cases in this book, in the remainder of this decision, it appeared that the Appeals Chamber more clearly confirmed this stance.

Turning to the second element, the period of time between the transfer of Barayagwiza and his initial appearance: could the 96-day period (between 19 November 1997 and 23 February 1998) be seen as violating the requirement that the initial appearance is to be held "without delay"?[838] The Appeals Chamber held that it could.[839]

With respect to the second main issue, the abuse of process doctrine, the Appeals Chamber explained that this doctrine would be used to look at Barayagwiza's allegations regarding the following three issues:

> 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him.[840]

However, before turning to these three issues, the Appeals Chamber first described some general features of the abuse of process doctrine.

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[837] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 67. It may be interesting to note that the Appeals Chamber was of the opinion that the suspect's right to be promptly charged (see Rule 40 *bis* of the ICTR RPE) becomes effective when an order based on this rule has been filed. See *ibid*. However, it must be noted that Rule 40 *bis* (C) states that "[t]he provisional detention of the suspect may be ordered for a period not exceeding 30 days *from the day after the transfer of the suspect to the detention unit of the Tribunal* [emphasis added, ChP]." In that respect, one can wonder whether Rule 40 *bis* was in fact violated. The Appeals Chamber, however, remarked on this point: "[T]he purpose of Rule 40 and Rule 40*bis* is to limit the time that a suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards." (*Ibid*., para. 53.) (See also n. 982 and accompanying text.)

[838] See *ibid*., para. 69.

[839] See *ibid*., para. 71: "Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62."

[840] *Ibid*., para. 73.

Here, it repeated the above-mentioned point identified in other cases that in the context of the abuse of process doctrine, the Tribunal should be concerned by and take responsibility for pre-transfer wrongs, irrespective of who was responsible for them:

> [T]his analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal – or is the result of the actions of a third party, such as Cameroon – it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights.[841]

As was stated earlier, one can wonder whether the national abuse of process doctrine in fact deems the perpetrator of the violation irrelevant; although it is true that there are some cases in which rather general statements were made, statements which could be seen as supporting the ICTR's explanation,[842] it was concluded in the previous chapter of this book that it appears that the prosecuting forum's own authorities must be involved in the irregularity before one can turn to the abuse of process doctrine.

Nevertheless, even if the national abuse of process doctrine does not support the idea that a court may refuse jurisdiction if a third party were responsible for the violations, it is clear that this study supports this ICTR's version of the abuse of process doctrine: as the Tribunals do not have their own police force, it is appropriate that they not only take advantage of achievements effectuated by the parties on which they depend (national police forces, international troops *etc*.) but also take responsibility if something goes wrong in the arrest and transfer phase.[843]

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[841] *Ibid*.

[842] See the following words of Lord Lowry in *Bennett* (see n. 610 and accompanying text of Chapter III and ns. 300 and 310 and accompanying text of Chapter V): "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." See also the following words of Lord Steyn in *Latif* (see n. 346 and accompanying text of Chapter V): "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." Not very surprisingly, these quotations were also referred to by the Appeals Chamber, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 74-75. (See also ns. 730 and 739.)

[843] *Cf*. also the still-to-discuss 2000 decision in *Barayagwiza* ("[A]ll violations demand a remedy": ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 74.), Sluiter 2001, p. 156 ("It is imperative that the defendant receives the full protection of human rights instruments and

In that respect, they should also be able to, for example, review the circumstances surrounding the arrests and detentions made by national States and international forces on the ground.[844]

The Appeals Chamber, after having stated that "[u]nder the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process",[845] subsequently stressed the discretionary approach of the abuse of process doctrine: "It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."[846]

After having discussed a number of national abuse of process cases, which were, by the way, not all correctly summarised,[847] and after having mentioned the three

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should not be the victim of the fragmentation of the criminal procedure over two or even more jurisdictions. In other cases, Trial Chambers have acknowledged their responsibility in this respect and have not refrained from providing drastic remedies in cases where the rights of the defendant were violated in the pre-trial phase, even if the Tribunal itself had no part in it [original footnote omitted, ChP].") and Swart 2002 A, p. 1250: "Where it is a case involving the *ad hoc* Tribunals, rather than a case of extradition between two States, the responsibility for the person's arrest/or detention lies mainly with the Tribunals, and it is therefore principally to the Tribunals that a suspect or accused must turn for the protection of his basic individual rights when deprived of his liberty for the purpose of surrender."

[844] This view, see also ns. 138 and 208 and accompanying text, is not in conformity with the (Trial Chamber) cases of *Djukić and Krsmanović*, *Karemera*, *Ngirumpatse*, *Kajelijeli*, *Nshamihigo*, *Nzirorera* and *Nyiramasuhuko* (where the Tribunal argued that it was not competent to review the legality of the arrests and detentions made at the national level), but it *does* appear to be in conformity with the (arguably better) view of the Appeals Chamber. This will be further discussed in the next cases.

[845] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.

[846] *Ibid*. Note, however, that this test is arguably relative, see n. 618.

[847] For example, the Appeals Chamber stated that "[i]n R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed [emphasis in original and original footnote omitted, ChP]." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 75.) As already explained in n. 133 (and accompanying text) of the previous chapter (and see the remainder of this footnote), this is incorrect. Schabas, in his commentary to the *Barayagwiza* case, doubts the precedential value of the abuse of process cases invoked by the Appeals Chamber, hereby indicating that the seriousness of Barayagwiza's alleged charges should play a role: "For example, as "one of the leading cases," the judgment cites one [this is the *Bennett* case, ChP] in which a stay for abuse of process was allowed "because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." What the appeals chamber does not mention is that the crime in question was fraudulent purchase of a helicopter, and that the accused had been handcuffed to an airplane seat by South African policemen in lieu of the normal extradition process. A second case, cited by the appeals chamber to support a stay for failure to inform an accused of the charges, involved driving while intoxicated. A third case concerned firearms charges but no killing. Only the fourth case dealt with homocide [this is the *Hartley* case, ChP], but contrary to what the appeals chamber contends, a conviction was not quashed based on abuse of process. Although the Court of Appeal of Wellington was harsh in its criticism of an illegal rendition, the court explicitly refrained from ordering a stay for abuse of process, and overturned the conviction because of an illegally obtained confession. The court noted that without the confession, there was no evidence – an uncontroversial proposition but hardly a precedent to support releasing an accused *génocidaire*.

important functions of the use of supervisory powers (a notion "[c]losely related to the abuse of process doctrine"),[848] namely "to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process [original footnote omitted, ChP]",[849] the Appeals Chamber looked at the above-mentioned three elements[850] to find out "whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused".[851] This question was based on the following, and already briefly mentioned,[852] abuse of process test:

> [T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to the pre-trial impropriety or misconduct.[853]

With respect to the first of the three elements, the right to be promptly informed of the charges during the first period of detention, the Appeals Chamber noted that this right was indeed violated[854] and repeated its point made earlier that it would take responsibility for the violations suffered by the suspect, even if the Tribunal, to a great extent, is, strictly speaking, not responsible for them:

> In the present case, the Appellant was detained for a total of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April – 16 May 1996 and 4 – 10 March 1997),[[855]] the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges

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Presumably, if the appeals chamber had found any case whatsoever where the facts were even remotely similar to those before it – that is, where multiple murder charges had been stayed because of a delay of less than two years – it would have cited the case in its judgment [original footnotes omitted, ChP]." (Schabas 2000, p. 567.)

[848] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 76.

[849] *Ibid*. *Cf*. also n. 471 and accompanying text.

[850] See n. 840 and accompanying text.

[851] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 77.

[852] See ns. 729 and 738 and accompanying text.

[853] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 77.

[854] See *ibid*., para. 78: "In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request [emphasis in original and original footnotes omitted, ChP]."

[855] See also n. 829 where it was wondered why the ICTR does not conclude that Barayagwiza was also in the constructive custody of the ICTR between 17 April 1996 and 16 May 1996. After all, also in that period, it could be argued that the ICTR was detaining Barayagwiza pursuant to lawful authority (namely pursuant to the request based on Rule 40 of the ICTR RPE) but in the absence of physical control.

> against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.[856]

The ICTR takes responsibility here for irregularities (irrespective of which entity committed them) which occurred even *beyond* the constructive custody/the detention at the behest of the Tribunal.[857] Schabas has criticised this stance because it would be "tantamount to holding the prosecutor responsible for things over which she had no control".[858] Schabas may have a point here, for this violation was also taken into account when the judges formulated their final remedy, which was, as will be shown at the end of this case, with prejudice to the Prosecutor. However, it is arguably a good thing that the *judges* take the ultimate responsibility for violations committed in the context of their case, irrespective of whether the Prosecutor or another entity was responsible for these violations. Hence, that may also include violations committed by entities over which the organs of the Tribunal have no control. One could think here, for example, of private individuals involved in the kidnapping of a suspect. The only important requirement is arguably that these wrongs can in some way be connected to the context of the Tribunal case (at least, if one does not want that the Tribunal takes responsibility for wrongs which have absolutely nothing to do with the Tribunal case).[859] Two examples have already

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[856] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 85.

[857] See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 100: "[E]ven if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy." However, one cannot agree with the ICTR's conclusion a few paragraphs later that "[i]n the present case, the Appellant has been in provisional detention since 15 April 1996 – more than three years. During that time, *he spent 11 months in illegal provisional detention at the behest of the Tribunal* without the benefits, rights and protections afforded by being formally charged [emphasis added, ChP]." (*Ibid*., para. 104.) After all, only a few days of the 11 months between 15 April 1996 and 10 March 1997 were at the behest of the ICTR (between 17 April and 16 May 1996 and between 4 March and 10 March 1997). (According to the ICTR, Barayagwiza was only in the constructive custody of the ICTR between 4 March and 10 March 1997, but it was argued before (see ns. 829 and 855) that one could add to this constructive custody period the other 'at the behest of the ICTR' period (between 17 April and 16 May 1996). As explained in n. 829 (and 855), these concepts are arguably the same. Why the ICTR only qualifies the second (between 4 March and 19 November 1997) and not the first 'at the behest of' period (between 17 April and 16 May 1996) as 'constructive custody' of the ICTR is unclear.)

[858] Schabas 2000, p. 569. See also *ibid*., pp. 568-569.

[859] In that respect, one cannot agree more with Zahar and Sluiter (2008, pp. 285-286, see also n. 799 and accompanying text) when they state: "When other entities bear primary responsibility for violations of human rights, what matters is the duty of every tribunal bench to protect the fairness and integrity of the trial by determining an appropriate remedy. Obviously, *the trial does not start at the seat of the tribunal but extends to every act connected with it.* While this may be a heavy and seemingly unfair burden on the tribunals – they interact with a wide variety of actors, not all of whom may apply the highest standards of justice, and the tribunals are not in a position to change this – the reverse is even more unfair. The decision of the ICTR Trial Chamber [here, Zahar and Sluiter refer to the decisions of

been mentioned in that respect: irregularities committed while the suspect was in the constructive custody of the Tribunal and irregularities in some way connected to the way a person was brought into the jurisdiction of the court. However, there may be other situations falling under the notion "committed in the context of a Tribunal case" but they would have to be determined on the basis of the exact circumstances of the case. In this case, the judges stated that they would take into account the entire 11-month period of detention, even if only a small portion of that period was at the behest of the Tribunal, "since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims". However, the fact that the Tribunal is now adjudicating the case does not mean that the Tribunal also has to take responsibility for *every* violation *ever* suffered by the suspect. As already explained, the minimum requirement must obviously be that the violation was committed *in the context of the Tribunal case*. Otherwise, the Tribunal would also have to remedy human rights violations suffered by the suspect 50 years ago which have nothing to do with the Tribunal, for the only reason that the Tribunal is now trying that suspect. That, of course, would be a ridiculous situation. However, the Tribunal is probably saying that it needs to take responsibility for violations committed in the context of the Tribunal case, irrespective of the question of who committed these violations, because it is the Tribunal that is now trying this case. That is to be welcomed. Although the judges do not explain very clearly how they view these violations as falling within the context of the ICTR case, an explanation may be that these violations occurred after the Prosecution started the case against Barayagwiza and in a period during which the Prosecution, even if Barayagwiza was not detained at the ICTR's behest, was nevertheless (perceived to be)[860] involved in the case.[861]

With respect to the second element, the alleged failure of the Trial Chamber to resolve the writ of *habeas corpus* filed by Barayagwiza, the Appeals Chamber stated that Barayagwiza was indeed "never afforded an opportunity to be heard on the *writ of habeas corpus*".[862] This notwithstanding the importance of the possibility for a detained person to "have recourse to an independent judicial officer for review of

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Nyiramasuhuko, *Ngirumpatse*, *Kajelijeli*, *Karemera* and *Nzirorera* (see also ns. 138, 208-209 and 844 and accompanying text), ChP] not to review national activities is simply untenable from the perspective of the duty to ensure a fair trial [emphasis added and original footnote omitted, ChP]."

[860] See, for example, Schabas 2000, p. 564: "On May 31, 1996, the Yaounde Court of Appeal suspended the Rwandan extradition hearing, apparently at the request of Cameroon deputy director of public prosecutions, and proceedings did not resume for many months. The Cameroon authorities claimed they were acting pursuant to Article 8(2) of the Statute, which asserts the primacy of the ICTR and requires states to relinquish jurisdiction in its favor. Cameroon's having made such a claim, would, moreover, explain why, while awaiting the Yaounde Court of Appeal decision, Barayagwiza wrote to the ICTR complaining about his detention."

[861] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 86: "The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights."

[862] *Ibid*., para. 87.

the detaining authority's acts".[863] The judges concluded that even though their decision (of 3 November 1999) rendered the writ of Barayagwiza moot,

> the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods

[863] *Ibid*., para. 88. The Appeals Chamber clarified that the fact that a detained person must have this possibility, even if "neither the Statute nor the Rules specifically address *writs of habeas corpus* as such" (*ibid.*), "is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR [original footnotes omitted, ChP]." (*Ibid*.) See for other examples from the context of the UN *ad hoc* Tribunals also n. 407 and accompanying text of this chapter (the *Milosević* case), ICTY, Trial Chamber II, *Prosecutor v Radoslav Brđanin*, 'Decision on Petition for a Writ of Habeas Corpus On Behalf of Radoslav Brđanin', Case No. IT-99-36-PT, 8 December 1999, paras. 2-6, ICTR, Trial Chamber II, *The Prosecutor v. Joseph Kanyabashi*, 'Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings', Case No. ICTR-96-15-I, 23 May 2000, paras. 27-28, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, paras. 112-113, ICTR, Trial Chamber II, *The Prosecutor v. Samuel Musabyimana*, 'Decision on Musabyimana's Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer', Case No. ICTR-2001-62-T, 20 June 2002, para. 24 and ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Notice of Appeal', Case No. IT-94-2-AR72, 9 January 2003, Dissenting Opinion of Judge Shahabuddeen, para. 11. See also n. 45 and, generally, n. 880. Note that in the *Kanyabashi* case, the judges, after having referred to the rather broad scope of some national *habeas corpus* concepts (they provide, for instance, the example of the US writ of *habeas corpus ad subiiciendum* (see also n. 42 of Chapter II) which "extends to all constitutional challenges" (ICTR, Trial Chamber II, *The Prosecutor v. Joseph Kanyabashi*, 'Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings', Case No. ICTR-96-15-I, 23 May 2000, para. 24)), stipulate that "[t]he Chamber restates that the Tribunal is not bound by any national law. It finds the notion of *habeas corpus* at the international level is limited to a review of the legality of detention. The Accused's Motion, apart from the submission of violation of the right to protection from unlawful detention, is beyond that scope and, therefore, is not proper." (*Ibid*., para. 28.) Although the judges do not mention this point very clearly, it can be argued that the concept of the right to protection from unlawful detention used by the judges must, of course, also encompasses the consequence of release if the detention (and arguably also the arrest) is to be considered unlawful, in conformity with what appears to be the scope of the *habeas corpus* concept at the international level, see, for example, Art. 9, para. 4 of the ICCPR, Art. 5, para. 4 of the ECHR and Art. 7, para. 6 of the ACHR. (See also Chapter III of this book.) Even though it has been argued earlier that this remedy is not without its problems and that it would be better if judges confronted by a *male captus* of a considerable but not serious nature would continue the case instead and accord other, *real* remedies, such a construction can, of course, only be suggested if one assumes in the first place that judges in principle have the obligation to release the suspect in the case of an unlawful arrest/detention. If the judges do not even recognise *that*, then there would be no need to devise a construction on how to cope with irregularities which can be linked with one's deprivation of liberty. (However, *that* cannot be seriously maintained by judges for it could mean that a suspect would not even be released in the case of the most extreme unlawful arrest/detention, a situation which, of course, has nothing to do with protection from unlawful detention.) Finally, it must also be stated that the ICTR was willing to look at the other objections of Kanyabashi, even though they were, according to the judges, beyond the scope of the *habeas corpus* concept (violation of right to protection from unlawful detention). One of those objections was the violation of the right to be promptly informed of the reasons for his arrest/detention/charges. However, one can argue that this right is in fact part of this concept. *Cf*., for example, Swart when he notes that "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal." (Swart 2001, p. 204, see also n. 607 and accompanying text of Chapter III and n. 247 of the present chapter.)

> when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.[864]

Regarding the third and final element, Barayagwiza's assertions that the Prosecutor did not diligently prosecute her case against him, the judges first stated that "once the Prosecutor has set this process [namely the process of bringing a defendant to trial, ChP] in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused".[865]

The judges then explained that Barayagwiza had "claimed that the Prosecutor simply forgot about his case".[866] Although such a claim is, of course, very difficult to prove, the judges noted "that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay".[867]

However, that argument was not credible to the judges, who stated, among other things, that "[t]he Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order [original footnote omitted, ChP]".[868] Hence, "the only logical conclusion to be drawn (…) is that the Prosecutor failed in her duty to diligently prosecute this case".[869]

After having repeated the conclusions related to the two main issues of this case,[870] the Appeals Chamber turned to the final point to be looked at here: the appropriate remedy for these pre-trial irregularities.

The judges, hereby also referring to the seriousness of Barayagwiza's charges, concluded:

> The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction

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[864] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 90.
[865] *Ibid*., para. 92.
[866] *Ibid*., para. 98.
[867] *Ibid*.
[868] *Ibid*.
[869] *Ibid*., para. 99.
[870] See *ibid*., paras. 100-101. See for a brief summary also *ibid*., para. 104: "In the present case, the Appellant has been in provisional detention since 15 April 1996 – more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. [See for criticism on this point n. 857, ChP.] He submitted a *writ of habeas corpus* seeking to be released from this confinement – and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on this motion to have his arrest and detention nullified."

> and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[871]

Indeed, the judges clarified that Barayagwiza's release and dismissal had to be *with prejudice to the Prosecutor*, meaning that the Prosecutor was barred from starting a new prosecution against Barayagwiza in the future.[872] This is a clear *male detentus* verdict: because of the serious *male captus* involved, the court has no jurisdiction to try the person and the Prosecutor cannot start the trial anew when the person is released from custody.[873]

The judges were aware of the fact that this remedy, which was "consistent with the jurisprudence of many national systems [original footnote omitted, ChP]",[874] was extreme, but they felt that it was also necessary:

> As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find

[871] *Ibid*., para. 106. See for the element 'seriousness of the charges' also Judge Shahabuddeen's 'Separate Opinion' to the decision of 3 November 1999, under '1. Post-transfer delay': "Matters to be taken into account in evaluating whether that consequence [namely lack of jurisdiction, ChP] follows from a breach of the requirement of promptitude include the seriousness of the offences with which the accused is charged. Here the offences were serious. But the requirement of promptitude was fundamental, and its breach was also grave, the delay extending to a little over three months. On balance, I respectfully agree with the Appeals Chamber that the administration of justice by the Tribunal would suffer from proceeding with the case notwithstanding the delay."

[872] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 108. See also n. 611 and accompanying text of Chapter III.

[873] This also implies that there is a difference between a dismissal of the indictment/the charges as such and a dismissal of the indictment/the charges with prejudice to the Prosecutor in that the first remedy would not exclude a new trial. See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 109: "The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew [original footnote omitted, ChP]." However, one can imagine that if a judge, because of the serious *male captus* involved, were to determine that the person's indictment must be dismissed, that that *should* mean the real ending of the case. After all, it would be very strange if the Prosecutor could restart the trial after a judge has determined that the pre-trial irregularities are so serious that the charges must be dismissed. Note finally that the 1999 *Barayagwiza* decision can also be seen as a rupture with the *Kabiligi* decision (see n. 801) where the appeal of the suspect (who also claimed to have been the victim of serious violations, namely torture) was dismissed "on the basis that the Notice of Appeal did not go to the jurisdiction of the Tribunal". (Lamb 2000, p. 242, n. 279.) See also *ibid*.: "This decision (...) sits uncomfortably with the recent Appeals Chamber ruling in *Barayagwiza* (...) where, on the basis of numerous irregularities pertaining to the accused's detention (some of which were attributable to the Office of the Prosecutor), the Appeals Chamber did resort to the exceptional remedy of dismissing the indictment against the accused and directing his immediate release."

[874] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 108. The judges referred here to a subsection of the decision in which, among other things, the cases of *Bennett* and *Latif* were discussed.

> that it is the only effective remedy for the cumulative breaches of the accused's rights.[875] Finally, this disposition may very well deter the commission of such serious violations in the future.[876]

Although one can seriously wonder whether the violations suffered by Barayagwiza were indeed so serious that they must lead to the ending of the case (one could perhaps also opt for other, less far-reaching remedies such as a reduction of the sentence and/or compensation),[877] an international criminal tribunal should, of course, have the power to release a person and dismiss the charges against him with prejudice to the Prosecutor.

Such a *male detentus* remedy may constitute the only appropriate answer to serious irregularities in the pre-trial phase.

The basis for this discretionary remedy lies in what is called the abuse of process doctrine in common law countries, namely the – arguably – inherent power of *any* judge (whether stemming from a common, civil or other legal background)[878] to

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[875] See also *ibid*., para. 109: "We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case."

[876] *Ibid*., para. 108. *Cf*. also n. 849 and accompanying text.

[877] *Cf*. also Swart 2001, p. 206: "I have attempted to explain that not all criticisms of the Appeals Chamber are justified. In my opinion, there was no violation of "the Appellant's right to be promptly charged pursuant to international standard as reflected in Rule 40 *bis*". Neither the ICCPR nor the ECHR recognise such a right. They accord the person the right to be promptly informed of the "charges". That, however, is an entirely different matter. (...) On the other hand, it is obvious that the Appellant's right to be promptly informed of the reasons for his arrest and of any 'charges' against him in accordance with international human rights standards had been violated, and more often than the Appeals Chamber assumed. [See, however, Schabas 2003, pp. 264-265, where he writes that Barayagwiza "must have known he was being held for his involvement in the Rwandan genocide from the moment of his arrest, and, most certainly, from the point he first appeared in court in Cameroon to answer the Rwandan and Belgian extradition requests. This was not some Kafkaesque scenario where an ignorant accused lingered in prison wanting to know what he might have done to justify arrest and detention. Where, then, is the violation of the international norm entitling any person "to be informed, at the time of arrest, of the reasons for his arrest" and to be "promptly informed of any charges against him" [original footnote omitted, ChP]?", ChP.] Finally, I strongly disagree with the Appeals Chamber as to how long the Appellant spent in illegal detention in Cameroon at the behest of the Tribunal. In sum, the violations of Appellant's rights, although serious, were considerably less egregious and numerous than the Appeals Chamber believed. (...) Another remedy which is accepted in the case law of international bodies concerning these two Articles [Artt. 9 of the ICCPR and 5 of the ECHR, ChP] has been the reduction of the sentence in the situation of a conviction (...). Finally, the two Articles provide that a person wrongfully arrested or detained shall have an enforceable right to compensation, a right that is of particular importance when a person has been acquitted. Of course, recourse can also be had to a combination of different remedies. My own assessment of the legal situation in the case of the Appellant leads me to believe that a combination of these remedies would have been an appropriate solution." Note finally that the entire decision (including its far-reaching remedies) has also been hailed, although that opinion does not appear to be shared by many people. See DeFrancia 2001, p. 1405: "What should have been recognized as a healthy decision to strengthen the future integrity of the Tribunal was rather considered a "setback in efforts to hold accountable those responsible for the Rwandan genocide in 1994." [original footnote omitted, ChP]"

[878] See, for example, the 1985 *Stocké* case (see ns. 512-513 and 516-517 and accompanying text of Chapter V) and the decision the German Federal Constitutional Court issued one year later: BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022

stop the proceedings if he is of the opinion, for example, that to continue the trial would seriously damage the integrity of the judicial process.[879]

Before turning to its disposition, the Appeals Chamber stated the following last words, which generally (not focusing on the question as to whether or not Barayagwiza's violations were indeed that serious as to divest jurisdiction) can only be applauded:

> The Tribunal – an institution whose primary purpose is to ensure that justice is done – must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice.

(see ns. 522-523 and 526 and accompanying text of Chapter V). Note that also in the *Ebrahim* case, words resembling the abuse of process doctrine were used: "The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and *abuse of law must be avoided in order to protect and promote the integrity of the administration of justice* [emphasis added, ChP]." (Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896.) *Cf.* also Nsereko 2008, p. 61: "Invoking the abuse of process doctrine, the South African court nullified the proceedings." Note, however, that in that case, the Court did not state that judges had a *discretion* to consider whether the violations of these values had to lead to a refusal of jurisdiction. It simply stated that these violations entailed that the judges had no jurisdiction to try the case. See finally also *Beahan* (see n. 713 of Chapter V) and the reasoning of Acting Justice of Appeal O'Linn in the *Mushwena* case (see n. 781 and accompanying text of Chapter V). *Cf.* also Schabas 2000, p. 567, writing on the ICTR's use of the abuse of process doctrine: "[T]he Chamber is (...) on firm legal ground in invoking abuse of process. In particular, even though the Statute gives the ICTR no explicit authority to stay proceedings in the case of abuse of process, the remedy is well recognized in national legal systems and can reasonably be deemed to be an inherent power." See also Lamb 2000, p. 237, writing on "the inherent jurisdiction of *any judicial body* to prevent an abuse of its own process [emphasis added, ChP]". See also *ibid.*, p. 240: "[C]ases in which an otherwise-competent national court has declined to exercise jurisdiction over an accused stress the unacceptable and egregious nature of the violations of the accused's rights which have occurred and the fact that *all judicial bodies* have an inherent jurisdiction to guard against abuses of their own process [emphasis added, ChP]." *Cf.* finally the words of Arbour in ns. 23-24 of the very first chapter of this book. Although she writes about quite another issue here (rendition), she connects the abuse of process doctrine with the words "*any* credible jurisdiction [emphasis added, ChP]": "[The] features of the 'new normal' are characterized by the fact that it would appear that terrorist suspects are being arrested, detained and interrogated with no apparent intention of bringing them to trial. And I say 'with no apparent intention of bringing them to trial' because the circumstances of their arrest, detention and interrogation – take only the length of their detention – would in any credible jurisdiction amount to such an abuse of process that trial jurisdiction, if it ever existed, could never be exercised."

[879] However, it must be noted that the Appeals Chamber, in defending the remedy, also referred to Rule 40 *bis* (H) of the ICTR RPE which states that "[t]he total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made." The judges noted that the word "shall" "is imperative and is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 110.) However, although judges may, of course, be of the opinion that if the Prosecutor has violated this provision to such an extent that the suspect cannot be re-arrested anew, the provision *itself*, like a *habeas corpus* provision such as Art. 9, para. 4 of the ICCPR, only speaks of a release as such and not of a release with prejudice to the OTP. Arguably, the word "shall" does not change this observation.

> Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals – including those charged with unthinkable crimes – would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.[880]

Then, finally, the Appeals Chamber unanimously dismissed the indictment with prejudice to the Prosecutor and directed the immediate release of Barayagwiza.[881] In addition, it directed – with Judge Shahabuddeen dissenting – "the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon".[882]

Perhaps not very surprisingly,[883] all hell broke loose after the decision was issued.

The Government of Rwanda, for example, could not believe that such a 'big fish' as Barayagwiza was apparently going to escape justice and consequently suspended its cooperation with the Tribunal.[884]

Amnesty International also issued a public statement in which it expressed its concerns. Although the organisation regretted "that there have been violations of the procedural rights of fair trial of Jean-Bosco Barayagwiza",[885] it noted that the Appeals Chamber decided to release Barayagwiza "without any assurance that the

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[880] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 112. That the ICTR stressed the importance of human rights in the pre-trial phase, a context which is not comprehensively regulated by the ICTR RPE, is, of course, to be applauded. See also Swart 2002 A, p. 1251: "Time limits included in the RPE (...) are not concerned with arrest and detention in the requested State but with provisional detention after the person's transfer by that State. It is therefore to be welcomed that, in *Jean-Bosco Barayagwiza v. The Prosecutor*, the Appeals Chamber of the ICTR seized the opportunity to affirm that arrest and detention for the purpose of transfer should conform to established international legal norms, that the person arrested on the territory of a State may turn to the Tribunal for *habeas corpus* and that the surrender proceedings should be conducted with due diligence on the part of the Prosecutor [original footnote omitted, ChP]." See also ns. 45 and 863 and accompanying text with respect to the issue of *habeas corpus*.

[881] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 113.

[882] *Ibid.* Judge Shahabuddeen was of the opinion that "the proper order was to set the appellant at liberty and to direct the Registrar to provide him with reasonable facilities to leave Tanzania, if he so wishes." (Judge Shahabuddeen's 'Separate Opinion' to the decision of 3 November 1999, under '1. Post-transfer delay'.) It must also be noted that Judge Shahabuddeen believed that Barayagwiza had to be released and his indictment dismissed on the basis of the delay between the transfer and his initial appearance (and not on his detention prior to his transfer), see *ibid*., under 'Preliminary'.

[883] See also Swart 2001, p. 206.

[884] This is very much reminiscent of the reactions within NATO after the *Todorović* decision of 18 October 2000 was issued, see ns. 377-378 and accompanying text.

[885] Amnesty International, News Service: 221/99, AI Index: AFR 47/20/99, 24 November 1999, 'International Criminal Tribunal for Rwanda: Jean-Bosco Barayagwiza must not escape justice' (Public Statement), available at: http://www.amnesty.org/en/library/asset/AFR47/020/1999/en/c5424d3e-dfee-11dd-82c9-a1d1b98af6ef/afr470201999en.html.

charges then pending against him of having participated in the Rwandan genocide of 1994 will be considered by a national court".[886]

This is a good point which was also examined in Chapter III of this book where it was explained that although a *male detentus* outcome may constitute a proper remedy for serious violations and will lead to the ending of the case *before the now prosecuting court*, it is not the same, or should not be the same, as impunity for the suspect. That a court decides to refuse to exercise jurisdiction because, for example, the authorities which can be linked to the prosecuting forum have acted irregularly, does arguably not mean that another court, which has nothing to do with the *male captus*, cannot try the suspect afterwards.[887]

However, Barayagwiza was not released immediately after the decision since Barayagwiza himself filed an application for review two days later. This was because he did not agree with the fact that the Registry was ordered to return him to Cameroon.[888]

When the Prosecutor "responded to the application, asking to be heard on the same point [original footnote omitted, ChP]",[889] Barayagwiza withdrew his request. On 19 November 1999, the Prosecutor informed the judges "of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal,[[890]] and in the alternative, a "motion for reconsideration"",[891] and on 1 December 1999, her request, entitled 'Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution' was filed.[892]

In its decision of 31 March 2000, the Appeals Chamber considered this motion, in which the Prosecutor argued, among other things, that

> review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due

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[886] *Ibid*.

[887] That court could then take into account the fact that the suspect has suffered an irregular pre-trial phase and grant him certain remedies. Otherwise, the suspect would still not have received a 'personal' remedy repairing the wrongs. (The fact that the first court refuses jurisdiction and that the second court starts a new trial is not of any 'advantage' to the suspect. Although it is not so that every remedy must be to the benefit of the suspect, it would arguably contravene the concept of fairness if the suspect is, for example, kidnapped, brought to a court which refuses jurisdiction, brought before a new court and then tried without the latter court providing him a remedy, which, in the suspect's eyes, would effectively repair the wrongs suffered by him, such as a reduction of his sentence.)

[888] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 4.

[889] *Ibid*.

[890] This article ('Review Proceedings') reads: "Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement."

[891] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 6.

[892] See *ibid*., para. 1.

> diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.[893]

The Prosecutor also stressed that the decision of 3 November 1999 was "contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits"[894] and that not only the rule of law and the human rights of the suspect had to be taken into account, but also, indeed *particularly*, "the interests of justice required by the victims and the international community as a whole".[895]

The Defence, of course, did not agree with these arguments. Moreover, it specifically urged the judges "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".[896]

The Appeals Chamber first reacted to the warning from the Government of Rwanda that an unfavourable decision would jeopardise the co-operation on the part of Rwanda with the ICTR:[897]

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[893] *Ibid*., para. 25.
[894] *Ibid*., para. 22.
[895] *Ibid*.
[896] *Ibid*., para. 33.
[897] See *ibid*., para. 34: "[T]he Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae["] to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review [original footnotes omitted, ChP]." It may be interesting to note that during the hearing of 22 February 2000, Carla Del Ponte took the guilt of Barayagwiza for granted when she stated rather sweepingly: "I am the only person here to represent the victims, and on their behalf I pray you to allow the prosecutor to institute proceedings against Barayagwiza, who has committed crimes against humanity, who has committed genocide, and his indictment has been confirmed. He is no longer a suspect. He is an accused. This accused is responsible for the death of over 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty…In the name of justice, genuine justice, for the sake of the victims, for the sake of the survivors. There are victims who are still suffering for what happened in Rwanda. I will always continue to say that Barayagwiza is guilty." (Del Ponte 2009, p. 82.) Luckily, the Appeals Chamber emphasised that it is for the judges and for the judges alone (and not the Prosecutor) to adjudicate on the guilt of Barayagwiza. (See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 35.) In his Separate Opinion to the 31 March 2000 decision, Judge Shahabuddeen examines this interesting point a little further (para. 68): "The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice". The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and

> The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.[898]

These words are, of course, to be welcomed: the ICTR is a legal institution which should not be put under pressure by political entities which do not agree with the outcome of a certain case.[899]

However, even though the Appeals Chamber's stance is very commendable, many believe that the remainder of the decision, which – as will be shown *infra* – led to quite another outcome, in fact revealed that the judges *did* yield to political pressure.[900]

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the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point [original footnote omitted, ChP]." It is reassuring that Carla Del Ponte, in her memoirs, also admitted that her (above-mentioned) words were perhaps too strong, although it is also clear that she (still) assumed the guilt of Barayagwiza, see Del Ponte 2009, pp. 82-83: "In hindsight, these words might have gone over the line. I allowed my zeal on behalf of the victims to carry my rhetoric beyond the bounds required by the presumption of innocence and respect for the tribunal's own independence. Perhaps I should have stressed that Barayagwiza had only been *indicted* for genocide and crimes against humanity, that he stood *accused* of these crimes. I anticipated that the judges would comment upon my rhetorical flourish. But I decided that if I did not stress as starkly as possible the fact that, if the Appeals Chamber did not overturn the previous ruling and allowed a guilty man, a man who had participated in genocide at the wholesale level, to go free, then it would be on their conscience and not mine. I was almost daring the judges not to overturn the ruling of November 3 [emphasis in original, ChP]."

[898] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 34. This point was further elaborated upon by Judge Nieto-Navia in his declaration to the 31 March 2000 decision.

[899] See also Sloan 2006, p. 343: "For an Appeals Chamber to order the release of an accused war criminal would take courage, but, depending on the circumstances (including who was involved, on whose behalf and what level of force was used), it could well be the only appropriate way forward. While there would certainly be political fallout in the face of a decision to order the release of an accused war criminal – many would view this as a retrograde movement in the battle against impunity – the impartial administration of justice must be the primary concern of a judicial body, not political factors."

[900] See, for example, Schabas 2000, pp. 570-571 ("As for the judges of the appeals chamber, their second thoughts may well have saved the ICTR, whose future was compromised by Rwanda's quite predictable and understandable fury with the first judgment and with what appeared to be an ICTR-sanctioned grant of impunity to Barayagwiza. In view of the lamentable legal reasoning in the second decision, the judges' insistence that Rwanda's pledge not to cooperate with the Tribunal – a threat echoed by the prosecutor at the February 2[2] hearing on the review motion – had no bearing in their deliberations was, and remains, unconvincing."), Cogan 2002, p. 135 ("The judges denied that they had been coerced into changing their decision to release Barayagwiza, but it is likely that Rwanda's threats played a part in the outcome [original footnotes omitted, ChP]."), Sloan 2006, p. 338 ("This judicial

After having stated that it could review the 3 November 1999 decision on the basis of Article 25 of the ICTR Statute and Rule 120 of the ICTR RPE,[901] the Appeals Chamber turned to the merits of the case. It divided Barayagwiza's pre-trial detention in three periods, namely 1) 15 April 1996 (arrest by the Cameroon authorities) – 21 February 1997 (when the Court of Appeal of the Centre of Cameroon rejected Rwanda's extradition request); 2) 21 February 1997 (Rule 40 ICTR RPE request) – 19 November 1997 (transfer of Barayagwiza) and 3) 19 November 1997 (transfer of Barayagwiza) – 23 February 1998 (initial appearance of Barayagwiza).[902]

With respect to the first period, it found that the new information submitted to the judges established that Barayagwiza "knew the general nature of the charges against him by 3 May 1996 at the latest".[903] Although these 18 days (at most) still entailed a violation of his right to be informed without delay of the charges against him, the judges felt that "this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months".[904]

New facts were also 'discovered'[905] with respect to the second period; the judges explained that in the 3 November 1999 decision, the Appeals Chamber had determined that "Cameroon was willing to transfer the Appellant".[906] However, the new information showed that Cameroon had in fact not been prepared to transfer Barayagwiza before 24 October 1997.[907]

The judges continued:

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flip-flop was viewed by many as politically motivated."), Sridhar 2006, p. 362 ("The *Barayagwiza* case in the International Criminal Tribunal for Rwanda (ICTR) provides a parallel example of how international tribunals might be undermined by political pressures.") and Zahar and Sluiter 2008, pp. vii-viii, where they state that "the ICTR Appeals Chamber distorted the law in order to breathe new life into legal proceedings which had been terminated, by its first decision, for no reason other than to appease the Rwandese government which was furious about the release of a prominent defendant over what the government saw as a trivial human rights violation."

[901] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 50. Rule 120 of the ICTR RPE complements Art. 25 of the ICTR Statute (see n. 890) and reads: "Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement."

[902] See *ibid*., para. 53.

[903] *Ibid*., para. 54.

[904] *Ibid*., para. 55.

[905] See Schabas 2000, p. 568: "None of the "new facts" admitted by the appeals chamber were "discovered," nor were they unknown when the appeals chamber first heard the case in 1999. The prosecutor had simply failed to put them in evidence."

[906] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 57.

[907] See *ibid*.

> The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit,[908] would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act (...).[909]

As a result, it was held that "the new facts show that, during this second period, the violations [of Barayagwiza's human rights, ChP] were not attributable to the Prosecutor".[910]

As already explained in the context of the *Karadžić* case, this may, of course, be true and if so, should have an effect on the remedies. However, this quotation arguably does not mean that these violations were not taken into account by the Appeals Chamber when it came to determine the remedies.[911]

With respect to the third and final period, the judges stated that the new information had revealed that counsel for Barayagwiza, in an annex to a letter to the Registrar, had in fact consented to an initial appearance taking place on 3 February 1997. Although this still meant a substantial delay of 20 days (the initial appearance took place on 23 February 2007), the delay was clearly less extensive than the 96-day period mentioned in the 3 November 1999 decision.[912]

After having discussed these three periods, the Appeals Chamber turned to Rule 120 of the ICTR RPE which introduces an additional condition related to Article 25 of the ICTR Statute.[913]

According to this rule, a party can only submit a motion for review "[w]here a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence".[914]

After the Appeals Chamber had concluded that "[t]he new facts identified in the first two periods (...) may have been known to the Prosecutor or at least they could

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[908] These words are arguably incorrect; Cameroon *was* prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit. After all, a few moments earlier, the Appeals Chamber had clarified that Cameroon was not prepared to transfer Barayagwiza before 24 October 1997. However, that also means that Cameroon *was* prepared to transfer Barayagwiza after 24 October 1997, a date which is still prior to the date Barayagwiza was actually transferred to the ICTR (19 November 1997). Unfortunately, the Appeals Chamber does not go into this period of time (of almost a month) between the moment Cameroon would be prepared to transfer Barayagwiza and the actual date of transfer.

[909] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 58.

[910] *Ibid*.

[911] It seems that the Appeals Chamber *did* take (like it arguably *should* take) all the violations into account when determining the remedies, including those which cannot be attributed to the Prosecution, see n. 919 and accompanying text.

[912] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 62.

[913] See n. 890.

[914] See also n. 901.

have been discovered",[915] a conclusion which would block the motion for review with respect to the 'new' facts of the first two periods, it consequently diminished the relevance of Rule 120 of the ICTR RPE to, arguably, reach the result it already had in mind:[916]

> In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.[[917]] There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. (...) To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.[918]

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[915] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 64. The Appeals Chamber was arguably of the opinion that the new fact related to the third period was not known to the Prosecutor because the annex to the letter written by the defence counsel of Barayagwiza to the Registrar, in which counsel had given his consent to an initial appearance taking place on 3 February 1997, was not available to her. The word "arguably" has been used here because the Appeals Chamber states that "[i]t must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber". (*Ibid*., para. 70.) However, taking all the words of this paragraph into account (and the fact that the judges first clarified that "[t]he new facts identified in the first two periods (...) may have been known to the Prosecutor or at least they could have been discovered", thus contrasting the first two periods with the third period), it appears that the judges have forgotten the word "not" between "was" and "known", see *ibid*.: "With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C [the annex to the letter written by Barayagwiza's counsel and directed to the Registrar which indicated that the former had given his consent to an initial appearance taking place on 3 February 1997, ChP] was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber."

[916] *Cf*. also Schabas 2000, p. 567: "In the second decision, the appeals chamber ultimately distorts the law in an effort to achieve the desired result – to compensate for its previous decision and, in view of the "new facts" adduced, to enable the prosecution of Barayagwiza to proceed. In all fairness, the "new facts" did, indeed, change the appeals chamber's perception of the case and of the prosecutor's conduct, but the chamber's efforts to justify overturning its previous decision are surprisingly weak. For example, the chamber itself seems to acknowledge that none of the "new facts" came anywhere near the test set by Rule 120". See also *ibid*., p. 571.

[917] For criticism related to this observation, see *ibid*., pp. 567-568.

[918] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, paras. 65-66 and 69.

In the end, the judges concluded "that the Appellant's rights were violated, and that all violations demand a remedy"[919] but that "the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded".[920]

As a result, the remedy had to be changed.[921] Barayagwiza was not released and his indictment was not dismissed with prejudice to the Prosecutor, but the judges decided

> that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation; b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.[922]

Consequently, when Barayagwiza's case was completed on the merits, the Trial Chamber reduced his life sentence (Barayagwiza was found guilty of conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (extermination, murder and persecution) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II) to 35 years' imprisonment.[923]

As has become clear from examination of this case, decisions of the Appeals Chamber are definitely not flawless, one of the most important points of criticism being that the Appeals Chamber should take into account the fact that refusing jurisdiction may be an appropriate remedy in serious cases, but that refusing

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[919] *Ibid*., para. 74. These words confirm the idea of the 3 November 1999 decision that every violation committed in the context of an ICTR trial, even one for which the Prosecutor may not be directly responsible, should be remedied. That the Appeals Chamber supports the rather general view of the first decision in that the judges must take responsibility for violations *committed in the context of an ICTR trial* (and do not only have to look at violations which, for example, occurred while Barayagwiza was being detained at the behest/request of the Tribunal) can also be discerned from the following words: "The information now before the Chamber demonstrates that (…) the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him." (*Ibid*., paras. 54-55.) Thus, the judges start to count as from the day Barayagwiza was arrested (3 May 1996 minus 18 days = 15 April 1996), a day on which Barayagwiza was not yet detained at the behest/request of the ICTR. Apparently, the judges were of the opinion that by then, the detention could nevertheless be seen as falling within the context of their case.

[920] *Ibid*., para. 74.

[921] See also *ibid*., para. 71: "The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements: (…) The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified."

[922] *Ibid*., para. 75.

[923] See ICTR, Trial Chamber I, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, 'Judgement and Sentence', Case No. ICTR-99-52-T, 3 December 2003, para. 1107.

jurisdiction should not be equated with impunity for the suspect. That prosecuting forum A has forfeited its right to prosecute the suspect does not mean that the suspect may not be tried by prosecuting forum B.[924] However, the decisions can also be applauded, for example, for (arguably) confirming the idea that the Tribunal must remedy every violation committed in the context of its case, even if the Tribunal is, strictly speaking, not responsible for it. This duty to repair wrongs is apparently not only valid in the context of the abuse of process doctrine (when the Tribunal decides to refuse jurisdiction because of serious violations), but also in the context of less serious irregularities which do not lead to the ending of the case, see the general words in the 2000 *Barayagwiza* case: "all violations demand a remedy".

Finally, a last word on this case's judicial legacy; although the 2000 decision clearly reversed many *factual* observations from the 1999 decision, other, more general, reasonings of the 1999 decision have remained untouched.[925] One could hereby think of the Appeals Chamber's observation that one may rely on the abuse of process doctrine if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice",[926] cited with approval by the Trial Chamber in *Nikolić*.[927] The same Chamber also agreed with the idea established in the 1999 decision of *Barayagwiza* that a court may refuse to exercise jurisdiction in the case of serious violations, irrespective of the entity responsible for it.[928] Moreover, the Appeals Chamber's remarks on the importance

[924] See also Subsection 4.1 of Chapter III and Schabas 2000, p. 569: "In the November decision, the appeals chamber ordered Barayagwiza to be returned to Cameroon. Although theoretically, in view of the prosecutorial abuse, it may have been appropriate for the appeals chamber to refuse to exercise its jurisdiction, the ICTR still had a duty to promote accountability for genocide. Its decision to send Barayagwiza back to Cameroon seemed destined to accomplish the opposite. Article VI of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) offers two bases for jurisdiction: an international tribunal or the state where the crime took place. Rwanda would therefore be the alternative forum, and the ICTR should have seen itself as bound to ensure Barayagwiza was within effective reach of that forum." See also Fernández de Gurmendi and Friman 2002, pp. 330-331, n. 240, referring to (the wrong pages of) Schabas. One can agree with Schabas that, "[i]f the interests of international justice are to be served, the ICTR should be empowered to transfer individuals to a state with jurisdiction over the crime and a willingness to prosecute in cases where the ICTR declines jurisdiction (for whatever reason)." (Schabas 2000, p. 570.) Luckily, in 2002, Rule 11 *bis* of the ICTR RPE was adopted (see also n. 244), which enables and regulates the transfer of cases from the ICTR to national courts. Finally, it must be noted that the ICC might face the same problems the ICTR has experienced as "the same lacuna exists in the Rome Statute of the International Criminal Court [original footnote omitted, ChP]." (*Ibid.*)

[925] See also Sluiter 2003 B, pp. 944- 945 and Currie 2007, p. 364 (quoting Sluiter).

[926] ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 77.

[927] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111. See also, for example, ICTR, Trial Chamber II, *The Prosecutor v. Pauline Nyiramasuhuko*, 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', Case No. ICTR-97-21-T, 20 February 2004, para. 14.

[928] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114. As already explained earlier, it was not entirely clear whether the ICTY Appeals Chamber also followed this stance (although it seems that it did), the judges of the ICTY Appeals Chamber in any case

of a person's right to *habeas corpus* have been confirmed as well.[929] In that respect, one cannot agree with Schabas who wrote in 2003 that the 1999 decision "seems to have been entirely forgotten in subsequent case law, as if it were a bad dream".[930]

3.2.2 *Semanza*

The next case under examination, *Semanza*, has many similarities with *Barayagwiza*. On or about 26 March 1996, Laurent Semanza was arrested by the authorities of Cameroon pursuant to an international arrest warrant issued by the Rwandan Attorney-General's Office.[931] Some three weeks later, on 17 April 1996, the ICTR Prosecutor used Rule 40 of the ICTR RPE to issue a request for provisional measures to be taken against Semanza and several other suspects (including Jean-Bosco Barayagwiza).[932] On 6 May 1996, the Prosecutor issued a request to the authorities of Cameroon for a three-week extension of the suspects'

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concurred with the idea expressed in *Barayagwiza* that a court may refuse jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." (See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74 and ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, paras. 29-30.) These latter words were also confirmed in the still-to-discuss *Kajelijeli* case, see ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206.

[929] Although many cases have generally confirmed the *habeas corpus* reasoning of the ICTR Appeals Chamber (see n. 863), the following two statements are explicit examples in that respect. In the *Milošević* case, the judges held, commenting on a person's right to *habeas corpus* and the 1999 *Barayagwiza* decision: "This case was overturned by the Appeals Chamber on a review on grounds that do not in any way affect the validity of the Chamber's rulings as to the significance of the right of an accused to *habeas corpus*." (ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 39, n. 44.) *Cf.* also the Separate Opinion of Judge Robinson in the *Todorović* case where he stated: "The subsequent history of this case, in which the decision was reviewed pursuant to Rule 120 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, in no way affects the validity of the Appeals Chamber's dictum in paragraph 88 that the "notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts" is a "fundamental right"." (ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, para. 3, n. 1.) See finally (from the context of the international*ised* criminal tribunals): SCSL, Trial Chamber, *The Prosecutor against Tamba Alex Brima*, 'Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant', Case No. SCSL-03-06-PT, 22 July 2003, pp. 7 and 9. (See also n. 1288 and accompanying text.)

[930] Schabas 2003, p. 265. (Note that the 2005 case of Kajelijeli (see n. 928) should, of course, not be taken into account here as that decision was only issued after Schabas' article was published.) See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 50, n. 187.

[931] See ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 2.

[932] See *ibid*., para. 3. See also ns. 806-807 and accompanying text.

provisional detention[933] but on 16 May 1996, he informed the authorities in Cameroon of his intention to proceed against only four of the suspects, *excluding* Semanza (and Barayagwiza).[934] As previously explained in the context of the *Barayagwiza* case, on 21 February 1997, the day that the Court of Appeal of Cameroon rejected a request from Rwanda to have the remaining suspects extradited to Rwanda and ordered their release, the ICTR Prosecutor reacted by issuing a new request for provisional arrest.[935] Furthermore, she requested an Order for transfer and provisional detention pursuant to Rule 40 *bis* of the ICTR RPE,[936] which was filed by Judge Aspegren on 4 March 1997.[937] This Order was "served on the authorities in Cameroon on 6 March 1997 and the Appellant received a copy thereof on 10 March 1997".[938] Like Barayagwiza, Semanza filed a writ of *habeas corpus* challenging the lawfulness of his detention on 29 September 1997.[939] On 17 October 1997, the indictment against Semanza was filed,[940] charging him with "genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II".[941] This indictment was confirmed on 23 October 1997.[942] Like Barayagwiza, Semanza was finally transferred to the ICTR on 19 November 1997,[943] where he made his initial appearance on 16 February 1998,[944] more than 22 months – *cf.* again *Barayagwiza* – after he was arrested in Cameroon. After his indictment was amended and corrected, Semanza filed his 'Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful' on 16 August

[933] See *ibid*., para. 4. See also n. 807. Note that para. 4 of the 6 October 1999 decision speaks of an extension of three months, but this is arguably incorrect, see also ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 6.

[934] See ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 5. See also n. 809 and accompanying text.

[935] See *ibid*., paras. 6-7. See also n. 811 and accompanying text.

[936] See *ibid*., para. 8. See also n. 812 and accompanying text.

[937] See *ibid*., para. 10. See also n. 813 and accompanying text.

[938] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 9.

[939] See *ibid*., para. 10. See also n. 815 and accompanying text.

[940] See ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 11.

[941] ICTR, Prosecutor, *The Prosecutor of the Tribunal versus Laurent Semanza*, 'Indictment', Case No. ICTR-97-20-I, 16 October 1997, p. 1.

[942] See ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 12.

[943] See *ibid*., para. 13. See also n. 814 and accompanying text. Note that para. 13 of the 6 October 1999 decision speaks of 11 November 1997 as the date of Semanza's transfer, but this is arguably incorrect, see also ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 12.

[944] See ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 14.

1999, which was considered by Trial Chamber III.[945] On 6 October 1999, the judges issued their decision on this motion.

The Trial Chamber first examined the submissions of the parties. Like Barayagwiza, Semanza argued, among other things, that his detention was "unlawful and unjustifiable".[946]

This was countered by the Prosecutor, who was of the opinion that his detention was "lawful under the Statute and Rules".[947] It was also stipulated that "the Prosecutor does not have judicial control *stricto senso* over detention within a sovereign State".[948]

The Trial Chamber divided the points to be discussed into two categories: 1) the detention of Semanza *before* his transfer to the ICTR and 2) the detention of Semanza *after* his transfer.

With respect to the first category, the judges held that "it is not for the Tribunal to consider alleged violations of Semanza's rights before his transfer to the custody of the Tribunal"[949] because "an accused, before his transfer to the custody of the Tribunal, has no remedy under the Statute and Rules for the detention and acts by sovereign States over which the Tribunal does not exercise control".[950]

This stance was already expressed in the 1996 ICTY case of Djukić and Krsmanović (see also footnotes 138, 208 and 844 and accompanying text) and was later repeated by ICTR Trial Chambers in cases such as *Karemera*, *Ngirumpatse*, *Kajelijeli* (this last case will be further discussed in Subsection 3.2.3 of this chapter), *Nshamihigo*, *Nzirorera* and *Nyiramasuhuko*.

However, one can question whether these six decisions (which were decided on 10 December 1999 (*Karemera* and *Ngirumpatse*), 8 May 2000 (*Kajelijeli* and *Nshamihigo*), 7 September 2000 (*Nzirorera*) and 12 October 2000 (*Nyiramasuhuko*)) are consistent with the first (and second) Appeals Chamber's decision in *Barayagwiza*, where it was, after all, seemingly established that the ICTR may also remedy pre-trial violations committed by third parties in the context of a Tribunal case.[951]

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[945] See ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 17.

[946] ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 23. See also *ibid*. why Semanza thought his detention was unlawful and unjustifiable: "(a) the accused did not receive a formal indictment stating the charges against him before his transfer, and therefore was unable to prepare his defence; (b) the provisional detention of the accused violated the rights of the accused under Article 20 of the Statute and Rule 40; (c) the extension of the detention in the absence of judicial control was arbitrary and an abuse of the rights of the accused; (d) the accused has been discriminated against, as compared to others arrested in Cameroon; (e) the Prosecution failed to comply with Rule 40*bis* and the 40*bis* Order to file an indictment within thirty days, by 2 April 1997."

[947] *Ibid*., para. 27.

[948] *Ibid*.

[949] *Ibid*., para. 31.

[950] *Ibid*., para. 30.

[951] With respect to the question as to whether the Trial Chambers must follow the reasonings of the Appeals Chamber, it may be interesting to refer to the following words stemming from the ICTY Appeals Chamber's judgement in the *Aleksovski* case: "The Appeals Chamber considers that a proper

Furthermore, the judges, turning to the second category, found "that the Defence has failed to show any violation of the provisions of the Statute and the Rules with regard to Semanza's detention after his transfer to the custody of the Tribunal".[952]

Semanza decided to appeal this decision and the Appeals Chamber issued its decision on 31 May 2000, two months after the Appeals Chamber had reversed its 3 November 1999 decision in *Barayagwiza*.

The similarities between the cases of *Semanza* and *Barayagwiza* was also why the Appeals Chamber stressed that this did

> not necessarily imply that the legal findings will be the same. The Appeals Chamber would like to recall the specific features of the instant case relative to the *Barayagwiza* case and states that it has considered the issues raised in the instant case on the basis of the specific arguments and grounds submitted to it by the Parties.[953]

Before turning to the merits of the case, the judges first had to consider a preliminary point, namely the Prosecutor's request to supplement the record on appeal with additional evidence in view of the outcome of the *Barayagwiza* case.

According to the Prosecutor, "the new evidence was rendered unavailable inasmuch as it related to points of law which the Chamber had not considered; those points of law were raised only after the *Barayagwiza* Decision had been delivered".[954] In addition to this unavailability argument, the Prosecutor submitted that the interests of justice must also constitute a reason why the Appeals Chamber should consider the new evidence.[955]

Semanza did not agree with these arguments and stated, among other things, that "the Prosecutor did possess the evidence but simply failed to make use of it [original footnote omitted, ChP]".[956] With respect to the interests of justice argument, Semanza believed that this concept in fact demands that the Appeals Chamber must "refuse to admit the evidence presented by the Prosecutor, who, "just as for any other organ of the Tribunal, or any party, […] is bound by the rights and privileges stipulated in the Statute and Rules" [original footnote omitted, ChP]."[957]

The judges concurred with Semanza with respect to the unavailability argument; according to them, the Prosecutor had failed to demonstrate in what respect the

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construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers". (ICTY, Appeals Chamber, *Prosecutor v. Zlatko Aleksovski*, 'Judgement', Case No. IT-95-14/1-A, 24 March 2000, para. 113.)

[952] ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', Case No. ICTR-97-20-I, 6 October 1999, para. 36.

[953] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 3.

[954] *Ibid*., para. 30.

[955] See *ibid*., para. 31.

[956] *Ibid*., para. 32. According to Semanza, "this application is but a frantic attempt to anticipate issues and/or reopen the debate on the jurisprudence of *Jean-Bosco Barayagwiza*" [original footnote omitted, ChP]." (*Ibid*.)

[957] *Ibid*., para. 33.

relevant documents had not been available at the trial proceedings.[958] The outcome of the *Barayagwiza* case could not constitute a reason for unavailability: "developments in case-law can in no case be the cause or grounds for, or even a factor in the unavailability of evidence".[959]

Nevertheless, with respect to the interests of justice argument, the judges agreed with the Prosecution:

> [B]y admitting the new facts presented in the *Barayagwiza* case, ICT[R] Appeals Chamber, in reviewing the Decision, rectified the miscarriage of justice which had emerged in the light of those facts. The Appeals Chamber is consequently aware that if henceforth it refuses to admit certain items of evidence in the instant case a miscarriage of justice will result. This exceptional situation consequently enables it to admit said evidence (...).[960]

As a result, the judges turned to the merits of the case, taking into account (some of) the new evidence presented by the Prosecutor.

The judges first summarised the substantive arguments submitted by the two parties and noted that Semanza had requested the Appeals Chamber

> to vacate the Trial Chamber III Decision; to find that his fundamental rights were violated and that the principle of equality of arms was not complied with; to vacate the arrest and detention proceedings as unlawful; to order his release; and to rule the Appeal suspensive of proceedings before the Trial Chamber [original footnote omitted, ChP].[961]

However, the Prosecutor did not agree. She argued, among other things, that the Trial Chamber had correctly concluded "that no remedy was open to the Accused under the Statute or Rules of the Tribunal for matters predating his transfer to the Tribunal"[962] because "the above-mentioned legal instruments contain no provision for reviewing the domestic legislation of States in which arrest and detention take place [original footnote omitted, ChP]".[963] As already explained *supra*, this stance was later repeated by ICTR Trial Chambers in cases such as *Karemera*, *Ngirumpatse*, *Kajelijeli*, *Nshamihigo, Nzirorera* and *Nyiramasuhuko* but appears to be inconsistent with the *Barayagwiza* case where it was seemingly established that the ICTR may also remedy pre-trial violations committed by third parties in the context of a Tribunal case. Moreover, the Prosecutor was of the opinion – a point which was also explained in Chapter III of this book[964] – "that dismissal of the Prosecution charges is not a remedy which is permitted under international human

[958] See *ibid*., para. 43.
[959] *Ibid*.
[960] *Ibid*., para. 45.
[961] *Ibid*., para. 59.
[962] *Ibid*., para. 63.
[963] *Ibid*., para. 63.
[964] See n. 611 of Chapter III.

rights law [original footnote omitted, ChP]".[965] The Prosecutor also argued that even if this remedy were permitted under international law, that the facts of the case did not justify granting it.[966] As already explained in the present chapter,[967] the Prosecutor looked at different factors which should be considered in deciding whether or not a dismissal should be with or without prejudice, one of them being the seriousness of the suspect's charges.

The Appeals Chamber considered five major issues, of which four will be examined here:[968] 1) the right of the suspect to be informed promptly of the nature of the charges against him, 2) the suspect's right to be promptly charged, 3) the right of the accused to be brought before a Trial Chamber without delay and to be formally charged and 4) the right to challenge the lawfulness of detention (*habeas corpus*).

With respect to issue number one, the judges first made the general statement that "a suspect arrested by the Tribunal has the right to be informed promptly of the reasons for his or her arrest [original footnote omitted, ChP]".[969] In addition, they stressed that, "[i]n accordance with the norms of international human rights law, (...) this right comes into effect from the moment of arrest and detention [original footnote omitted, ChP]".[970]

This means that either the Tribunal or national authorities/international forces making the arrest for the Tribunal must promptly inform the person of the reasons for his arrest if this right is not to be violated. This, in turn, implies that the Tribunal, if necessary, should be able to review whether the arrest and detention at the national level was properly executed, for example, with due regard to a person's right to be promptly informed of the reasons for his arrest.

Hence, this can arguably be seen as a rupture with cases such as *Karemera*, *Ngirumpatse* and *Kajelijeli* (Trial Chamber) which support the idea that the ICTR cannot review the circumstances surrounding the arrest and detention at the national level. Concerning this specific case, the judges divided Semanza's detention at the request of the ICTR Prosecutor in two different periods,[971] namely 15 April 1996 (the date of the first request based on Rule 40 of the ICTR RPE)[972] – 17 May 1996 (when the authorities of Cameroon were informed that the Prosecutor was not

[965] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 65.
[966] See *ibid*.
[967] See n. 653.
[968] The first, whether or not there was a violation of the principle of *ne bis in idem*, is not particularly interesting here. (However, note that the topic can be relevant for this book's subject in general, see n. 353.)
[969] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 78.
[970] *Ibid*.
[971] See *ibid*., para. 79.
[972] Note that this request (dated 15 April 1996) was submitted on 17 April 1996 to the authorities of Cameroon, see n. 932 and accompanying text.

interested in prosecuting the suspect)[973] and 21 February 1997 (the date of the second request based on Rule 40 of the ICTR RPE) – 19 November 1997 (when Semanza was transferred to the ICTR).

Regarding the first period, the judges concluded on the basis of the new evidence that Semanza "had been informed of the nature of the crimes for which he was being pursued by the Prosecutor on 3 May 1996".[974] This is 18 days after the date of the first request based on Rule 40 of the ICTR RPE of 15 April 1996, when Semanza was detained for the first time at the request of the ICTR Prosecutor.[975] According to the judges, this constituted a violation of Semanza's right to be informed promptly of the nature of the charges against him.[976] Furthermore, the judges found that "[a] fitting remedy for this violation is justified".[977]

This is an interesting point, which was also used by Karadžić,[978] for the judges state that a remedy is necessary because of the violation *as such*. They do not state, for example, that the remedy is necessary because it can be clearly attributed to the Prosecutor.

This is the correct approach. A suspect detained at the behest of the ICTR must be promptly informed of the nature of the charges against him, whether this is done by somebody from the OTP or by the national authorities detaining the suspect for the ICTR. However, this also means that if the OTP requests the national authorities to inform the suspect and the latter authorities fail to do so, a violation has occurred within the context of the ICTR case which must be remedied, whether or not that violation is, strictly speaking, attributable to the OTP.

Regarding the second period, the judges opined that Semanza's right to be informed promptly of the nature of the charges against him started on 21 February 1997 and that he "was formally informed of the charges laid against him by the Tribunal when the Order issued under Rule 40 *bis* was served on him in Cameroon on 10 March 1997".[979] The Appeals Chamber admitted that this period of 18 days could be seen as a violation of Semanza's right to be informed promptly of the nature of the charges against him, but also held that "the violation is less serious

[973] Note that, according to the Trial Chamber in *Semanza* and the Appeals Chamber in *Barayagwiza*, the Cameroon authorities were informed on 16 May 1996, see ns. 934 and 809 and accompanying text, respectively.
[974] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 81.
[975] See *ibid*., para. 87. Note that the judges (in contrast to those of the *Barayagwiza* case) do not look at the period of time between Semanza's first deprivation of liberty (pursuant to an international arrest warrant issued by the Rwandan Attorney-General's Office) and his detention at the request of the ICTR. Hence, in this case, the judges were not of the opinion that the first days of detention could be seen as falling with the context of the ICTR case.
[976] See *ibid*.
[977] *Ibid*.
[978] See also n. 792 and accompanying text.
[979] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 88. See also n. 938 and accompanying text.

since the Appellant had been informed in substance of the nature of the Prosecutor's charges against him during his first period in detention".[980]

With respect to issue number two, Semanza's right to be promptly charged, the judges first noted that their colleagues who had written the 3 November 1999 decision in *Barayagwiza* were of the opinion that this right "becomes effective as soon as a Rule 40 *bis* Order is filed [original footnote omitted, ChP]".[981] However, the judges in Semanza did not agree with this, arguing that "the clock for the Rule 40 *bis* time-limit starts running only from the day the suspect is transferred to the Tribunal's Detention Facility".[982] As a result, Rule 40 *bis* of the ICTR RPE *could* not have been violated, as Semanza's indictment had already been confirmed (23 October 1997) *before* he was transferred to the ICTR (19 November 1997).[983] Moreover, the judges also made a point comparable with the one made by the judges in the 31 March 2000 decision in *Barayagwiza*, namely

> that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal's Detention Facility. The evidence before the Appeals Chamber shows that Cameroon was not inclined to transfer the Appellant before 21 October 1997.[984]

As was also explained in the context of the 31 March 2000 decision in *Barayagwiza*, it may, of course, very well be that the Tribunal was, strictly speaking, not responsible for what happened to Semanza prior to his transfer, but this does not mean that the Tribunal, *if* it is of the opinion that violations occurred in the context of its case, may not repair them (although the fact that certain violations cannot clearly be attributed to the Tribunal can, of course, be of influence in determining the remedies for the violations). As asserted before, see the text following footnote 830 and accompanying text, one can very well argue that violations which occur in the context of constructive custody – the context on which the case of Semanza focuses – can generally be seen as being the Tribunal's responsibility, whether or not the specific violations occurring in this context can be clearly attributed to it.[985]

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[980] *Ibid*., para. 90.
[981] *Ibid*., para. 91.
[982] *Ibid*., para. 96. See also n. 837.
[983] See *ibid*., para. 100.
[984] *Ibid*. para. 101. Note, however, that in the *Barayagwiza* case, Cameroon was three days slower, see n. 907 and accompanying text.
[985] *Cf.* also Judge Lal Chand Vohrah's declaration to this decision, where he remarked (see also n. 834): "If an accused is arrested or detained by a state at the request or under the authority of the Tribunal, even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible, and this remedy must be proportional to the violations. (…) I would also like to note my apprehension of certain language employed in the present Decision, which states that the "Appeals Chamber emphasises that, in any case, the Tribunal is not responsible for the period of time which elapsed before the Appellant was transferred to the Detention Facility of the Tribunal." [It must be noted that this is not an entirely accurate reproduction of the Appeals Chamber's words. The original Appeals Chamber's words go as follows: "[T]he Appeals Chamber emphasizes that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal's

The statement cited above, on the "fitting remedy", and the declaration of Judge Lal Chand Vohrah in this case, see footnotes 834 and 985, can be seen as evidence for this reasoning, for the idea that ICTR takes its responsibility for violations which occur in the context of its case.

With respect to issue number three, the right of Semanza to be brought before a Trial Chamber without delay and to be formally charged, the judges again made a point comparable with the one made by the judges in the 31 March 2000 decision in *Barayagwiza*, namely that counsel for Semanza had requested postponement of Semanza's initial hearing to 16 February 1998.[986] According to the judges, this request had "the import of waiving the Appellant's right to claim violation of his right to be brought before a Trial Chamber without delay and be formally charged".[987]

The fourth and final issue which had to be discussed was Semanza's right to challenge the lawfulness of detention (*habeas corpus*). After having confirmed the reasoning of the 3 November 1999 decision in *Barayagwiza* on the importance of this right,[988] the judges noted that a writ of *habeas corpus* was filed on 29 September 1997 but was not heard by a Trial Chamber.[989] As a result, Semanza's right to challenge the lawfulness of his detention was violated.[990] However, "[t]o assess the extent of the violation and its consequences in terms of remedy",[991] the judges had to take into account all the circumstances of the case. In doing so, they found that after this writ was filed in 1997, counsel for Semanza remained inactive on it for quite some time; according to the judges, it was "apparent that the Appellant became interested in the fate of his writ of *habeas corpus* only after the Appeals Chamber's 3 November 1999 Decision in the *Barayagwiza* case [original footnote omitted, ChP]".[992] Because of this, the Appeals Chamber concluded that Semanza's counsel "had failed in his duty of diligence by not carrying through to

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Detention Facility.", ChP.] (…) I do not take it to imply nor should it be interpreted as implying, that the Tribunal has no responsibility to an accused before he is transferred to the Detention Facility of the Tribunal when the accused has been arrested or detained at the behest of the Tribunal. This accords with the position taken in the *Barayagwiza Review Decision*, that the cumulative effects of all violations – even those occurring prior to transfer into Tribunal custody – are to be considered in fashioning an appropriate remedy [original footnotes omitted, ChP]." (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, paras. 6-7.) Judge Lal Chand Vohrah further notes that "[r]esponsibility and authority to redress violations occurring at a time when the accused was not detained under Tribunal request or authority would need to be considered on a case by case basis." (*Ibid*., para. 7, n. 7.)

[986] See ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 108.

[987] *Ibid*., para. 111. See for criticism on this point, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, paras. 9-10.

[988] See ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, paras. 112-113. See also n. 863 and accompanying text.

[989] See *ibid*., para. 114.

[990] See *ibid*.

[991] *Ibid*., para. 115.

[992] *Ibid*., para. 118.

conclusion the matter he had undertaken on the Appellant's behalf in his writ of *habeas corpus*".[993] This is rather an awkward statement: it appears that the Appeals Chamber is trying to turn the ICTR's *own* fault (namely its fault not to have considered the 1997 writ of *habeas corpus*) into a fault of the Defence because the latter has not sufficiently stressed the importance of this writ for his case. Is this not the world turned upside-down?[994] The judges also clarified that Semanza

> adduced two principal grounds in his 29 September 1997 writ of *habeas corpus*. Firstly, he contends that the Prosecutor was responsible for the continuing increase in the lapse of time before he was transferred to the Tribunal's Detention Facility and, secondly, that he was detained with no formal legal justification. The Appeals Chamber recalls that an indictment was confirmed against the Appellant on 23 October 1997 and that he was transferred to the Tribunal's Detention Facility on 19 November 1997. The results sought by filing the writ of *habeas corpus* were therefore achieved relatively soon after the writ was filed [original footnote omitted, ChP].[995]

As a result, the judges concluded that "while indeed there was prejudice caused, it must be seen in perspective and thus does not take the form of material prejudice alleged by the Appellant".[996] Arguably, the judges' clarification does not seem to be without its flaws. Although the fact that Semanza's indictment was confirmed indeed appears to resolve his argument that he was detained with no formal legal justification, it is difficult to understand how his transfer can solve his assertion "that the Prosecutor was responsible for the continuing increase in the lapse of time before he was transferred". After all, even if Semanza has been transferred, the

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[993] *Ibid*., para. 121. However, one can wonder whether this is indeed so. After all, the Appeals Chamber notes itself (*ibid*., para. 116) that "[h]is 29 September 1997 writ of *habeas corpus* aside, the Appellant challenged the lawfulness of his arrest and detention in Cameroon for a second time in his Motion to Set Aside [the Arrest and Detention of Laurent Semanza] as Unlawful, which he filed on 16 August 199[9] [original footnote omitted, ChP]." As the aim of a writ of *habeas corpus* is to challenge the lawfulness of one's arrest and detention, one can wonder whether this challenge, made on 16 August 1999 – hence *before* the *Barayagwiza* case – is not a repetition of the 1997 writ of *habeas corpus* in another form. In that respect, the following words are also incomprehensible (*ibid*., para. 119): "Counsel for the Appellant neglected to follow up the 29 September 1997 writ of *habeas corpus* until the *Barayagwiza* Decision had been delivered. The fact that Counsel for the Appellant elected to challenge the lawfulness of the Appellant's arrest and detention in August 1999 in a second motion confirms this finding." The question is how this possible, given the fact that (16) August 1999 is clearly *preceding* the moment the *Barayagwiza* Decision was delivered (3 November 1999).

[994] *Cf.* also ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, para. 12: "I consider that when any organ of the Tribunal contributes to due process or other human rights violations (including by omission or oversight), the Chambers should be sufficiently flexible to allow the violations to be raised and redressed. Indeed, when an accused is defending himself against charges of genocide, crimes against humanity or war crimes before the Tribunal, he should not also be required to diligently ensure that the Tribunal is not itself contributing to a violation of his rights, as that onus should rest with the Tribunal."

[995] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 124.

[996] *Ibid*.

Prosecutor can still be held responsible for the considerable lapse of time prior to the transfer.

Be that as it may, the Appeals Chamber nevertheless found "that any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy".[997] This statement, which very much resembles the concluding statement of the judges in the 31 March 2000 decision in *Barayagwiza* that "all violations demand a remedy",[998] can be welcomed[999] as it can be seen as confirmation of what appears to be the reasoning in the *Barayagwiza* decisions, namely that the Tribunal will take responsibility for *any* violations committed in the context of its case, even if these violations have been committed by third parties.[1000]

The last remark made by the judges before they turned to the final conclusion arguably indirectly showed that in determining a proportionate remedy, the seriousness of the suspect's alleged crimes may be taken into account: "In that connection, the Appeals Chamber also kept in mind the Tribunal's mandate, particularly in respect of the protection of international public order."[1001]

The judges' final conclusion was that Semanza's right to be informed promptly of the nature of the charges against him and his right to challenge the lawfulness of his detention were violated.[1002] However, "the remedy sought by the Appellant, namely his release, is disproportionate, in the instant case".[1003] As a result, the judges decided

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[997] *Ibid*., para. 125.

[998] See n. 919 and accompanying text.

[999] However, strictly speaking, one could argue that the Appeals Chamber's statement is in violation of the ICTR RPE for Rule 5 (A) of the ICTR RPE states that "[w]here an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused *material* prejudice to that party [emphasis added, ChP]". Remarkably, this rule was also presented in this decision (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 122) but the Appeals Chamber does not say anything about the fact that this rule seemingly contradicts the Appeal Chamber's conclusion that a remedy will be provided in this case, even if the prejudice caused "does not take the form of material prejudice alleged by the Appellant". (See n. 996 and accompanying text.) This point will be returned to in the *Rwamakuba* case, see ns. 1139-1145 and accompanying text.

[1000] The only difference is that in the *Barayagwiza* case, the judges also looked at a period of detention which could not be seen as being at the behest/request of the Prosecutor, see ns. 857 and 919 and accompanying text.

[1001] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 126.

[1002] See *ibid*., paras. 127-128.

[1003] *Ibid*., para. 129. As explained earlier (see the *Dokmanović* case), although the remedy of (final) release may indeed not be a proportionate remedy in this case, the judges do not explain how their conclusion can be reconciled with the strict application of the law, which stipulates that such violations lead to an unlawful detention (see also Swart 2001, p. 204 who explains that "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal"), which, in turn, according to para. 4 of Artt. 9 of the ICCPR or 5 of the ECHR, demands the remedy of release.

> that for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows: (a) If he is found not guilty, the Appellant shall be entitled to financial compensation; (b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute.[1004]

Although this disposition is similar to the one of the second *Barayagwiza* case, Semanza's remedy was considerably smaller than the one of Barayagwiza (whose life sentence, it is recalled, was reduced to 35 years' imprisonment); when Semanza's substantive case was completed, his sentence (25 years' imprisonment) was reduced by six months.[1005]

Although it is not clear exactly how the judges arrived at this remedy and although this remedy may not seem very impressive to the suspect, it is to be welcomed that the judges seemingly did what every chamber should do, namely to properly examine the pre-transfer period of its case and to accord the suspect a remedy if his rights were violated in the context of the case, irrespective of who was responsible for these violations.

Perhaps, the fact that the judges in this case accorded a small remedy for the violations may also reassure people critical of granting remedies to suspects of international crimes that providing a remedy may not necessarily jeopardise the prosecution of that suspect. Although such remedies may and in fact should be granted in certain serious *male captus* cases, for example when the Tribunal itself is involved in a kidnapping, one can assume, or hope, that this will not happen too often. Normally, a (small) reduction of the (very often quite severe) sentence will suffice, hence ensuring that both the sense of justice of the person in question (in that his violations are remedied) and of the victims/the international community as a whole (in that a suspect of international crimes, if found guilty, receives an appropriate (which very often means stern) penalty for his deeds) are met.

3.2.3 *Kajelijeli*

The penultimate case in the ICTR context to be discussed here is that of Kajelijeli. On 5 June 1998, pursuant to Rule 40 of the ICTR RPE, Juvénal Kajelijeli was arrested by the authorities in Benin and put in custody.[1006] Almost three months

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[1004] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, under 'Disposition', para. 6.

[1005] See ICTR, Trial Chamber III, *The Prosecutor vs. Laurent Semanza*, 'Judgement and Sentence', Case No. ICTR-97-20-T, 15 May 2003, para. 590. See also *ibid*., para. 580: "The Chamber has fully considered the nature of these violations. The total period of the violation of the Accused's right to be promptly informed of the charges lasted approximately thirty-six days, while the violation of his right to challenge his detention was found not to cause material prejudice. Considering the importance of these fundamental rights, the Chamber finds that it is appropriate to reduce the Accused's sentence by a period of six months."

[1006] See ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice

later, on 29 August 1998, Kajelijeli's indictment was confirmed, charging him, and others (including André Rwamakuba whose case will be discussed after this one), with "Conspiracy to commit Genocide, Genocide, Complicity in Genocide, Direct and Public Incitement to commit Genocide, Crimes Against Humanity and Violations of Article 3 common to the Geneva Conventions and Additional Protocol II".[1007] A few days later, on 9 September 1998, Kajelijeli was transferred to the ICTR.[1008] Although his initial appearance was scheduled for 24 November 1998, this date was postponed several times and took place as late as 7 and 8 April 1999.[1009] However, already long before this date, namely on 9 November 1998, Kajelijeli had filed a motion challenging the lawfulness of his arrest and detention.[1010]

Kajelijeli complained 1) that he was arrested without a warrant and probable cause;[1011] 2) that he was denied the right to counsel during his interrogation in July 1998 in Benin;[1012] 3) that he was not promptly informed about the charges against him in a language he understands;[1013] and finally 4) that his right to an initial appearance without delay was violated.[1014] Because of these violations, counsel for Kajelijeli submitted that his client was "entitled to a right to remedy pursuant to Article 9 (4) of the ICCPR; Article 5 (4) of the ECPHR [here, another abbreviation for the ECHR is used, ChP] and Article 8 of the Universal Declaration of Human Rights".[1015] This latter submission is very interesting for it is, surprisingly, one of the few where the Defence specifically refers to those human rights provisions which one would think would be used much more often by suspects claiming to have been the victims of an illegal arrest/detention, namely the *habeas corpus* provisions of the ICCPR and ECHR which unequivocally state that the judge must release a person if that person's detention is unlawful, see Subsection 4.2 of Chapter III.

The Prosecutor rejected these arguments and claimed, among other things, that "if the Accused has any complaint about his arrest, he can seek redress from the Benin Authorities, as the Tribunal has no jurisdiction".[1016] This, again, is

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of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, p. 2.

[1007] *Ibid*.

[1008] See *ibid*.

[1009] See *ibid*.

[1010] See *ibid*.

[1011] See *ibid*., para. 3.

[1012] See *ibid*., para. 9.

[1013] See *ibid*., para. 10. See also *ibid*.: "He was presented, for the first time: a confirmation of non-disclosure of the indictment; a warrant and a copy of a redacted indictment without his name being mentioned anywhere and without any identification of him, when he was transferred to Arusha on 9 September 1998. All the documents were in English, which he does not understand".

[1014] See *ibid*., para. 11.

[1015] *Ibid*.

[1016] *Ibid*., para. 17.

reminiscent of a case like *Ngirumpatse*, the reasoning of which seems to have been abandoned in cases such as *Barayagwiza* and *Semanza*.[1017]

The *Ngirumpatse* decision, and likewise the *Karemera* decision, were also referred to by the judges in *Kajelijeli*, namely in the context of Kajelijeli's first point; the judges found, after having stated that the ICTR RPE do not refer to "probable cause" but only to a "suspect",[1018] that, when arresting a "suspect", no warrant of arrest is needed.

This is because

> [a]t this stage, the manner and execution of arrest is an area within the States' responsibility. When the Prosecutor makes a request for the arrest of the Accused, the matter falls within the domain of the requested State and it is that State which organizes, controls and carries out the arrest in accordance with their domestic law. All these procedures were fulfilled in this case. The Accused was, therefore, properly arrested under Rule 40.[1019]

After this statement, the judges recalled the reasonings of *Karemera*[1020] and *Ngirumpatse*[1021] and stated that "[t]he Trial Chamber maintains its reasoning in the above cited cases on the issue of lack of warrant of arrest and is of the view that there is no good reason to depart from it".[1022] Furthermore, Kajelijeli "had not shown that any denial, whatsoever, has occurred to affect his right to immediately challenge the legality of his arrest in Benin".[1023] That may be so, but as national proceedings may not be used as an excuse to refuse the transfer of the person in question to the ICTR (unless one is of the opinion that transferring the suspect would lead to a *ius cogens* violation),[1024] national authorities will not permanently

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[1017] This point will be further discussed when examining the Appeals Chamber's decision in *Kajelijeli.*

[1018] As a result, what is required is reliable information which tends to show that a person may have committed a crime over which the ICTR has jurisdiction. See ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, para. 32.

[1019] *Ibid*., para. 34.

[1020] See *ibid*., para. 35: "In [the] *Karemera* case, Trial Chamber II expressed the opinion that a request made by the Prosecutor is executed and controlled by the State authorities using their law enforcement organs (…). In that case, it was decided that "the Trial Chamber therefore, considers that it cannot provide any remedy concerning such arrest and custody as these are still matters within the jurisdiction of the requested State.""

[1021] See *ibid*.: "In the *Ngirumpatse* [c]ase a similar declaration was made. At para. 56, the Trial Chamber states that "the Tribunal is not competent to supervise the legality of arrest, custody, search and seizure executed by the requested State. The laws of the requested State may not require an arrest warrant or impose other legal conditions.""

[1022] *Ibid*.

[1023] *Ibid*., para. 36. The Prosecutor noted (*ibid*., para. 21) that "[t]he Accused made a request to the Benin Authorities to be released but they did not respond. The Prosecutor has no power over the Benin Authorities and she cannot compel the release of the Accused by those authorities."

[1024] See n. 24 and accompanying text. It must be clarified that even though some may assert that the right of a person to challenge the lawfulness of his detention can be considered a *ius cogens* norm (see n. 433 and accompanying text of Chapter III where Knoops argues that "the right to liberty [which, of

release a person on the basis of a *habeas corpus* proceeding.[1025] In fact, Swart has already[1026] explained that "the arrested person's sole recourse is to a tribunal for *habeas corpus* or for obtaining interim release, since Rule 57 of the RPE of both *ad hoc* Tribunals leaves no discretion to States to decide on these matters".[1027] Rule 65 (A) of the ICTR RPE could also be mentioned here: "Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber."[1028] Hence, the reference of both the Prosecutor[1029] and the judges to Kajelijeli's right to challenge the legality of his arrest and detention in Benin is quite odd.

With respect to the second point raised by Kajelijeli, namely that he was denied the right to counsel during his interrogation in July 1998 in Benin, the judges noted that "the Accused voluntarily waived his right to counsel at the time of the questioning".[1030]

The judges also looked at an issue which can be connected to this subject, but which was not mentioned by the Trial Chamber in its summary of the allegations of Kajelijeli, namely the fact that there was a delay in the assignment of his counsel.[1031] They were of the opinion that the process of assigning counsel to Kajelijeli was indeed prolonged but this was also caused by Kajelijeli himself, who had "abused

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course, includes the right to challenge the lawfulness of one's detention, ChP] is recognized as a *jus cogens* norm"), it can arguably not be said that a denial of this right by the national authorities can constitute a reason for the national judge, in the context of the ICTR, to refuse the transfer. A refusal to transfer the suspect is arguably only possible if the judge is of the opinion that the transfer to the ICTR *itself* would lead to a *ius cogens* violation. (*Cf.* also n. 203.)

[1025] As explained earlier, the *habeas corpus* provisions in human rights law only speak of a release as such and not of a permanent release/a release with prejudice. Hence, such a release does not have to lead to a refusal to transfer. Nevertheless, judges may be of the opinion that such serious procedural irregularities occurred in the arrest/detention that the person in question is to be released with prejudice to the OTP, hence blocking the possibility of transferring the person to the Tribunal.

[1026] See n. 44 and accompanying text.

[1027] Swart 2002 A, p. 1250.

[1028] See also n. 43, where reference was also made to the following words from Gallant 1994, p. 585, writing that the ICTY version of the rule "suggests that the arresting state has no authority to release the defendant pursuant to its own law."

[1029] See n. 1016.

[1030] ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, para. 39.

[1031] It appears that the Trial Chamber simply forgot to mention this allegation ('Right to Counsel generally'). The fact that the Trial Chamber first states that "[t]he Defence submitted that there were five major complaints against the Prosecutor, which are elaborated below." (*Ibid.*, para. 1.) and then addresses only four complaints (namely 1) that he was arrested without a warrant and probable cause; 2) that he was denied the right to counsel during his interrogation in July 1998 in Benin; 3) that he was not promptly informed about the charges against him in a language he understands; and finally 4) that his right to have an initial appearance without delay was violated) may be additional proof for that assertion. Note that in the summary of the Prosecutor's response, the Trial Chamber *did* mention this point, see *ibid.*, paras. 24-25.

his right to Counsel by not following the established procedure on the assignment of Counsel".[1032]

With respect to the complaint that Kajelijeli was not promptly informed about the charges against him in a language he understands, the Trial Chamber found "that, at the time of arrest, the Accused should have been informed of the reasons for his arrest by the Benin Authorities".[1033] After having stated that it was not certain whether this had in fact happened, the Trial Chamber quickly turned to the undisputed fact that Kajelijeli had received a warrant of arrest, a copy of the redacted indictment and an order for the non-disclosure of the indictment "while in Benin, before his transfer to the UNDF [United Nations Detention Facilities, ChP] on 9 September 1998".[1034] Although this seems correct,[1035] one can wonder whether the Trial Chamber can present this as an undisputed fact because Kajelijeli had (apparently incorrectly) argued that he had received these documents for the first time "when he was transferred to Arusha on 9 September 1998".[1036] Furthermore, the judges do not really explain how Kajelijeli's was *promptly* informed of the charges. Moreover, they forget to address the argument of Kajelijeli that he must not only be promptly informed, but also *in a language he understands*.

Concerning Kajelijeli's last complaint, that his right to an initial appearance without delay was violated, the judges opined that at the initial appearance, the judges must also be satisfied that Kajelijeli's right to counsel is respected.[1037] However, as already explained by the Trial Chamber, the assignment of counsel was also delayed by Kajelijeli himself. Thus, the judges concluded, "he stands to blame

[1032] *Ibid*., para. 41. See also *ibid*., para. 40: "It is clear that serious efforts were made by the Registry to secure an assigned Counsel for the Accused. It is also true that the Accused frustrated these efforts by selecting Counsel whose names were not on the Registrar's drawn up list."
[1033] *Ibid*., para. 42.
[1034] *Ibid*.
[1035] See also ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 210: "In total, the Appellant was in the custody of the authorities of Benin from the date of his initial arrest until his transfer to the custody of the Tribunal for 95 days. During this period, the Appellant was in the custody of Benin authorities for 85 days before being served with an arrest warrant or a confirmed indictment." That would mean that Kajelijeli was served with these documents 10 days before his transfer on 9 September 1998, on 30 August 1998. See also *ibid*., para. 231 for a less clear conclusion: "The evidence on the record indicates that the Appellant was never informed by a Judge of the charges against him, even provisionally, until sometime between 29 August 1998 and 7 September 1998, when he was formally served with an arrest warrant and a copy of the redacted indictment against him from the Tribunal [original footnote omitted, ChP]."
[1036] See n. 1013. The following words do not contradict this as 9 September 1998 is, of course, also falling in the period after 29 August 1998: "The Appellant notes that it was not until after 29 August 1998 that he was served in Benin with copies of a warrant for his arrest, an order of surrender, an order of confirmation and non-disclosure, and a redacted version of the amended indictment from the Tribunal." (ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 212.)
[1037] See ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, para. 45.

for the delay in his initial appearance, which is inter-twined to the issue of the assignment of Counsel".[1038]

As a result, Kajelijeli's motion was dismissed. Kajelijeli subsequently filed a notice of appeal but this was dismissed by the Appeals Chamber on 10 August 2000 as it "lacked specificity in that it did not mention any ground of appeal or the relief sought, and that the Appellant failed to cure this deficiency within the deadline it had set for doing so".[1039]

Hence, Kajelijeli filed a second challenge to the jurisdiction of the ICTR, but this challenge was also rejected by Trial Chamber II, which noted "that these issues are *res judicata*, as they were decided upon by the Trial Chamber in its Decision of 8 May 2000".[1040]

When Kajelijeli appealed this decision, the Appeals Chamber, in its decision of 16 November 2001,

> declined to comment on the Appellant's arguments contesting the Tribunal's personal jurisdiction noting that an appeal on that issue had already been dismissed. The Appeals Chamber indicated that at a later stage in the trial, the Appellant could raise before the Trial Chamber all issues relating to his fundamental rights and any demands for reparation [original footnotes omitted, ChP].[1041]

When Kajelijeli's substantive case was about to be brought to an end, the Appeals Chamber stated that it now had to find out whether, taking its earlier decisions of 10 August 2000 and 16 November 2001 into account, it could perhaps "reconsider the arguments addressed therein in considering the Appellant's submission under this ground of appeal that the Trial Chamber erred in rejecting them and in finding that it had jurisdiction".[1042]

It decided that Kajelijeli could not re-litigate the issue of the ICTR's personal jurisdiction[1043] and explained that even if the judges were to reconsider it, this would not lead to a refusal of jurisdiction.[1044] This was because Kajelijeli's violations – in contrast to their colleagues at the Trial Chamber level, the judges of the Appeals

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[1038] *Ibid*.
[1039] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 199.
[1040] ICTR, Trial Chamber II, *The Prosecutor versus Juvénal Kajelijeli*, 'Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal', Case No. ICTR-98-44A-T, 13 March 2001, para. 6.
[1041] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 200.
[1042] *Ibid*., para. 201.
[1043] See *ibid*., para. 205. The judges explained in that respect (*ibid.*): "The Appeals Chamber squarely held, in its 16 November 2001 decision, that the Appellant procedurally lost his entitlement to raise his personal jurisdiction objection by failing to file a sufficiently specific notice of appeal, even after the Appeals Chamber had allowed him extra time to do so after his initial failure. This holding disposed of the personal jurisdiction objection. The Appellant has not demonstrated any cause to reconsider this determination on a discretionary basis: there is no clear error in the Appeals Chamber's reasoning, nor is reconsideration necessary to prevent an injustice."
[1044] See *ibid*., para. 206.

Chamber had *proprio motu*[1045] established that his "rights were in fact violated during his initial arrest and detention prior to his initial appearance"[1046] – did not meet the *male detentus* test as established by the *Barayagwiza* and *Nikolić* cases:

> [E]ven if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction. The Appeals Chamber is mindful that it must maintain the correct balance between "the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law." While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment." However, those cases are exceptional and, in most circumstances, the "remedy of setting aside jurisdiction, will . . . be disproportionate." The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above [original footnotes omitted, ChP].[1047]

It must be noted that the Appeals Chamber, even though it does not exclude the fact that serious violations of a suspect's human rights (without serious mistreatment) can lead to the ending of the case,[1048] again (see also the *Nikolić* case) focuses here on the more 'physical' dimension ("very serious mistreatment") of the *male detentus* test.

That is, of course, unproblematic, but one must be careful that the *male detentus* test, by constantly focusing on this dimension, is not slowly transforming into a 'torture test'. As argued before, there may be other *male captus* situations not involving serious mistreatment which should also lead to the ending of the case, such as an abduction (not involving serious mistreatment) orchestrated by OTP staff.

Even though the violations did not lead to a *male detentus* outcome, what was the exact opinion of the Appeals Chamber judges on these violations and their consequences for this case?

The judges divided the violations in two different periods, namely 1) between his arrest and transfer to the ICTR and 2) between his transfer and his initial appearance.

[1045] See *ibid*., para. 208.
[1046] *Ibid*., para. 206.
[1047] *Ibid*.
[1048] See the words "[f]or example" as in: "While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment.""

With respect to the first period, the judges examined three issues, namely 1) the arrest and the right to be promptly informed of the reasons for the arrest; 2) Kajelijeli's detention in Benin and 3) Kajelijeli's right to counsel during questioning. The second period covered two issues, namely 1) the right to counsel and 2) the right to an initial appearance.

However, before it addressed issue number one, it first noted a number of what it called undisputed facts.

These included that Kajelijeli had been detained by the Benin authorities for 95 days and that it had taken 85 days before he was served with an arrest warrant or a confirmed indictment.[1049] This also means that Kajelijeli had been served with these documents ten days before he was transferred to Arusha. Even though this may, of course, be true,[1050] it is hard to see how this point can be presented as an undisputed fact – see also footnote 1036 and accompanying text – since Kajelijeli had claimed that he had only received these documents for the first time "when he was transferred to Arusha on 9 September 1998".[1051]

Be that as it may, the judges also made a few general remarks, for example, that "under Rule 40 of the Rules, the Prosecution and Benin had overlapping responsibilities during the first period of the Appellant's arrest and detention in Benin".[1052] This, the judges continued,

> flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person. Under the prosecutorial duty of due diligence, the Prosecution is required to ensure that, once it initiates a case, "the case proceeds to trial in a way that respects the rights of the accused [original footnote omitted, ChP]."[1053]

This statement by the *Kajelijeli* Appeals Chamber, which includes a quotation from the first *Barayagwiza* decision,[1054] must be applauded for it clearly stresses the importance alluded to earlier that the suspect must not become the victim of the fact that the legal proceedings of his case are fragmented over two or more jurisdictions.[1055]

Returning to the overlapping responsibilities during the first period of arrest and detention in the State concerned,[1056] the Appeals Chamber explained that this means

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[1049] See ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 210.
[1050] See also n. 1035 and accompanying text.
[1051] See n. 1013.
[1052] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 220.
[1053] *Ibid*.
[1054] See n. 865 and accompanying text.
[1055] See n. 199 and accompanying text. (See also ns. 231-232 and accompanying text of Chapter III and n. 843 of the present chapter.)
[1056] See also ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 221: "[A] shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters."

that the national judge can and must also safeguard several fundamental rights of the suspect,[1057] but that it is not this judge's task to go into the merits of the case:

> He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.[1058]

It can be argued that the words quoted above, that the ICTR bears principal responsibility for the deprivation of liberty of the person, is valid for the *entire* deprivation of liberty. Hence, not only for the substantive part, but also for the procedural part (even though that latter part is factually executed by others).

The judges recalled the commendable and previously mentioned[1059] words of Judge Lal Chand Vohrah in the *Semanza* case that

> if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible (…).[1060]

They then turned to the first issue (the arrest and the right to be promptly informed of the reasons for the arrest) of the first period (between his arrest and transfer).

The Appeals Chamber first noted that the Trial Chamber had found that Kajelijeli's arrest was not arbitrary or in violation of due process of law;[1061] Rule 40 of the ICTR RPE had been adhered to[1062] and, with respect to the exact "manner and execution of the arrest pursuant to the Prosecutor's request",[1063] this was the domain of the State over which the Tribunal had no control:

[1057] See *ibid*. For example, "[a] Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee and consular officers [original footnotes omitted, ChP]." (*Ibid*.)

[1058] *Ibid*.

[1059] See ns. 834 and 985.

[1060] However, as commendable as these words are, it is submitted that judges should also take their responsibility for irregularities which can be seen to fall within the notion of "within the context of the Tribunal case" but which are not triggered by the fact that a request for arrest and detention has been issued by the Tribunal. This was not excluded by Judge Lal Chand Vohrah, by the way, see again ns. 834 and 985, where it was explained that this Judge further noted that "[r]esponsibility and authority to redress violations occurring at a time when the accused was not detained under Tribunal request or authority would need to be considered on a case by case basis." (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, para. 7, n. 7.)

[1061] See ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 225.

[1062] See *ibid*.

[1063] *Ibid*.

> [T]he Trial Chamber held that responsibility lies with the cooperating State to organize, control, and carry out the arrest in accordance with its domestic law. The Trial Chamber found that there was no violation of the Appellant's right to be promptly informed of the reasons for his arrest and of the charges against him. The Trial Chamber noted that responsibility for promptly informing the Appellant of the reasons for his arrest lay with the Benin authorities, and it was disputed whether or not information was passed to the Appellant at the time of his arrest.[1064]

It was noted earlier that this reasoning, which was also expressed in cases such as *Karemera* and *Ngirumpatse*, appears to be in violation of cases such as *Barayagwiza* and *Semanza* (Appeals Chamber) where the judges examined the pre-transfer phase of their case and seemingly took responsibility (by granting remedies) for *any* violation committed in the context of their case.

The Appeals Chamber in *Kajelijeli* apparently supports this stance because it did not agree with the above-mentioned reasoning of the Trial Chamber. Although Rule 40 of the ICTR RPE was not violated in this case, "the manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest".[1065] Hence, the fact that the national authorities had not informed Kajelijeli entailed a breach of his rights.[1066] This means that Tribunal does what it arguably should do, namely taking into account pre-transfer violations committed in the context of its case (such as violations occurring in the context of the Tribunal's constructive custody), even if the Prosecutor was not, strictly speaking,[1067] responsible for these violations.

With respect to the second issue (Kajelijeli's detention in Benin) of the first period (between his arrest and transfer), the judges concluded that the Trial Chamber

> erred in failing to find that his detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal's Statute and Rules as well as international human rights law.[1068]

[1064] *Ibid*.

[1065] *Ibid*., para. 226. The Appeals Chamber hereby referred to the already-mentioned (see ns. 969-970 and accompanying text) observation by the Appeals Chamber in *Semanza* that "a suspect arrested at the behest of the Tribunal has a right to be promptly informed of the reasons for his or her arrest, and this right comes into effect from the moment of arrest and detention [original footnote omitted, ChP]." (*Ibid*.)

[1066] See *ibid*., para. 227: "The Appellant claims in this appeal that at the time of the arrest, he asked the Benin authorities as to the reasons for his arrest and was informed that he would find them out at a later date. The Prosecution failed to rebut this argument. Consequently, the Appeals Chamber finds that in the absence of any evidence to the contrary, the Appellant's right to be informed of the reasons as to why he was being deprived of his liberty was not properly guaranteed [original footnotes omitted, ChP]."

[1067] Nevertheless, it can again be maintained that the Prosecutor can be seen as generally responsible for every violation taking place within this constructive custody (or better: within the context of the Tribunal case more generally).

[1068] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 231.

For these violations, the judges continued, the Prosecution was responsible because the latter "failed to make a request within a reasonable time under Rules 40 and 40*bis* for the Appellant's provisional arrest and transfer to the Tribunal".[1069] With respect to the responsibility of the Prosecution for Kajelijeli's violated right to be brought promptly before a judge, the judges clarified that this violation was not solely attributable to the Prosecution. Hence, the violation could also be attributed in part to the national authorities. However, the Prosecution was nevertheless to be held responsible *in general* as "it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and detention in Benin".[1070] This statement, which was also used by Karadžić,[1071] can again be seen as a confirmation of the view that the Prosecution is to be held generally responsible for pre-transfer violations committed in the context of a Tribunal case (such as in this case: violations occurring in the constructive custody of the Tribunal), irrespective of the question as to exactly which entity the violation could be attributed.[1072]

Concerning the third issue (Kajelijeli's right to counsel during questioning) of the first period (between his arrest and transfer), the judges simply agreed with the Trial Chamber that there was no violation of this right as Kajelijeli had not challenged "the Trial Chamber's conclusion that there had been voluntary waiver or his concession of the same".[1073]

With respect to the second period (between the transfer and the initial appearance), it is recalled that the Appeals Chamber looked at two issues, namely 1) the right to counsel and 2) the right to an initial appearance.

However, as with the first period, before the judges went to address issue number one of this second period, they first noted a number of undisputed facts. For example, the fact that Kajelijeli "was in the custody of the Tribunal for a total of 211 days prior to any initial appearance during which he was without assigned counsel for 147 days".[1074]

Turning to the first issue in the context of the second period, the judges concluded, in contrast to their colleagues from the Trial Chamber, that Kajelijeli's right to counsel had in fact been violated because "[i]t constitutes a violation (...) not

[1069] *Ibid*.
[1070] *Ibid*., para. 232.
[1071] See n. 793 and accompanying text.
[1072] Hence, what is important is that, if a violation is identified in the context of a Tribunal case (for example, after the Prosecutor has requested the national State to provisionally arrest a person), that violation is consequently repaired by the now prosecuting forum, the Tribunal, irrespective of who committed the violation. However, this does not mean that the Tribunal will express itself on whether the party which (seems to have) committed this violation is also legally responsible for it. That is clearly a domain which is not for the Tribunal to enter, see also ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 252, where the judges summarised their findings, without going into or "irrespective of any responsibility of Benin for violations of the Appellant's rights during the first period of arrest and detention, on which this Tribunal does not have competence to pronounce".
[1073] *Ibid*., para. 236.
[1074] *Ibid*., para. 237.

to assign duty counsel, in spite of ongoing efforts to assign counsel of choice in light of the outstanding initial appearance".[1075]

With respect to the second issue of this period, the right to an initial appearance, the judges, again, disagreed with the Trial Chamber. In fact, they held that "the 211-day delay between the Appellant's transfer to the Tribunal and the initial appearance before a Judge of this Tribunal constitutes extreme undue delay".[1076] The problems with respect to assigning counsel to Kajelijeli did not change this.[1077]

Now that the five issues, divided over two periods of time, had been examined, the judges turned to the conclusion. In this context, the judges stated, among other things:

> [T]he Appeals Chamber finds that fault is attributable to the Prosecution for violations to the Appellant's rights during this first period of arrest and detention. The Prosecution failed to effect its prosecutorial duties with due diligence out of respect for the Appellant's rights following its Rule 40 request to Benin. Thus, the Appellant is entitled to a remedy from the Tribunal.[1078]

As earlier explained in the context of the *Karadžić* case (see the text following footnote 784 and accompanying text), this is a tricky remark as it seems to connect the granting of remedies with the attribution of certain violations to the Prosecutor, note the word "[t]hus". Of course, it is obvious that if certain violations can be attributed to the Prosecutor, then the suspect is entitled to a remedy. However, the more interesting question is whether these words imply that the suspect is *only* entitled to a remedy if certain violations can be attributed to the Prosecutor. As has become clear from discussion of this case, this study is of the opinion that the decision provides enough room for the interpretation that the Tribunal is of the opinion that *all* violations in the context of a certain case (which in this case happened as from the constructive custody) must be remedied, irrespective of the question as to exactly which entity the violation could be attributed. Recall in this respect, for example, the following statement, made by the Appeals Chamber in the context of Kajelijeli's right to be promptly brought before a judge:

> [A]lthough the violation is not solely attributable to the Tribunal, it has to be recalled that it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and detention in Benin.[1079]

Thus, the fact that the Prosecutor initiated the case means that it must take the general responsibility for violations which occur in the context of its case,

[1075] *Ibid*., para. 245.
[1076] *Ibid*., para. 250.
[1077] See *ibid*., para. 248.
[1078] *Ibid*., para. 252.
[1079] *Ibid*., para. 232. See also n. 1070 and accompanying text.

irrespective of the question as to exactly which entity the violation could be attributed.

This is arguably also confirmed by the final words of this part of the *Kajelijeli* decision, when the judges repeated the reasonings of their colleagues in the *Barayagwiza* and *Semanza* (Appeals Chamber) cases[1080] that "*any* violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR [emphasis added, ChP]".[1081]

In the end, they concluded, in conformity with the *Barayagwiza* (Appeals Chamber) and *Semanza* (Appeals Chamber) cases, that

> where the Appeals Chamber has found on interlocutory appeal that an accused's rights have been violated, but not egregiously so, it will order the Trial Chamber to reduce the accused's sentence if the accused is found guilty at trial. With this in mind, the Appeals Chamber will take into consideration its findings here on violations of the Appellant's rights when it turns to the task of determining the Appellant's sentence in this Judgement in order to provide for an appropriate remedy [original footnote omitted, ChP].[1082]

The remedy was considerable, although the remaining sentence was still so severe that it is unlikely that Kajelijeli will ever be a free man again:

> The Appeals Chamber finds that under the circumstances of this case, in view of the serious violations of the Appellant's fundamental rights during his arrest and detention in Benin and the UNDF from 5 June 1998 to 6 April 1999, and considering the Appellant's entitlement to an effective remedy for those violations under the Tribunal's law and jurisprudence and Article 2(3)(a) of the ICCPR, the Appellant's two life sentences and fifteen years' sentence as imposed by the Trial Chamber shall be set aside and converted into a single sentence consisting of a fixed term of imprisonment of 45 years.[1083]

Before turning to the final case in the ICTR context, it may be interesting to note that the Appeals Chamber speaks here of "*serious* violations of the Appellant's fundamental rights [emphasis added, ChP]". In the disposition, the judges also stated "that the Appellant's fundamental rights were *seriously* violated [emphasis added, ChP]".[1084]

The fact that the Appeals Chamber did not refuse jurisdiction in this case, notwithstanding the fact that Tribunal was of the opinion that the suspect's rights

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[1080] See ns. 919 and 997 and accompanying text, respectively.

[1081] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 255. See also *ibid*., para. 322: "Where a suspect or an accused's rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2(3)(a) of the ICCPR stipulates that "[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."" See for Art. 2, para. 3 (a) of the ICCPR also n. 575 of Chapter III.

[1082] *Ibid*., para. 255.

[1083] *Ibid*., para. 324.

[1084] *Ibid*., para. 325.

were *seriously* violated/that *serious* violations of the suspect's rights had occurred, can be seen as additional proof for the fact that the serious/egregious test as presented by the *Nikolić* case is indeed a very restrictive test which will probably not be met in the case of 'normal' serious human rights violations (see the outcome of *Kajelijeli*) but probably only in such serious cases as those in which the suspect is, for example, seriously mistreated (involving torture-like conditions). As explained earlier, one should be careful that this test does not become too restrictive; there may still be situations which do not involve serious mistreatment, but which should nevertheless lead to a *male detentus* outcome, for example, if the Tribunal itself is involved in a kidnapping or when third parties are responsible for serious violations/irregularities not involving serious mistreatment.

3.2.4 *Rwamakuba*

The final case in the ICTR context to be discussed here is that of Rwamakuba. On 2 August 1995, André Rwamakuba was arrested and detained by the authorities in Namibia.[1085] Almost five months later, on 22 December 1995, the ICTR's OTP "contacted the Namibian authorities for the Accused to be kept in custody pending further information by their services".[1086] However, on 18 January 1996, the OTP informed the Namibians that they had no evidence against Rwamakuba, as a result of which the latter was released by the Namibian authorities on 8 February 1996.[1087]

Nevertheless, on 29 August 1998, Rwamakuba's indictment was confirmed – charging him with the same crimes with which Kajelijeli was charged[1088] – and after an order for his arrest and transfer was issued on 8 October 1998, he was arrested on 21 October in Namibia and transferred to the ICTR the next day.[1089] It was not until more than five months later, on 7 April 1999, that Rwamakuba's initial appearance took place,[1090] showing that the ICTR seems to have great difficulty in bringing persons before a judge of the ICTR as soon as possible.

The Defence claimed, among other things, 1) that Rwamakuba's arrest was carried out on the basis of a formal request from the OTP pursuant to Rule 40 of the ICTR RPE, thus ensuring that "[a]ny irregularities pertaining to both the arrest and the subsequent detention of the Accused in Namibia from 2 August 1995 to 7 February 1996 are (...) attributable to the Tribunal";[1091] 2) that his arrest was illegal "in the absence of any proof against the Accused to consider him a suspect, let alone

[1085] See ICTR, Trial Chamber II, *The Prosecutor v. André Rwamakuba* et alia, 'Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused', Case No. ICTR-98-44-T, 12 December 2000, p. 2.
[1086] *Ibid*.
[1087] See *ibid*.
[1088] See n. 1007 and accompanying text.
[1089] See ICTR, Trial Chamber II, *The Prosecutor v. André Rwamakuba* et alia, 'Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused', Case No. ICTR-98-44-T, 12 December 2000, p. 2.
[1090] See *ibid*.
[1091] *Ibid*.

ask for his arrest";[1092] 3) that during his detention, "several of his individual rights were violated",[1093] namely that he had not received assistance of a counsel, that he was not brought before a judge and that no indictment was issued against him;[1094] 4) that his second arrest in 1998 (after his release in 1996 in the absence of evidence against him) shows "a lack of diligence in the Prosecutor's handling of this case, resulting, notably, in the violation of his right to a speedy trial";[1095] 5) that there was a 135-day delay between his second arrest/transfer and his initial appearance and, moreover, a delay in providing him with a counsel and that both delays "are substantial enough in themselves to warrant the loss of jurisdiction of the Tribunal over the Accused and, consequently, his release and the dismissal of all charges against him";[1096] and 6) that, in any case, this remedy had to be granted in view of "[t]he cumulation of all these violations of the individual rights of the Accused".[1097]

The Prosecution countered these arguments, saying that it "did not direct or otherwise cause the August 1995 arrest".[1098] According to the OTP, former Prosecutor Goldstone only learnt of Rwamakuba's arrest four months after it had happened, as a result of which he sent the Namibians a letter, dated 22 December 1995,

> asking them to continue detaining the Accused pending further information under the regime of their municipal laws rather than on behalf of the Tribunal. Therefore, the Accused was not detained at the behest of the Tribunal in 1995/1996, which has no jurisdiction over alleged irregularities in this respect.[1099]

Regarding the delay between Rwamakuba's transfer and his initial appearance, the Prosecution explained that this was not only caused by the judicial recess but also by Rwamakuba himself who had delayed appointment of his counsel.[1100] The Prosecution felt that Rwamakuba could "not claim for responsibility of the Tribunal with respect to a delay for which he is partly responsible".[1101]

The judges first examined whether the ICTR had jurisdiction over the conditions of Rwamakuba's detention in Namibia in 1995 and 1996. In this context, they recalled the reasoning of cases such as *Karemera*, *Ngirumpatse*, *Kajelijeli* (the decision of 8 May 2000), *Nzirorera* and *Nyiramasuhuko* that "as a rule, the Tribunal has consistently held that it had no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign State at the request of the Tribunal".[1102] However, the judges continued,

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[1092] *Ibid*., para. 3.
[1093] *Ibid*., para. 4.
[1094] See *ibid*.
[1095] *Ibid*., para. 5.
[1096] *Ibid*., para. 6.
[1097] *Ibid*., para. 7.
[1098] *Ibid*., para. 8.
[1099] *Ibid*.
[1100] See *ibid*., para. 9.
[1101] *Ibid*.
[1102] *Ibid*., para. 22.

> [a]s far as detention in a State is concerned (...), these holdings have to be read in the light of the Bar[a]yagwiza Decision of 3 November 1999 (...) where the Appeals Chamber (...) held that "*under the facts of this case, Cameroon was holding [him] in the* "*constructive custody*" of the Tribunal by virtue of the Tribunal's lawful process or authority". Although the notion of one's "*constructive custody*" was not explicitly referred to in its subsequent Semanza Decision of 31 May 2000, which addressed in essence the same issues, the Appeals Chamber applied some of the consequences drawn from the notion of constructive custody in its Barayagwiza Decision of 3 November 1999 in the Semanza Decision as well. Among these consequences are the responsibility of the Tribunal for some aspects of the detention of such an individual detained at its behest, while specific timeframes under the Rules run with respect to the "constructive detainee" of the Tribunal, prior to his transfer to the UNDF, notably with respect to his right to be promptly informed of the nature of the charges against him [emphasis in original, ChP].[1103]

It can be argued that this is not entirely correct since the judges in the *Barayagwiza* case even took responsibility for violations committed *beyond* the constructive custody period/the period during which Barayagwiza was detained at the behest of the ICTR.[1104] In addition, the cases of *Barayagwiza* and *Semanza* (Appeals Chamber) can arguably be viewed as support for the broader idea that the Tribunal must take responsibility for *all* wrongs committed in the context of a Tribunal case.

Be that as it may, it appears that the judges in *Rwamakuba* would nevertheless take their responsibility for parts of the detention of Rwamakuba, even if violations in this context could not, strictly speaking, be attributed to the Tribunal, as long as the detention was at the behest of the ICTR. This is at least something. However, in this specific case, the judges were of the opinion that Rwamakuba had not been arrested and detained on 2 August 1995 at the behest of the ICTR.[1105] Furthermore, they established that the ICTR Prosecutor was only informed of Rwamakuba's detention as from 21 December 1995.[1106] As a result, the judges concluded that the Prosecutor was not responsible for Rwamakuba's detention between 2 August 1995 and 22 December 1995,[1107] that the ICTR had no jurisdiction over the conditions of

[1103] *Ibid*., para. 23.
[1104] See ns. 857 and 919 and accompanying text.
[1105] See ICTR, Trial Chamber II, *The Prosecutor v. André Rwamakuba* et alia, 'Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused', Case No. ICTR-98-44-T, 12 December 2000, para. 27: "The Trial Chamber (…) finds that no such evidence was brought by the Defence that the Namibian authorities so acted to abide, more specifically, by a formal request from the Prosecutor pursuant to Rule 40 of the Rules, in the form of a list of suspects including the Accused's name, notified to the State of Namibia by the Prosecutor, and requesting States to arrest and detain the suspects in question. (…) Being thus satisfied, in view of the arguments and the material submitted by both Parties, that the Namibian Authorities did not act on the basis of a list of suspects circulated by the Prosecutor prior to the Accused's arrest of 1995, the Trial Chamber does not find it necessary to request, pursuant to Article 28 of the Statute, the said authorities for further clarifications on the circumstances of the arrest and detention of the Accused in 1995 and 1996, as asked by the Defence."
[1106] See *ibid*., para. 30.
[1107] See *ibid*.

that period of detention and that "any challenges in this respect [were] to be brought before the Namibian jurisdictions".[1108]

The judges concluded the same with respect to the period between 22 December 1995 and 18 January 1996 (when the OTP informed the Namibians that they had no evidence against Rwamakuba), because "the letter [of 22 December 1995, ChP] does not amount to a request under Rule 40 to detain the Accused on behalf of the Tribunal".[1109]

It may very well be that Rwamakuba was not arrested and detained at the request of the ICTR, but perhaps the more interesting question the judges could have asked themselves, see also the point mentioned *supra*, is whether the arrest and detention by the Namibians could in any way be seen as falling within the context of the ICTR case more generally. If that were not the case, then the ICTR, of course, does not need to take responsibility for irregularities committed in the course of that arrest/detention, but if were the case, then the Tribunal should arguably take responsibility.

With respect to the delay between Rwamakuba's transfer (22 October 1998) and initial appearance (7 April 1999), the judges first of all noted that one had to look at the date between the transfer and (no later than) 10 March 1999 as counsel of Rwamakuba (and counsels of the other co-accused) had requested that the initial appearance, planned for 10 March 1999, be adjourned to 7 April 1999.[1110] However, "[e]ven so, it clearly appears that the Accused's initial appearance was not scheduled (…) "without delay" (…) as more than four months and a half had elapsed since his transfer".[1111] Nevertheless, the judges noted "that this delay is mainly attributable to the difficulties in having a Counsel assigned to the Accused"[1112] and that "the Registrar took reasonable steps so as to have a Counsel assigned to the Accused in due time following his transfer to the Tribunal".[1113] As a result, the Registry was not responsible for the delay in assigning counsel to Rwamakuba.[1114] Nevertheless, a suspect's right to legal assistance is broader than just having the counsel of his choice assigned to him; the Registry has also a duty, as from the moment of transfer, of assigning a *duty* counsel to the suspect pending nomination of the 'real' counsel.[1115] The judges concluded that the Registry had failed in that respect and that

[1108] *Ibid*.
[1109] *Ibid*., para. 33. See also *ibid*.: "[T]he words used by the Prosecutor do not suggest that, upon being notified of the Accused's detention in Namibia, he considered him a suspect before the Tribunal. On the contrary, the letter suggests that the Prosecutor did not even know whether the Accused could be considered a suspect. Besides, the Trial Chamber notes that the Prosecutor, in this letter, did not ask for the continued detention of the Accused on behalf of the Tribunal, but rather envisaged such possibility under the regime of the Namibian laws, "*if [these] laws permit this*" [emphasis in original, ChP]."
[1110] See *ibid*., para. 35.
[1111] *Ibid*., para. 36.
[1112] *Ibid*.
[1113] *Ibid*., para. 40.
[1114] See *ibid*.
[1115] See *ibid*., para. 41.

> [t]his omission resulted in the absence of any legal assistance for the Accused over an extended period of time in contradiction with, notably, Article 20(4)(c) of the Statute [the right to be tried without undue delay, ChP], and, further, in the delay in the Accused's initial appearance.[1116]

However, notwithstanding the fact that this delay in assigning a duty counsel constituted "a violation of one of the Accused's fundamental rights"[1117] and had caused the delay in his initial appearance, the judges were also of the opinion that it had not caused Rwamakuba "a serious and irreparable prejudice".[1118] Thus, Rwamakuba's request to be immediately and unconditionally released was dismissed.

Rwamakuba appealed, but in 2001, a bench of the Appeals Chamber, for procedural reasons, dismissed his appeal. Nevertheless, the judges clarified "that it is open to the Appellant to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time".[1119]

When more than five years later Trial Chamber III rendered judgment in this case, it found that Rwamakuba was not guilty of the (amended) charges, namely genocide, complicity in genocide and crimes against humanity (extermination and murder) and thus that he had to be acquitted.[1120]

With respect to the observation of the Appeals Chamber in 2001 "that it is open to the Appellant to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time", the judges of Trial Chamber III first of all noted that Trial Chamber II had found in 2000 that Rwamakuba's right to legal assistance had been violated – Trial Chamber III appears to forget here that Trial Chamber II was *also* of the opinion that the delay in assigning a duty counsel to Rwamakuba was in contradiction with the latter's right to be tried without undue delay[1121] – and that the delay in assigning a duty counsel to him had caused a delay in his initial appearance.[1122] It then repeated the words of the Appeals Chamber in cases such as *Barayagwiza*, *Semanza* and *Kajelijeli*[1123] that every violation must be effectively remedied[1124] – note, however, the previously mentioned point that even though these

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[1116] *Ibid*., para. 43.
[1117] *Ibid*., para. 45.
[1118] *Ibid*., para. 44.
[1119] ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention)', Case No. ICTR-98-44-A, 11 June 2001, p. 4.
[1120] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, under 'Chapter IV – Verdict', I.
[1121] See n. 1116 and accompanying text.
[1122] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 217.
[1123] See ns. 919, 997 and 1081 and accompanying text.
[1124] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 218.

words are rather generally formulated, they were also made in the context of a case which involved violations for which the ICTR was clearly responsible – and remarked that the judges in *Barayagwiza* and *Semanza* had decided that if the person in question were found to be not guilty, then he had to receive financial compensation.[1125] Finally, it concluded that "[s]ince a violation of the Accused's right to legal assistance during the first months of his detention was found,[1126] André Rwamakuba is at liberty to file an application seeking an appropriate remedy".[1127]

Rwamakuba consequently filed an application, in which he requested not only an appropriate remedy for the violation of his right to legal assistance "but also for the alleged grave and manifest injustice occasioned".[1128] He was of the opinion that he "was indicted and prosecuted on false and manipulative evidence"[1129] and that "this circumstance, combined with the length of his pre-trial and trial detention which amounts to a total of nine years, constitutes a miscarriage of justice [original footnote omitted, ChP]".[1130] Rwamakuba requested the judges to order that the Registry:

> (i) provide Rwamakuba with an apology; (ii) seek the good offices of the State where Rwamakuba's family is present to facilitate some temporary status for him in that State; (iii) seek the good offices of that State to ensure the uninterrupted schooling of Rwamakuba's children; and (iv) provide financial compensation to Rwamakuba [original footnote omitted, ChP].[1131]

Regarding the violation of his right to legal assistance, Rwamakuba more specifically requested "financial compensation covering a minimum of 2,000 US dollars (USD) per month for loss of earnings and 10,000 USD for emotional stress [original footnote omitted, ChP]".[1132]

The judges first of all noted that Trial Chamber III, in its judgement of 2006, had not stated that grave and manifest injustice had occurred which could be used to seek a remedy, but they were also of the opinion that it was nevertheless "in the interests of justice to discuss it since it could pertain to the fundamental rights of a former accused of the Tribunal."[1133]

[1125] See *ibid*.
[1126] Note, however, that Trial Chamber II was *also* of the opinion that the delay in assigning a duty counsel to Rwamakuba was in contradiction with the latter's right to be tried without undue delay, see ns. 1116 and 1121 and accompanying text.
[1127] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 220.
[1128] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 5.
[1129] *Ibid*., para. 19.
[1130] *Ibid*.
[1131] *Ibid*., para. 5.
[1132] *Ibid*.
[1133] *Ibid*., para. 13.

However, in their discussion of this request, in which Rwamakuba also referred to Article 85, paragraph 3 of the ICC Statute,[1134] the judges explained, whilst underlining the importance of the concept behind Article 85, paragraph 3 of the ICC Statute,[1135] that the Statute/RPE/case law of the ICTR unfortunately did not provide for "the power to accord compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice".[1136] In addition, neither did another source of law which could be applied by the ICTR, customary international law, help Rwamakuba as,

> other than the ICC Statute,[[1137]] no instrument in international criminal law or international human rights law includes a provision for compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice while some of them do provide for compensation under other circumstances.[1138]

Hence, the additional request of Rwamakuba was denied by the judges.

Turning to Rwamakuba's request for a remedy based on the violation of his right to legal assistance, the judges first explained that Rule 5 of the ICTR RPE, which demands that material prejudice is proved,[1139] could not constitute a basis for such a request as the judges in 2000 had clarified that the violation had not caused Rwamakuba "a serious and irreparable prejudice".[1140] Nevertheless, the judges admitted that a right to an effective remedy for violations of human rights

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[1134] This provision states: "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason." See also n. 44 of Chapter IX.

[1135] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, paras. 29-30: "[T]he Chamber finds it (…) necessary to emphasize the importance and the relevance of the principle set forth in Article 85(3) of the ICC Statute in light of the long and complex trials in this Tribunal. (…) [T]he Chamber is of the view that the possibility to grant some sort of remedy or compensation would be fair in circumstances where, although the arrest or detention of an acquitted person was not unlawful, he or she was subject to a lengthy detention during the pre-trial and trial stages. Such an award of compensation would be exercised in light of the circumstances of the case, and could not be applied, for instance, where an accused had intentionally caused his or her arrest or where it would be unreasonable to award compensation. In the Chamber's view, such a provision would offer an acceptable balance between the fundamental right to freedom of any individual and the realities of the investigation and prosecution of international crimes."

[1136] *Ibid*., para. 21.

[1137] The judges also noted that the inclusion of Art. 85, para. 3 in the ICC Statute had not been without controversy either, see *ibid*., para. 26.

[1138] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 25.

[1139] The entire rule reads: "Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party."

[1140] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 38. See also the discussion in the *Semanza* case on this issue, see n. 999.

"undoubtedly forms part of customary international law"[1141] and is expressly provided for in many international human rights instruments.[1142] In addition, the judges stated,

> [r]elying upon international human rights instruments, and particularly the International Covenant on Civil and Political Rights, the Appeals Chamber of this Tribunal has recognized on several occasions [the judges refer here to the cases of *Barayagwiza, Semanza* and *Kajelijeli*, ChP][[1143]] that an Accused has a right to an effective remedy [original footnote omitted, ChP].[1144]

Thus, the judges concluded that they had the power to grant an effective remedy for human rights violations and that this power arose out of "the combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms".[1145]

However, did this also include financial compensation? The Registry was of the opinion that it did not. It had two arguments in this respect: 1) "orders to financially compensate those whose rights have been violated are only under development within the general principles of law as understood in Article 38 of the ICJ Statute";[1146] and 2) "there is no provision in the Statute that allows the Tribunal or Chambers to grant financial compensation to individuals it has allegedly wronged [original footnote omitted, ChP]".[1147]

The Trial Chamber, after having examined human rights instruments and human rights case law, quickly rejected the first point, stating that "it cannot be said that orders to financially compensate those whose rights have been violated are only under development in international law".

With respect to the second point, the Trial Chamber noted that the Registrar had referred in this respect to, among other things, the fact that the Presidents of the ICTR (and the Presidents of the ICTY) had sent letters to the UNSC requesting the latter to have the Statute(s) of the Tribunal(s) amended so that the Chambers could make orders for compensation,[1148] something which has already been briefly mentioned earlier in this study.[1149] However, the judges also rejected this point; the

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[1141] *Ibid*., para. 40.
[1142] See *ibid*. In more detail: "[T]he Universal Declaration of Human Rights, the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the ECHR, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights [original footnotes omitted, ChP]." (*Ibid*.)
[1143] See ns. 919, 997 and 1081 and accompanying text. See also n. 1124 and accompanying text.
[1144] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 41.
[1145] *Ibid*., para. 45. See also *ibid*., para. 47: "[T]his power is essential for the carrying out of judicial functions, including the fair and proper administration of justice."
[1146] *Ibid*., para. 53.
[1147] *Ibid*., para. 57.
[1148] See *ibid*.
[1149] See n. 246.

Chamber's above-mentioned inherent power to grant an effective remedy encompassed financial compensation "where, in the specific circumstances of a case, it constitutes the appropriate remedy to redress a violation of the human right in question".[1150] The fact that this power was not explicitly mentioned in the ICTR's Statute/RPE was immaterial in that respect.[1151] Moreover, the above-mentioned letters of the Presidents did not change this point either as

> the Presidents did not discuss the possibility that the Chamber possessed an inherent power to grant financial compensation, nor did they comment on the right to an effective remedy as they were not acting as a judicial body as this Chamber is in the present case.[1152]

Finally, the judges also referred to the *Barayagwiza* and *Semanza* cases[1153] where the Appeals Chamber had stated that if the suspects were found to be *not* guilty, they were entitled to financial compensation.[1154]

Now that the judges had established that they could indeed grant Rwamakuba financial compensation, they turned to the merits of this case. After having stated that human rights case law had shown that "an effective remedy must be granted on a case-by-case basis, taking into account the subject matter as well as the nature of the right allegedly violated [original footnote omitted, ChP]",[1155] the judges asked themselves two questions: 1) would the outcome, with respect to (pecuniary and non-pecuniary) damages, have been different if Rwamakuba's right to legal assistance had *not* been violated and 2) had Rwamakuba suffered from the violation itself?[1156]

The judges answered the first question in the negative: "there is no causal link between the violation found and his alleged loss in earnings, nor between the violation found and any non-pecuniary injury he may have suffered as a result of his detention".[1157] While that may, of course, be the case, the judges explained in this context that "[w]hile Trial Chamber II established that the violation of Rwamakuba's right to legal assistance caused a delay in his initial appearance, the Defence has not established that this delay lengthened the duration of his time in detention [original footnote omitted, ChP]".[1158] That, however, seems to be a rather strange observation. After all, a delay in one's initial appearance arguably *automatically* means that one's (pre-trial) detention is extended (until the moment of his initial appearance).

[1150] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 58.
[1151] See *ibid*.
[1152] *Ibid*., para. 59.
[1153] See ns. 922 and 1004 and accompanying text.
[1154] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 63.
[1155] *Ibid*., para. 68.
[1156] See *ibid*., para. 70.
[1157] *Ibid*., para. 71.
[1158] *Ibid*.

With respect to the second question, the judges concluded that "Rwamakuba must have suffered some moral damage as a result of the violation of his right to legal assistance which cannot be adequately compensated by the sole finding of a violation and the provision of an apology by the Registrar".[1159]

Finally, and in contrast to the comprehensive examination on the question of whether the Chamber could provide the remedy of financial compensation, the judges very quickly established that all the other remedies Rwamakuba had asked for were also to be granted by the Registrar.[1160]

As a result, the Chamber ordered

> that the Registrar provide André Rwamakuba with an apology for the violation of his right to legal assistance; (…) that the Registrar provide André Rwamakuba with financial compensation in the amount of 2,000 (two thousand) US dollars for the moral injury sustained as a result of this violation; (…) that the Registrar use all available means to seek the good offices of the State where André Rwamakuba's family is present to facilitate some temporary status for him in that State and to seek the good offices of that State to ensure the uninterrupted schooling of his children.[1161]

Neither Rwamakuba nor the Registrar agreed with this decision; Rwamakuba because his claim based on the grave and manifest injustice was not considered and the Registrar because it did not agree with the Chamber's award of financial compensation to Rwamakuba.[1162]

The judges of the Appeals Chamber, however, agreed with the Trial Chamber and rejected both arguments,[1163] thereby confirming important observations from earlier cases such as the one in *Semanza* that "any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy [original footnote

[1159] *Ibid*., para. 73. See also *ibid*.: "Bearing in mind the complexity of international criminal proceedings, his unfamiliarity with the Tribunal's proceedings, the seriousness of the charges and the potential sentence involved, in all probability, Rwamakuba suffered feelings of confusion, isolation, and distress as a result of the failure to provide him with duty counsel over a four and a half month period [original footnote omitted, ChP]."

[1160] This was because the Registrar "has the duty to give effect and implement any Chamber's Decision or Judgement [original footnote omitted, ChP]." (*Ibid*., para. 76.)

[1161] *Ibid*., pp. 23-24.

[1162] See ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision on Appeal against Decision on Appropriate Remedy', Case No. ICTR-98-44C-A, 13 September 2007, para. 3.

[1163] See *ibid*., paras. 15 ("Mr. Rwamakuba has not demonstrated that the Trial Chamber erred in law in finding that it lacked authority to award him compensation for his acquittal. Furthermore, Mr. Rwamakuba fails to substantiate his claim that he suffered a grave and manifest injustice from the proceedings brought against him because he was indicted and prosecuted on false and manipulative evidence and because of his lengthy pre-trial detention.") and 31: "[T]he Appeals Chamber concludes that the Trial Chamber did not err in awarding Mr. Rwamakuba two thousand United States dollars as financial compensation as part of an effective remedy for the violations in the present case." Note finally that even though the Registrar was ordered to pay 2,000 US dollars to Rwamakuba, it "refused to pay the award, choosing instead simply to refer the trial chamber's order to the Security Council. (…) Rwamakuba will thus have to return to court to enforce the order." (Heller 2008, p. 664, n. 2.)

omitted, ChP]".[1164] The only other point which may be interesting to note in relation to this decision is that the judges held that "[i]t is not disputed that Mr. Rwamakuba's suffered *serious* violations of his fundamental rights [emphasis added, ChP]".[1165] The word "serious" is reminiscent of the discussion at the end of the *Kajelijeli* case[1166] and confirms the idea that judges will probably only refuse jurisdiction in extremely serious cases, for example, cases involving serious physical mistreatment and torture-like circumstances. As explained, judges should, however, be careful to not restrict this test too severely: there may also be violations not involving serious mistreatment (*cf.* the *Barayagwiza* case) that are so serious that jurisdiction should be refused.

4 GENERAL REMARKS ON COOPERATION REGIMES IN THE CONTEXT OF THE INTERNATIONALISED CRIMINAL TRIBUNALS

As already stated in the introduction to this chapter, this study will only devote a few general remarks to the cooperation regimes in the context of the internationalised (or hybrid) criminal tribunals – tribunals which are half international, half national[1167] – as it is unnecessary for the purpose of this study to explain all the different regimes in detail. However, a few general remarks can certainly be made.

Like the UN *ad hoc* Tribunals, internationalised criminal tribunals do not have a police force of their own.[1168] Hence, for cooperation – such as for arresting suspects – they are dependent on other entities. (For most[1169] internationalised criminal

[1164] ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision on Appeal against Decision on Appropriate Remedy', Case No. ICTR-98-44C-A, 13 September 2007, para. 24. See also ns. 919 (*Barayagwiza*), 997 (*Semanza*) and 1081 (*Kajelijeli*) and accompanying text. See also ns. 1124 and 1144 and accompanying text (*Rwamakuba*).
[1165] *Ibid*., para. 29.
[1166] See ns. 1083-1084 and accompanying text.
[1167] For example, their staff may be half national – half international, their subject-matter jurisdiction may encompass both international and national crimes and their way of establishment has also very often some semi-international dimensions (think of an agreement between the State in question and the UN). For more information on these internationalised criminal tribunals, see Romano, Nollkaemper and Kleffner 2004 (see also n. 1).
[1168] See Sluiter 2004 B, p. 379.
[1169] See, however, Art. 22 of the STL Statute ('Trials in absentia'): "1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge. 2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that: (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality; (b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal; (c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused. 3. In case of conviction in absentia, the accused, if he or she had not

tribunals, arresting suspects is normally a necessity because they explicitly/most probably do not allow trials *in absentia*.)[1170] These other entities will normally be the State where the internationalised criminal tribunal is located, but one could also think here of assistance from other (neighbouring) States, for example, if suspects have moved to those areas.[1171] Furthermore, the help of international forces may be needed,[1172] for instance, if such forces have taken over the daily tasks of the local authorities.[1173] With respect to the role played by international forces in the context of arresting suspects for internationalised criminal tribunals, it may be interesting to refer to UNSC Resolution 1638 of 11 November 2005, in which the UNSC, acting under Chapter VII of the UN Charter, decided

> that the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone and to keep the Liberian Government, the Sierra Leonean Government and the Council fully informed (...).[1174]

In contrast to the sometimes rather vague mandates of a peacekeeping force such as IFOR/SFOR (see Section 2 of this chapter), this mandate is extremely explicit and clear and should therefore be welcomed.[1175]

However, it must also be understood that this Chapter VII decision was made in the specific context of the UNSC's determination that Charles Taylor's "return to

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designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement."

[1170] See Sluiter 2004 B, p. 380: "It must be mentioned that the legal framework of the UNTAET Serious Crimes Panels in East Timor and UNMIK courts in Kosovo explicitly exclude the possibility of trials *in absentia*. The legal framework of the Sierra Leone Special Court and the legal framework of the Cambodia Extraordinary Chambers are not as explicit on this point, but one may expect that in light of the right attributed to the accused to be tried in his presence and in light of the reduced authority of *in absentia* verdicts, these bodies will avoid conducting trials *in absentia*, in particular when an individual is accused of the most serious international crimes [original footnotes omitted, ChP]."

[1171] See *ibid*., pp. 380-381.

[1172] See *ibid*., p. 379.

[1173] See Frulli 2006, p. 352, n. 2, mentioning "the powers conferred upon military forces acting in the framework of a UN Transitional Administration or Authority such as those established, for instance, in East Timor (UNTAET) and in Kosovo (UNMIK/KFOR)": "It is obvious that in these cases the military components are endowed with broad enforcement powers, including the power to arrest and detain war criminals, since they temporarily replace local authorities."

[1174] UNSC Res. 1638 of 11 November 2005, UN Doc. S/RES/1638 (2005), para. 1. It may also be interesting to note that almost two years earlier, a private UK-based military firm, Northbridge Services Groups, stated that it was looking for an investor to fund an operation by which the company would kidnap Taylor "to claim a $2m reward allegedly offered by the United States Congress." (*BBC*, 'Firm Seeks Charles Taylor Bounty', 11 December 2003, available at: http://www.globalpolicy.org/component/content/article/199/41037.html.) (*Cf.* also n. 281.)

[1175] See also Frulli 2006, p. 352: "This new duty assigned to a peacekeeping mission enables a significant and most welcome departure from UN practice." See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 40.

Liberia would constitute an impediment to stability and a threat to the peace of Liberia and to international peace and security in the region".[1176] The decision has nothing to do with the nature of the cooperation regime of the SCSL itself.

In fact, although the term 'tribunals' (as in: internationalised criminal tribunals) hints at a connection with the UN *ad hoc* Tribunals, the cooperation regime of the internationalised criminal tribunals is very much akin to the inter-State cooperation regime.[1177] Nevertheless, the lack of a vertical cooperation regime may not always be a problem as many of these tribunals (although an exception is the SCSL) "have the advantage of being integrated into a domestic legal order, enabling them to exercise enforcement power over a certain territory".[1178] With respect to the internationalised criminal tribunals in Kosovo and East Timor, Sluiter writes, for example, that these institutions, even if they "lack enforcement powers of their own",[1179] "have the considerable advantage over the existing international criminal tribunals in that they do preside over a 'police force' capable of using coercive measures, within a geographically limited area".[1180] And, since many suspects in whom those Tribunals are interested may still reside in those areas, the lack of a vertical cooperation regime may not necessarily be an insurmountable problem. However, things are different, of course, with respect to suspects which have moved to other areas. In those cases, being unable to issue binding orders to States that certain suspects must be arrested may indeed influence the effectiveness of the Tribunals' ability to bring suspects to justice.[1181] Having said that, it is time to examine the *male captus* case law stemming from the context of the internationalised criminal tribunals.

5 CASES IN THE CONTEXT OF THE INTERNATIONALISED CRIMINAL TRIBUNALS

5.1 The *Duch* case before the ECCC

Guek Eav Kaing, alias Duch, was arrested and detained by the Cambodian Military Court on 10 May 1999 for various charges under Cambodian law.[1182] It was more

[1176] UNSC Res. 1638 of 11 November 2005, UN Doc. S/RES/1638 (2005).
[1177] See Sluiter 2003 C, p. 651, n. 167: "These "internationalized tribunals" do not in any way enjoy the benefit of a vertical cooperation relationship and can only count on existing and applicable mechanisms of interstate legal assistance. As a result, a considerable amount of evidence – and a considerable number of suspects – could be beyond their reach."
[1178] *Ibid*. See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 6 (writing on the ECCC).
[1179] Sluiter 2004 B, p. 379.
[1180] *Ibid*., p. 389. See also n. 1073 and accompanying text.
[1181] See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 8, writing on the situation in East Timor.
[1182] See ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 2.

than two years later, on 10 August 2001, that the 'Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia' entered into force.[1183] (However, according to the co-investigating judges of the ECCC, it was not until 22 June 2007, the date the Internal Rules of the ECCC entered into force, that this new internationalised criminal tribunal became operational.)[1184] On the basis of this 'Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia' (ECCC law) and apparently in anticipation of the birth of this new internationalised criminal tribunal,[1185] the Investigating Judge of the Cambodian Military Court issued detention orders for Duch on 20 February 2002, 2003 and 2004 charging him with crimes against humanity.[1186] On 28 February 2005, 2006 and 2007, Duch's 'provisional' detention (now for charges of war crimes and crimes against internationally protected persons but again pursuant to the ECCC law) was extended by the Investigating Judge, but on 21 July 2008, "the Military Court, considering that it was no longer competent to try crimes falling under the jurisdiction of the ECCC, issued a Decision terminating the competence of the Military Court with respect to the Accused [original footnote omitted, ChP]".[1187]

However, this did not lead to Duch's release because by that time, he was already in the custody of the ECCC; as explained earlier, the ECCC had become operational on 22 June 2007. About a month later, on 31 July 2007, two co-investigating judges of the ECCC[1188] ordered that Duch be placed in the provisional detention of the ECCC. In reaching this result, the co-investigating judges examined the *male captus* discussion and its effect on the proceedings of this specific internationalised criminal tribunal. It is this interesting order and its aftermath which will be discussed here in detail.

In their order, the two co-investigating judges first explained the charges against Duch in the context of the ECCC. He was

> accused of directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population (arbitrary detention, torture and other inhumane acts, mass executions,

[1183] See *ibid*.
[1184] See ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 20.
[1185] See Mohan 2009, p. 16. See also K. Ossenova, 'Khmer Rouge genocide tribunal denies bail for former prison chief', *Jurist Paper Chase*, 3 December 2007 (available at: http://jurist.law.pitt.edu/paperchase/2007/12/khmer-rouge-genocide-tribunal-denies.php): "Those charges were primarily brought to keep Duch in custody while the ECCC started operations."
[1186] See ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 2.
[1187] *Ibid*., para. 3.
[1188] The (on the – civil law – Cambodian legal system focused) system of the ECCC is not comparable with the system of Tribunals like, for example, the ICTY and ICTR. "[T]he investigations before the trial stage are carried out not by the Parties (Prosecutors and Defense), but by two Co-Investigating Judges, a national Judge and an international Judge." (Http://www.eccc.gov.kh/english/investigating_judges.aspx.) After this investigative phase, the proceedings before the Trial Chamber, consisting of 'real' judges, will start.

> etc.), which occurred within a political context of widespread or systematic abuses and constitute crimes against humanity.[1189]

Although the ECCC's co-prosecutors requested Duch's placement in provisional detention, Duch's lawyer argued, unsurprisingly, that Duch had been in detention for more than eight years, that this violated both Cambodian law and international standards (standards which the ECCC must respect), that the conditions for provisional detention were not satisfied, that Duch was no senior leader and finally that ""more than two thousand persons" held positions as heads of security centres".[1190]

Because of this, Duch's lawyer requested "that the Court release Duch from detention and impose a bail order instead".[1191] This seems a rather mild request. After all, a bail order implies that Duch only sought to be released *pending* trial. However, one can imagine that there would also be suspects/lawyers who would demand a much more far-reaching remedy for these kinds of violations, namely a real *male detentus* remedy such as a dismissal of the charges/release with prejudice to the Prosecutor (with the result that the suspect does not have to appear in court again). That Duch did not choose such a remedy may be explained by the fact that it seems as if he *wanted* to be tried. In any case, the Defence argued that Duch "did not resist arrest in May 1999",[1192] "has never denied being the chief of centre S-21",[1193] "has said that he is prepared to reveal details of all the crimes committed by the Khmer Rouge"[1194] and "has (…) indicated that he is prepared to be tried by the ECCC".[1195]

However, even though it appears that Duch did not want a true *male detentus* remedy (and only a provisional release pending trial), the co-investigating judges deemed it necessary nevertheless to delve into the *male captus* discussion:

[1189] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 1.
[1190] *Ibid*.
[1191] *Ibid*.
[1192] ECCC, Pre-Trial Chamber, 'Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007' (Confidential), Case No. 002/14-08-2006, 5 September 2007, para. 120. Note that this appeal was only submitted after the 31 July 2007 decision (which still needs to be discussed here), but these arguments are of a general nature and were hence also applicable to the period before that decision was issued.
[1193] *Ibid*.
[1194] *Ibid*.
[1195] *Ibid*., para. 121. On 12 August 2009, Duch told the ECCC: "I will accept without challenge (…) all the judgments which will be made by this Chamber; the judgment for my role as the Chairman of S-21 and all the crimes committed there. I will accept it by legal means and by psychological means. And I am humble before the Cambodian people to accept all these crimes and I would like the Cambodian people to condemn me to the strictest level of punishment." (ECCC, Trial Chamber, 'Transcript of Trial Proceedings – Kaing Guek Eav "Duch"' (Public), Case No. 001/18-07-2008-ECCC/TC, 12 August 2009 (available at: http://www.eccc.gov.kh/english/cabinet/caseInfo/157//E1_62.1_TR001_20090812_Final_EN_Pub.pdf), pp. 49-50.)

> It is necessary (...) to examine if DUCH's prior detention [, which, it must be stressed, the co-investigating judges qualified as "problematic in light of international standards of justice and, more specifically, articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights, which states that any individual arrested or detained for a criminal offence shall be entitled to a trial within a reasonable time period or to be released",[1196] ChP] affects the proceedings for which the concerned person is before us today. The issue may be phrased in these terms: Does the more than 8 year detention of the Charged Person in separate proceedings before another jurisdiction taint the present proceedings? Or rather, is such detention so excessive and prejudicial to the rights of the defence as to affect the very ability to bring this case within the jurisdiction of the Extraordinary Chambers (which was established within the Cambodian Judicial organization but constitutes an independent institution having a separate structure from the national jurisdictions), to no longer allow the detention of the Charged Person within the jurisdiction of the Extraordinary Chambers, or even to require the Co-Investigating Judges to stay the proceedings? The alternatives before the Co-Investigating Judges today are as follows: must the adage *Male captus, bene detentus* be applied or, on the contrary, should the theory of abuse of process take precedence? Before concluding, both theories shall be reviewed.[1197]

The fact that the co-investigating judges placed the eight years of *detention* under the term *male captus* is explicit support for the view entertained in this study, namely that in the *male captus* discussion, one may focus on, but should not limit oneself to, irregularities related to the capture; the *male captus* discussion may also involve other pre-trial irregularities, such as irregularities related to the pre-trial detention (*cf.*, for example, the *Barayagwiza* case). In the words of the co-investigating judges:

> Many examples exist in domestic as well as international law which apply this maxim, whereby the circumstances which bring an Accused before a tribunal have no effect on the judgement of the Accused. Although most of these precedents are based on the initial arrest of the Charged Person, and more rarely on the conditions of their prior detention, in both cases the reasoning is the same as that with which we are now confronted [emphasis in original, ChP].[1198]

First, the co-investigating judges examined cases which can be linked to the *male captus bene detentus* side. Alongside a few national cases (which were all mentioned/discussed in this study),[1199] they looked at the ICTR case of Rwamakuba (noting in a footnote that the same reasoning was also used in the cases *Semanza* and *Kajelijeli*) and explained in that context that the ICTR "has stated on many occasions that it was not responsible for the illegal arrest and detention of a

[1196] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 2.
[1197] *Ibid*., paras. 3-4.
[1198] *Ibid*., para. 5. See also n. 6 and accompanying text of Chapter III.
[1199] Namely the cases of *Scott*, *Elliott*, *Ker v. Illinois*, *Frisbie v. Collins*, *Alvarez-Machain*, *Eichmann*, *Argoud* and *Barbie*.

defendant if the act was not the result of its order".[1200] The co-investigating judges concluded this part of their decision by stating that "[t]here therefore exists a solid tradition supporting the strict separation of, on the one hand, a legal procedure before one jurisdiction and, on the other hand, the prior illegal arrest and detention ordered by a different authority".[1201] Some comments need to be made about this conclusion.

First of all, the ECCC connects the national *male captus* cases with the idea that there exists a strict separation between the legal procedure in one jurisdiction and the *male captus* problems caused by *other* entities in another jurisdiction. However, the national *male captus* cases may go much further than that; they may state that the prosecuting forum will continue to exercise jurisdiction, *regardless of how the suspect was brought into the jurisdiction of the court*. That may thus also involve irregularities perpetrated in another jurisdiction by *authorities which can be linked to the prosecuting forum* (and hence not only irregularities caused by authorities which cannot be linked to the prosecuting forum).

Secondly (and with respect to the ICTR cases), it is true that the *Semanza*, *Kajelijeli* (but then the Appeals Chamber)[1202] and *Rwamakuba* cases focused on the lawfulness of arrests and detentions at the national level pursuant to ICTR requests, but that does not mean that those judges would not *also* look into irregularities beyond the constructive custody if the judges were of the opinion that those irregularities occurred in the context of their case. That "in the context of their case" concept is normally triggered by a request for arrest and detention,[1203] but there might also be other circumstances which the judges may consider to fall within this notion. For example, something may also go wrong in the context of a suspect being brought into the jurisdiction of the Tribunal, without that suspect being detained by

[1200] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 10.
[1201] *Ibid*., para. 11.
[1202] It is a little strange that the judges refer here to the *Trial Chamber*'s decision in *Kajelijeli* because the reasoning of the judges in that decision (namely that it is not up to the ICTR to take responsibility for the arrest and detention phase at the national level, *even if* that arrest/detention is at the behest of the ICTR, with reference to the *Karemera* and *Ngirumpatse* cases, see ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, paras. 34-35) was rejected by the other two cases the judges at the ECCC allude to, see the text following n. 970 and accompanying text (*Semanza*) and n. 1103 and accompanying text (*Rwamakuba*). In fact, the Trial Chamber's decision in *Kajelijeli* was also rejected by the Appeals Chamber in the same decision, see n. 1065 and accompanying text.
[1203] In *Semanza*, the judges were apparently of the opinion that the arrest/detention preceding the arrest/detention at the request of the ICTR could not be seen as falling within the context of the ICTR case, see ns. 975 and 1000 and accompanying text. In *Kajelijeli*, there was not even an arrest/detention prior to the arrest/detention at the request of the ICTR, see n. 1006 and accompanying text, as a result of which the Tribunal *could* only look at the arrest/detention at the request of the ICTR. Finally, the judges in *Rwamakuba*, like their colleagues in *Semanza*, were apparently of the opinion that the arrest/detention preceding the arrest/detention at the request of the ICTR (including its alleged violations) could not be seen as falling within the context of the ICTR case, see n. 1099 and accompanying text.

a State at the request of the ICTR, for instance if private individuals kidnap a person and bring him into the jurisdiction of the Tribunal. Such a situation does not fall under the 'arrest/detention at the request/behest of the Tribunal' category but is certainly an irregularity committed in the context of the ICTR case which one can assume the judges will look at. Indeed, the fact that the ICTY has already stated that it will take the ultimate responsibility (by refusing jurisdiction, invoking the abuse of process doctrine) in a serious *male captus* involving such a situation, even if the irregularity cannot be attributed to the Tribunal, may constitute evidence for the idea that judges of the ICTR would also remedy violations which can be connected with this irregularity but which do not reach the *male detentus* standard. It can be argued that *Semanza* and *Kajelijeli* can be interpreted as having followed this reasoning – that the Tribunal will take its responsibility for pre-transfer irregularities committed in the context of its case, irrespective of the entity responsible for these irregularities – when they make the general statements that "*any* violation (…) requires a proportionate remedy [emphasis added, ChP]",[1204] or that "*any* violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR [emphasis added, ChP]".[1205] These two statements were also confirmed in the *Rwamakuba* case[1206] where the judges referred not only to the cases of *Semanza* and *Kajelijeli*, but also to the second decision in *Barayagwiza*, a decision where the judges – like their colleagues in the first decision[1207] – took responsibility for violations which occurred even *beyond* the context of constructive custody/a detention at the request/behest of the ICTR.[1208] Nevertheless, as clarified earlier, it must also be admitted that *Rwamakuba* seems to be less far-reaching than *Semanza* and *Kajelijeli* as the above-mentioned confirmations were made in the context of a case in which the violations were clearly attributable to the ICTR.[1209]

Be that as it may, it is in any case difficult to connect these ICTR cases with the idea that there is a strict separation between, on the one hand, *male captus* problems caused by other entities and stemming from a pre-transfer jurisdiction and, on the other hand, the jurisdiction of the Tribunal. Even if one is of the opinion that these cases only constitute evidence for the idea that judges will remedy violations which can be connected to an arrest/detention at the behest of the Tribunal (in which context it must be noted that *Rwamakuba* is again less far-reaching than *Semanza*

[1204] ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 125. See also n. 997 and accompanying text.
[1205] ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 255. (*Cf.* also *ibid*., para. 322.) See also n. 1081 and accompanying text.
[1206] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 218 (see n. 1124 and accompanying text), ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 41 (see n. 1144 and accompanying text) and ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision on Appeal against Decision on Appropriate Remedy', Case No. ICTR-98-44C-A, 13 September 2007, para. 24 (see n. 1164 and accompanying text).
[1207] See n. 857 and accompanying text.
[1208] See n. 919.
[1209] See the text following n. 1124 and accompanying text.

and *Kajelijeli*),[1210] the fact that these judges nevertheless take responsibility for actions of others, committed in another legal system (albeit under the authority of the ICTR), shows that the separation between the national level and the Tribunal level is perhaps not as strict as the ECCC wants to present it here.

After having discussed the *male captus bene detentus* side, the co-investigating judges turned to the other side of the coin, the abuse of process doctrine.[1211] Although it can be maintained that the most accurate opposite of the *male captus bene detentus* doctrine is, of course, the *male captus male detentus/ex iniuria ius non oritur* doctrine (and not the abuse of process doctrine), the co-investigating judges, in their examination of the abuse of process doctrine, looked at cases which can more generally be seen as opposing the reasonings of the *male captus bene detentus* doctrine: not only abuse of process cases but also 'real' *male captus male detentus* cases such as *Ebrahim*.[1212] After a discussion of these cases, which have all been examined in this study already,[1213] the co-investigating judges turned to the ICC Appeals Chamber's position in the still-to-discuss *Lubanga Dyilo* case, see Section 2 of Chapter X, and explained that the ICC had

[1210] See n. 1103 and accompanying text.

[1211] It is interesting to note that the ECCC, which is focused on the (civil law) Cambodian legal system, looked at the – from the common law stemming – abuse of process doctrine. This confirms the idea that this doctrine may very well be used by courts with a more civil law background, see n. 878. (See also n. 1255.)

[1212] Note that also in the *Ebrahim* case, words resembling the abuse of process doctrine were used: "The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and *abuse of law must be avoided in order to protect and promote the integrity of the administration of justice* [emphasis added, ChP]." (Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896. See also n. 690 and accompanying text of Chapter V.) Note, however, that in that case, the Court did not state that judges had a *discretion* to consider whether the violations of these values had to lead to a refusal of jurisdiction. It more straightforwardly stated that these violations entailed that the judges had no jurisdiction to try the case.

[1213] Other cases (besides *Ebrahim*) were: *Barayagwiza*, *Toscanino*, *Hartley* and *Bennett*. It must also be noted that the judges in a few of these cases may have made some general interesting remarks on the abuse of process doctrine/a comparable doctrine, but may not have used the abuse of process doctrine itself to refuse jurisdiction, see, for example, the *Hartley* case (and n. 847). In addition to these cases, the judges also mentioned the *Nikolić* case, as an example of a case where the abuse of process doctrine from *Barayagwiza* was repeated, but, in the end, not applied. The co-investigating judges referred here specifically to the reasoning of the Trial Chamber in *Nikolić* that under the abuse of process doctrine, jurisdiction may be refused, irrespective of the entity responsible for the serious *male captus* (in *Nikolić*: private individuals): "In this decision, the ICTY held that (…) this theory could only apply where the Accused had been subject to serious mistreatment [This is, by the way, not certain. Although the Trial Chamber indeed focused on this physical dimension, it also concurred with the more general words in *Barayagwiza*, which 'only' demand egregious violations of the rights of the suspect, see n. 531 and accompanying text. *Cf.* also n. 1231 and accompanying text, ChP.], specifying that "Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract. Accordingly, the level of violence used against the Accused must be assessed. Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals (…) was of such an egregious nature."" (ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 18.)

> held that the violation of the rights of the defendant at the time of his prior arrest and detention could only be taken into account in two cases: if the court acted in concert with the external authorities, or if the defendant was the victim of torture or serious mistreatment.[1214]

As will also be shown in Chapter X (some parts of *Lubanga Dyilo* must, however, already be discussed right now), this is not entirely clear. One could indeed argue that the ICC Appeals Chamber agreed with the ICC Pre-Trial Chamber in that case that in the first situation of "concerted action", violations must be considered,[1215] but the serious mistreatment/torture point is less certain as this situation stems from the abuse of process doctrine, a doctrine which was explicitly *rejected* by the Appeals Chamber. Lack of clarity with respect to this point is also caused by the fact that the exact stance of the ICC Pre-Trial Chamber on this point is uncertain. It namely explained

> that whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused; and that, to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [original footnotes omitted, ChP][.][1216]

The problem is that under the abuse of process doctrine in the Tribunal context, there is no requirement for the *male captus* to have been committed by national authorities. Jurisdiction can be refused, irrespective of the entity responsible. Think, for example, of the actions of the private individuals in the *Nikolić* case. However, whether this was a mistake by the Pre-Trial Chamber is not clear. On the one hand, it refers to Tribunal cases alone (*Nikolić* (Appeals Chamber), *Kajelijeli* and *Dokmanović*)[1217] but on the other, the test from the Appeals Chamber's decision in the *Nikolić* case was not very clear (see Subsection 3.1.4 of this chapter), *Kajelijeli* involved the actions of State authorities working at the behest of the ICTR and the exact paragraphs from the *Dokmanović* case to which the Pre-Trial Chamber refers contain examinations of national cases. (And in the national context, the abuse of process doctrine appears to require the involvement of authorities which can be linked to the prosecuting forum.) The following does not solve this issue either: one could argue that the Pre-Trial Chamber adheres to the normal abuse of process doctrine from the Tribunal context (not requiring the involvement of State

[1214] *Ibid*., para. 19.
[1215] See n. 282 and accompanying text of Chapter X.
[1216] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10.
[1217] See *ibid*., p. 10, n. 33.

authorities) but only applies the specifics of the case before it to the theory at hand. However, even though a number of quotations from this decision can be seen as such specific applications,[1218] this particular quotation cannot, for it is too generally formulated. Hence, it is not clear whether the Pre-Trial Chamber would refuse jurisdiction irrespective of the entity responsible or whether it would only do so in the case of a *male captus* committed by the national authorities of the custodial State.

Because of the Appeals Chamber's rejection of the abuse of process doctrine and the lack of clarity with respect to the Pre-Trial Chamber's view of the abuse of process doctrine, it is not clear how the Appeals Chamber would act in the case of serious mistreatment/torture by, for example, private individuals. Although Chapter X will show that serious violations which occur when the ICC is involved in a case (including actions of third parties working at the behest of the ICC) and which entail that one can no longer speak of a fair trial, must/can[1219] lead to the ending of the case (which will certainly be the case if the ICC itself, or third parties working for the ICC, are responsible for serious mistreatment/torture of the suspect), it is uncertain how the Appeals Chamber would react in the case of serious mistreatment/torture *as such*, even if (third parties working for) the ICC were not involved in the case.

However, notwithstanding this lack of clarity, it will be shown below that the co-investigating judges concluded that the ICC Appeals Chamber's view in *Lubanga Dyilo* is the same as in the *Nikolić* case, namely that the application of the abuse of process doctrine – again, it should be remembered that the ICC Appeals Chamber explicitly *rejected* this doctrine – requires the existence of grave violations of the suspect's rights, such as serious mistreatment/torture.[1220]

The different cases having been discussed, the co-investigating judges looked at the specifics of the case before them and concluded "that they do not have jurisdiction to determine the legality of DUCH's prior detention".[1221] The argument as to why this was so clearly followed what the co-investigating judges thought was the reasoning of the ICC Appeals Chamber in the *Lubanga Dyilo* case. The co-investigating judges were namely of the opinion that neither situation, where one

[1218] See *ibid*., pp. 9 ("[A]ny violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities [original footnote omitted, ChP]") and 10: "[N]o issues has arisen to any alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities".

[1219] Chapter X will show that there is lack of clarity on this point as well, see the text following n. 255 and accompanying text of that chapter.

[1220] See ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21 and n. 1231 and accompanying text. See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 49, n. 182.

[1221] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 20.

could look at alleged irregularities prior to the arrest and detention of the now prosecuting forum (namely if the prosecuting forum acted in concert with the authorities causing the irregularities and if the defendant was the victim of torture or serious mistreatment), applied here.

With respect to the first situation, the co-investigating judges explained that

> [t]he fact that the Extraordinary Chambers is part of the judicial system of the Kingdom of Cambodia does not lead to the conclusion that this special internationalised Tribunal acted in concert with the military court: the Extraordinary Chambers only became operational on June 22, 2007 (...). Prior to the initiation of this judicial investigation, the Co-Investigating Judges (who together form the sole authority empowered to decide upon matters of provisional detention) had no means of intervening. Once they were in a position to do so, they dealt with the issue. Thus, the time lapse between the lodging of the Introductory submission and the arrest warrant (12 days)[[1222]] cannot seriously be considered excessive or be characterised as negligence, given the time needed to review the case file.[1223]

One can wonder whether the link between the ECCC and the Military Court is indeed as weak as the co-investigating judges present it here. Although it is, of course, true that the ECCC was not yet in operation when Duch was placed in detention, it was explained at the beginning of the examination of this case that *on the basis of the ECCC law and apparently in anticipation of the birth of this new internationalised criminal tribunal*, the Investigating Judge of the Cambodian Military Court issued detention orders for Duch on 20 February 2002, 2003 and 2004 charging him with crimes against humanity and that on 28 February 2005, 2006 and 2007, Duch's 'provisional' detention (now for charges of war crimes and crimes against internationally protected persons but again pursuant to the ECCC law) was extended by the Investigating Judge.[1224] Hence, it can be argued that, even if one cannot speak of concerted action here, there was certainly a link between Duch's provisional detention, at least as from 2002, and the ECCC, even if the latter was not yet operational. It could be argued that this link entails the violations being seen as falling within the context of the ECCC case more generally and that as a result of that, the violations must be remedied by the ECCC. At this point, it may be interesting to refer to Mohan, who notes that

[1222] On 18 July 2007, the co-prosecutors of the ECCC made an introductory submission requesting the co-investigating judges to investigate, arrest and detain five suspects (namely Duch, Chea Nuon, Sary Ieng, Thirith Ieng and Samphan Khieu) and on 30 July 2007, an arrest warrant was issued against Duch.

[1223] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 20.

[1224] See also Mohan 2009, p. 16, n. 86: "The charges against Duch and the orders placing him and holding him in detention by the Military Court were based on the crimes currently under the ECCC's jurisdiction and the Military Court made specific reference to the ECCC's authority to justify his Prior Detention. It appears therefore that Duch was merely being housed by the Military Court's detention centre in anticipation of the ECCC's proceedings against him."

> [t]he ECCC, as an organ of the Cambodian government, had a legal obligation to review and remedy the breach of the government's obligation under Articles 9 and 14 of the ICCPR to try Duch within a reasonable time or to release him. It was a patently poor excuse for the ECCC's pre-trial courts to retort that Duch's quarrel should have been with the Military Court and not the ECCC. Even if the ECCC was not to blame for Duch's Prior Detention, as a court firmly located within the Cambodian court structure, the ECCC's pre-trial courts were obliged to pronounce on the unlawfulness of Duch's prior detention ordered and executed by another court and organ of the Cambodian government.[1225]

This is reminiscent of the previously discussed issue on the problems caused by fragmentation of a suspect's legal process over two or more systems and the idea that, if the first entity does not examine the irregularities in that process, it is up to the second entity to do so in order to prevent the suspect from falling into a legal vacuum. Mohan also asserts, among other things referring to the ICTR case of Kajelijeli and the ICC case of Lubanga Dyilo, that even if one did not regard the ECCC to be part of the Cambodian Government but a true international court,

> this does not detract from the ECCC's obligation to look beyond its seat and examine alleged human rights violations committed by Cambodian national authorities against its defendants. The independence that international(ized) courts are clothed with is an independence *from* State interference, not a prerogative to dismiss human rights violations perpetrated *by* the State [emphasis in original, ChP].[1226]

Hence, Mohan is also of the opinion that there is a clear link between Duch's earlier provisional detention and the ECCC, and that as a result of this detention, which occurred in the context of the ECCC case more generally, the co-investigating

[1225] *Ibid*., p. 17. See also *ibid*., p. 13: "It follows that where a branch of the Cambodian government fails to fulfil its obligations under the ICCPR, the ECCC, applying Cambodian criminal procedure as it is required to, must remedy such unlawful conduct. This is especially so where the government's conduct impinges on a defendant's due process rights. In such cases, the ECCC is expressly required to exercise its jurisdiction in accordance with "international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR." From the perspective of both Cambodian and international law, therefore, the ECCC had a duty to inquire into and pronounce upon the legality of Duch's Prior Detention [original footnotes omitted, ChP]." See also *ibid*., p. 16.

[1226] *Ibid*., p. 17. See also *ibid*., pp. 17-18 for the link with *Kajelijeli*: "[A]s the ICTR's Appeals Chamber has held, where national authorities hold a defendant in custody effectively on behalf of an international court, "a shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters." That is because the tribunal has "overlapping responsibilities" with the national authorities and once it begins operation, it must ensure that "the case proceeds to trial in a way that respects the rights of the accused". As a result, "if an accused is arrested or detained by a State at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible" [original footnotes omitted, ChP]." Note that the last words in fact stem from Judge Lal Chand Vohrah's declaration in the *Semanza* case, see ns. 834, 985 and 1060 and accompanying text. See also *ibid*., p. 18 for the link with *Lubanga Dyilo*, where Mohan explains that the ICC Appeals Chamber "held that it was required to "see that the process envisioned in [national] law was duly followed and that the rights of the arrestee were properly respected." [original footnote omitted, ChP]"

judges should have looked into the irregularities which can be connected with this detention.

With respect to the second situation, the co-investigating judges clarified that courts which have applied the abuse of process doctrine "have always considered the proportional relationship between the alleged violations and the proposed remedy".[1227] However, the subsequent words of the co-investigating judges reveal that they felt that they also had to take into account the seriousness of the crimes with which the suspect is charged, an element which this study also finds to be important as it is one of the many elements which a judge, under certain circumstances, should take into account when considering the most appropriate remedy in a certain case: "It is obvious that in a case of crimes against humanity, the proceedings should be stayed only where the rights of the accused have been seriously affected, at least, for example, to the degree in *Toscanino*."[1228] It can be argued that the choice of (at least!) the degree of seriousness from *Toscanino* is unfortunate as this test is extremely high; it is to be recalled that Toscanino was tortured for nearly three weeks. However, in the remainder of the text, one can also see lower thresholds, although one can assume that even those 'lower' thresholds (which apply irrespective of the entity responsible)[1229] will still be very difficult to meet:

> The Co-Investigating Judges are (…) compelled to follow the solution adopted in *Nikolic* and *Lubanga*[1230] which requires, for the application of the abuse of [process] doctrine, the existence of grave violations of the rights of the Accused. Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused.[1231]

Hence, the co-investigating judges did not have jurisdiction to review the legality of Duch's prior detention, enabling them to continue with the trial.

Although the co-investigating judges may have been right in deciding that the seriousness of the *male captus* suffered by Duch was not such as to divest jurisdiction, the conclusion that his prior detention cannot be reviewed can – again – be criticised. The judges should be able to review alleged irregularities which occur in the context of their case, even if the irregularities were not so serious as to refuse jurisdiction and even if there was no concerted action. If these were the only reasons

[1227] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21.
[1228] *Ibid*.
[1229] See the link with *Nikolić* and n. 1213.
[1230] As explained *supra*, it is doubtful whether this is in fact the position of the ICC Appeals Chamber in *Lubanga Dyilo*.
[1231] ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21.

for a judge to review the irregularities, he would not be able to review a kidnapping by private individuals, not involving serious mistreatment and not involving concerted action between the kidnappers and the prosecuting forum. That, of course, would be very unfortunate as the judge in that case would close his eyes to issues which clearly have to be seen as falling within the context of his case and which it would be very unfair not to consider.

Nevertheless, the co-investigating judges also made a statement which could perhaps be seen as an opening to a broader stance. Although they concluded that the trial, where Duch could enjoy "his full rights of defence",[1232] had to proceed, they also stated that a less far-reaching remedy was not to be excluded in the future: "[A]n eventual remedy for the prejudice caused by the prior detention (in the form of a reduction of sentence or by any other means decided by the Chambers) is not at issue during the investigative phase."[1233] This remark, which does not exclude the granting of remedies for irregularities, even if those remedies would not lead to the ending of the case, is, of course, to be welcomed for it adds the necessary range to the *male captus* discussion which can sometimes have too great a focus on the extreme solutions. Furthermore, it may mean that the prosecuting forum (if not the co-investigating judges in the investigative stage,[1234] then this must be the 'real' judges in the trial proceedings) must examine the legality of irregularities which it finds as falling within the context of this case. After all, if the prosecuting forum does not examine these irregularities, it cannot grant an appropriate remedy.

The final point left to be discussed by the co-investigating judges, now that they had established that the trial should proceed, was whether it was also necessary to detain Duch pending trial. Referring, among other things, to the seriousness of the crimes with which Duch was charged, the co-investigating judges were of the opinion that it was.[1235]

On appeal, the lawyers for Duch tried to convince the judges

> why the more than eight years of prior detention violates both the relevant provisions of Cambodian law and applicable human rights law, as contained in Article 9 of the

[1232] *Ibid*.
[1233] *Ibid*.
[1234] See the words: "[T]he Co-Investigating Judges consider that they do not have jurisdiction to determine the legality of DUCH's prior detention." (*Ibid*., para. 20.)
[1235] See *ibid*., paras. 22-23: "[T]he acts alleged against the Charged Person are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order to such a degree that it is not excessive to conclude that the release of the person concerned risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the person concerned. Furthermore, because DUCH may be sentenced to life imprisonment, it is feared that he may seek, as a consequence, to flee any legal action. Consequently, taking into consideration that there is a well-founded belief that KAING GUEK EAV, alias DUCH, committed the crimes with which he is charged, that provisional detention is necessary to guarantee that the Charged Person remains at the disposition of justice and to protect his safety; and that, finally, it is necessary to preserve public order; because furthermore, no bail order would be rigorous enough to ensure that these needs would be sufficiently satisfied and therefore detention remains the only means to proceed".

> ICCPR, with reference to the jurisprudence related to the abuse of process doctrine [original footnote omitted, ChP].[1236]

According to them, "this period of prior detention may be imputed to the judicial authorities responsible for the present case".[1237] Furthermore, they argued, "such prior detention was a bar to the exercise of a discretion to apply Internal Rule 63(3)[[1238]] and consider the issue of a provisional detention order with respect to proceedings before the ECCC".[1239] This last point clarifies that the lawyers were requesting a *male detentus* remedy with respect to the proceedings related to the provisional detention order. However, that – again – does not mean that they also want a *male detentus* remedy for the entire proceedings. As already explained, it appears that Duch did not attack the complete proceedings before the ECCC (because he seemingly wished to stand trial), but only the power of the co-investigating judges to order his provisional detention.

The judges of the Pre-Trial Chamber asked themselves the question "whether previous actions by other than ECCC judicial authorities have caused a violation of (...) [Article 9 of the ICCPR, ChP] entailing consequences for decisions taken by organs of the ECCC".[1240] According to them, they could only take into account a violation of this provision "when the organ responsible for the violation was

[1236] ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 13. It may be interesting to quote the following excerpt of Mohan's article which clearly shows how the subject of human rights for suspects of the most serious international crimes is often received: "When Duch's Cambodian lawyer Kar Savuth suggested that Duch's human rights had been violated because of his 8-year pre-trial detention by the Cambodian government prior to the hearing, the largely Cambodian audience erupted into laughter. Cambodian human rights activist Kek Galabru observed that "[t]his is Cambodian style, they laugh…it's too much for them because they know that when he was torturing Cambodians there was no talk about the human rights of the victims. Even me, when I hear that, I laugh." According to Galabru, the idea of conferring human rights to an alleged human rights violator is understandably laughable for local victims of the Khmer Rouge [original footnote omitted, ChP]." (Mohan 2009, pp. 2-3.)

[1237] ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 13.

[1238] Which reads: "The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met: a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to: i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC; ii) preserve evidence or prevent the destruction of any evidence; iii) ensure the presence of the Charged Person during the proceedings; iv) protect the security of the Charged Person; or v) preserve public order."

[1239] ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 13.

[1240] *Ibid*., para. 15.

connected to an organ of the ECCC, or had been acting on behalf of any organ of the ECCC or in concert with organs of the ECCC".[1241]

It can be argued that this test is less far-reaching than the 'attribution' test of the DARS, see Chapter III, which clarifies, for example, that conduct which the now prosecuting forum acknowledges and adopts as its own, can also be attributed to it.[1242] In addition, and again raising the (arguably important) point mentioned above, one can assert that besides this legal attribution test, the prosecuting forum should also be authorised to look more generally into pre-trial irregularities if it is of the opinion that these can be seen as falling within the context of its case, even if it is, strictly speaking, not responsible for them.[1243] To again use the example of a kidnapping by private individuals before the kidnapped person is brought into the jurisdiction of the court: such conduct will not readily fall under the test used here by the ECCC (or the 'acknowledges and adopts as its own' test) but it would nevertheless be strange if the judges did not take into account the wrongs caused by such a kidnapping because it can be seen as falling with the context of the Tribunal case and because "all violations demand a remedy".

However, the judges of the ECCC did not use this test and only examined whether the prolonged detention of Duch could be legally attributed to the ECCC. In the end, referring, among other things, to the "concerted action" concept of the ICC Appeals Chamber's decision in *Lubanga Dyilo*,[1244] they concluded that this was not possible.[1245] In this context, the judges also looked at the point made above, namely that the Military Court detained Duch from 2002 on the basis of the ECCC law. They found that "[t]o the extent that the Military court purported to base certain actions on the pre-amendment and amended ECCC Law, this cannot have been at the direction of the ECCC"[1246] because the ECCC did not exist at that time. As already stated, the fact that the ECCC was not yet operational is indeed true and it is also accurate that this automatically means that the ECCC could not have directed the Military Court to detain Duch. Nevertheless, it is also clear that there exists a certain link between the ECCC and the provisional detention of Duch by the Military Court which justifies the judges of the ECCC looking at the irregularities committed in the context of their case. Be that as it may, the judges did not share

[1241] *Ibid*.
[1242] *Cf.* also n. 483 for the context of international organisations.
[1243] See also ECCC, Pre-Trial Chamber, 'Amicus Curiae Brief [of The Center for Social Development & The Asian International Justice Initiative, ChP] Relating to the Appeal Challenging the Order of Provisional Detention of 31 July 2007', Case No. 002/14-08-2006, 3 October 2007, paras. 20 and 23: "[T]he OCIJ [the Office of the co-investigating judges, ChP] had the jurisdiction to determine and declare whether or not the Prior Detention of more than 8 years amounted to a violation of the Appellant's rights. (…) [T]he OCIJ should have proceeded to further acknowledge that it was a violation of his rights under the law. Instead, the OCIJ circumvented this issue by saying that it had no jurisdiction whatsoever to inquire into the matter."
[1244] See n. 1214 and accompanying text.
[1245] See ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 21.
[1246] *Ibid*., para. 22.

this view and hence concluded that they could not look into them. (Furthermore, they opined that the co-investigating judges had correctly decided that the substantive requirements for Duch's provisional detention were met.)

Nevertheless, the judges also made a statement which resembles the one made by the co-investigating judges in the 31 July 2007 decision[1247] and which may open the door to a review of Duch's detention at a later stage:

> The Pre-Trial Chamber further observes that the Trial Chamber and the Supreme Court Chamber may determine, as submitted by the Co-Prosecutors, that it is appropriate to take any previous provisional detention, whether or not it was illegal, into account at a latter stage of the proceedings.[1248]

This point played an important role in the remainder of the proceedings. On 15 June 2009, the Trial Chamber of the ECCC considered the allegations of Duch. After having noted, among other things, the points that "the ECCC (...) is a separately constituted, independent and internationalised court",[1249] that "[t]he fact that the Military Court made reference to the ECCC law in its earlier orders (...) does not demonstrate continuity between the detention ordered by the Military Court and ECCC"[1250] and that "[t]here is no evidence of any involvement by ECCC judicial authorities in the Accused's Military Court file and in particular in its decisions concerning the detention of the Accused [original footnote omitted, ChP]",[1251] the judges made an unexpected but arguably welcome move: referring to the excerpt from the *Barayagwiza* case where the ICTR judges took responsibility for violations committed against the suspect, irrespective of the entity responsible, and even beyond the "constructive custody" of Barayagwiza,[1252] the judges of the ECCC stated:

> Even if a violation of the Accused's right cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention. The ICTR Appeals Chamber decision in *Barayagwiza* held that a violation of an accused person's rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that violation cannot be attributed to that tribunal [original footnote omitted, ChP].[1253]

[1247] See n. 1233 and accompanying text.
[1248] ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 25. See also *ibid*., paras. 62-63.
[1249] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 10.
[1250] *Ibid*., para. 14.
[1251] *Ibid*.
[1252] See n. 857 and accompanying text.
[1253] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16.

This task, the judges correctly observed, was separate from the situation where "previous violations of an Accused's rights are so egregious that they may preclude or restrain the exercise of an international criminal tribunal's jurisdiction on grounds of abuse of process and violation of the fundamental rights of the accused [original footnote omitted, ChP]".[1254]

Thus, judges of international criminal(ised) tribunals have a general responsibility to repair the pre-trial wrongs committed against the suspect in the context of the tribunal case, even if the tribunal was not responsible for them, and in addition to that, the judges even have discretion, in the case of very serious irregularities, to stop the proceedings under the abuse of process doctrine if they consider that to proceed with the case in such circumstances would undermine the court's integrity.[1255]

As a result, the judges of the ECCC had to ascertain whether Duch's detention before the Military Court was a violation of his rights and if so, what kinds of remedies he was consequently entitled to.[1256]

They concluded that Duch's detention indeed constituted a violation of Cambodian domestic law[1257] and also "contravene[d] his internationally-recognised right to a trial within the reasonable time and detention in accordance with the law".[1258]

[1254] *Ibid*. (Very remarkably, the judges referred here not only (correctly) to the *Barayagwiza* case, but also to paras. 26-35 of the ICC Appeals Chamber's decision in *Lubanga Dyilo*. However, in those paragraphs, the ICC judges first explained and then *rejected* the abuse of process doctrine, see n. 238 and accompanying text of Chapter X.) See also *ibid*., para. 35: "The case law of the ICTR Appeals Chamber nevertheless indicates that even where these violations cannot be attributed to an international tribunal or do not amount to an abuse of process, an accused may be entitled to seek a remedy for violations of his rights by national authorities [original footnote omitted, ChP]."

[1255] It is again (see also n. 1211) interesting to note that the ECCC, which is focused on the (civil law) Cambodian legal system, looked at the – from the common law stemming – abuse of process doctrine. This confirms the idea that this doctrine (or a comparable doctrine with another label) may very well be used by courts with a more civil law background. Thus, the fact that the judges in the Pre-Trial Chamber (see the decision of 3 December 2007) did not go into the abuse of process doctrine, can probably not be seen as evidence for the idea that the ECCC does not want to apply the – from the common law stemming – abuse of process doctrine. See on this point Ryngaert 2008, pp. 727-728.

[1256] See ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 17.

[1257] See *ibid*., paras. 19-20: "In 1999, the Cambodian government (...) promulgated the Law on Duration of Pre-Trial Detention of 1999, which imposed a maximum ceiling of three years' provisional detention in relation to genocide, war crimes and crimes against humanity charges. The Accused appears to have been held under this latter law for nearly eight years and therefore illegally until his transfer to the ECCC in July 2007. (...) There appears to have been no substantial and systematic investigation throughout the period of detention and there was a general lack of reasoning setting out the legal basis for the various detentions. It also appears from the military file that in some instances, the extension of the detention was ordered by the Prosecutor alone, and not the Investigating Judge. Further, several laws on which the Military Court relied appear to have been applied retroactively, in violation of the rights of the Accused under Cambodia and international law [original footnotes omitted, ChP]."

[1258] *Ibid*., para. 21. (This conclusion may not seem very surprising as the co-investigating judges, in their decision of 31 July 2007, had also noted that Duch's detention was "problematic in light of international standards of justice and, more specifically, articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights, which states that any individual arrested or detained for a criminal offence

Notwithstanding this, they also concluded that there was nothing wrong with Duch's provisional detention under the authority of the ECCC (as from 31 July 2007). As a result, the only problem left to tackle was to determine the remedies Duch was entitled to with respect to his unlawful detention before the Military Court.

However, before turning to the remedies with respect to the violations engendered by this detention, the judges also stipulated that Duch, if convicted, was entitled to credit for the duration of his pre-trial detention, not only the pre-trial detention under the authority of the ECCC (as from 31 July 2007)[1259] but also the pre-trial detention under the authority of the Military Court (as from 10 May 1999).[1260] This was because Duch "would have been entitled to credit for time served from 10 May 1999 to 31 July 2007, had he been brought to trial before the Military Court".[1261] Now that the latter Court had terminated its case against Duch, Duch was no longer going to be brought before that Court.[1262] Thus, it was appropriate that the ECCC would give Duch credit for these years, especially since Duch "was detained before the Military Court for investigations of allegations broadly similar to those being considered in this trial".[1263]

With respect to remedies for the violations committed in the context of Duch's unlawful pre-trial detention, the judges referred to the observation of the Appeals Chamber in *Nikolić* that the correct "balance must ... be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law [original footnote omitted, ChP]".[1264] It must be emphasised again that this balance must never be understood to mean that enforcers should be less concerned about the human rights of suspects of genocide than those of suspects of fraud.[1265] All suspects are human beings and as such entitled to

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shall be entitled to a trial within a reasonable time period or to be released", see n. 1196 and accompanying text.)

[1259] See *ibid*., para. 27.

[1260] See *ibid*., para. 28.

[1261] *Ibid*.

[1262] See *ibid*.

[1263] *Ibid*.

[1264] *Ibid*., para. 31.

[1265] For example, if authorities which can be linked to the prosecuting court have kidnapped a person, that court must decisively refuse jurisdiction if it does not want to legally approve such reprehensible conduct, whether the kidnapped person is charged with fraud or genocide. *Cf*. also Mohan 2009, pp. 24-25: "The legitimacy of the Khmer Rouge trials require that an alleged *genocidaire* receives all the benefits of due process and legality he himself denied to his victims. To treat a *genocidaire* otherwise than with fairness would result in the tribunal descending to the same level of disrespect for the rule of law and render the proceedings a show trial [original footnote omitted, ChP]." Mogan (*ibid*., p. 25) also points to the influence such a decision could have on Cambodian justice system. (*Cf*. in that respect also the already-mentioned words of Swart 2001, p. 201, writing about the ICTY/ICTR and the "negative consequences that transcend the limited framework of the Tribunals".) Indeed, internationalised criminal tribunals are even closer to a State's own legal system than the ICTY/ICTR, which may increase the detrimental effect of an incorrect decision by the tribunal on the national level.

human rights. Moreover, every violation must be remedied.[1266] However, the Appeals Chamber's remark can be supported to the extent that it means that the seriousness of the crimes with which the suspect is charged (and hence the importance of continuing the trial) may play a role in determining the appropriate remedy in the case of a violation (in the context of the abuse of process doctrine[1267] and in the context of the consequences of a determination that the person's arrest/detention was unlawful).[1268]

As explained earlier, it must be admitted that that may mean that a suspect of less serious crimes may be better off than a suspect of serious crimes.[1269] Imagine the situation that a suspect of minor domestic crimes becomes the victim of a kidnapping by private individuals in which the authorities of the now prosecuting forum were not involved and during which he was not mistreated before being brought to the national judge. In such a situation, it would not be surprising if the national judge were to refuse to exercise jurisdiction and to release the suspect because of, on the one hand, the rather serious *male captus* and, on the other, the minor importance of having this person prosecuted. However, if the person is charged with genocide, one can imagine that the judge (whether it be a judge at the national or at the tribunal level) would continue the case and grant the person other remedies. Although the seriousness of the *male captus* is the same in both cases, the importance of having this person prosecuted will probably tip the balance, ensuring that the trial will continue and that the suspect will receive other less far-reaching remedies for the wrongs he suffered. Notwithstanding this, a *male detentus* remedy is never excluded, even in the case of a suspect of very serious crimes.

Returning to the *Duch* case, the judges then repeated, referring to *Rwamakuba*, the strict legal attribution test that "[v]iolations of an accused person's rights by external authorities will only be attributed to an international tribunal where there

[1266] *Cf.* also Swart 2001, p. 201 (see also n. 133): "Persons suspected or accused of international crimes should be no less entitled to respect for their basic individual rights than any other suspects or accused."

[1267] See also Ryngaert (2008, p. 732), writing on the abuse of process doctrine: "It is a doctrine that the tribunal is not required to invoke, but that it may do if it believes that the fairness of the entire proceedings may suffer as a consequence of the prior violations. Because the tribunal's decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them."

[1268] See, for example, the discussion of this topic in the *Dokmanović* and *Nikolić* cases.

[1269] *Cf.* Ryngaert 2008, p. 720, writing about the abuse of process doctrine: "[A] high standard of applying abuse of process in international criminal law – resulting in less protection for the defendant's rights – is appropriate, in the light of the grave crimes for which the defendants are prosecuted before international criminal tribunals." Ryngaert refers in that respect, among other things, to the *Eichmann* case. Although it was explained earlier that the judges in Israel did not apply the *male captus bene detentus* principle *because* of the seriousness of the crimes with which Eichmann was charged, Ryngaert is not referring to the reaction of the Israeli judges, but to the reaction of the international community in general, see *ibid.*, p. 732. As already explained in the context of the proceedings before the UNSC, it seems that in *that* context, the seriousness of Eichmann's crimes was indeed taken into account to, in a way, approve the trial in Israel, see n. 521 and accompanying text of Chapter III.

has been concerted action between the international tribunal and those authorities in respect of these violations [original footnote omitted, ChP]".[1270]

However, the judges continued, referring to *Barayagwiza* (but in fact repeating *verbatim* the words of the ICC Pre-Trial Chamber in *Lubanga Dyilo*),[1271] "[t]he abuse of process doctrine constitutes an additional guarantee of the rights of the accused".[1272] A little earlier (and see also Chapter X), it was argued that the ICC Pre-Trial Chamber incorrectly presented the abuse of process doctrine, demanding the involvement of "national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [original footnote omitted, ChP]" (whereas the abuse of process arguably requires serious violations *irrespective of the entity possible*).[1273] Very interestingly, the judges of the ECCC presented a slightly different version of the abuse of process doctrine, a version which, as concerns the above-mentioned point, is arguably better:

> The abuse of process doctrine constitutes an additional guarantee of the rights of the accused and may apply even in circumstances where there is no concerted action between the international criminal tribunal and the *external authorities*.[[1274]] This doctrine, which would require a tribunal to decline to exercise its jurisdiction in a partic[u]lar case, has been narrowly construed and limited to cases where the illegal conduct in question is such as to make it repugnant to the rule of law to put the accused on trial.[[1275]] Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment *by the external authorities* and has most usually been applied in relation to the process of arrest and transfer [emphasis added and original footnotes omitted, ChP].[1276]

However, such serious situations did not apply here: "although the Accused's prior detention amounted to a clear violation of his rights, absent allegations of torture or serious mistreatment by the national authorities,[1277] this would appear insufficient to

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[1270] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 32.
[1271] See n. 1216 and accompanying text.
[1272] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33.
[1273] See also n. 1216 and accompanying text.
[1274] Here, the judges referred to para. 73 of the first *Barayagwiza* decision where it was stated that "under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights."
[1275] Here, the judges referred to the ICC Appeals Chamber's decision in *Lubanga Dyilo*, but again, it must be stressed that the judges in that decision explicitly rejected the abuse of process doctrine. See also ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 34, n. 55.
[1276] *Ibid*., para. 33.
[1277] Although the words now used are "national authorities", this can be explained by the application of the theory to this specific case. However, that does not jeopardise the general test, which more broadly speaks of "external authorities".

debar the exercise of the ECCC's discretion to order provisional detention".[1278] One could argue that the judges placed too much emphasis on the often-used examples here: serious mistreatment/torture.[1279] Conversely, they should assess for themselves whether Duch's prior detention can be seen as such a serious *male captus* that it would be "repugnant to the rule of law" to put him on trial.

However, what the judges did do correctly is to consequently note that besides the attribution test and the abuse of process doctrine, the *Barayagwiza* case indicated that "an accused may be entitled to seek a remedy for violations of his rights by national authorities [original footnote omitted, ChP]".[1280] One could, of course, think here of a reduction of the sentence and financial compensation. Although such remedies could, in the end, very well be appropriate here,[1281] the judges, like the ones in *Semanza*, see footnote 1003, do not mention the fact that strictly speaking, Duch, like every person unlawfully arrested or detained, would first be entitled to the remedy of release:

> Should the Accused be convicted, the Chamber finds him to be entitled to a remedy, to be decided by the Chamber at the sentencing stage, for the time spent unlawfully in detention before the Cambodian Military Court between 10 May 1999 and 30 July 2007. Where an Accused is acquitted, the international case law instead indicates that he may seek compensation before the national authorities responsible for the violation of his rights. If acquitted, the Accused would thus be entitled to pursue remedies available within the Cambodian national law in relation to time spent in detention and any violation of his rights whilst in the custody of the Cambodian Military Court [original footnote omitted, ChP].[1282]

[1278] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 34.

[1279] Interestingly in that respect is that the judges left out two important words which can be found in the ICC Pre-trial Chamber's decision in *Lubanga Dyilo*, namely that the abuse of process doctrine has been restricted to serious mistreatment/torture *to date* (which does not exclude other examples in the future). See n. 1216 and accompanying text.

[1280] ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 35.

[1281] But see Mohan (2009, pp. 14-15), who still wrote at a time when the Trial Chamber had not yet issued its decision and who deemed these remedies only appropriate as an alternative option and thus found that Duch's detention is so serious that the ECCC judges must invoke the abuse of process doctrine and stay the proceedings: "Duch's continuous prior detention of more than 8 years without any demonstrable attempt to bring him to trial flouts Cambodian criminal procedure and is *prima facie* unlawful, violating his fundamental right to a trial within a reasonable time or to release. Having acknowledged that the prior detention was "problematic in light of international standards of justice", the ECCC's pre-trial courts should have proceeded to examine, determine and declare the illegality of this detention under both Cambodian and international law. Consistent with international jurisprudence, the ECCC's pre-trial courts should have granted declaratory relief allocating responsibility for human rights violations to the Cambodian government and terminate proceedings in view of the egregious abuse of the court's process. Alternatively, if the courts had come to the conclusion that Duch's rights "have been violated, but not egregiously so", they could have insisted that the ECCC's Trial Chamber reduce the sentence imposed, in the event of a conviction or award Duch financial compensation for the violation, in the event of an acquittal [original footnotes omitted, ChP]."

[1282] See ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, paras. 36-37.

This is a very important decision for it confirms the *Barayagwiza* idea that every violation of the rights of the suspect in the context of a tribunal case, even if these violations have not been committed by authorities which can be linked to the prosecuting forum and even if the arrest/detention was not executed at the request/behest of the tribunal, hence beyond the scope of the suspect's constructive custody, must be remedied. Thus, the tribunal will also take responsibility for wrongs for which it is not responsible, simply because these wrongs occur in the context of the tribunal case and because basic fairness demands that the now prosecuting forum, in whose context these violations were committed, repairs these wrongs. Therefore, it is not clear why the ECCC's Trial Chamber states, in its very last words and after having shown that it will take responsibility for wrongs, even if it is not responsible for them,[1283] that Duch should turn to the *Cambodian* authorities for compensation if he is acquitted. From cases such as *Barayagwiza* and *Semanza*, it is not apparent that compensation had to be sought from the national authorities.[1284] After the sentence "international case law indicates...", the judges of the ECCC refer to the *Rwamakuba* case. However, that case arguably only supports the idea that the judges, if certain violations cannot be seen as falling within the context of a tribunal case, do not need to take responsibility for these violations. That is very logical. After all, judges are not obliged to take responsibility for violations which have nothing to do with the tribunal case. However, *if* judges deem that certain violations *do* fall within the context of their case, they (and not the judges at the national level) should remedy these violations, whether a suspect is convicted or acquitted.

6 FINAL INTERESTING OBSERVATIONS STEMMING FROM THE CONTEXT OF THE INTERNATIONALISED CRIMINAL TRIBUNALS

This study has found no other case in the context of the internationalised criminal tribunals other than *Duch* which so clearly goes into the *male captus* issue. Nevertheless, it may be interesting to mention a few final interesting observations from this context which address topics which, more generally, can be connected to this book's central topic and which have been mentioned earlier in this chapter.

[1283] After all, the ECCC will reduce the sentence of Duch, if the latter is convicted, because of the illegal detention for which the ECCC itself is not responsible.

[1284] In the *Barayagwiza* case, it was held "that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation; b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights." (See n. 922 and accompanying text.) In *Semanza*, it was stated "that for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows: (a) If he is found not guilty, the Appellant shall be entitled to financial compensation; (b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute." (See n. 1004 and accompanying text.)

For example, in the already briefly mentioned[1285] *Brima* case before the SCSL,[1286] Judge Itoe eloquently confirmed the idea already expressed in the *Barayagwiza* case[1287] that a suspect must be able to ask the prosecuting forum to review the legality of his detention, even if the statute of the tribunal before which he stands does not contain an explicit possibility to file a writ of *habeas corpus*:

> It is my opinion that because the right to liberty is too sacred to be violated by whoever, any Court faced with or called upon to rule on applications of this nature, in whatever form they may be brought, should, for reasons based on the universal resolve and determination to uphold by all lawful means, respect by all and sundry and in all circumstances, of this entrenched fundamental human right, should entertain such applications and refrain from dismissing them merely on technical pretexts or niceties, geared at and designed to prevent them from being entertained and examined. (…) I agree with the submission of the Respondents that the procedure for granting a release through a Writ of "Habeas Corpus" features nowhere in the Rules for Procedure and Evidence which are applicable to the Special Court. However, entertaining this Writ is dictated by the imperatives of universally ensuring the respect of human rights and liberties.[1288]

In another decision of the SCSL, the judges focused on the – for this study – most interesting situation of the abuse of process doctrine, the one which looks at the broad concept of a fair trial/the integrity of the proceedings:

> At the root of the doctrine of abuse of process is fairness. The fairness that is involved is not fairness in the process of adjudication itself but fairness in the use of the machinery of justice. The consideration is not only about unfairness to the party complaining but also whether to permit such use of the machinery of justice will bring the administration of justice into disrepute.[1289]

[1285] See n. 603 of Chapter III and ns. 205, 242 and 832 of the present chapter.

[1286] It must be noted that in the context of this internationalised criminal tribunal, one will also find allegations of illegal arrests/detentions/transfers, see, for example, SCSL, Trial Chamber, *The Prosecutor against Moinina Fofana*, 'Decision on the Urgent Defence Application for Release from Provisional Detention', Case No. SCSL-2003-11-PD, 21 November 2003 and SCSL, Trial Chamber, *The Prosecutor against Allieu Kondewa*, 'Decision on the Urgent Defence Application for Release from Provisional Detention', Case No. SCSL-2003-12-PD, 21 November 2003. However, in these cases, the claims of the Defence were quickly rejected. (See also n. 3 of Chapter IV.)

[1287] See n. 863 and accompanying text.

[1288] SCSL, Trial Chamber, *The Prosecutor against Tamba Alex Brima*, 'Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant', Case No. SCSL-03-06-PT, 22 July 2003, p. 7. At *ibid*., p. 9, reference is then made to the para. 88 of the first *Barayagwiza* decision, see n. 863 and accompanying text. (See also n. 929.)

[1289] SCSL, Appeals Chamber, *Prosecutor Against Morris Kallon* (Case No. SCSL-2004-15-AR72(E)) and *Brima Bazzy Kamara* (Case No. SCSL-2004-16-AR72(E)), 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', 13 March 2004, para. 79.

This observation was confirmed in the case *Brima, Kamara and Kanu*[1290] where the judges subsequently clarified that, within the context of the abuse of process doctrine, one may also take into account, the element of the seriousness of the crimes with which the suspect is charged:

> The Trial Chamber wishes to emphasise that the operation of judicial discretion involves an assessment of the nature and severity of the crimes with which the accused is charged, weighed against the abuse of process that continuing the prosecution would engender.[1291]

In the same case, the judges also supported the *Barayagwiza* reasoning that a tribunal may stay the proceedings under the abuse of process doctrine, even if authorities which can be connected to the tribunal were not responsible for the violations.[1292]

The final words of this chapter are saved for to the newest internationalised criminal tribunal, the STL.[1293] Although it is still unclear as to how the case against those who are allegedly responsible for the attack of 14 February 2005 in Beirut which killed former Lebanese Prime Minister Hariri and 22 others is going to develop, it is interesting to note that the STL may be confronted by *Duch*-like submissions in the future. On 30 August 2005, the Lebanese authorities arrested and detained four generals (Al-Sayyed, Al-Hajj, Azar and Hamdan), "pursuant to arrest warrants issued by the Lebanese Prosecutor General based on recommendations from the Commission that there was probable cause to arrest and detain them for conspiracy to commit murder in connection with the assassination of Rafiq Hariri [original footnotes omitted, ChP]".[1294] The 'Commission' mentioned here is the UN International Independent Investigation Commission (UNIIIC), the predecessor – of

[1290] See SCSL, Trial Chamber, *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 'Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts', Case No. SCSL-04-16-PT, 31 March 2004, para. 18.

[1291] *Ibid*., para. 25. The judges referred here to the following words stemming from the *Mullen* case (and not from the *Bennett* case as the SCSL judges indicated), see *ibid.*, where mention is made of situations "in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within the jurisdiction. *In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged* [emphasis in original and original footnote omitted, ChP]."

[1292] See *ibid*., para. 26.

[1293] See also Swart 2007, p. 1153.

[1294] STL, Pre-Trial Judge, 'Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence' (Confidential), Case No. CH/PTJ/2009/004, 27 April 2009, para. 15. The Prosecutor of the STL refers here to the *Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)*, Beirut, 19 October 2005 (available at: http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ReportsoftheUNIIIC/2005-10-20%20UNIIIC%20Report-EN.pdf), para. 174.

sorts – of the STL's OTP.[1295] Although these generals were thus in detention from 2005, the STL only began functioning on 1 March 2009.[1296] As from 10 April 2009, when the Lebanese authorities "referred to the Prosecutor the results of the investigation and a copy of the court's records regarding the *Hariri* case",[1297] and when the STL was thus officially seized of the case, the generals were detained under the legal authority of the STL.[1298] According to Rule 17 (B) of the STL RPE, the Prosecutor must file "[a]s soon as practicable, (…) reasoned submissions together with any supporting material stating, for each person on the list, whether he requests the continuation of his detention". In this context, Pre-Trial Judge Daniel Fransen stated on 15 April 2009:

> [I]n order to rule as soon as possible on whether these persons should continue to be detained and to ensure that the basic requirements for the protection of human rights are met, the Pre-Trial Judge holds that a time limit must be set for the filing of the Application by the Prosecutor. Indeed, the persons detained are presumed innocent and freedom is the principle, detention the exception.[1299]

On 27 April 2009, the Prosecutor submitted his Application. Although he stressed that it did not "address the detention of the individuals in question prior to the

[1295] See Art. 17 ('Practical arrangements') (a) of the Annex ('Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon') to UNSC Res. 1757 of 30 May 2007: "Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor". See further STL, Pre-Trial Judge, 'Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others', Case No. CH/PTJ/2009/06, 29 April 2009, para. 25: "[*H*]*aving directed the work of the Investigation Commission, which began investigating in June 2005,* having conducted his own investigations and received the records provided by the Lebanese authorities, *the Prosecutor has an in-depth knowledge of the* Hariri *case file* [emphasis added, ChP]." See finally C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 54, noting that the UNIIIC "only later became the STL's Office of the Prosecutor once the STL was established".

[1296] See STL, Pre-Trial Judge, 'Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others', Case No. CH/PTJ/2009/06, 29 April 2009, para. 1.

[1297] STL, Pre-Trial Judge, 'Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence', Case No. CH/PTJ/2009/03, 15 April 2009, para. 5.

[1298] See STL, Pre-Trial Judge, 'Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence', Case No. CH/PTJ/2009/03, 15 April 2009, para. 5. See also STL, Pre-Trial Judge, 'Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others', Case No. CH/PTJ/2009/06, 29 April 2009, para. 5.

[1299] STL, Pre-Trial Judge, 'Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence', Case No. CH/PTJ/2009/03, 15 April 2009, para. 7. In this order, the Pre-Trial Judge also referred to the importance of the right to *habeas corpus* and the *Barayagwiza* case, see *ibid*., para. 14, n. 2.

deferral of the Hariri case to the Tribunal",[1300] he nevertheless explained how the suspects came into the power of the STL and that they had been arrested and detained in Lebanon as from 30 August 2005.[1301] He explained "that information gathered to date in relation to the possible involvement of the four detained persons in the attack against Rafiq Hariri has not proved sufficiently credible to warrant the filing of an indictment against any of them".[1302] Because of that, he could not request their provisional detention and would not oppose their release.[1303] However, he also clarified that his submission was "made without prejudice to any further action that the Prosecutor may wish to take in the future in relation to any person".[1304]

The Pre-Trial Judge, who also emphasised that he would only "address the matter of provisional detention at the current stage of the investigation",[1305] but nevertheless also noted "the context in which the Submission is made, that is to say the detention of these persons in Lebanon since 30 August 2005",[1306] agreed with the Prosecutor's Application and thus released the generals. However, as was also mentioned by the Prosecutor, this was "without prejudice to any possible future prosecution before the Tribunal".[1307]

[1300] STL, Pre-Trial Judge, 'Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence' (Confidential), Case No. CH/PTJ/2009/004, 27 April 2009, para. 5.
[1301] See *ibid*., para. 15.
[1302] *Ibid*., para. 29.
[1303] See *ibid*., para. 31.
[1304] *Ibid*., para. 33.
[1305] STL, Pre-Trial Judge, 'Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others', Case No. CH/PTJ/2009/06, 29 April 2009, para. 23.
[1306] *Ibid*., para. 37.
[1307] *Ibid*., para. 23.

As a result, it may very well be that in the future, if one of the four generals is re-arrested at the request of the STL, that he, like Duch in the context of the ECCC, will complain about and ask for remedies with respect to his pre-trial detention in Lebanon, which may very well be seen as falling within the context of the STL case, even if the STL had only detained the generals under its legal authority as from 10 April 2009.[1308]

[1308] See also the following words from the statement of Mr Bellemare (then Commissioner of the UNIIIC and later Prosecutor of the STL), during the presentation of the UNIIIC's eleventh report to the UNSC: "I cannot conclude my presentation without referring to the situation of the detainees in the Hariri case. This is an issue that is of interest to many, and rightly so. I can assure the Council that this is an issue that is also important to me. As I mentioned in my report, the Commission has continued to share with the Lebanese authorities all the information required to allow them to make a decision on the detainees. Moreover, the detention has been discussed with the Lebanese judicial authorities, with whom I have shared my views. Again, I can only reiterate, as the Minister of Justice of Lebanon forcefully did during a recent television interview, that the Commission gives information to the Lebanese judicial authorities, but that the power of the judicial authorities is absolute on these matters. *If transferred to The Hague, the detainees will then be in a position to seek new remedies before the Tribunal.* Meanwhile, as Minister Najjar said, no one gives orders to the Lebanese judiciary [emphasis added, ChP]." (UNSC, Sixty-third year, 6047th meeting, Wednesday, 17 December 2008, 10 a.m., New York, UN Doc. S/PV.6047), p. 4.) See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 53, n. 206.

CHAPTER VII
CREATING AN EXTERNAL EVALUATIVE FRAMEWORK: PRINCIPLES DISTILLED FROM PART 3

1 INTRODUCTION

It is, of course, not an easy task to distil principles from so much case law, especially since many decisions did not excel in their clarity – to say the least. However, a few elements from these cases are definitely worth of attention and hence deserve to be mentioned here. The next section will address the principles distilled from the inter-State context discussed in Chapter V and the third section of this chapter will deal with the principles from the context of the international(ised) criminal tribunals, which was examined in Chapter VI of this book.

2 PRINCIPLES DISTILLED FROM THE CASES BETWEEN STATES

Before presenting the principles from this context, it should be reiterated (see also Chapter IV) that, due to the huge amount of available *male captus* case law in this context, the overview, even though it was rather extensive, consisted of 'merely' a *selection* of the most interesting cases. Hence, the principles must be accepted with caution for it is possible that if the overview consisted of even more cases, some principles might have been formulated a little differently. However, notwithstanding this caveat, it seems that the following conclusions, the accuracy of which has also been tested with help of views from literature, have a deal of support in the practice of courts in the inter-State context and therefore can be used for the purposes of this book. As will be shown in the following pages, the focus of this section is on the more recent cases. Although the older cases will also be used to show how the law has developed, the most interesting thing is, of course, to find out what the current status of the law is (acknowledging, of course, that some principles which are valid today may have deep roots in old cases).

Most judges in the older *male captus* cases continued exercising jurisdiction, stating that they could not[1] or did not want to (because it would make no difference anyway)[2] look at the way a person was brought into the jurisdiction of the State of

[1] See, for example, *Scott*.
[2] See, for example, *Ker*.

the now prosecuting court,[3] even if irregularities might have been committed (by authorities from that State)[4] in the pre-trial phase abroad (*male captus bene detentus*).[5] As such, they adhered to the non-inquiry rule and a restricted notion of a fair trial, excluding that phase which had in fact ensured that the person was brought to the courtroom in the first place. The *Jolis* case was a clear exception to these *male captus bene detentus* cases, but it must also be remembered that in that case, there was an unambiguous protest (and a request for the return of Jolis) from the injured State (Belgium) against the illegal arrest executed by French authorities on Belgium territory. Such a protest was lacking in the above-mentioned *male captus bene detentus* cases, because there was no clear violation of State sovereignty (for example, because the *male captus* was allegedly committed by authorities from the State of residence,[6] because the authorities of both States worked together in the arrest,[7] because the State of residence did not have an effective government at the time of the *male captus*[8] or because the person making the arrest could be seen as a private individual rather than a State agent)[9] or, even if there was, the injured State did not protest.[10] One can only guess what these courts would have decided if there had been a clear violation of State sovereignty followed by a protest and request for the return of the suspect, although the fact that most judges by that time adhered to the non-inquiry rule could mean that they would probably have stated that international matters were to be resolved by the Executives of the two States involved and not by the judge, who must only ensure that crimes are prosecuted.[11]

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[3] Some courts used both arguments, see, for example, *Sinclair* and *Elliott*.

[4] See, for example, *Scott*.

[5] It must be noted, however, that the *male captus bene detentus* maxim could not be seen as rule of customary international law. This is because customary international law demands that a State acts in a certain way (State practice), but also acts as such because that State believes it has a legal obligation *under international law* to do so (*opinio iuris*). However, the *male captus bene detentus* courts did not continue to exercise jurisdiction, notwithstanding the occurrence of a *male captus*, because they were of the opinion that *international law* dictated that solution. See Borelli 2004, p. 354: "[G]iven the absence of references by domestic courts to any international law norm providing for the application of the *male captus* doctrine and the consequent lack of *opinio iuris*, it would have been improper to qualify the principle as an international customary norm. Nevertheless, given the consistency of national case law on the matter, one could arguably have framed it as a "general principle of law recognized by civilised nations" [original footnotes omitted, ChP]." See also *ibid*., n. 92: "Domestic courts have never claimed that the application of the *male captus* doctrine was required by international law. The doctrine was almost invariably applied on the basis of domestic law norms, in particular those regulating the relationship between the judiciary and the executive." See also the remainder of this chapter with respect to *male captus male detentus* and customary international law.

[6] See, for example, *Sinclair*.

[7] See, for example, *Elliott*.

[8] See, for example, *Ker*.

[9] See, for example, *Ker*.

[10] See, for example, *Scott*.

[11] *Cf.* the *Argoud* case (where it was unclear whether there was such a formal protest and request for the return of Argoud but where the Court appeared to state that even if the injured State had formally protested the *male captus* and had requested the return of Argoud, this would have been of no concern to the Judiciary). For the, in the main text, above-mentioned traditional rationales of the *male captus bene detentus* rule, see also Michell 1996, p. 392 (see also ns. 6, 8 and 14 of Chapter V): "Traditionally, the rationale underlying the *male captus bene detentus* principle has been threefold. First, the rule satisfies

Likewise, one can only surmise what the Court in *Jolis* would have decided had there not been a protest from Belgium; it may very well be that if Belgium had not complained about the matter, the case of Jolis would have continued as normal, especially since sovereignty violations by that time could only be brought forward by the injured State and not by the individual, whose role in the international plane was still insignificant.[12]

With the arrival of human rights treaties such as the ICCPR and the rising status of the individual in the international context, judges appeared to pay more attention to concepts such as 'fair trial' and were more willing to look at the pre-trial phase abroad, independently of the question of whether or not there had been a protest from the injured State. This is arguably a good development if one does not want individuals to remain, in the words of Eichmann's counsel, toys of States.

Because of this development, one might argue that the era of *male captus bene detentus* is over and that *male captus male detentus* or *ex iniuria ius non oritur* is now the new preferred guideline for judges. However, looking at the alleged pre-trial irregularities is not the same as issuing *male captus male detentus* decisions.

Even though the old(-fashioned) version of the *male captus bene detentus* rule (in that judges cannot or will not look at how the suspect came into the jurisdiction of the State of the now prosecuting court) indeed seems to have been (rightly) abandoned,[13] many judges still issue decisions which could be qualified as *male captus bene detentus* decisions; not because they state that they cannot or will not look at alleged pre-trial irregularities abroad (and hence that they are going to exercise jurisdiction, regardless of the circumstances in which the suspect came into the jurisdiction of the State of the now prosecuting court), but because they are of the opinion that, having investigated the pre-trial phase abroad, the alleged *male captus* in question is not serious enough to divest jurisdiction: (a not so serious) *male captus bene detentus*.

Much will depend here on the exact circumstances and the question of how those circumstances are to be weighed in the balancing exercise which judges clearly prefer.[14]

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domestic due process guarantees. According to this view, a criminal defendant is entitled only to a fair trial, and forcible abduction does not affect the fairness of the trial itself. Second, there is a strong public interest in the prosecution of crime. The rule ensures that alleged offenders are brought to trial. Finally, the judiciary traditionally has held the view that courts are not the appropriate forum to adjudicate alleged violations of public international law by the executive. Instead, courts have adopted the position that any difficulties arising from an irregular arrest are best resolved diplomatically."

[12] See, for example, *Eichmann* and *Argoud*.

[13] See, however, *Vervuren*, where the Court held that *Sinclair* was technically speaking still good law and *Alvarez-Machain*, where the judges followed *Ker*. Nevertheless, it must also be noted that both cases received sharp criticism. Note finally that in two other more recent (French) cases, *Ramirez Sánchez*, and, to a lesser extent, *Barbie*, the judges appeared to be *especially* interested in the fairness of the proceedings in court.

[14] The aftermath of *Ebrahim* has clearly shown that judges prefer the discretionary approach and not the automatic one as used in this South African case. This also means that the *male captus bene detentus* principle is still the starting point from which judges depart; in principle, they have jurisdiction. It only needs to be found out whether this jurisdiction must be refused because of the *male captus* in this

In some instances, the *male captus* is deemed to be so serious that judges are of the opinion that refusing jurisdiction is the only way to protect such values as respect for another State's sovereignty,[15] due process of law/human rights of the suspect[16] and the rule of law/the integrity of the (executive/judicial) proceedings.[17] Much used in that respect is the abuse of process doctrine, which stems from the common law context but whose rationale can arguably also be found in the reasonings of judges from other legal contexts:[18] courts in principle have jurisdiction

specific case. *Cf.* also Rayfuse 1993, p. 893: "Courts in other jurisdictions, *while accepting and restating the general proposition that the court has jurisdiction*, have occasionally exercised their discretion in favour of a defendant [emphasis added, ChP]".

[15] See, for example, one of the possibilities to refuse jurisdiction under the *Toscanino* exception (an abduction violating another State's sovereignty and followed by a protest and request for the return of the suspect from the injured State), a possibility which was followed in *Al-Moayad* (and confirmed by the ECtHR). See also *Ebrahim* (where there was not even a protest from the injured State). A general *male captus male detentus* remark regarding respect for State sovereignty (where no protest from the injured State was mentioned as a requirement either) can also be found in the *Beahan* case, but in that case, the concrete end result could nevertheless be qualified as *male captus bene detentus*, for it was not established that the prosecuting State had committed an abduction violating another State's sovereignty (the *male captus* necessary to lead to a *male detentus* result).

[16] See, for example, the other possibility to refuse jurisdiction under the *Toscanino* exception (see also the previous footnote), namely an abduction accompanied by serious mistreatment/serious human rights violations. This possibility was also followed in *Al-Moayad* (and confirmed by the ECtHR). See also *Ebrahim* for human rights considerations. (Note that it was explained in Chapter III of this book that the remedies which can be connected to violations of the relevant human rights (for example the release if the judge is of the opinion that a person's arrest/detention is unlawful) *as such* cannot be equated with *male detentus* outcomes (refusal of jurisdiction/dismissal of the indictment). Nevertheless, it is clear that serious human rights violations in the *male captus* may lead to a *male detentus* result. Thus, it can be argued that the rise of human rights law has certainly played a role in the rise of the *male captus male detentus* rule, even though human rights law as such does not contain *male detentus* remedies.)

[17] See, for example, *Hartley*, *Levinge*, *Ebrahim*, *Beahan* and *Bennett*. *Cf.* for these values also more generally Sloan 2003 B, pp. 546-547: "By one approach, which may be summarized by the maxim *male captus, male detentus*, the national court would refuse jurisdiction where the circumstances of the accused's capture were sufficiently irregular. Among the reasons given by these national courts for refusing jurisdiction in such circumstances have been the following: (i) the rule of law; (ii) the integrity of the executive branch (it must not be rewarded for illegal behaviour); (iii) the integrity of the judicial branch; (iv) the fairness of the legal process; and (v) respect for state sovereignty [original footnotes omitted, ChP]."

[18] See, for example, the 1985 *Stocké* case (see ns. 512-513 and 516-517 and accompanying text of Chapter V) and the decision the German Federal Constitutional Court issued one year later: BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022 (see ns. 522-523 and 526 and accompanying text of Chapter V). Note that also in the *Ebrahim* case, words resembling the abuse of process doctrine were used: "The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and *abuse of law must be avoided in order to protect and promote the integrity of the administration of justice* [emphasis added, ChP]." (Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896.) *Cf.* also Nsereko 2008, p. 61: "Invoking the abuse of process doctrine, the South African court nullified the proceedings." Note, however, that in that case, the Court did not state that judges had a *discretion* to consider whether the violations of these values had to lead to a refusal of jurisdiction. It simply stated that these violations entailed that the judges had no jurisdiction to try the case. See finally also *Beahan* (see n. 713 of Chapter V) and the reasoning of Acting Justice of Appeal O'Linn in the *Mushwena* case (see n. 781 and accompanying text of Chapter V).

(*bene detentus*) but will use their discretion not to exercise that jurisdiction (*male detentus*) if the *male captus* is so serious that to continue exercising jurisdiction would constitute an abuse of the court's process.[19]

Applying these general remarks to the different basic *male captus* situations presented in Chapter III of this book (disguised extradition, luring and abduction),[20] and starting with the abduction, one could argue that it appears that the more recent cases show that courts would refuse jurisdiction in the case of an abduction

[19] *Cf.* also Schabas 2000, p. 567, writing on the abuse of process doctrine in the context of the ICTR: "[T]the remedy is well recognized in national legal systems and can reasonably be deemed to be an inherent power." See also n. 878 of Chapter VI.

[20] Whose definitions arguably imply that they are executed *intentionally*. After all, one cannot, for example, 'accidentally' kidnap a person. These violations are seemingly the result of predetermined plans to commit the *male captus*. However, other *male captus* situations might occur which stem from negligence rather than from intent. This is an important difference. Not only with respect to the nature of the violation but also with respect to its consequences. For instance, irregularities in the pre-trial phase which have not been executed intentionally will probably lead to less serious consequences. See, for example, House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 152 ("[I]f a serious question arises as to the *deliberate* abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court, which I regard as the proper forum in which such a decision should be taken [emphasis added, ChP]"), Court of Appeal, *R* v. *Hartley*, 5 August 1977, [1978] 2 *N.Z.L.R.* 216 (*International Law Reports*, Vol. 77 (1988), p. 335) ("There are explicit statutory directions that surround the extradition procedure. (…) And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has *deliberately* ignored those imperative requirements of the statute [emphasis added, ChP]") and the Swiss case from 2007, where the Court was of the opinion that the Swiss could not be accused of *mala fide* conduct, but that that would be different if they, with the *intent* to circumvent an extradition procedure, had asked the Dominican officials to deport the suspect to Switzerland instead (see n. 477 and accompanying text of Chapter V). See also the *Toscanino* case where the judges held that "we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's *deliberate*, unnecessary and unreasonable invasion of the accused's constitutional rights [emphasis added, ChP]." (US Court of Appeals, Second Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 275.) Interesting in this 'intent' discussion are also the cases of *Mackeson* and *Healy* but the Court in *Driver* was of the opinion that these cases had been decided *per incuriam* (see n. 274 of Chapter V). See also Swart 2001, p. 206: "Dismissal of criminal cases as a result of official misconduct is a remedy accepted by the courts of many States. There is, of course, considerable variation in the way national legal systems make use of that remedy. Among other things, the choice will depend on the availability of other effective remedies for correcting the wrongs done to the accused. Usually, a relevant consideration is also whether unlawful conduct on the part of law officers shows an *intent* to prejudice the rights of the accused or instead constituted negligence [emphasis added, ChP]." For another view, see Michell 1996, pp. 495-496: "The mere fact that a fugitive has been returned to the jurisdiction through a deportation which is unlawful under foreign law cannot in itself amount to an abuse of process, even when extradition might have been available. Rather, there must be evidence of action taken by domestic authorities to circumvent formal extradition procedures, and the fugitive cannot rely upon a violation of foreign law by foreign authorities alone. There must be evidence of unlawfulness on the part of the domestic executive, usually evidence that the violation of foreign law came at the instigation of the domestic authorities. Proof of actual *intention* on the part of the domestic authorities to circumvent extradition [proceedings] may not be required, however. It may be sufficient to demonstrate that the domestic authorities were ambivalent or unconcerned as to whether extradition proceedings have been circumvented, *i.e.*, acting with willful blindness [emphasis in original and original footnotes omitted, ChP]."

(performed by the prosecuting State's own agents on another State's territory without the latter's consent) which 1) was accompanied by serious human rights violations/serious mistreatment[21] *or* 2) was followed by a protest and request for the return of the suspect from the injured State.[22]

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[21] See the aftermath of *Toscanino*, such as *Lujan*. *Cf*. also the 1986 decision of the German Federal Constitutional Court (BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022), which involved an abduction without a protest and request for the return of the abducted suspect from the injured State. Here, the Court stated that jurisdiction could also be refused under domestic law if the situation could be qualified as an "extremely exceptional case". The meaning of this rather general concept is not clear, but one could perhaps think here of *Toscanino*-like circumstances, see also Wilske 2000, p. 334, n. 413 (commenting on this concept): "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also Grams 1994, pp. 70-71. See also more generally American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 433 ('External Measures In Aid Of Enforcement Of Criminal Law: Law Of The United States', para. 2: "A person apprehended in a foreign state, whether by foreign or by United States officials, and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society."

[22] See the aftermath of *Toscanino*, such as *Verdugo*. See also the German *Stocké* case: "Ein Blick auf die Staatenpraxis zeigt, daß Gerichte es nur dann allgemein ablehnen, ein Strafverfahren gegen einen völkerrechtswidrig Entführten zu betreiben, wenn der durch die Entführung verletzte Staat gegen die Unrechtshandlung protestiert und die Rückgabe des Entführten gefordert hat". (BVerfG (1. Kammer des Zweiten Senats), Beschl. v. 17.7 1985 – 2 BvR 1190/84. *NJW* 1986, Heft 22, p. 1428.) See also more generally American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 432 ('Measures in Aid of Enforcement of Criminal Law'), Comment c ('Consequences of violation of territorial limits of law enforcement'): "If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned." Perhaps, one could even refer here to the old (and already briefly mentioned, see n. 175 of Chapter III) 1935 Harvard Research in International Law's Draft Convention on Jurisdiction with Respect to Crime, see the *American Journal of International Law Supplement*, Vol. 29 (1935), pp. 435-651. Art. 16 of this Convention contains the following *male captus male detentus* provision: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." This provision is even broader than the test requiring an abduction followed by a protest and request for the return of the suspect by the injured State (for it more generally demands a violation of international law and a lack of consent from the injured State) but it is, of course, clear that an abduction followed by a protest and request for the return of the suspect from the injured State would be covered by these more general words. This *Draft* Convention is obviously not legally binding but Deen-Racsmány is nevertheless of the opinion that it "carries great weight, as the drafters sought on the basis of extensive research to codify international custom as it stood at that time." (Deen-Racsmány 2001, p. 610.) See also Slater 2004, p. 155, n. 22: "The Harvard Research Project analyzed national criminal statutes, criminal procedure, and the writings of international scholars and jurists, to attempt to resolve the problem of gaps in overlapping jurisdiction. Based upon their inquiry into international criminal jurisdiction, the researchers produced the *Draft Convention on Jurisdiction with Respect to Crime*." Nevertheless, it must also be remarked that this specific provision is not devoid of *lex ferenda* either, see the commentary to this article (see the *American Journal of International Law Supplement*, Vol. 29 (1935), pp. 623-632), at, for example, pp. 623-624: "The principle thus formulated is in part a restatement of existing practice and in part a reconciliation of conflict between contemporary doctrines. It is believed that its inclusion in a comprehensive convention on the subject of international penal

In the *Alvarez-Machain* case, the second possibility was clearly quashed, but the immense (international) criticism directed against this decision shows that many States are seemingly of the opinion that jurisdiction must in fact be refused in the case of an abduction followed by a protest and request for the return of the suspect by the injured State. Because the US Supreme Court in *Alvarez-Machain*, in the context of the abduction, used the word "shocking", it has been suggested that *Alvarez-Machain* also brought about the end of the *Toscanino* mistreatment exception. However, it appears[23] that this is not the case. Hence, in the US, courts would still refuse jurisdiction in the case of an abduction accompanied by serious mistreatment. Nevertheless, to the extent that States are of the opinion that *Alvarez-Machain* has quashed both *male detentus* situations, one can argue that the criticism towards this decision in general is proof of the idea that many States are of the opinion that in those two situations (an abduction followed by a protest and request for the return of the suspect and an abduction accompanied by serious mistreatment) jurisdiction must be refused.

However, is "many States" enough to argue that State practice more generally indicates that in those two circumstances, jurisdiction must be refused? This is not entirely clear. First of all, one has, of course, to cope here with the situation in the US, which does not recognise the second *male detentus* situation mentioned above. Moreover, with respect to the same *male detentus* situation, one should mention the situation in France: even though the *Argoud* case – in which the Supreme Court seemingly stated that even in the case of a protest and request for the return of the suspect, the Court will not refuse jurisdiction because international matters have to be solved by the Executives of the two States involved – cannot be seen as a recent case, it still appears to represent the current French position on this issue.[24] Finally

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competence is indicated by the most persuasive considerations of policy. (…) It is not everywhere agreed that there may be no prosecution or punishment in reliance upon custody thus obtained "without first obtaining the consent of the State or States whose rights have been violated by such measures." Thus the present article assures an additional and highly desirable sanction for international law in the matter of recovery of fugitives from criminal justice. It removes much of the incentive to such irregular or illegal recoveries as have been the source of international friction in the past. (…) It provides an added incentive for recourse to regular methods in securing custody of fugitives. And if, peradventure, the custody of a fugitive has been obtained by unlawful methods, the present article indicates an appropriate procedure for correcting what has been done and removing the bar to prosecution and punishment. The desirability of such a provision in a convention which embodies a comprehensive statement of the broad penal competence supported by contemporary practice would seem to require no emphasis. While it is frankly conceded that the present article is in part of the nature of legislation, it is not to be understood that the principle stated is without support in national jurisprudence or international practice."

[23] See n. 206 and accompanying text of Chapter V.

[24] *Cf.* also ICTY, Trial Chamber II, *The Prosecutor v Dragan Nikoli*[*ć*], 'Motion to Determine Issues As Agreed Between the Parties And the Trial Chamber As Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal Under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of Any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention', Case No. IT-94-2-PT, 29 October 2001, para. 14, where Nikolić's Defence writes about the *male captus bene detentus* maxim, referring to the *Argoud* case: "[I]n some civil law jurisdictions, the maxim may still remain good law [original footnote omitted, ChP]." Note that Gilbert (1998, p. 360), however, writes that "[t]he French

(and again with respect to the second *male detentus* situation), the (more recent) Israeli *Vanunu* case should be mentioned. Although it is not clear that Italy's protest against the abduction was followed by a request for the return of Vanunu, one can imagine that even if such a request had been made, Israel would probably not have refused jurisdiction in this case.[25]

The question now is whether these exceptions effectively negate the establishment of a certain norm in State practice. In the *Nicaragua* case, the ICJ, writing on customary international law, clarified:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[26]

Interestingly, all the three cases mentioned above have received (much) criticism, which may constitute evidence for the idea that State practice more generally indicates that the two situations mentioned above should lead to a *male detentus* result.[27]

Cour de Cassation in *Re Argoud* decided that French courts would only be deprived of jurisdiction if the State from which the accused was taken objected and sought his return. This position was reiterated in *Barbie* [original footnotes omitted, ChP]." Nevertheless, besides the fact that the judges in *Argoud* seemingly went further than that (see the main text), no such confirmation in *Barbie* has been found.

[25] The Scottish case *Vervuren* has not been mentioned here for it seems that Scottish courts, even if *Sinclair* is, strictly speaking, still the case to follow (see n. 13), may very well refuse jurisdiction in the more specific *male captus* situations mentioned above, where it can certainly be said that the prosecuting authorities do not come to court with clean hands. This could be derived from the fact that the Prosecution (and the Defence) in that case agreed that "if the United Kingdom authorities were guilty of some form of collusion, and did not come to court with clean hands, the courts were entitled to respond by, for example, sustaining a plea in bar of trial" and that Lady Paton noted this agreement without criticising it, see n. 738 and accompanying text of Chapter V.

[26] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits), 'Judgment', 27 June 1986, para. 186. See also Loan 2005, p. 280.

[27] With respect to the *Alvarez-Machain* case, see, for example, Gluck 1994, pp. 630-631: "This consistent pattern of return notwithstanding, there have been incidents when the asylum state's demand for repatriation was not honored even though the facts clearly showed that the abducting state had violated international law. The most blatant example of this was the *Alvarez-Machain* case (…). Such examples, however, do not indicate that there is no customary law requiring in cases of international abduction. International custom does not require that state practice be unanimous in order to acquire the force of law; some exceptions are allowed provided they are regarded as breaches of the general rule. [And then, Gluck, refers to exactly the same quotation from the ICJ mentioned in the main text, ChP.] Certainly the outrage engendered by the abduction of Dr. Alvarez-Machain by the United States shows that the "no abduction" rule is well established and that the failure to return the individual by the United States was not accepted as a harbinger of an emerging rule permitting such action [original footnote omitted, ChP]." See also Zaid 1997, p. 861: "The outrage expressed by the international community following the Supreme Court's decisions demonstrates that the "no abduction without consent" concept is well-established and still in force and that the United States' failure to repatriate Alvarez-Machain following Mexico's repeated demands did not serve to create a revision or exception to the rule." With respect to the *Vanunu* case, see Wilske 2000, p. 348: "Aufgrund sehr eigenwilliger Vorstellungen Israels zum Inhalt und zur Geltungskraft des Völkerrechts kann Israel aber nicht als Beispiel für eine representative Staatenauffassung betrachtet werden." With respect to *Argoud*, see the criticism of Kiss

Additional support for this can be found in the confirmation of these two *Toscanino* possibilities by the German Federal Constitutional Court in the (*male captus bene deditus*) case of Al-Moayad, with whose findings the ECtHR agreed. Reference can also be made to the conclusion of the 2000 book from Wilske, who extensively discussed the topic of cross-border State-sponsored abductions in the inter-State context. (It was also this conclusion to which the German Federal Constitutional Court referred in *Al-Moayad*.) Wilske, who did not limit himself to the practice of courts,[28] concluded:

> Gerade diese Entscheidung [namely the *Alvarez-Machain* decision, ChP] ist der Schlüssel zu einer geänderten Staatenpraxis, die die *male captus, bene detentus*-Regel zumindest im Fall eines Staatenprotestes wie auch bei schweren Menschenrechtsverletzungen eindeutig ablehnt.[29]

Thus, it may indeed be the case that State practice more generally indicates that courts will refuse jurisdiction in these two situations.[30] However, and this is an important point which needs to be mentioned here (see also footnotes 575-576 and accompanying text of Chapter V), Wilske goes a step further when he asserts, not only that more recent State practice indicates that *male detentus* will follow in these two situations, but also customary[31] international law more generally: "Ein Strafverfahrenshindernis *aus Völkerrechts* ist immer dann anzunehmen, wenn der verletzte Staat protestiert hat. Dies gilt aber auch, wenn die Entführung von schweren Menschenrechtsverletzungen begleitet war [emphasis added, ChP]."[32] However, before one can draw *that* conclusion, it must be clear that the other requirement of customary international law – alongside (State) practice – is also

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(see also n. 409 of Chapter V): "Les vues qu'exprime cet arrêt semblent être contraires à la pratique française qui a toujours nié la validité des arrestations opérées en territoire étranger, même en l'absence de toute protestation émanant de l'Etat dont la compétence territoriale a été lésée [original footnote omitted, ChP]." (Kiss 1965, p. 937.)

[28] It must be noted that the present study 'merely' focused on the practice of courts, although some other manifestations of State practice (see the reactions of governments in the context of the *Alvarez-Machain* case) have also been reviewed.

[29] Wilske 2000, p. 336.

[30] *Cf.* also the following conclusion of Oehmichen 2007, p. 237: "Während früher die meisten nationalen Gerichte der „male captus – bene detentus" Doktrin folgten, erfuhr dieses Prinzip eine erste Einschränkung durch den Toscanino-Fall in der Weise, dass ein Strafverfolgungshindernis in Fällen, in denen die Entführung mit schweren Menschenrechtsverletzungen einher ging, angenommen wurde. Teilweise wurde als Bedingung für ein Strafverfolgungshindernis gefordert, dass der verletzte Staat gegen die Entführung protestiert hatte."

[31] Although Wilske uses the word "*Völkerrecht*" (international law) here, it is clear that he is especially interested in *customary* international law (although customary international law is, of course, also international law), see Wilske 2000, p. 338: "Ziel der hier dargestellten Staatenpraxis war, eine Antwort auf die Frage zu erhalten, ob Völker*gewohnheits*recht einem Strafverfahren gegen völkerrechtswidrig entführte Personen entgegensteht [emphasis added, ChP]."

[32] *Ibid*., p. 340. See also *ibid*., p. 349: "Nach Auswertung der Staatenpraxis ist ein Strafverfahrenshindernis *aus Völkerrechts* immer dann anuznehmen, wenn der verletzte Staat protestiert hat oder wenn die Entführung von schweren Menschenrechtsverletzungen begleitet war [emphasis added, ChP]."

met: *opinio iuris sive necessitatis*. Thus, the acts of States, for example through the decisions of their courts, must confirm the above-mentioned two *male detentus* situations (which may very well be the case), but in addition to that, the States must have acted in that way because they are convinced that it is "required and permitted or necessary under international law".[33] Is that also the case here?

It appears that this is indeed the case with respect to the *male detentus* situation of an abduction followed by a protest and request for the return of the abducted person by the injured State. In that situation, the State (if not the Executive, then the Judiciary) arguably returns the suspect to the injured State because it is of the opinion that international law has been violated (namely the rule that a State cannot exercise police powers on another State's territory without that State's consent) and that this breach must be repaired. Hence, even though a conventional rule does not exist in international law that a State must return the abducted suspect to the State which protests and requests the return of the suspect (although such a rule could perhaps be gathered (in the future) from the rather influential DARS rules on restitution, see Subsection 4.1 of Chapter III), States nevertheless appear to be of the opinion that they would return the abducted suspect in such cases[34] and would do so with international law considerations at the back of their minds. Hence, this rule – that a State (if not the Executive, then the Judiciary) must return the abducted suspect if the injured State protests and requests the return of the suspect – indeed seems to have the status of a rule of customary international law. Thus, one could assert more generally that international law (namely customary international law) demands that in such a case, a State (if not the Executive, then the Judiciary) must return the suspect.[35] That would also mean that, in this specific situation, there would actually be no discretion for judges,[36] but an obligation to refuse jurisdiction.

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[33] See the discussion of the *Al-Moayad* case for this definition. Note that Oehmichen, referring to Wilske, writes more generally that there is a conviction that the rule in question is law (Rechtsüberzeugung): "Zumindest in den Fällen, in welchen die Verhaftung von schweren Menschenrechtsverletzungen begleitet wurde order der betroffene Staat protestiert hat, hat sich eine Rechtsüberzeugung zu Gunsten der Annahme eines Strafvervolgungshindernisses herausgebildet [original footnote omitted, ChP]." (Oehmichen 2007, p. 246.)

[34] See also Loan 2005, pp. 282-283: "It is widely recognized that when an abduction breaches a state's sovereignty and the protesting state demands the return of the individual then the first duty on the abducting state is to return the individual [original footnote omitted, ChP]."

[35] See also Michell 1996, pp. 424-427: "The duty to return is an established rule of customary international law. This custom is demonstrated through state practice, specifically in cases involving: Canada and the United States; the United Kingdom and the United States; Mexico and the United States; Spain and the United States; Germany and Switzerland; France and Germany; Italy and Switzerland; and the United Kingdom and South Africa. In all of these incidents the fugitive was returned by the abducting state to the injured state upon protest and a request for his return. Cases where the abducting state made this determination, either by the executive or its domestic courts, support the validity of this doctrine. Until *Alvarez-Machain*, the U.S. Supreme Court had never denied this rule of customary international law. In fact, federal appellate courts had never refused to return a fugitive when there was a protest and request for the fugitive's return. Moreover, the rule is well-grounded in *opinio juris*. Thus, the assertion that there is no rule of customary international law requiring the return of a fugitive is inaccurate. Only the broad formulation of the rule (*i.e.*, without the stipulations that the injured state must protest and request the fugitive's return) is inaccurate. Where there is a violation of territorial sovereignty by state agents, and the injured state protests and requests the return of the fugitive,

With respect to the *male detentus* situation of an abduction accompanied by serious mistreatment; it is less clear that courts refuse jurisdiction in such cases because they believe international law dictates that they do so.

On the one hand, it is true that international law considerations may also play a role here. One could think here of the situation that a judge is of the opinion that such mistreatment brings about violations of international human rights provisions. Even though these human rights provisions do not command a judge to refuse jurisdiction in the case of violations, such violations may nevertheless convince the judge that the *male captus* is so serious that he must refuse jurisdiction (see also the discussion on this topic in Chapter III).[37]

However, on the other hand, even though international law considerations may play a role here, these considerations are arguably weaker than in the case of an abduction followed by a protest and request for the return of the suspect, in which case the judge arguably feels that the international system is disrupted by the violation and request for the return of the abducted suspect and that he must correct this international imbalance (by refusing jurisdiction and ordering the return of the suspect) if the Executive has not already done so. A judge confronted by an abduction accompanied by serious mistreatment appears to refuse jurisdiction mainly in the framework of *domestic* legal considerations.[38]

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customary international law requires that the fugitive be returned to the state from which he was abducted [original footnotes omitted, ChP]." See also Gluck 1994, p. 630 (see also p. 654): "[A]n international custom has developed in cases of state-sponsored international abduction: when an asylum state protests an abduction and demands the return of an individual taken from its territory, the abducting state is under an international legal duty to return the individual to the asylum state." See finally also American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 432 ('Measures in Aid of Enforcement of Criminal Law'), Comment c ('Consequences of violation of territorial limits of law enforcement'): "If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned."

[36] *Cf.* n. 14.

[37] A judge could argue that a violation of the customary international law prohibition of torture demands that a trial cannot continue if it has been preceded by torture. See also Wilske 2000, p. 271: "Der Schutz vor Folter ist Inhalt des Völkergewohnheitsrechts. Die Unvereinbarkeit von Folter mit einem ordnungsgemäßen Strafverfahren kann daher (…) mit völkerrechtlichen Verpflichtungen begründet werden [original footnote omitted, ChP]." *Cf.* also Swart 2001, p. 206 (not with respect to mistreatment but with respect to the human right to liberty and security): "[B]oth Article 9 of the ICCPR and Article 5 ECHR make it imperative that a person be released if his detention was unlawful. I take it for granted that, in the case of more serious violations of these Articles, the nature of this particular remedy rules out any possibility of re-arresting the suspect or the accused." If serious violations of the right to liberty and security would already lead to the ending of the case (which is arguably a good thing), one can assume that a judge will also refuse jurisdiction if he is confronted by serious violations of human rights provisions which deal with mistreatment/torture.

[38] See, for example, the *Russell* case: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that *due process principles* would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California (…), the instant case is distinctly not of that breed [emphasis added, ChP]." (US Supreme Court, *United States v. Russell*, 24 April 1973, No. 71-1585 (411 US 423), pp. 431-432.) See also the German Federal

In that respect, one can wonder whether Wilske's more broadly formulated conclusion, that (customary) international law in any event demands that in these two situations, jurisdiction must be refused,[39] is entirely correct. Nevertheless, it appears that his first conclusion, that *State practice* shows that in such cases, jurisdiction must be refused (a conclusion which was confirmed by the German Federal Constitutional Court (and the ECtHR) in *Al-Moayad*),[40] is accurate. This ultimately also means that, apart from the *male captus* situation whereby a State protests an abduction and requests the return of the abducted suspect, there is no international law rule demanding that a State (if not the Executive then the Judiciary) refuse jurisdiction.[41]

It should be emphasised that State practice shows that in the above-mentioned two situations, courts *will* refuse jurisdiction; in those two cases, *male captus bene detentus* is rejected *at any rate*. However, that does not mean that courts may not utilise a lower *male captus male detentus* threshold in the case of abductions. There have also been *male captus* cases where courts have suggested a test which does not require a protest from the injured State or serious mistreatment. Examples in that respect are *Levinge*,[42] *Bennett*,[43] *Ebrahim*[44] and *Beahan*.[45]

Constitutional Court's examination in its 1986 case (BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, pp. 3021-3022) whether *domestic considerations* (namely those related to the rule of law and to Article 1, paragraph 1 of the German *Grundgesetz*) require that one can speak of an "extremely exceptional case" which demands the refusal of jurisdiction and about which concept Wilske states that "das Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." (Wilske 2000, p. 334, n. 413.) See also Grams 1994, pp. 70-71.

[39] See Wilske 2000, pp. 340 and 349.

[40] See *ibid*., p. 336.

[41] See also Loan 2005, p. 284: "While it may be desirable for domestic courts to refuse to endorse a state's violation of its human rights obligations, there is no international obligation on domestic courts to decline jurisdiction over an abductee. The prevalence of the rule "male captus bene detentus" throughout the world [As Chapter V has shown, these latter words are probably too sweeping. Much will depend on the exact meaning of the words *male captus bene detentus*. However, it is clear that there are still many modern cases which can be summarised by the words *male captus bene detentus*. In that sense, Loan is right that, except for the situation in which the injured State protests and requests the return of the abducted suspect (see also n. 34), there is no rule of international law demanding courts to issue a *male captus male detentus* decision, ChP.], while controversial, is clear evidence of the non-existence of any norm requiring states to decline the prosecution of abductees."

[42] See, for example, the following general reasoning in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. Such an abuse may arise by reason of delay on the part of prosecuting authorities. But delay is only one variety of unfair or wrongful conduct on the part of those authorities. Other such conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another." (*Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 FLR 142.)

[43] See, for example, the following general reasonings in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international

Nevertheless, it appears that these lower thresholds, even if they can be applauded,[46] and even if these cases may be seen as evidence of a certain trend in

law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed. It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 163.) See also House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 151: "In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

[44] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896: "When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean."

[45] See, for example, the following general reasoning in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting state. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual." (Supreme Court, *Beahan* v. *State*, 4 September 1991, *International Law Reports*, Vol. 103 (1996), p. 214.)

[46] After all, why should a suspect have to prove, for example, that the injured State protested the abduction if it has been established that he was abducted by agents from the now prosecuting State? (See also Pulkowski 2001, p. 1037: "[T]he concept of a human rights dimension that is independent of the state's territorial rights casts doubt on the sustainability of the common view that a court of the abducting state must only relinquish its jurisdiction if the territorial state protests subsequently. How would the lack of subsequent protest by the territorial state do away with the human rights violation, after the individual has been captured by authorities which were undisputedly unlawful at the time of the capture?". See further Frowein 1994, p. 185: "The return of the person cannot be made dependent upon the formal claim of the state from where the abduction took place. If individual rights in that context mean anything, the abducting state must be seen to be under an obligation to return the person independently of any request. A 'male captus male detentus' rule should be applied as a consequence of the violation of human rights." See also Henkin 1990, pp. 310-311, who is of the opinion that the principle *male captus bene detentus* is "antedating the age of human rights". See further Cazala 2007, p. 838: "Le statut de cet adage est discutable au regard, ou au sein, du droit international contemporain, notamment dans sa dimension protectrice des droits de l'homme." See finally Rayfuse 1993, p. 882: "It will be argued that State-sponsored abductions are a violation of the internationally recognised fundamental human rights to liberty and security of the person and freedom from arbitrary arrest and detention and that courts lack jurisdiction to try defendants who are brought before them in violation of these rights.") Likewise, why should a suspect have to prove that he was seriously mistreated during this abduction? Should the fact that authorities of a State have resorted to an abduction in circumvention of available procedures not already suffice to divest jurisdiction, whether or not there was a protest from

State practice,[47] do not have the same degree of support in the rest of the world as the two *Toscanino* possibilities. Hence, it is difficult to maintain that in *any* case involving an abduction (even one without serious mistreatment or without a protest and request for the return of the suspect), State practice (let alone customary international law) indicates that a court will issue a *male detentus* decision.[48]

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the injured State and whether or not the suspect was seriously mistreated in the course of this *male captus*? See Mann 1989, p. 419 and Michell 1996, p. 403. See also Loan 2005, p. 284 (writing on the *Ebrahim* and *Bennett* cases): "Such decisions should be applauded as not only giving effect to an individual's rights, but also acting as a deterrent to future violations of international law. Only by declining to exercise jurisdiction can domestic courts maintain the integrity of international human rights and encourage states to abide by their international legal obligations [original footnote omitted, ChP]." See further Hamid 2004, p. 85: "It is a long established legal principle that an illegal act does not give rise to any right; *ex injuria jus non oritur*. Since the act of abduction itself is illegal and invalid under international law, the abducting State does not have a right to subject the abducted individual to its laws and proceedings following such illegal abduction." See also Gilbert 1998, p. 362 (writing on abduction): "Its manifest illegality ought not to be approved, implicitly at least, by the judiciary accepting jurisdiction to try the fugitive." See also the following recommendation from the International Law Association: "Courts should refuse to permit prosecutions of persons brought before them by government-conducted or government-inspired abductions. In appropriate cases they should decline to exercise jurisdiction and should order the return of the abductee to the state from which he was abducted, without prejudice to future lawful extradition proceedings." (International Law Association 1994, p. 165.) See finally Resolution No. 9 relevant to the topic 'The Protection of Human Rights in International Cooperation in Criminal Matters' (unanimously approved at the closing session of the XV Congress of the International Association of Penal Law in Rio de Janeiro, 4-10 September 1994): "Abducting a person from a foreign country (…) in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution." (Schomburg 1995, p. 105.)

[47] See Henquet 2003, pp. 118-119, writing that "[c]ourts increasingly decline to exercise jurisdiction where the forum State is complicit in an abduction of an accused from the territory of another State [original footnote omitted, ChP]." Note, however, that after Henquet's article was published, the *Al-Moayad* case was issued. Although that case only presents the situations which must, *in any event*, lead to a *male detentus* result, thus not clarifying what the German Court's own stance would be on a normal abduction not accompanied by serious mistreatment and not followed by a protest and request for the return of the suspect from the injured State, it is very well possible that it would follow the German case of 1986, which involved such an abduction from the Netherlands and which did not lead to the ending of the case.

[48] *Cf.* Knoops 2002, p. 241. It may be interesting to note that Wilske stated that (customary) international law *at any rate/in any event* ("immer dann") demands that courts refuse jurisdiction if the abduction is followed by a protest (and a request for the return of the suspect) or if the abduction is accompanied by serious mistreatment. That may mean that he is of the opinion that customary international law would perhaps also require a *male detentus* result in less serious cases, not involving these two situations (one could hereby think of cases like *Bennett* and *Ebrahim*). That he writes, in the context of customary international law, about "die Überzeugung (…) daß im Regelfall einer völkerrechtswidrigen Entführung ein Strafverfahrenshindernis folgen muß" (Wilske 2000 p. 339), may also constitute evidence for that possibility. Although it is not entirely sure whether Wilske is indeed of the opinion that customary international law demands a *male detentus* result in other situations than the two above-mentioned ones, Pulkowski straightforwardly criticises the fact that "Wilske concludes that customary international law today bars a court from initiating criminal proceedings against an abducted individual." (Pulkowski 2001, p. 1035.) This was because "the attempt to anchor the rule that courts have no jurisdiction over individuals abducted by state agents in customary international law meets with some systematic concerns with respect to both practice and *opinio juris*." (*Ibid.*) He explains: "Occasionally, the author is forced to bend state practice considerably to present evidence of the alleged

What can be said about the other two techniques: luring and disguised extradition (and other less serious irregular methods not clearly falling within these three basic *male captus* situations, such as an informal transfer between two States without any procedural guarantees)?[49]

Quite a few of the more recent cases show that such techniques, even if they can be considered less serious than an abduction, can still lead to a refusal to continue

new rule of customary law. Strictly speaking, only the judgments of the British House of Lords *ex parte Bennett* and the South African Supreme Court in *State v. Ebrahim* can serve as precedents actually involving state-ordered kidnapping. The author predominantly relies on political declarations within or outside international institutions and academic writings in order to support his thesis. Therefore, some scepticism remains whether a departure from *male captus bene detentus* is really 'in accordance with a constant and uniform usage practised by the States in question'. Furthermore, neither *male captus bene detentus* nor the alleged new rule to the contrary was applied by courts with a belief that such conduct was required by international law. The major precedents relied on by the author to support his thesis, the judgments *ex parte Bennett* and *State v. Ebrahim*, were both based exclusively on the interpretation of domestic law [original footnotes omitted, ChP]." (*Ibid*., pp. 1035-1036.) Although one must not forget that the judges in these two latter cases (and in other cases not mentioned by Pulkowski such as *Levinge* and *Beahan*, see ns. 42 and 45) also used international law considerations to dismiss the case, it is true that they were mainly basing their decisions on domestic grounds. (*Cf.* also De Sanctis 2004, p. 538.) However, even if they had based their findings on international law alone, one can indeed wonder with Pulkowski whether these cases, which support a low *male captus male detentus* threshold, have *general* support in State practice. Notwithstanding this, that does not do away with the fact, not mentioned by Pulkowski, but correctly observed by Wilske, that State practice appears to indicate that in two more specific situations (namely in the case of an abduction followed by a protest and request for the return of the suspect and an abduction accompanied by serious mistreatment) courts will refuse jurisdiction and that one could even argue that in the case of an abduction followed by a protest and request for the return of the suspect, *customary international law* indicates that courts will refuse jurisdiction. Finally, reference must also be made to Borelli. She first states that "[t]his brief survey of domestic case law related to cases of forcible abduction brings into question the qualification of the *male captus* doctrine as a "principle of law recognized by civilised nations". (Borelli 2004, p. 361.) She then continues stating, referring to Wilske and the criticism of Pulkowski, that "it may still be premature to affirm the existence of a customary rule, or even of a "general principle of law", compelling the courts to divest themselves from jurisdiction over abducted defendants [original footnote omitted, ChP]". (*Ibid*.) However, one can argue that this does not exclude the fact that Borelli may also be of the opinion that customary international law indicates that courts will refuse jurisdiction in the case of an abduction followed by a protest and request for the return of the suspect as Borelli adheres to the following definition of the *male captus bene detentus* maxim: "According to this doctrine [of *male captus bene detentus*, ChP], *in the absence of protest from another State*, once an individual is brought within the jurisdiction, even if he was apprehended by irregular means (including forcible abduction), he may be tried in the apprehending State [emphasis in original and original footnote omitted, ChP]." (*Ibid*., p. 353.) Hence, this may mean that Borelli is of the opinion that one can indeed not assert that customary international law demands that in every abduction case, a judge must opt for *male detentus*, but that this may be different when the injured State has protested the abduction (and has demanded the return of the suspect).

[49] See also the end of Section 1 of Chapter III.

the case – a point which can again be applauded[50] – on the condition that the now prosecuting State's own authorities were involved in the *male captus*.[51]

[50] After all, one can argue that also in cases of luring and disguised extradition, the authorities have resorted to illegal means to obtain custody over the suspect and that courts in such cases should consider whether this is not already enough to divest jurisdiction. It is submitted that the low *male detentus* tests produced by cases such as *Hartley*, *Levinge* and *Bennett* (see also the following footnote) are much more appropriate if the court wants to protect values like State sovereignty, human rights, due process of law/the rule of law, including the integrity of the judicial and executive proceedings. Only a low *male detentus* standard can effectively deter the prosecuting authorities from using dubious methods in bringing a suspect to trial. (Recall the three functions of the use of supervisory powers, see ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 76: "[T]o provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process [original footnote omitted, ChP].") See again (see also n. 46) the International Law Association's recommendation that "[c]ourts should refuse to permit prosecutions of persons brought before them by government-conducted or government-inspired abductions. [Note that the International Law Association views a kidnapping by deception (luring) as a form of abduction, see International Law Association 1994, p. 162, ChP.] In appropriate cases they should decline to exercise jurisdiction and should order the return of the abductee to the state from which he was abducted, without prejudice to future lawful extradition proceedings. A court should adopt the same approach where the accused has been brought before it by deportation intended to circumvent the obligations imposed by extradition." (*Ibid*., p. 165.) See also Resolution No. 9 relevant to the topic 'The Protection of Human Rights in International Cooperation in Criminal Matters' (unanimously approved at the closing session of the XV Congress of the International Association of Penal Law in Rio de Janeiro, 4-10 September 1994): "Abducting a person from a foreign country or enticing a person under false pretences to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution. (…) Similarly, procedures such as deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures should be avoided." (Schomburg 1995, p. 105.) See finally also the general statement of Michell 1996, p. 500: "[I]t is my argument that domestic courts possess a discretion to stay proceedings against a fugitive brought before it in violation of the law of a foreign state; or in circumvention of regular extradition proceedings; or in order to prevent unlawfulness on the part of the domestic executive. In exercising its discretion to order a stay the court must weigh and evaluate the circumstances through which the fugitive came before it. The finding that there was no violation of customary international law (e.g., because the injured state consented to the abduction) should not prevent a domestic court from refusing to have its processes tainted by the executive's illegal conduct. The rule of law rationales opposing the *male captus bene detentus* principle – that it brings the administration of justice into disrepute, encourages lawlessness, violates state sovereignty, disregards international human rights law, and undermines the international extradition network – are overwhelming."

[51] See, for example, *Hartley* (where the New Zealand police was involved in a "short cut" 'extradition' from Australia), *Levinge* (where the Court formulated the following, rather general, *male captus male detentus* test: "Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. Such an abuse may arise by reason of delay on the part of prosecuting authorities. But delay is only one variety of unfair or wrongful conduct on the part of those authorities. Other such conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another."), *Bennett* (where (as summarised by the Court in *Westfallen*) it had to be sorted out "whether it appears that the police or the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign States or abused their powers in a way that should lead this court to stay the proceedings against the applicants [original

That also means that courts will generally continue with the case if the prosecuting State's own authorities were *not* involved in the *male captus*.[52] An exception in this respect is the 1982 Swiss case of X (where no Swiss authorities were involved in the luring operation and the judge nevertheless halted the case), although it must also be emphasised that this Court did not refuse jurisdiction to try the case (*male detentus*) but refused to extradite the person to the State involved in the luring operation (*male deditus*).

Notwithstanding the fact that quite a few of the more recent cases thus show that *male captus* techniques not involving abduction can still lead to a refusal to continue the case, on the condition that the now prosecuting State's own authorities were involved in the *male captus*, there are also quite a few recent cases in which such

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footnote omitted, ChP].") and *Mullen* (where the Court stated that "the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law."). These cases show that there are hence quite some *male captus male detentus* cases which do not involve, for example, a protest from a third State. In that respect, the following statement from the Third Restatement of the Foreign Relations Law of the United States from 1987 can clearly be seen as outdated, see American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 432 ('Measures in Aid of Enforcement of Criminal Law'), Reporters Notes, No. 2 ('*Rule of* "male captus, bene detentus."'): "Nearly all states have followed the rule that, absent protest from other states, they will try persons brought before their courts through irregular means, even through an abduction from another state in violation of international law." That these cases show that judges may also refuse to exercise jurisdiction in arguably less serious cases than, for example, a genuine abduction, does not mean, however, that the *male captus* does not have to be rather serious, see, for example, House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 163: "I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity." Hence, the *male detentus* outcome will indeed normally be reserved for the more exceptional cases, see ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 10, n. 14: "[I]n all cases, it is clear that the remedy of release of the accused and dismissal of the indictment against him are remedies of last resort, to be utilised only upon the satisfaction of strict criteria and in extreme circumstances". (The Prosecution refers here to Lamb 2000, pp. 228-244.) However, it must also be remarked that the fact that *male detentus* constitutes an *ultimum remedium* does not necessarily mean that it will not be granted very often. Much will depend here on the conduct of the prosecuting authorities. See again House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 163: "No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety."

[52] See again the above-mentioned (see the previous footnote) cases of *Hartley*, *Levinge*, *Bennett* and *Mullen*. See also the *male captus bene deditus* case *Al-Moayad*. However, one can imagine that there might also be judges who will refuse jurisdiction if they deem the *male captus* so serious that they feel that jurisdiction must be refused, even if the authorities from the now prosecuting State were not involved in the *male captus* (for example, when the suspect is seriously mistreated in the process of his arrest and detention).

techniques had been used and where it was established that the prosecuting State's own authorities had been involved in the *male captus* but where the court nevertheless did *not* refuse jurisdiction.[53] Those cases show that a luring operation or a disguised extradition as such[54] are not seen as such a serious *male captus* as to lead to the ending of the case.[55] That might even be the case when the injured State (this can only be the State of residence in the case of a luring operation as the other *male captus* techniques (such as a disguised extradition) do not lead to a violation of State sovereignty) protests the *male captus* and requests the return of the suspect.[56]

Related to this issue is the fact that the element of 'seriousness of the alleged crimes with which a suspect is charged' sometimes seems to play a role in the judge's balancing exercise;[57] perhaps a *male captus* has indeed occurred, but given

[53] See, for example, *Yunis* (see also the following footnote) and *Latif* (where a luring operation executed by the prosecuting State's own authorities did not lead to the ending of the case). Two other cases could also be mentioned here in that respect – with some marginal comments: in *Stocké*, the Court held that the prosecuting State's authorities were not involved in the luring operation (or, if they were, were not acting on the State's authority), but that, even if they were, the *male captus* was not serious enough to divest jurisdiction. In *Schmidt*, the fact that the State's own authorities were involved in a luring case did not lead to the ending of the case either, but this was not a *male captus bene detentus* but a *male captus bene deditus* decision.

[54] Nevertheless, one can assume that if the suspect is seriously mistreated during a luring operation/a disguised extradition, the court may nevertheless refuse jurisdiction, see the reasoning in the *Yunis* luring case (in the following footnote). See also the 1985 *Stocké* luring case where the German Federal Constitutional Court stated that jurisdiction could be refused on the basis of national law if a certain *male captus* situation could be seen as an "extremely exceptional case". Although it is not clear what the exact meaning is of this concept (although the more serious *male captus* situation of an abduction (as such) will not fall under the term, see the abduction case which was decided by the Constitutional Court one year later (see also n. 21)), it may be that the Court was thinking of *Toscanino*-like circumstances, see (again) Wilske 2000, p. 334, n. 413 (commenting on this concept): "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also Grams 1994, pp. 70-71.

[55] See, for example, US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920: "In cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction." This would, however, be different if the luring would meet the serious mistreatment threshold of *Toscanino*, see *ibid.*: "In this action, there is no dispute that United States law enforcement officers were fully involved in the planning and execution of defendant's arrest. However, defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction. The record in this proceeding has been reviewed with care and the Court fails to find the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*."

[56] This could, perhaps, be derived from the German *male captus bene deditus* decision in *Al-Moayad*. Although in that case, no German officials were involved in the luring operation, which was followed by a protest from the suspect's State of residence (Yemen), the Court stated in a more theoretical exercise "that it is even doubtful under which preconditions the luring of a prosecuted person out of his or her state of residence by means of trickery – unlike the use of force – can be regarded as an act that is contrary to international law at all". (See n. 584 of Chapter V and accompanying text.) That may mean that the German Federal Constitutional Court would not refuse to exercise jurisdiction in the case of a luring operation executed by German officials, even if the injured State protested the operation.

[57] See also Lamb 2000, pp. 237-238 (*cf.* also Henquet 2003, p. 123, referring to Lamb): "State practice suggests that where the crimes alleged to have been committed by the accused are of the utmost gravity,

the fact that the suspect's alleged crimes are more serious and the continuation of the proceedings is hence of more importance, such a *male captus* will not lead to a *male detentus/deditus* outcome.[58]

This can most clearly be discerned from cases such as *Schmidt*[59] and *Latif*.[60] In *Mullen*, such a balancing exercise was also used, but in that case, the English judges felt that it was more important to legally *disapprove* of the *male captus* (a disguised extradition in which the British authorities were involved) by refusing jurisdiction, even though Mullen was charged with (and in fact already convicted for) serious crimes, namely IRA terrorism.

Admittedly, these are all English cases, but the idea that the seriousness of the alleged crimes should play a role in deciding whether or not jurisdiction/extradition has to be refused appears to have a broader basis in the more recent cases;[61] such

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the balance will (...) tend to favour an otherwise-competent court's upholding its jurisdiction, notwithstanding any defects which may be observed in the manner in which the accused was apprehended [original footnote omitted, ChP]." Note, however, that the words "any defects" are very broad and may lead to an *Eichmann* exception (where the trial is completely decoupled from the pre-trial phase), which this study does not support. Furthermore, it must be noted that Lamb refers to the *Eichmann* case to back her assertion, which, as was shown in Chapter V, does not seem to be correct. *Cf*. also Nsereko 2008, pp. 66-67: "In balancing these interests, the courts take into account two major factors; the gravity of the offence or offences charged, and the degree of seriousness of the alleged violations. The graver the offence charged, the greater the need to bring the perpetrator to justice and consequently the courts are less ready to apply the doctrine by permanently staying the proceedings [original footnote omitted, ChP]." Nsereko refers in this context to, among other things, three African cases which were not already mentioned in this study, namely the Namibian case *R v. Heienreich* (see *ibid*., p. 67), the Zimbabwean case *In Re Mlambo* (see *ibid*., p. 68) and the Botswanan case *Sejammitlwa & Another* (see *ibid*., p. 69). Although there was no need to address these cases in Chapter V of this book – from Nsereko's article, it can be deduced that these cases did not involve international *male captus* cases, but 'merely' purely domestic cases where there was a delay in bringing the suspect to justice – such cases nevertheless show that judges take the seriousness of the alleged crimes into account when determining the consequences of alleged irregularities in the pre-trial phase of their case, an element which may also be taken into account by these judges when addressing international *male captus* cases.

[58] Hence (and recalling the three traditional rationales of the *male captus bene detentus* rule presented by Michell (see n. 11)), even if judges are of the opinion that they must use a broad concept of fair trial and even if they are of the opinion that they cannot simply refer international problems to their Executive (but must take their responsibility as agents of the international legal order), they may nevertheless be of the opinion that the second rationale (the importance of trying this person) is so great that jurisdiction should not be refused.

[59] Where the English judges – in a theoretical exercise (because the judges were of the opinion that the *Bennett*/abuse of process exercise was not applicable to extradition procedures) – found that Schmidt, given the seriousness of his alleged crimes (serious drug offences), would have to be extradited (*bene deditus*), even if he had been lured to England by an English police officer (*male captus*).

[60] Where the English judges found that the suspect (Shazad), given the seriousness of his alleged crimes (serious drug offences) had to be tried (*bene detentus*), even if he had been lured to England by a British customs officer (*male captus*).

[61] Older cases do not appear to explicitly defend this idea but sometimes, persons commenting on the cases have argued that the seriousness of the alleged crimes may have played a role. See, for example, *Ker* (about which an anonymous author wrote: "The Court warned in *Ker* that it did "not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner … [the due process clause]; but for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all

ideas may also be identified in the Australian *Levinge* case,[62] the French *Barbie* case,[63] the German cases from 1986[64] and of Al-Moayad[65] and the Namibian case

…" 119 U.S. at 440. *This warning* hardly suggests that the Court considered due process to be limited to the guarantee of a fair trial; it *does suggest that the Court doubted the wisdom of allowing one who has committed a serious offense to avoid trial altogether because his arrest was constitutionally defective* [emphasis added, ChP].") and *Argoud* (about which rapporteur Comte wrote: "Rarely – perhaps never – has a problem more difficult, more complex, more disturbing, been put before the conscience of the judiciary. Account must be taken of the need for repression which the exceptional gravity of the crimes makes in the highest degree imperative; the maintenance of the principles sanctifying the rights of the human person and the liberty of the individual, of which the courts are the guardians and the guarantors, must be safeguarded; the sovereignty of States must be recognized and the nature and the limits of the sanctions which it postulates must be made explicit. Above all, it is necessary (…) *to preserve the independence and the dignity of French justice* [emphasis in original, ChP]."). The (older) *Eichmann* case has also sometimes been referred to as a case in which the seriousness of the alleged crimes with which the suspect is charged constituted a reason why the judges opted for *male captus bene detentus*. However, this is arguably incorrect (see n. 626 and accompanying text of Chapter V): the judges in *Eichmann* did not take the element 'seriousness of the alleged crimes with which the suspect is charged' into account to defend their usage of the *male captus bene detentus* principle because they did not have to; they were namely of the opinion that this maxim constituted an established rule of law (hence applicable to *anyone*).

[62] See New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 151: "[I]t is necessary to balance the public interest in preventing the unlawful conduct against the public interest in having the charge or complaint determined. This is not to say that the end can justify the means and that the more serious the charge the greater is the scope for the prosecution to engage in unlawful conduct. But conduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter."

[63] See Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), p. 130: "The *Chambre d'accusation* [of the Court of Appeal] held that it was competent to examine the submissions made in the application, according to which the detention of Barbie was a nullity since it was the result of a 'disguised extradition'. The Court of Appeal held that "In the absence of any extradition request, the execution of an arrest warrant on national territory, against a person who has not [this negation must be deleted, ChP] previously taken refuge abroad, is not subject to his voluntary return to France or to the institution of extradition proceedings. Furthermore, by reason of their nature, the crimes against humanity with which Klaus Barbie, who claims German nationality, is charged in France where those crimes were committed, do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign." In giving this ruling … the Court of Appeal gave a proper legal basis to its decision, without inadequacy or contradiction." This reasoning (focusing on the importance of prosecution and less on the way the suspect is brought to trial), plus the fact that the Supreme Court emphasises the fairness of the proceedings in the courtroom seem to imply that problems in the pre-trial phase (for example, a disguised extradition) are not really to be looked at in these kinds of cases. Nevertheless, it must be admitted that the Supreme Court's reasoning can also be read differently, namely that there was nothing wrong with Barbie's transfer and that it can in fact be seen as a sort of extradition (or in any case as a transfer not prohibited by the French extradition law of 1927). See ns. 500-501 and accompanying text of Chapter V.

[64] See BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 3.6 1986 – 2 BvR 837/85. *NJW* 1986, Heft 48, p. 3022: "Der (…) strafrechtliche Unrechtsgehalt der „Entführung" wiegt weniger schwer gegenüber der Schuld des Bf. dessen hohe kriminelle Energie auch seine erheblichen Vorstrafen belegen." It is to be noted that this case is more far-going than the other recent cases mentioned here which took the seriousness of the suspect's alleged crimes into account because in the German case, the suspect was abducted by the German police from the Netherlands. It is submitted that even though the seriousness of the alleged crimes should, where possible (for example, in an abuse of process-like exercise), play a role

Mushwena.[66] Oehmichen, for example, concludes after her overview of national case law that "[t]eilweise wurde nach der Schwere des Delikts sowie nach der Schwere der Menschenrechtsverletzung differenziert".[67]

Concluding this section, one can easily see that a lot depends on the exact circumstances, on questions such as: what kind of *male captus* was involved,[68] was

in deciding whether or not the *male captus* is so serious that jurisdiction must be refused, judges should also understand that this discretion is relative; certain *male captus* techniques, such as an abduction executed by one's own agents, should be deemed to be so serious that one should refuse jurisdiction, even if that person was charged with serious crimes.

[65] See German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 b) bb) (3)), 43 *International Legal Materials* (2004), p. 785: "[R]ecent state practice also takes the seriousness of the crime with which the person is charged into account, which means that in this respect, it takes proportionality into consideration. The protection of high-ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state's personal sovereignty that possibly goes along with the use of trickery (cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, *loc. cit.*, number 26). To the extent that the fight of most serious crimes such as the support of international drugs trade and of terrorism is concerned, luring someone out of a state's territorial sovereignty by means of trickery is not, at any rate to the extent that would be required to demonstrate state practice, regarded as an obstacle precluding criminal prosecution. Nothing different can apply as regards the existence of an obstacle precluding extradition." Although the German Federal Constitutional Court speaks of "recent state practice", para. 26 of the Appeals Chamber's decision in the *Nikolić* case essentially concerns the ICTY's own views on this problem. One can wonder whether the views of the ICTY can be seen as evidence of *State* practice but perhaps, the German Federal Constitutional Court is mainly interested in the cases on which the ICTY trusts to support its view. However, in that case, one can wonder whether the word "recent (state practice)" is well chosen as the two cases mentioned by the ICTY were not decided *that* recently (namely in 1962 (the *Eichmann* case) and 1983 (the *Barbie* case)). In addition to this, although there are indeed indications that the Supreme Court of France may have taken the seriousness of the crimes with which Barbie was charged in its decision whether or not jurisdiction had to be declined (see n. 63), it was shown, see n. 584 and accompanying text of Chapter VI, that the ICTY's reliance on the *Eichmann* case is incorrect as the Israeli courts did not continue with the exercise of jurisdiction *because of* Eichmann's alleged heinous crimes, but because the *male captus bene detentus* maxim in those days was an accepted rule of law, applicable to anyone, whether that 'anyone' was charged with fraud or with crimes against humanity. See also n. 61.

[66] In this case, reference was also (see the previous footnote) made to the ICTY Appeals Chamber's decision in *Nikolić*. Nevertheless, in this Namibian case, Acting Justice of Appeal Mtambanengwe was arguably primarily interested in the observations of the *Nikolić* judges *themselves* (and not so much in their (flawed) distillation of the principle 'seriousness of the charges' from State practice). That is, of course, unproblematic.

[67] Oehmichen 2007, p. 237.

[68] State practice shows that an abduction performed by the prosecuting State's own agents on another State's territory without the latter's consent, accompanied by serious mistreatment or a protest and request for the return of the suspect, will lead to the ending of the case. (It could be argued that in the case of an abduction followed by a protest and request for the return of the suspect, there is even an obligation pursuant to customary international law). Less serious cases (such as an abduction without serious mistreatment or without a protest and request for the return of the suspect) may also lead to the ending of the case, but here, State practice is more diverse. With respect to *male captus* situations which are deemed even less serious, such as luring and disguised extradition, courts more readily continue to exercise jurisdiction, although in such cases, jurisdiction may also be refused.

the *male captus* committed intentionally,[69] who committed the *male captus*,[70] did the *male captus* lead to a violation of another State's sovereignty (including a protest and request for the return of the suspect),[71] was the person seriously mistreated during the *male captus*[72] and was the victim of the *male captus* charged with serious crimes?[73]

In that respect, one must also be wary of general statements on the (customary international law) status of the *male captus bene detentus* rule for exactly what kind of *male captus* is involved must first be explored.[74]

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[69] See n. 20.

[70] See ns. 21-22 and 50-51 and accompanying text. See also n. 504 of the previous chapter: if a prosecuting forum's own authorities are involved in the *male captus*, it is more likely that a *male detentus* will follow.

[71] See n. 41. See also n. 506 of the previous chapter: State practice shows that an abduction performed by the prosecuting State's own agents on another State's territory without the latter's consent, followed by a protest and request for the return of the suspect, will lead to the ending of the case. (It could even be argued that in such a situation, there is even an obligation to refuse jurisdiction pursuant to customary international law.) See also n. 68. However, in other *male captus* situations, of which it is less clear whether they lead to a violation of international law in the first place, such as luring, a protest may not help, see *Al-Moayad*. Linked to this issue is the matter of the nationality of the suspect (see also n. 505 of the previous chapter). One can imagine that States may protest the violation of their sovereignty, irrespective of the nationality of the abducted person (see also Fawcett 1964, p. 199). Nevertheless, one can assume that a protest will be more likely if the suspect is a national of the injured State. See, for example, *Alvarez-Machain* (Mexican national, *male captus* in Mexico, protest from Mexico), *Jolis* (Belgian national, *male captus* in Belgium, protest from Belgium) and *Al-Moayad* (Yemeni national, *male captus* in Yemen, protest from Yemen). Conversely, if the suspect is a national from the forum State and not from the State where the *male captus* took place, there may not be a protest, see, for example, *Scott* (English national, *male captus* in the Netherlands) and *Ebrahim* (South African national, *male captus* in Swaziland).

[72] See n. 21 and accompanying text. See also n. 508 of the previous chapter: State practice shows that an abduction performed by the prosecuting State's own agents on another State's territory without the latter's consent, accompanied by serious mistreatment will lead to the ending of the case. See also n. 68. In fact, one can assume that courts will do so in any *male captus* situation, see, for example, the following reasoning from the *Yunis* luring case: "In this action, there is no dispute that United States law enforcement officers were fully involved in the planning and execution of defendant's arrest. However, defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction. The record in this proceeding has been reviewed with care and the Court fails to find the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920. See also n. 177 and accompanying text of Chapter V.)

[73] See ns. 57-67 and accompanying text. See also n. 509 of the previous chapter: judges may more easily continue the case because of the seriousness of the crimes with which the suspect is charged, see, for example, *Latif*.

[74] *Cf.* also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 75: "[T]he case law (…) is far from uniform. In some national jurisdictions, the maxim *male captus, bene detentus* is more closely followed than in others. Furthermore, the case law on this particular issue is still developing and such developments are more advanced in some jurisdictions. In addition, the concept of forced cross-border abductions is not always interpreted the same way. Case law often differs also in that the facts on which decisions have to be taken are not at all identical." See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of

After all, the maxim itself does not provide that differentiation.[75] In that respect, one can only agree with these old, but still very pertinent words:

> It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and disqualifications to them are more important than the so-called rules.[76]

A final point that should be made is that it can be concluded that many cases, even if most judges have abandoned the old(-fashioned) version of *male captus bene detentus* cases such as *Scott* and even if many *male captus male detentus* cases have been issued by them,[77] can still be qualified as *male captus bene detentus* decisions because jurisdiction will be exercised (*bene detentus*), notwithstanding the fact that a (not so serious) *male captus* has occurred. A more effective way to prevent a court from supporting the (at least after the *Alvarez-Machain* case) rather unpopular *male captus bene detentus* rule is to argue, not that the *male captus* was not serious enough to divest jurisdiction, but that no *male captus* occurred *at all*, even if there are indications that something irregular had happened.[78] After all, if the court is of the opinion that no *male captus* occurred in the first place, *it does not have to* choose the unpopular *male captus bene detentus* rule.[79]

Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 94: "[T]he case law (…) is rather diverse."

[75] See, for example, Strijards 2001, pp. 96-97, Goldstone and Simpson 2003, p. 19, Hamid 2004, pp. 70, 78 and 86 and Loan 2005, p. 284 (see n. 41).

[76] See Garner 2004, p. 1703, citing James Fitzjames Stephen in his 1883 *History of the Criminal Law of England* (Vol. 2, p. 94, n. 1).

[77] *Cf.* Borelli 2003, p. 808: "[I]n several relatively recent cases, domestic courts in a number of different states have started to challenge the *male captus bene detentus* rule. These courts have become willing to consider the way in which the defendant has been brought within their jurisdiction and to treat it as a circumstance that could preclude the exercise of criminal jurisdiction." See also Borelli 2004, p. 361: "The divergent approaches taken by courts of very similar judicial systems demonstrate that (...) it would be extremely inaccurate to maintain, as some authors did until relatively recently, that "the violation of [international] law does not affect the validity of the subsequent exercise of jurisdiction over [illegally seized] offenders", or that "with rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not and, indeed, cannot deprive it of its jurisdiction" [original footnotes omitted, ChP]." Borelli refers here to Brownlie 1998, p. 320 and Mann 1989, p. 414. It is perhaps saying that in the sixth edition of Brownlie's book (Brownlie 2003), one will no longer find this remark.

[78] See, for example, *Menten* and the Swiss case from 2007.

[79] *Cf.* also Cazala 2007, p. 382: "[O]n verra en étudiant les critères de qualification de l'arrestation que le juge a une très nette tendance à reconnaitre la régularité de celle-ci dans des circonstances qui sont pourtant parfois très contestables (…). (…) L'étude de la jurisprudence permet de constater que l'adage *male captus bene detentus* est finalement très peu utilisé, les juges préférant avoir une conception assez étroite de l'arrestation irrégulière." However, note also that Cazala is in particular focusing on the difference between the irregularities in the deprivation of liberty abroad and the formal arrest and detention in the prosecuting forum, see, for example, *ibid.*, p. 844 (with respect to the case *Ramirez Sánchez*) and *ibid.*, p. 844, n. 27 (with respect to the case *Argoud*). However, if a court states that the trial can continue under such circumstances, one can also argue that the court is not asserting that no

3 PRINCIPLES DISTILLED FROM THE CASES BETWEEN STATES AND INTERNATIONAL(ISED) CRIMINAL TRIBUNALS

Chapter VI has arguably shown that tribunals nowadays reject the old-fashioned version of the *male captus bene detentus* maxim in that they do not support the idea that the tribunals have jurisdiction, *regardless* of the circumstances in which the suspect was brought before them. This may be explained by the fact that these tribunals, after a perhaps somewhat dubious start,[80] have often stressed the importance of human rights, due process and fair proceedings[81] and have generally not limited these concepts to the proceedings in the courtroom (but see the Trial Chamber's decision of 8 July 2009 in *Karadžić* where the focus was arguably more on the fairness of the proceedings in court). In the words of Trial Chamber II in the *Nikolić* case:

> [T]his Tribunal has a responsibility to fully respect "internationally recognized standards regarding the rights of the accused *at all stages of its proceedings*." (…) [T]his Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. *Due process of law also includes questions such as* how the Parties have been conducting themselves in the context of a particular case and *how an Accused has been brought into the jurisdiction of the Tribunal* [emphasis added, ChP].[82]

This (welcome) position can be explained by the fact that when the tribunals discussed in this chapter came into being – as from the 1990s – concepts such as human rights and fair proceedings were already firmly established in the mindset of judges. The much older idea that a trial must continue, *irrespective* of what

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male captus occurred at all (unless one views the *captus* as the formal arrest in the prosecuting forum alone), but that it is in fact supporting the *male captus bene detentus* rule.

[80] See ICTY, Trial Chamber I, *Prosecutor v. Duško Tadić a/k/a "Dule"*, 'Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', Case No. IT-94-1-T, 10 August 1995, paras. 28 and 30.

[81] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 40: "The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom." See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 110: "The Trial Chamber observes first that it attaches great importance to respect for the human rights of the Accused and to proceedings that fully respect due process of law. It is also duty-bound to respect the rights laid down in Article 21 of the Statute. This Tribunal has a paramount duty and responsibility to respect fully the norms developed over the last decades in this field, especially within, but not limited to, the framework of the United Nations."

[82] *Ibid*., paras. 110-111.

happened in the course of bringing a suspect to justice had simply become out of step with these ideas.

One key element in this discussion is the right to liberty and security, which is so important for this study. Because of its customary international law/general international law status (see also Chapter III), the significance of this right has often been emphasised, even if it is not to be found in the regulatory documents of the tribunal in question.[83]

However, also in this context of the international(ised) criminal tribunals, it can be said that highlighting the importance of human rights, including the right to liberty and security, and looking at the way a person was brought into the jurisdiction of the court is not the same as issuing a *male captus male detentus* decision. In fact, although in the inter-State context, several *male captus* cases still resulted in a *male detentus* outcome,[84] there was only one case in the context of the international(ised) criminal tribunals where a *male captus* led to a *male detentus* outcome: the *Barayagwiza* case before the ICTR. However, even that outcome was altered (into a *bene detentus* outcome, 'softened' with a reduction of the sentence) after the Government of Rwanda, which would not allow such a 'big fish' as Barayagwiza to escape justice, had suspended its cooperation with the Tribunal and after the Appeals Chamber had reviewed its decision. In that respect, it can be maintained that the tribunals, even if they do not support the old-fashioned version of the maxim and even if they do not explicitly champion the (at least after the *Alvarez-Machain* case unpopular) *male captus bene detentus* maxim, are more easily affiliated with the latter maxim than with its counterpart *male captus male detentus*.[85] How can this be explained?

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[83] See ICTY, Appeals Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo*, 'Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić', Case No. IT-96-21-AR72.4, 22 November 1996, para. 16: "The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic." See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 79, n. 205: "We (…) see no reason to conclude that the protections afforded to suspects under Article 9 of the ICCPR do not also apply to suspects brought before the Tribunal." See further the *Dokmanović* case where the judges looked at Artt. 9, para. 1 of the ICCPR and 5, para. 1 of the ECHR (see n. 198 and accompanying text of Chapter VI). See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 110: "[T]his Tribunal has a responsibility to fully respect "internationally recognized standards regarding the rights of the accused at all stages of its proceedings." Such standards "are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights"; such standards are e.g. also contained in Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. This Chamber observes that these norms only provide for the absolute minimum standards applicable [emphasis in original and original footnote omitted, ChP]."

[84] Think of cases like *Ebrahim*, *Bennett*, *Toscanino*, the two Swiss cases from 1967 and 1982 (albeit that one, more correctly, led to a *male deditus* outcome), *Jolis*, *Samper* and *Mullen*.

[85] See also Van der Wilt 2004, pp. 274 ('abstract') and 276 and Knoops 2005, p. 35, who argues that the ICTY relies "on a nuanced version of the Latin maxim, *male captus, bene detentus*".

The tribunals argue, as do most national courts, that they have, in principle, jurisdiction (*bene detentus*), but that a serious *male captus* situation can lead, under the discretionary[86] abuse of process doctrine, to a *male detentus* outcome.[87] In doing so, the tribunals have adopted a broad version of the abuse of process doctrine in that, in determining whether a *male captus* is so serious that jurisdiction should be refused, it may not matter if the entity committing the *male captus* cannot be linked to the tribunal.[88] This stance clearly goes further than the national abuse of process

[86] Note, however, that although judges have a discretion in either refusing or not refusing jurisdiction in certain cases, this discretion is only relative in certain serious cases. There might be such serious cases that the tribunals will *have* to refuse jurisdiction. See, for example, ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30: "[C]ertain human rights violations are of such a serious nature that they *require* that the exercise of jurisdiction be declined [emphasis added, ChP]." See also ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 48: "[T]he International Tribunal *will* exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused [emphasis added, ChP]." The Chamber here referred to the *Barayagwiza* case, where, according to the ICTY Trial Chamber, the ICTR Appeals Chamber "stressed that the discretionary power to dismiss a charge is exercised "in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity"." (*Ibid*., para. 50.) Besides the fact that this sentence does not run properly, the Trial Chamber also presents the ICTR observation as if it would mean that judges *must* exercise their power to dismiss the charge under these circumstances ("is exercised"), whereas the ICTR decision speaks of a discretion. The exact sentence of the ICTR decision namely reads: "It is a process by which Judges *may* decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity [emphasis added, ChP]." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.) However, perhaps this difference only exists on paper; one can imagine that if the judges were to determine that to exercise jurisdiction under certain circumstances would prove detrimental to the court's integrity, that there is only one option left, namely to refuse jurisdiction. (In any case, it would be very difficult for judges to explain why they would nevertheless continue to exercise jurisdiction if they have previously determined that to continue to exercise jurisdiction would prove detrimental to the court's integrity.) *Cf.* in that respect also Jones and Doobay 2004, p. 95 (discussed in the context of the *Bennett* case in Chapter V).

[87] It may be interesting to note that this doctrine was also applied by the co-investigating judges (in their order of 31 July 2007) and the trial judges (in their decision of 15 June 2009) of the – on civil law focused – ECCC. This may constitute additional evidence for the idea that this concept, which has its roots in common law, can very well be used by non-common law courts as well, see ns. 878, 1211 and 1255 and accompanying text of Chapter VI.

[88] See, for example, the Trial Chamber's decision in *Nikolić* (with reference to the 1999 *Barayagwiza* decision): "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated.* This, the Chamber observes, is in keeping with the approach of the Appeals Chamber in the *Barayagwiza* case, according to which in cases of egregious violations of the rights of the Accused, it is "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights" [emphasis added and original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114.) See further ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-

doctrine where the involvement of the authorities of the prosecuting forum appears to be required.[89]

On a more normative note, it can be argued that the tribunals' broader version of the abuse of process doctrine is better and is in fact also appropriate for the inter-State context, where courts may also be confronted by irregularities in the context of their case which are not committed by entities which can be connected with the now prosecuting court.[90] The most important question a court should ask itself is whether the pre-trial irregularity, whichever entity committed it, is so serious that proceeding with the case would undermine the court's integrity/sense of justice. That would normally be where authorities which can be connected to the prosecuting forum are involved in the irregularity, but this may not necessarily be the case.[91] However,

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PT, 8 November 2001, para. 51, ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30, SCSL, Trial Chamber, *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 'Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts', Case No. SCSL-04-16-PT, 31 March 2004, para. 26, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206, ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21, ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33, ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85 and ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 47.

[89] See also Van der Wilt 2004, p. 278.

[90] See also Nsereko 2008, p. 69: "It needs to be emphasized again that where the violations are egregious, as was held by the Yugoslav Tribunal in the *Nikolic* case, it would not matter whether the state or prosecuting authorities were involved in such violations. In this connection, it is urged that national courts would do well to adopt this salutary stance [original footnote omitted, ChP]."

[91] See, for another opinion, Lamb 2000, p. 237: "It bears emphasising that none of the national authorities previously cited suggest that a court should decline to exercise jurisdiction over a defendant, in circumstances where the authorities of the forum State have acted with propriety, merely because the authorities of another State or individual may have acted irregularly. Consequently, where the ICTY or its agents were themselves neither involved nor complicit in any irregularities which may have occurred in the course of effecting an arrest, these irregularities would not suffice to vitiate the ICTY's jurisdiction, at least where that jurisdiction was otherwise well-founded. This consequence flows from the fact that the underlying purpose of the inherent jurisdiction of any judicial body to prevent an abuse of its own process is to impose a form of discipline and control over the law enforcement authorities of the forum State, an object which, in the case of the ICTY as with national courts, would not be promoted by preventing the trial of an accused on the basis of the prior unlawful conduct of a third State or unknown persons in effecting an arrest. [As the *Bennett* case has shown, however, this view, which can also be found in ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, para. 34, n. 9 and ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 6, n. 5, seems to be incorrect, see House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court*

even though the broad version of the abuse of process doctrine is interesting for both national and international courts, it is *especially* interesting for the tribunals because these do not have their own police force.[92] That means that, besides the fact that they may be confronted by irregularities committed by private individuals (a situation which may occur in the context of any court, even a court which has a police force at its disposal), the tribunals may be confronted by irregularities committed by, for example, national police forces and international troops executing arrests/detentions/transfers on their behalf. Normally, there is nothing wrong with arrests/detentions/transfers executed by those entities at the request of the tribunal. In such cases, the tribunal may profit from the actions of third parties. However, there may also be instances where the consequences of the tribunal's dependence on others are less fortunate, namely if something goes wrong in the pre-trial arrest and detention phase. It would be very easy but not a sign of real legal 'maturity' for the tribunal to only accept the positive side of the fact that it has no police force of its own.[93] Hence, a liberal concept of the abuse of process doctrine is to be preferred.[94]

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and another, 24 June 1993, [1993] 3 *All England Law Reports* 161: "The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'." *Cf.* also n. 302 of Chapter V, ChP.] Official collusion in the unlawful conduct in question thus appears to be a necessary – but not a sufficient – condition for an otherwise-competent court to decline to exercise its jurisdiction over an offender brought before it by means of an irregular rendition [original footnotes omitted, ChP]." See also ICTY, Appeals Chamber, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Brief of the United States of America on Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9-AR108*bis*, 15 November 2000, p. 9: "A variety of other cases address the lawfulness of cross-border abductions, with some upholding the principle that an abduction in violation of the law of one State does not divest another State to which he is brought of jurisdiction to prosecute, and others suggesting that a State's courts may exercise discretion to decline jurisdiction over an individual brought before them under such circumstances. However, when agents of the prosecuting State have not been shown to be complicit, there are no grounds for such discretion."

[92] This could perhaps be seen as one of the 'translations'/'transpositions' between the inter-State context and the tribunal context, *cf.* ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 76: "[T]he national case law must be "translated" in order to apply to the particular context in which this Tribunal operates."

[93] In this context, one could also argue that the moment national police forces/international troops are executing arrest/detentions/transfers for the tribunal, they function as the tribunal's enforcement arm, although this is in no way saying that these entities can thus be seen as organs of the tribunal. See for this point also ns. 340 and 375 of Chapter VI and accompanying text. See also Lamb 2000, p. 241. Nevertheless, one can imagine that the tribunal will more readily refuse jurisdiction in case national police forces/international troops working for the tribunal are involved in a serious *male captus* than in case an entity without any connection to the tribunal is involved in it, see also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114: "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons *acting for SFOR or the Prosecution* were involved in such very serious mistreatment [emphasis added, ChP]."

In addition, if the tribunal – and this also goes for a national court – did not remedy wrongs committed in its pre-trial phase, whichever entity committed those wrongs, the suspect would fall into a legal vacuum, a situation which must, of course, be prevented by the court which is ultimately prosecuting the case.[95]

However, even if the tribunals adopt a broader version of the abuse of process doctrine than that at the national level, in that the tribunals would also refuse jurisdiction in the case of a serious *male captus* situation occurring in the pre-trial phase of their cases, irrespective of who committed this *male captus* situation, the *male detentus* threshold suggested in what is arguably the most authoritative case on this matter, the ICTY Appeals Chamber's decision of *Nikolić*, still appears[96] to be high.

From this case, in which it was assumed that the suspect was brought into the jurisdiction of the ICTY by a forcible kidnapping executed by private individuals, one may deduce that jurisdiction would not be refused if, in the process of bringing a suspect of very serious crimes to justice, the sovereignty of a State is violated (arguably even if that State were to complain about the violation and request the return of the suspect), on the condition that, in the course of that process, the suspect's rights are not violated *to such an extent* that jurisdiction must be refused.

It is not hard to agree with the Appeals Chamber that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined". However, because it was assumed that Nikolić was the victim of an abduction, because the Appeals Chamber was apparently not very impressed by the value of State sovereignty and because the Appeals Chamber, in justifying its approach, refers to passages from cases which particularly focus on serious mistreatment when writing about their *male detentus* threshold, it could be argued that the Appeals Chamber's *male detentus* test appears to be mainly interested in the seriousness of the mistreatment inflicted on the suspect. This could mean that the Appeals Chamber would not be concerned about an abduction, as long as that abduction was not accompanied by serious mistreatment.[97]

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[94] *Cf.* also ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadzic*, 'Appeal of Decision of Holbrooke Agreement' (*Public*), Case No. IT-95-05/18-AR73.4, 27 July 2009, paras. 109-111 (see also n. 738 of Chapter VI).

[95] See also Sluiter 2001, pp. 155-156, commenting on the *Dokmanović* case: "A positive aspect of the examination of in particular human rights instruments appears to be its full application to that part of the criminal procedure that takes place outside the courtroom. In this respect, the Chamber, in my view, acknowledged the overall responsibility of the ICTY for these procedures. This responsibility is based on the duty incumbent upon the Trial Chamber pursuant to Article 20 to ensure that the accused receives a fair trial and on the vertical co-operation relationship between States, which enables the Tribunals to impose modalities of execution. It is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or even more jurisdictions [original footnote omitted, ChP]."

[96] See n. 98.

[97] As also explained in Chapter VI, although the Appeals Chamber's reference to the *Barayagwiza* case (where there was no mistreatment of the suspect) and the test mentioned in that case ("It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.") would not exclude, for example, a 'normal' abduction (without serious mistreatment), the

The problem with this *male detentus* test is that it is not entirely clear,[98] given the general observations of the Appeals Chamber in *Nikolić* and other indications from that decision,[99] whether this is the general *male detentus* test for the ICTY,

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Appeals Chamber's other references are particularly focused on the mistreatment aspect. First of all, the Appeals Chamber refers to the *Nikolić* Trial Chamber's words which specifically focus on the question whether Nikolić was seriously mistreated: "[W]here an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment." (ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 28.) See also *ibid*., para. 31: "In the present case, the trial Chamber examined the facts agreed to by the parties. It established that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. (…) [T]he Appeals Chamber concurs with the Trial Chamber that the circumstances of this case do not warrant, under the standard defined above, the setting aside of jurisdiction." The Appeals Chamber also referred to a passage from the *Toscanino* case dealing with the national concept of due process. These words could, in itself, encompass a 'normal' abduction but the *Toscanino* test has later been interpreted as a very restricted *male detentus* possibility. An abduction as such is not enough. What is required is in fact an abduction accompanied by serious mistreatment. For example, the judges in the *Yunis* case stated that their case did not involve "the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920.) That the Appeals Chamber prefers that interpretation of the *Toscanino* case can also be derived from its reference to the paragraphs in the *Dokmanović* case where one can read: "[T]here was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not mistreated in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 75.)

[98] As explained in Chapter VI, the Defence in *Nikolić* was apparently also not very sure about the exact content of the Appeals Chamber's *male detentus* test and therefore asked the Chamber for clarification, see ICTY, Appeals Chamber, *The Prosecutor v. Dragan Nikoli*[*ć*], 'Motion Requesting Clarification of the Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 20 June 2003, para. 5: "[T]he defence respectfully requests clarification of exactly what test is contemplated by 'the standard defined above' [see para. 31 of the Appeals Chamber's decision, ChP], and where that *above* (…) is to be found in the instant judgement. The facts agreed by the parties encompassed kidnapping and the forcible removal by a person against his will from a sovereign jurisdiction to another jurisdiction without the leave of either, such having involved the prosecution and conviction of some of the perpetrators in Serbia. If it be the case that the defence is correct in interpreting the 'standard' simply thus, that the agreed subjective facts were not sufficient to establish an egregious violation, then the defence respectfully requests what 'standard' is applicable so as to form the watershed between illegality that, on the one hand is egregious and, on the other, is not. That, with respect cannot be an abstraction, as the use of the phrase 'the standard defined' implies just that, a *defined* test [emphasis in original, ChP]." However, the Appeals Chamber, declaring the request "frivolous", considered that no clarification was required, see ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Motion Requesting Clarification', Case No. IT-94-2-AR73, 6 August 2003, A 69. See also Sloan 2006, pp. 333-334.

[99] After all, the Appeals Chamber also bases its 'serious violation' criterion on cases such as *Toscanino* and *Dokmanović*, cases in which the prosecuting forum itself was involved in the (alleged) irregularity. Moreover, the Appeals Chamber, in its central question and last sentence from its strategy, makes use of the combination "violations (…) committed by SFOR, *and by extension OTP* [emphasis added, ChP]"/"violations (…) attributable to SFOR *and by extension to the OTP* [emphasis added, ChP]."

applicable to *any male captus* situation, or whether this is the more specific *male detentus* test for the situation applicable in that specific case, in which the OTP was not involved in the abduction.

To raise a normative point again here, it is submitted that *if* the serious/egregious violation test is the *male detentus* test applicable to *any male captus* situation (even a *male captus* situation in which the OTP is involved), the serious/egregious violation test should *definitely* not be restricted to serious mistreatment circumstances.[100] After all, that would mean that the Tribunal would not refuse jurisdiction in the case of an abduction, executed by the OTP, as long as that abduction was not accompanied by serious mistreatment. That cannot seriously be the Tribunal's stance. As argued in the context of the *Nikolić* case, if the OTP were involved in an abduction, the ICTY should view this as such a serious *male captus* situation that it should resolutely refuse jurisdiction. In such a case, it should not matter whether or not the accused was seriously mistreated.[101] The mere fact that the OTP would orchestrate an abduction should make the judges refuse jurisdiction. It is not so much the harm inflicted on the suspect (which might be minimal) or the harm inflicted on the sovereignty of a State[102] which should lead to the refusal of jurisdiction here, it is above all the integrity and credibility of the Tribunal as an institution based on (international) (human rights) law which would be harmed if the trial were to continue.[103] In that sense, neither should it matter whether a State has,

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(ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, paras. 3 and 18.) That could mean that the conclusion of the Appeals Chamber, namely that the remedy of setting aside jurisdiction will almost never be the appropriate remedy, is also applicable to situations where the violations can be attributed to the OTP.

[100] Note, by the way, that a 'normal' arrest (not, for example, an abduction) accompanied by serious mistreatment may also constitute such a serious *male captus* that the Tribunal will refuse jurisdiction. See also Lamb who provides the following example of "an arrest which is so tainted by such illegality as to preclude the trial of the accused by the ICTY [original footnote omitted, ChP]" (Lamb 2000, p. 205): "For example, where the arrest of an indictee involved extreme, gratuitous violence or torture inflicted by Tribunal personnel and/or the international forces effecting the arrest, or where there has been official collusion in such abuses." (*Ibid*., p. 205, n. 127.)

[101] In that respect, it can be argued that the Tribunal should follow the lower *male detentus* standards which can, for example, be found in cases like *Bennett*. See also Sloan 2006, p. 337: "The Appeals Chamber made no effort to reconcile the approach in the *Toscanino* case [perhaps it is better to speak here of the interpretation of this case by subsequent courts, ChP] with the jurisprudence of other states which did *not* require an egregious element to the violation of human rights of an accused in order for the court to reject jurisdiction [emphasis in original and original footnote omitted, ChP]."

[102] That might indeed be of less importance to an international criminal tribunal like the ICTY whose relationship with national States is of a superior, vertical and not of an equal, horizontal nature. However, as already explained (see n. 636 of Chapter VI), the fact that the sovereignty aspect "by definition cannot play the same role" (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 100) in the context of the Tribunals does not mean that the Tribunal has a 'carte blanche' in violating the sovereignty of domestic States.

[103] *Cf*. also Sloan 2006, pp. 342-343: "If all the facts were brought to light and it became clear that SFOR had been involved in illegal behaviour, the nature of the violation of human rights and sovereignty would appear in a different light. Indeed, it is not beyond the realm of possibility that a thorough examination of the facts might even have shown foreknowledge on the part of the OTP of

for example, protested and requested the return of the suspect.[104] An abduction as such (with no further qualification) should lead to the ending of the case if the Tribunal wants to be taken seriously as a court of law. One could also mention practical considerations here; such an approach would arguably also be damaging to the entire mission of the Tribunal.[105] In addition, neither should one forget that the negative consequences of proceeding with a case involving an abduction might not be limited to the context of the Tribunals. For national States/courts, these international institutions may be seen as examples to follow. If employees of a Tribunal are involved in an abduction and in a way get away with it (because the judges do not decline jurisdiction), then national States/courts can refer to the Tribunal's approach to defend their own (potentially) dubious methods of bringing suspects to trial or to defend the 'approval' of such methods by proceeding with the case.[106] That in turn would harm the integrity of these States/courts, the human

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SFOR's intention to carry out illegal capture operations (...). Were such findings to have been made, the arrest process would have been found to be contaminated. The obligation of the Appeals Chamber, therefore, would have been to provide a remedy that reflected the ICTY's intolerance of such conduct by making it clear that such behaviour in the future would be unlikely to lead to the prosecution of the accused. This might very well have taken the form of ordering the release of Nikolić". See also Scharf 2000, pp. 969-970, commenting on authorities condemning *male captus* techniques as international human rights violations: "These precedents would suggest that an international criminal tribunal would have to dismiss a case where the defendant has been abducted in violation of international law."

[104] Although Section 2 of this chapter has shown that there seems to be a customary international law rule that courts will refuse jurisdiction in the case of an abduction followed by a protest and request for the return of the suspect, it was also remarked that judges will probably refuse jurisdiction in such cases to, among other things, protect the fragile legal international order based on the equality of sovereign States and to do what its Executive has failed to do, namely to return the suspect to the injured State. However, this rationale is less important in the 'vertical' context of, for example, the ICTY and ICTR, although it is not absent either (see the just-made observations that certain decisions of these Tribunals may also have their effect on the horizontal level). (*Cf.* also Van der Wilt 2004, pp. 294-295.) As a result, one can wonder whether this rule of customary international law (which, in principle, is also applicable to these Tribunals) can be applied *mutatis mutandis* into their context. Perhaps it could be argued that in such circumstances, there would be no *obligation* for the ICTY/ICTR to transfer the suspect back. Notwithstanding this, however, it has already been submitted that in the case of an abduction orchestrated by the Tribunals, the latter *should* return (conditionally, see n. 179 and accompanying text) the suspect back, whether or not there has been a protest from the injured State.

[105] See also ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 65: "Both SFOR and the Tribunal are involved in a peace mission and are expected to contribute in a positive way to the restoration of peace and security in the area. Any use of methods and practices that would, in themselves, violate fundamental principles of international law and justice would be contrary to the mission of this Tribunal." *Cf.* also Henquet 2003, p. 146: "The purpose of the Tribunal, indeed the legal basis for its establishment, is to contribute to the restoration of peace and security in the former Yugoslavia. Thus, it might be argued, if the Tribunal is to succeed in this task it must be perceived as credible and just. This requires it to uphold the highest standards of justice." See also Van Sliedregt 2001 B, pp. 82-83.

[106] In the words of Swart (when writing about the context of respect for international human rights): "[B]oth *ad hoc* Tribunals inevitably provide role models for national systems of criminal justice. Lack of respect for individual rights could, therefore, have negative consequences that transcend the limited framework of the Tribunals." (Swart 2001, p. 201.) See also Carcano 2005, p. 91: "[N]ational courts, when called to decide cases involving crimes of international concern or raising certain aspects of

rights of their suspects and – what is far more important for the horizontal context than for the context of the Tribunals – the very foundation of the inter-State level itself, namely respect for another State's sovereignty.[107] Furthermore, this could also have consequences for the ICC, the context of which will be discussed in the next part of this book.[108]

Luckily, however, there are also indications in the Appeals Chamber's decision of *Nikolić* that the ICTY would refuse jurisdiction if the OTP were involved in an abduction as such (without serious mistreatment).[109] This view can arguably also be

international criminal law, may be influenced by the content of international decisions." See further Smeulers 2007, p. 108 (writing about the concepts of human rights and due process of law): "The tribunal fulfills an important and exemplary function." See finally Starr 2008, pp. 713-714: "At least some of the ICTs' judges see the Tribunals as models for other courts' treatment of defendants and point out that respecting due process is crucial to that mission. Indeed, the ICTs' procedural rules and jurisprudence have repeatedly been cited by scholars discussing human rights in the context of domestic proceedings, by other international courts and commissions and advocates before those bodies, and by domestic courts interpreting their own international legal obligations [original footnotes omitted, ChP]." One could here think, for example, of the *Al-Moayad* and *Mushwena* cases discussed in Chapter V.

[107] See again (see also n. 519 and accompanying text of Chapter III) UNSC Res. 138 of 23 June 1960 (S/4349), in which the Council, dealing with the Israeli abduction of Eichmann in Argentina, stated "that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace". *Cf.* also Van der Wilt 2004, p. 295, who explains that if the Tribunal would knowingly make use of States carrying out violations of State sovereignty for the Tribunal, it would also jeopardise the peaceful coexistence.

[108] See also Sloan 2006, p. 333: "[T]o simply observe that the violation [of State sovereignty, ChP] may lead to 'consequences for the international responsibility of the State or organization involved', without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice. If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperating member states, the ramifications could be very damaging to international peace and security [original footnotes omitted, ChP]."

[109] It can, for example, be argued that the cases to which the Appeals Chamber refers would not exclude this. (However, as explained, the Appeals Chamber seems particularly interested in the serious mistreatment passages of some of these cases.) For example, the *Barayagwiza* case (where there was no mistreatment of the suspect) and the test mentioned in that case ("It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74)) would not exclude a 'normal' abduction (without serious mistreatment). See also *ibid.*: "Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued *if improper or illegal procedures are employed in pursuing an otherwise lawful process* [emphasis added, ChP]." Furthermore, one can also find evidence in the *Toscanino* case itself that a normal abduction would fall under its *male detentus* test, although the case has not been interpreted as such in subsequent cases. (See also Michell 1996, p. 403: "[T]hese later interpretations suggest incorrectly that *Toscanino* was primarily a "torture" case rather than a "forcible abduction" case.") In addition, the *Nikolić* and *Dokmanović* cases arguably also include passages which can be seen as supporting a *male detentus* test, which could include a normal abduction, without serious mistreatment. In the Trial Chamber's decision in *Nikolić*, the judges stated more generally: "Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must

found in the Trial Chamber's decision of *Nikolić*[110] and in cases which followed the Appeals Chamber's decision, although many of them, probably because of the

come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal. In addition, this Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.) In addition, neither should it be forgotten that the passage from the *Dokmanović* case, to which the Appeals Chamber refers, was (only) made in the context of luring. However, before the Trial Chamber in *Dokmanović* turned to this *male captus* situation, it had distinguished this situation from the *male captus* situation forcible abduction. This may mean that the Trial Chamber might have dismissed the case of Dokmanović if the OTP was not involved in a mere luring operation, but in an abduction operation. See also Scharf 1998, p. 371: "[T]he Trial Chamber focused on the distinction between "luring" (the means used to arrest Dokmanović) and "forcible abduction", reckoning that the former was acceptable while the latter might constitute grounds for dismissal in future cases [original footnote omitted, ChP]." Next to these references, one could also point to the fact that in paras. 27 and 33 of its decision, the ICTY Appeals Chamber – in contrast to its central question and strategy – suddenly leaves out the part "and by extension (to) the OTP", see also n. 646 and accompanying text of Chapter VI.

[110] Where the judges, even though they focused on the mistreatment example of the abuse of process doctrine in their explanation that this doctrine can also be applied to third parties (in that serious mistreatment can also lead to the ending of the case, not only when entities which can (more or less) be connected to the Tribunal are involved in it, but also when entities with no connection to the Tribunal are involved in it), also stated more generally that "in order to prompt a Chamber to use this doctrine [the abuse of process doctrine, ChP], it needs to be clear that the rights of the Accused have been egregiously violated [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.) Furthermore, one can also point to the Trial Chamber's confirmation of the approach taken in the first *Barayagwiza* decision, where the suspect was seriously mistreated by neither the national authorities nor the Prosecution but where the judges nevertheless dismissed the case, see *ibid*.: "[T]his Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice"." (Note, see also the previous footnote, that in the *Barayagwiza* case, it was stated as well that "[u]nder the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued *if improper or illegal procedures are employed in pursuing an otherwise lawful process* [emphasis added, ChP]." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.)) But perhaps the clearest indication that the Trial Chamber in *Nikolić* would also refuse jurisdiction if staff of the Tribunal were involved in an abduction (whether or not that abduction was accompanied by serious mistreatment) can be found in the following words, see ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111: "[T]his Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case [where, it should be remembered, the suspect was the victim of a 'normal' abduction, without any serious mistreatment, ChP] that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal."

(partial) involvement of third parties in the *male captus*, focused in particular on the serious mistreatment example of the abuse of process doctrine.[111]

Although one can seriously doubt that a tribunal would only refuse jurisdiction in the context of actions from third parties if these actions amounted to serious mistreatment or torture (this point will crop up again in a moment), it is in any case to be welcomed that the tribunal cases contain reasonings which entail that the judges would refuse jurisdiction if the OTP were to be involved in an abduction as such. After all, such a *male captus* can easily be seen as a 'serious' or 'egregious' violation under the Tribunals' abuse of process doctrine.[112] It may be illustrative here to refer again[113] to the *male detentus* possibilities proposed by the OTP *itself* in the *Nikolić* case. An abduction orchestrated by the OTP could easily fall under the first possibility:

> a) [u]nambiguous, advertent[[114]] violations of international law which can be attributed[[115]] to the Office of the Prosecutor; and/or b) a residual category of cases where the violations in question are of such egregiousness or outrageousness that, irrespective of any lack of involvement on the part of the Prosecution, the Trial Chamber could not, in good conscience, continue to exercise its jurisdiction over the Accused [original footnote omitted, ChP].[116]

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[111] See, for example, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206: "While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment." However, those cases are exceptional and, in most circumstances, the "remedy of setting aside jurisdiction, will . . . be disproportionate." The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above [original footnotes omitted, ChP]." Note that in this case, the Appeals Chamber arguably looked at violations on the part of both the national authorities and the Prosecution.

[112] See, for example, Henquet 2003, p. 123. See also the suggestion of this study, made in the *Nikolić* case, that the Tribunal should have stated more clearly that its *male detentus* test also contains the situation where employees of the Tribunal itself intentionally committed serious (procedural) irregularities in the process of bringing a suspect to trial, such as an abduction. See n. 633 and accompanying text of Chapter VI.

[113] See n. 478 and accompanying text of Chapter VI.

[114] A synonym of this word is 'mindful', a word which clarifies that there must have been a real *intent* from the Prosecution to violate international law. See also the word "conscious" in a comparable test from the Prosecution, see n. 116.

[115] The Prosecution was of the opinion that "[t]he mere subsequent acceptance by the Prosecution of custody of the Accused is not sufficient in and of itself to satisfy the required level of "collusion" and/or "official involvement." According to the Prosecution, at least some form of adoption and approval by the Prosecution of such violations is required [original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 27.)

[116] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 28. It may be interesting to note that the Prosecution would also find the first situation to constitute egregious conduct, see the clarification after the first possibility in the original words of the Prosecution: "(i.e. the

Although it might very well be argued that an abduction as such, orchestrated by the Prosecution, would almost certainly fall under this first notion of "[u]nambiguous, advertent violations of international law", things are less clear with respect to that other important *male captus* situation, the method of luring. As already explained in Chapter III, even though a luring operation may arguably lead to a violation of the sovereignty of the suspect's State of residence – for example, if agents of the luring State enter the territory of the State of residence to conduct police work – and of the suspect's human rights, it was also conceded that luring is in certain aspects less reprehensible than abduction and that that fact may lead to less serious consequences.

The ICTY Trial Chamber in *Dokmanović* went even further: it held that the luring of Dokmanović, in the course of which staff from the Prosecution entered the territory of the FRY, "is consistent with principles of international law and the sovereignty of the FRY".[117] This means that, according to this case, luring as such would not lead to a *male detentus* outcome. However, that may be different if that luring falls under the second notion mentioned above ("a residual category of cases where the violations in question are of such egregiousness or outrageousness that, irrespective of any lack of involvement on the part of the Prosecution, the Trial Chamber could not, in good conscience, continue to exercise its jurisdiction over the Accused"), *cf.* the cases of *Stocké* and *Yunis*, see footnotes 54 and 55.

Prosecution's *own* conduct would have to be in some way egregious [emphasis in original, ChP])" (ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 17). See also ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, para. 31: "a) unambiguous, conscious violations of international legality which can be attributed to the Office of the Prosecutor (i.e. the Prosecution's *own* conduct would have to be in some way egregious); and/or b) a residual category of case[s] where the violations in question are of such egregiousness or outrageousness that, irrespective of any lack of involvement on the part of the Prosecution, the Trial Chamber could not, in good conscience, continue to exercise its jurisdiction over the accused. In such circumstances, his or her release may therefore be ordered so as to safeguard the integrity of the entire judicial process [emphasis in original, ChP]." The Prosecution formulated this test relying on Lamb 2000. See also Sloan 2003 A., p. 110, n. 183. The following *male detentus* test from the ECCC would arguably not exclude an abduction orchestrated by the Prosecution either: "The abuse of process doctrine (...), which would require a tribunal to decline to exercise its jurisdiction in a partic[u]lar case, has been narrowly construed and limited to cases where the illegal conduct in question is such as to make it repugnant to the rule of law to put the accused on trial [original footnote omitted, ChP]." (ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33.)

[117] ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 57.

That may also be the case for other *male captus* situations with which the judges have to cope:[118] if they are not seen as clear violations of international law on the part of the Prosecution, they may not lead to the ending of the case, unless in the course of this *male captus* situation such serious (other) violations/irregularities have occurred that the judges cannot, in good conscience, continue the case.[119]

However, it should also be noted that the general reasonings of, for example, the *Nikolić*[120] and *Barayagwiza*[121] cases as mentioned in footnotes 109-110, cases which were decided *after* the *Dokmanović* case, may entail that tribunal judges confronted by luring-like situations are of the opinion that the Prosecutor has not come to court

[118] Although Chapter VI has not seen *male captus* situations which can really be compared to the inter-State concept of disguised extradition, there have been some cases in which the State of residence may have played a rather dubious role in the transfer of the suspect, see, for example, the *Milošević* case.

[119] It is reminded that judges, if they look into irregularities from authorities which can be linked to the State of residence, should persuade themselves of the fact that *actual* violations have in fact occurred. It can be maintained that judges should indeed only refuse jurisdiction in the most extreme cases and not in cases where it is clear that uncooperative States, executing arrests for the Tribunal, have violated procedures on purpose, even if these violations are rather serious, in an effort to ensure that a person's trial would not continue because of these violations. In that respect, one must agree with the understandable and pertinent concerns of the Prosecution in *Todorović* that "it could defeat the purposes of justice if every illegality by a State authority, over which the Tribunal has no control, could vitiate a prosecution altogether. Indeed, any such doctrine might potentially encourage certain States, which have hitherto failed to fulfil their obligations of co-operation with the Tribunal, to hand accused persons over to the Tribunal but to ensure that there are serious irregularities in the process. The States concerned could thus claim that they are fulfilling their obligation to co-operate, while at the same time ensuring that the prosecution against the accused cannot proceed." (ICTY, Trial Chamber III, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić a/k/a Miro Brko, Stevan Todorović a/k/a Stiv a/k/a Stevo a/k/a Monstrum and Simo Zarić a/k/a Šolaja*, 'Prosecutor's Response to the "Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment" Filed by Stevan Todorović on 10 February 1999', Case No. IT-95-9-PT, 22 February 1999, para. 51.) See also ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to "Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72" filed 17 May 2001', Case No. IT-94-2-PT, 31 May 2001, paras. 34-35 and ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, 'Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties And the Trial Chamber…and the Consequences of Any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention", filed 29 October 2001', Case No. IT-94-2-PT, 12 November 2001, para. 6. (See ns. 344 and 476 of Chapter VI.)

[120] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111: "[T]his Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal."

[121] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74: "Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued *if improper or illegal procedures are employed in pursuing an otherwise lawful process* [emphasis added, ChP]."

with clean hands, has resorted to illegal procedures, and thus that jurisdiction must be refused.[122]

Interestingly (and returning, as promised, to the point of serious mistreatment), the words mentioned in the second *male detentus* possibility proposed by the Prosecution in *Nikolić* – "violations (…) of such egregiousness or outrageousness" – are not necessarily restricted to serious mistreatment.

The abuse of process test of the tribunals can be found in the *Barayagwiza* case and entails that a judge, confronted by certain serious/egregious violations/improprieties/misconduct, may stop the proceedings of the case if he believes that to continue the case in these circumstances would be detrimental to the court's integrity/sense of justice, irrespective of the entity responsible.[123] Thus, the test 'only' requires such serious violations/irregularities that the judge cannot proceed with the case, not necessarily serious mistreatment/torture-like circumstances. One can see in the case law of the international(ised) criminal tribunals that the serious mistreatment element is very often used as *the* example to illustrate the concept of serious violations, especially, but not necessarily,[124] in the context of actions of third parties. That is unproblematic, as long as one does not forget that the test itself is not a 'serious mistreatment/torture test'. Serious mistreatment/torture is only an *example* of serious impropriety/misconduct/violations, but these concepts constitute the actual test. Nevertheless, it seems that some, perhaps inspired by the Trial Chamber's words in

[122] *Cf.* again (see also n. 112) the suggestion of this study, made in the *Nikolić* case, that the Tribunal should refuse jurisdiction if employees of the Tribunal itself intentionally committed serious (procedural) irregularities in the process of bringing a suspect to trial, *such as* an abduction. (See n. 633 and accompanying text of Chapter VI.) See also n. 50 of the present chapter. As concerns the above-mentioned element of intent: even though the words from the previous two footnotes do not contain this element (see also n. 20) as explicitly as the first *male detentus* possibility of the Prosecution (see ns. 114 and 116), they can nevertheless be viewed as containing that element implicitly, see the idea that the Prosecution must come to court with clean hands and that jurisdiction may be refused when improper or illegal procedures *are employed in pursuing* an otherwise lawful process.

[123] See, for example, ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, paras. 74: "It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." See also *ibid*., para. 77: "[T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct." In this context, it is also submitted that the judge should take a liberal stance. Hence, even if he is of the opinion, for example, that private individuals cannot violate human rights (see the *Nikolić* case), he should ask himself whether what happened to the suspect is nonetheless so serious that jurisdiction must be refused. In that respect, one can agree with the following words from the Appeals Chamber in *Karadžić*: "[T]he question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct *amounting to* serious and egregious violations of the Appellant's rights [emphasis added, ChP]." (ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 51.)

[124] See the *Kajelijeli* case (see n. 111).

Dokmanović,[125] a case issued prior to the Appeals Chamber's decisions in *Barayagwiza*, have forgotten this,[126] although it can be argued that the *Karadžić* case has correctly re-clarified the state of the law.[127]

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[125] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 75: "[T]here was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not *mistreated* in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience [emphasis added and original footnote omitted, ChP]." It is reminded that Toscanino was tortured for almost three weeks.

[126] See, for example, ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33: "Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment by the external authorities and has most usually been applied in relation to the process of arrest and transfer [original footnote omitted, ChP]." See also ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21: "It is obvious that in a case of crimes against humanity, the proceedings should be stayed only where the rights of the accused have been seriously affected, at least, for example, to the degree in *Toscanino*." (As also explained in the previous footnote, it is to be recalled that Toscanino was tortured for nearly three weeks.) The co-investigating judges of the ECCC also used more generally words when they stated that they "are (...) compelled to follow the solution adopted in *Nikolic* and *Lubanga* which requires, for the application of the abuse of [process] doctrine, the existence of grave violations of the rights of the Accused" (*ibid*.), but the words following that quotation again show that the co-investigating judges apparently require serious mistreatment/torture-like circumstances: "Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused." (*Ibid*.) See also Ryngaert 2008, p. 733: "In cases where the tribunal was not involved in the violations of the defendant's rights, the tribunals have only been willing to find abuse of process – and on that basis stay the proceedings – if the defendant was subjected to torture or serious mistreatment. It was also this rather high standard that was applied by the ECCC co-investigating judges in *Duch*." See also *ibid*., p. 735: "Careful analysis of the tribunals' case law (…) demonstrates that all tribunals that have heard abuse of process challenges relating to violations of the rights of the accused in which the tribunal itself played no role (either because it did not commit them, or because it did not act in concert with the responsible state) apply this same strict standard; only torture or serious mistreatment could give rise to a stay of the proceedings." See finally also *ibid*., p. 736: "Consequently, in spite of appearances, there is in reality no contradiction between the application of the abuse of process doctrine by the international (or internationalized) criminal tribunals; in the absence of concerted action by the tribunals and the entity responsible for the violations (typically the state in whose custody the accused was before being transferred to the tribunal), only torture or serious mistreatment by that entity will lead to a stay of proceedings on the basis of abuse of process. As argued above, this principle deserves support, as, under specific circumstances, the international community's desire to bring perpetrators of heinous crimes to justice may outweigh the accused perpetrator's 'less fundamental' due-process rights."

[127] See, for example, ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85: "As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or degrading treatment, there is no indication that the Accused suffered such serious mistreatment *or that there was any other* egregious *violation of his rights*, including his right to political activity. In any event, in the opinion of this Chamber, it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed [emphasis added and emphasis (of the word "egregious") in original, ChP]."

Leaving the matter of serious mistreatment for now and returning to that other *male detentus* possibility of the OTP, the violations of international law which can be attributed to the Prosecution: if the tribunals were indeed to refuse jurisdiction in the case of a 'normal' abduction performed by its own people – and it seems that they would – they would fall below the *male detentus* test at the inter-State level, which, after all, appears to require not only an abduction, but an abduction either 1) accompanied by serious violations/mistreatment or 2) followed by a protest and request for the return of the suspect. This lower threshold is to be applauded.[128]

However, as stated earlier, even if the tribunals adopt this lower threshold and even if the abuse of process doctrine accepted by the tribunals seems broader than that at the inter-State level (which is also generally defined but which seems nevertheless restricted to actions by entities which can be connected to the prosecuting forum), the tribunals are still more readily affiliated with the *male captus bene detentus* rule because no *male captus* situation has, ultimately, led to a *male detentus* result. This may be explained by the following two factors.[129]

See also ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadzic*, 'Appeal of Decision of Holbrooke Agreement' (*Public*), Case No. IT-95-05/18-AR73.4, 27 July 2009, para. 104: "The *Barayagwiza* Appeals Chamber never purported to exclude third-party conduct from scrutiny under the abuse of process doctrine or to limit such scrutiny only to extreme cases of severe physical mistreatment or torture." (One can, however, wonder why Karadžić made this point in his appeal as the Trial Chamber apparently shared his view, see the above-mentioned quotation in this footnote and in particular the words "*or that there was any other* egregious *violation of his rights*".) See finally also ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 47: "[T]he Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one, by considering whether the Appellant suffered a serious mistreatment *or if there was any other egregious violation of his rights* [emphasis added, ChP]." See finally *ibid*., para. 51: "[T]he question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights."

[128] See n. 46.

[129] The following two factors assume the existence of a *male captus*. However, like courts at the inter-State level, tribunals may also be of the opinion that no *male captus* occurred in the first place, even if one can doubt whether that is accurate. In that case, the judge does not have to turn to the *male captus bene/male detentus* discussion because the basic requirement for this discussion (the *male captus*) is lacking. See, for example, the *Dokmanović* case and the views of the judges in that case on the method of luring (see also ns. 197, 236, 267 and 327 and accompanying text of Chapter VI). See in that respect also Smeulers 2007, p. 109: "From the Dokmanović case, however, it can be concluded that the Trial Chamber does not easily qualify an arrest as illegal. Dokmanović had been lured into entering UNTAES territory in order to be arrested. Although the prosecutor was closely involved in the arrest, the Trial Chamber concluded that the arrest was not unlawful. This is a decision that can be heavily criticized, because it can be seen as a violation of Article 5 European Convention of Human Rights [original footnote omitted, ChP]." See also Sluiter 2001, p. 153. *Cf*. also Cazala 2007, p. 838: "[O]n verra en étudiant les critères de qualification de l'arrestation que le juge a une très nette tendance à reconnaître la régularité de celle-ci dans des circonstances qui sont pourtant parfois très contestables (…). (…) L'étude de la jurisprudence permet de constater que l'adage *male captus bene detentus* est finalement très peu utilisé, les juges préférant avoir une conception assez étroite de l'arrestation irrégulière." *Cf*. in that respect also Starr 2008, p. 722: "The traditional remedy for speedy trial violations, endorsed by the

First, as the tribunals do not have their own police force, the *male captus* will often be performed by third parties. This, of course, diminishes the seriousness of the *male captus*. If a judge is confronted by a *male captus*, he must determine, taking every single aspect of the case into account, whether that *male captus* is so serious that to continue the case would undermine his sense of justice/the integrity of the court/the concept of a fair trial broadly perceived. Now, as already explained in the context of the *Karadžić* case, it can be argued that the nature of the actor responsible for the *male captus* is, *of course*, an important element which should be taken into account here.[130] It can certainly be maintained that the integrity of a tribunal will more easily be affected by a certain violation if that violation could be attributed to the tribunal. The *Barayagwiza/Nikolić* cases 'only' support the idea that serious violations can lead to the ending of the case, irrespective of the entity responsible,[131] but not that actions by a third party may not be given less weight than

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Appeals Chamber in *Barayagwiza*, is release and dismissal of charges. But that remedy, as the *Barayagwiza* case ultimately illustrated, would be catastrophic for the ICTs. Thus, whenever defendants, *after* a long delay, have complained of speedy trial violations, the ICTs have construed that right narrowly and avoided granting remedies. It is possible that this narrow reading is simply correct and that the ICTs would have adopted it regardless of the remedial cost. But some contrary evidence is provided by the ICTs' greater willingness to enforce the speedy trial right when they consider its scope *before* a potential violation, in contemplation of some procedural development that would delay trial [emphasis in original and original footnote omitted, ChP]."

[130] *Cf.* also Sluiter 2003 B, pp. 946-947: "Crucial factors, in determining whether or not this remedy [this is the termination of the proceedings, ChP] should be provided for are the following: 1. The degree of attribution of the violation to the Tribunal, in particular the Prosecutor (…); 2. The nature of the violation of individual rights (violation of individual rights of an egregious nature (…) may constitute a legal impediment to exercise of jurisdiction by the Tribunal, regardless of whether or not the Tribunal, in particular the Prosecutor, had anything to do with that violation)."

[131] Arguably, the tribunal should apply a broad concept of abuse of process doctrine here, see also the discussion on this point in the context of the *Nikolić* case. *Cf.* also ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadzic*, 'Appeal of Decision of Holbrooke Agreement' (*Public*), Case No. IT-95-05/18-AR73.4, 27 July 2009, paras. 109-111: "Within national jurisdictions, it will almost always be a single state authority which creates the criminal law, investigates and arrests individuals for breaches of it, and establishes the courts in which to hear the criminal case. It is also the same state authority which is represented by the prosecution that proceeds with the case. In these circumstances, it will be exceedingly rare for an actor unrelated to the state to be involved in the law enforcement and adjudication. As such, it is perhaps rational for an abuse or process doctrine operating in this context to look primarily or solely to misconduct attributable to the state – reserving only an extraordinary or residual category for abusive misconduct attributable to other unrelated actors. The exact opposite is true of international tribunals. These are highly decentralized institutions. Only the actors which create the criminal law (the UNSC) and which hear and prosecute cases for breaches of its (the Tribunal/OTP) are exclusively related to the central authority (the UN). As the Tribunal itself frequently points out, "the International Tribunal has no enforcement arm of its own – it lacks a police force." As such, it is entirely dependent on a diverse range of actors to fill this critical role. A whole host of states, inter-state organizations and international agencies – as well as diplomats, special envoys, local authorities, and military personnel, – routinely fill the key roles of investigating crimes, sharing intelligence, and arresting and transferring suspects. This involvement may be formal or informal, and it may occur with or even without the Tribunal's knowledge. Where so many diverse actors may be involved in creating, enforcing and adjudicating international criminal law – sometimes even without one another's knowledge or consent – it is essential that the doctrine of abuse of process in this setting not be applied in a restrictive or technical manner. (…) A Court operating in these circumstances must have the

actions by parties which can be connected to the prosecuting forum if the judge has to determine whether a certain violation is *so* serious that it must lead to the ending of the case.

The second factor which may explain why the tribunals are still more readily affiliated with the *male captus bene detentus* rule is that the judges, even if they establish that a serious *male captus* has occurred, also look at the other side of the coin, namely the fact that the suspect is charged with serious crimes and that the international community demands that such a suspect should, if possible, be prosecuted. Hence, the judges basically have to determine, taking every aspect of their case into account, what is more serious: the *male captus* or that this person is prosecuted. Although the definition of the abuse of process doctrine from paragraph 74 of the first *Barayagwiza* decision[132] does not explicitly mention the possibility of taking this element into account, the fact that the doctrine is *discretionary* would indeed seem to provide room for judges, both at the national and at the international level, to take into account every single aspect of the case, including the importance of continuing the case where the suspect is charged with very serious crimes, in determining whether or not to resort to the extreme remedy of the refusal of jurisdiction. One could hereby refer to the definition of the doctrine as quoted in paragraph 77 of the same decision[133] or to the well-known definition from the *Bennett* case[134] (to which the *Barayagwiza* decision also alluded).[135] These last-mentioned definitions more clearly show that within the context of the – for this book – most interesting abuse of process situation, that which focuses not on the fairness of the trial itself but on the broad concept of a fair trial/the integrity of the proceedings (see also Subsection 4.3 of Chapter III), a judge may be of the opinion that a serious violation has occurred but that, taking into account the particulars of the case (which could include the seriousness of the alleged crimes and the importance of prosecution), one cannot say that to continue with the case, notwithstanding this violation, would contravene the court's sense of justice.

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discretionary authority to look at *all* the events that have led to the proceedings and decide, regardless of whom they are attributable, whether *on the whole* they breach the Accused's rights or contravene the Court's sense of justice [emphasis in original and original footnotes omitted, ChP]."

[132] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74: "It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."

[133] See *ibid*., para. 77: "[T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where *in the circumstances of a particular case*, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct [emphasis added, ChP]."

[134] See House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused *in the circumstances of a particular case* [emphasis added, ChP]."

[135] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 75.

Alongside these definitions stemming from the *Barayagwiza* case, one may also point to the fact that the judges in this case took into account more explicitly the seriousness of Barayagwiza's alleged crimes in determining whether or not the case had to be stopped (although many will argue that they did not attribute enough weight to this element):

> The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[136]

Thus, the judges seem to have relative freedom in invoking the doctrine, meaning that they will only refuse jurisdiction under the abuse of process doctrine if, taking all the different elements of the case into account, they deem that to proceed with the case would be detrimental to the court's sense of justice/integrity. The word "relative" has been chosen here because one can understand that there might be such serious circumstances – one could think here of an abduction orchestrated by the Prosecution during which the suspect is seriously mistreated – that the judges would have no option but to refuse jurisdiction if they still want to be taken seriously as custodians of the law, even in the case of a suspect charged with serious crimes.[137] In addition, it should also be pointed out that even though the first situation of the abuse of process doctrine (the one looking at the fairness of the trial itself and which is not the focus of this study, see again Subsection 4.3 of Chapter III) is part of a *discretionary* doctrine, one can argue that the discretion in this situation is also relative: if it is clear that the suspect can no longer receive a fair trial (in the strict sense of the word) (the minimum requirement of any trial), one can assume/hope that judges *will* refuse jurisdiction, whether or not that suspect is charged with serious crimes.[138]

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[136] *Ibid*., para. 106. See for the element 'seriousness of the charges' also Judge Shahabuddeen's 'Separate Opinion' to the decision of 3 November 1999, under '1. Post-transfer delay': "Matters to be taken into account in evaluating whether that consequence [namely lack of jurisdiction, ChP] follows from a breach of the requirement of promptitude include the seriousness of the offences with which the accused is charged. Here the offences were serious. But the requirement of promptitude was fundamental, and its breach was also grave, the delay extending to a little over three months. On balance, I respectfully agree with the Appeals Chamber that the administration of justice by the Tribunal would suffer from proceeding with the case notwithstanding the delay."

[137] In that respect, one cannot agree with the so-called *Eichmann* exception, which concept supports the idea that the trial of a suspect charged with very serious crimes should be decoupled from its pre-trial phase, see Higgins 1994, pp. 72-73 and Michell 1996, pp. 423-424. However, this concept is not followed by the tribunals (and rightly so) as very serious cases may, at least in theory, still lead to the ending of the case.

[138] *Cf.* also the discussion on this point in the context of the *Levinge* case, see the text following n. 159 and accompanying text of Chapter V.

The element of 'seriousness of the alleged crimes' can also be found in the ICTY Appeals Chamber's decision in *Nikolić*. Although its methodology in distilling this principle from the inter-State context was arguably not without its flaws, it must not be forgotten that the Appeals Chamber, "[d]rawing on these indications from national practice",[139] also added some observations of its own on this matter and that such observations are not without authority. It stated that there is a legitimate expectation that persons accused of 'Universally Condemned Offences' are quickly brought to justice[140] and that this expectation "needs to be weighed against the principle of State sovereignty and the fundamental rights of the accused".[141] This view has been affirmed by different chambers and tribunals,[142] as a result of which one can safely assert that the seriousness of the suspect's alleged crimes is definitely an element which the international(ised) criminal tribunals take into account in determining whether or not a certain *male captus* should lead to a *male detentus*.

Again adding a normative note to this principle from the context of the international(ised) criminal tribunals: one can argue that, to a certain extent (see *infra*), it may indeed be appropriate for courts, both at the national and at the international level, to take into account the seriousness of the suspect's alleged crimes when determining the consequences of a certain *male captus*. As long as there is no clear (inter)national law rule *obliging* judges to refuse jurisdiction in a certain *male captus* case[143] and judges consequently have discretion, for example, under the abuse of process doctrine, to decide whether or not the exercise of jurisdiction should be refused, it seems very reasonable for them to take *every* aspect of the case into account here. And one of those aspects may be that the suspect is charged with international crimes, crimes of which the international community demands that they be prosecuted. Hence, there is nothing strange about the fact that a judge, under the abuse of process doctrine and confronted by a certain *male captus*, is of the opinion that, taking every aspect of the case into account (including

[139] ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 24.
[140] See *ibid*., para. 25.
[141] *Ibid*., para. 26.
[142] See, for example, SCSL, Trial Chamber, *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 'Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts', Case No. SCSL-04-16-PT, 31 March 2004, para. 25, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206, ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21, ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, 'Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules' (Public), Case No. IT-05-88/2-PT, 14 December 2007, paras. 19 and 25, ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 31 and ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 49. Note that this point could also (but more indirectly) be found in earlier cases, see, for example, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 126.
[143] See n. 103.

the importance of prosecution), it would not contravene the court's sense of justice to continue with the case, notwithstanding the *male captus*. It is certainly reasonable that, because of the seriousness of the alleged crimes involved, a court should do everything within the limits of the law to prevent the termination of the proceedings. However, what is not justified – and what the Appeals Chamber in *Nikolić* should have disapproved of more clearly – is that the seriousness of the alleged crimes may be used as an excuse to commit irregularities in the process of bringing suspects of such crimes to justice;[144] it must be stressed that the view that one may take the seriousness of the crimes into account to a certain extent in deciding what the consequences of a certain *male captus* will be cannot in any way be seen as a green light for using *male captus* techniques in the context of international crimes.[145] On the contrary: as already submitted, if the tribunal discovers that its own employees have orchestrated an abduction, it should resolutely refuse jurisdiction, even if the suspect is charged with very serious crimes. That would arguably be the only avenue to avoid further damage to the integrity of the proceedings.[146] However, if less serious wrongs (by others?) have been committed in the pre-trial phase, it would

[144] See also Sloan 2006, p. 334: "The Appeal Chamber's focus on the serious nature of the crimes and the indignation of the international community, and its willingness to balance it against violations of human right or sovereignty (and, in the case of sovereignty, to find a good basis for not setting aside jurisdiction in the 'universally condemned' nature of the alleged offences) leaves the impression that the graver the alleged crime, the less troubled an international judicial body should be by the violation."

[145] See also Swart 2001, p. 201: "Persons suspected or accused of international crimes should be no less entitled to respect for their basic individual rights than any other suspects or accused." In that respect, this study cannot disagree more with views such as the one expressed by Mohit (2006, p. 144) who writes on the inter-State context: "It would be absurd to hold that terrorists and serious human rights violators should not be brought to trial by irregular means, for example, by abduction. The interests of society require that such offenders be brought to trial." (Mohit (*ibid.*) stresses that "[t]hese methods should (…) be utilized by states only once they have exhausted all possible routes to secure the fugitive's return by normal processes", but even then, prosecuting authorities should not debase themselves by resorting to illegal means of obtaining custody over a suspect.) *Cf.* also De Sanctis 2004, p. 548: "By reason of their strict subject matter jurisdiction and their logistic limits, international tribunals are designed to prosecute a limited number of individuals, thus restricting the cases in which it might be held appropriate to have recourse to transnational abduction." (De Sanctis is of the opinion that transnational abductions may be justified in the context of the tribunals, but not in the inter-State context, because this would encourage "transnational seizure of a potentially too broad category of persons." (*Ibid.*) In his explanation (*ibid.*): "This is because this category [namely the category of suspects of 'Universally Condemned Offences', ChP] could be construed by domestic courts as including those suspected of acts of terrorism or even mere membership in a terrorist organisation. The legal definition of 'terrorist act' by national legislations is far more open to political considerations and influences than the notions of 'crimes against humanity' or 'war crimes'. As a result it may often be the product of the political agenda of a government, rather than of a genuine commitment to the preservation of human security. In this context a justification of transnational abduction in violation of State sovereignty on the ground of the universal nature of the crime prosecuted, looses much of its soundness and should, therefore, be rejected.")

[146] See also Starr 2008, p. 759: "[I]n a case of egregious abuse of process, an ICT could determine that even after taking into account all the countervailing interests, the windfall remedy of release with prejudice is necessary to send the message to the prosecution that such conduct will not be tolerated."

only seem natural for judges to opt for less far-reaching remedies which do not jeopardise the trial.[147]

Although this position is arguably not particularly controversial – if judges have certain discretion in deciding what the consequences of a certain *male captus* will be, it seems natural that they should have the (relative) freedom to opt for those remedies which do not jeopardise the trial of a suspect charged with very serious crimes – one may wonder how one should then deal with the human right to *habeas corpus*, the right of a suspect to challenge the lawfulness of his detention and to be released in the case of an unlawful (arrest and) detention. A right which, given its customary international law/general international law status, is, in principle, also applicable to the context of the tribunals, even if their regulatory instruments do not contain such a provision.[148] A right also which has also – surprisingly – not been invoked that often in the context of the tribunals.[149]

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[147] See also Lamb 2000, pp. 241 and 243: "[W]ithdrawal of the indictment altogether and the release of the accused would be required only in extreme cases, where any continuation of the trial proceedings would in all the circumstances be fundamentally incompatible with the right to a fair trial and the integrity of the judicial process. (…) [I]n most cases, the extreme remedy of release of a person indicted for the commission of serious violations of international humanitarian law will not be seen to comport with justice. Nevertheless, the release of the accused must, *in extremis*, remain as the ultimate remedy on the grounds that it constitutes the strongest deterrent and sanction against the abuse of power by law enforcement personnel and serves as a remedy of last resort in those truly exceptional circumstances where the divestiture of its jurisdiction is thought by the Tribunal to be necessary to safeguard the integrity of the conduct of international criminal justice [original footnote omitted, ChP]." See also Starr 2008, p. 747: "The most obvious and drastic remedy – release and dismissal of charges with prejudice – will never be a tenable remedy for procedural violations in international criminal trials, except perhaps in truly extraordinary cases. The charges are simply too serious." See finally Sluiter 2003 B, p. 946 (writing on the termination of the proceedings): "It seems now accepted that this remedy is not excluded, but still should not be taken lightly taking account of the nature of the accusations we are dealing with here."

[148] Sluiter (2001, p. 152) notes that, because of the fact that the ICTY Statute and RPE "do not incorporate the right of persons not to be subjected to arbitrary arrest and detention", it is "of vital importance that the Tribunal applies these provisions [namely Artt. 9 of the ICCPR and 5 of the ECHR, ChP] *to their full extent*, including relevant case law pertaining to these provisions [emphasis added, ChP]." Hence, that should also include the *habeas corpus* provision of para. 4, including its remedy of release. *Cf.* in that respect also ICTY, Appeals Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo*, 'Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić', Case No. IT-96-21-AR72.4, 22 November 1996, para. 16: "The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic. The right also entails the right to an effective remedy for deprivation or violation of that right." See also *ibid*., para. 17 where it is clarified that this means that the Chamber must review the lawfulness of a person's deprivation of liberty. Although it is not clearly stated as such, this must arguably also include a release if the deprivation of liberty is deemed unlawful. However, that was not the case here: "The mistake which the Applicant makes, however, is to consider that the Trial Chamber, by denying the motion for provisional release, has violated the Applicant's right to liberty and that the Applicant is therefore entitled to an effective judicial remedy for that violation. The correct analysis is that the Trial Chamber *is the effective judicial remedy* for any alleged violation of the right to liberty. By applying to the Trial Chamber, the Applicant exercises his right to challenge the lawfulness of his detention and deprivation of liberty. The word "effective" does not mean that the Application has to *succeed*; this would be a nonsense. It is enough that the competent judicial authority reviews the position in accordance with the

This question is very interesting here as the remedy of release, in contrast to the remedy 'refusal of jurisdiction' under the abuse of process doctrine, is *not* discretionary: if a judge is of the opinion that a suspect's detention (read: deprivation of liberty) is unlawful, he *must*, strictly speaking, release that person. In addition, this remedy must be granted to *any* suspect whose detention is considered unlawful; it cannot be restricted to suspects who are only charged with minor crimes.[150] In other words, *any* suspect, whether charged with fraud or genocide,

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appropriate norms and human rights standards, which the Trial Chamber has done quite properly [emphasis in original, ChP]." See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 88: "Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR [original footnotes omitted, ChP]." See further also ICTY, Trial Chamber II, *Prosecutor v Radoslav Brđanin*, 'Decision on Petition for a Writ of Habeas Corpus On Behalf of Radoslav Brđanin', Case No. IT-99-36-PT, 8 December 1999, paras. 2-6, ICTR, Trial Chamber II, *The Prosecutor v. Joseph Kanyabashi*, 'Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings', Case No. ICTR-96-15-I, 23 May 2000, paras. 27-28, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, paras. 112-113, ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 38 and ICTR, Trial Chamber II, *The Prosecutor v. Samuel Musabyimana*, 'Decision on Musabyimana's Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer', Case No. ICTR-2001-62-T, 20 June 2002, para. 24. See also Zappalà 2002 A, p. 1195 (and Zappalà 2003, p. 75), Knoops 2003, p. 221, ICTY, Trial Chamber III, *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, 'Separate Opinion of Judge Robinson', Case No. IT-95-9-PT, 18 October 2000, paras. 2-4 and 7, ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Notice of Appeal', Case No. IT-94-2-AR72, 9 January 2003, Dissenting Opinion of Judge Shahabuddeen, para. 11 and SCSL, Trial Chamber, *The Prosecutor against Tamba Alex Brima*, 'Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant', Case No. SCSL-03-06-PT, 22 July 2003, pp. 7 and 9. Note that in the *Kanyabashi* case, the judges, after having referred to the rather broad scope of some national *habeas corpus* concepts (they provide, for instance, the example of the US writ of *habeas corpus ad subiiciendum* (see also n. 42 of Chapter II) which "extends to all constitutional challenges" (ICTR, Trial Chamber II, *The Prosecutor v. Joseph Kanyabashi*, 'Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings', Case No. ICTR-96-15-I, 23 May 2000, para. 24)), stipulate that "[t]he Chamber restates that the Tribunal is not bound by any national law. It finds the notion of *habeas corpus* at the international level is limited to a review of the legality of detention. The Accused's Motion, apart from the submission of violation of the right to protection from unlawful detention, is beyond that scope and, therefore, is not proper." (*Ibid*., para. 28.) Although the judges do not mention this point very clearly, it can be argued that the concept of the right to protection from unlawful detention used by the judges must, of course, also encompasses the consequence of release if the detention (and arguably also the arrest) is to be considered unlawful, in conformity with what appears to be the scope of the *habeas corpus* concept at the international level, see, for example, Art. 9, para. 4 of the ICCPR, Art. 5, para. 4 of the ECHR and Art. 7, para. 6 of the ACHR.

[149] See, however, ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, para. 11.

[150] *Cf*. also Knoops 2005, p. 36, noting that "there does seem to be a disjuncture between the approach under international criminal law [Knoops writes here on *male captus* cases in the context of the

must, strictly speaking, be released if the judge is of the opinion that his detention is unlawful.[151]

However, as explained in Chapter III and in the examination of Chapter VI cases such as *Dokmanović* and *Nikolić*, this remedy is not without its problems: if a person has been the victim of an unlawful arrest/detention, he must, strictly speaking, be released. However, as was clarified, that does not prevent him being re-arrested on the spot and re-brought to trial. Although a person released by the ICTY/ICTR (in the Netherlands/Tanzania) cannot be re-arrested for 15 days, one can imagine that the ICTY/ICTR would then demand from all UN Member States (which must cooperate with these Tribunals) to immediately transfer the suspect back to the ICTY/ICTR the moment he sets foot on their soil. Thus, one can assume that there is a considerable chance that, after those two weeks, the person is immediately re-arrested and brought to the jurisdiction of the Tribunal in question. In such a case, the prosecuting authorities could assert that this 'remedy' (the 'release') has repaired the initial *iniuria* of the irregularity and that the trial can continue as normal. However, in that case, the suspect would only be granted a *pro forma* remedy, comparable with that at the national level (but then only extended over a longer period), which does not comport with the idea that a remedy must be real and effective. In addition, the *pro forma* release does not take account of the exact seriousness of the irregularity. In other words: it is not only a *pro forma* remedy but also an over-simplified remedy.

Thus, it was suggested that this specific remedy should be avoided and that a judge should instead simply accord the most appropriate remedy, taking every single aspect of the case into account, not only, among other things, the seriousness of the irregularity, but also the seriousness of the alleged crimes and hence the importance of the continuation of the trial. If one follows that route, then one can still satisfy the common sense idea behind the immediate re-arrest mentioned above, namely that cases involving suspects of serious crimes must be continued if possible – although it should neither be forgotten that a truly serious *male captus* situation can lead to one remedy only, namely the ending of the case before that particular court, that is, a 'real' release (without the possibility of re-arrest) – but one will also avoid the strange *pro forma* release and immediate re-arrest and replace it with *real* remedies,

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ICTY/ICTR, ChP], and that under human rights law, which does not render such a distinction between the nature of the alleged crimes in order to determine the enforceable rights of the accused."

[151] In the *Semanza* case, the judges' final conclusion was that Semanza's right to be informed promptly of the nature of the charges against him and his right to challenge the lawfulness of his detention were violated. However, they also stated that "the remedy sought by the Appellant, namely his release, is disproportionate, in the instant case." (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 129.) However, although the remedy of (final) release may indeed not be a proportionate remedy in this case, the judges did not explain how their conclusion can be reconciled with the strict application of the law mentioned in the main text, which stipulates that such violations lead to an unlawful detention (see also Swart 2001, p. 204 who explains that "a failure to promptly inform the person of the reasons for his arrest and of any charges against him makes his detention illegal"), which in turn, according to para. 4 of Artt. 9 of the ICCPR or 5 of the ECHR, demands the remedy of release. See also the *Duch* case before the ECCC (see the text following n. 1281 and accompanying text of Chapter VI).

such as a reduction of the sentence (in the case of a conviction) or compensation (in the case of an acquittal).[152] The judge can then take the exact seriousness of the irregularity into account in determining how much the sentence should be reduced or how much compensation one should accord the suspect. For example, one could hereby look at the (perceived)[153] involvement of the tribunal in the *male captus* situation (one could also think here of the question of whether private individuals were involved in the violation, see Chapter III), the seriousness of the unlawful arrest/detention/deprivation of liberty and the mistreatment suffered by the suspect in the operation.

Such a solution would arguably be fairer to the suspect and better capable of putting flexibility into the system,[154] which sometimes focuses only on the extreme outcomes *bene*/*male detentus*/(no) refusal of jurisdiction.[155]

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[152] See also ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 75 (see n. 922 and accompanying text of Chapter VI), ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, under 'Disposition', para. 6 (see n. 1004 and accompanying text of Chapter VI), ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, paras. 255 and 324 (see ns. 1082-1083 and accompanying text of Chapter VI), ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 218 (see n. 1124 and accompanying text of Chapter VI) and ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 63 (see n. 1154 and accompanying text of Chapter VI). Note that in the case of Rwamakuba, the judges issued an order for compensation as the suspect had already been acquitted. See also ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21 (see n. 1233 and accompanying text of Chapter VI), ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 25 (see n. 1248 and accompanying text of Chapter VI) and ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, paras. 35-37 (see ns. 1280 and 1282 and accompanying text of Chapter VI). (See, however, for criticism on some parts of the ECCC Trial Chamber's decision ns. 1283-1284 and accompanying text of Chapter VI). As explained in Chapter VI (see n. 246), this construction may be very appropriate, but one must not forget either that provisions like para. 5 of Art. 9 of the ICCPR and Art. 5 of the ECHR state that compensation should not only be awarded in the case of an acquittal. Compensation is, in principle, available to any person whose detention was considered unlawful, whether that person was later acquitted or not. See also Sluiter 2001, pp. 153-154: "[I]t is suggested that creative use be made of (a combination of) other available remedies, such as *the reduction of the sentence in case of conviction – and financial compensation*, rather than termination of the proceedings and the release of the accused [emphasis added and original footnote omitted, ChP]."

[153] Even though an international force working for the tribunal cannot be seen as an organ of the tribunal, one can imagine that the remedy for an abduction committed by such an international force will be greater than in the case of an abduction committee by private individuals having no connection with the tribunal whatsoever, see also n. 93. See also n. 154 of Chapter V.

[154] *Cf.* the words of Sluiter in n. 152.

[155] See, for example, the Trial Chamber's decision in *Nikolić* (see n. 548 and accompanying text of Chapter VI), the Appeals Chamber's decision in the same case (see the text following n. 557 and accompanying text of the same chapter) and the *Tolimir* case, see n. 700 and accompanying text of the same Chapter VI. Nevertheless, as explained, there are also tribunal cases where this focus is less pertinent, see the authorities mentioned in n. 152.

Furthermore, this solution also avoids the (justified) criticism one may expect from various actors if a suspect of serious crimes is released for an irregularity which is not so serious as to lead to the ending of the case (in such serious cases, the public must understand that the court has no option but to refuse jurisdiction and to release (but now in a 'real' way) the suspect), but which nevertheless ensures that the detention must be qualified as unlawful and that, strictly speaking, the suspect must be released, for example, if a suspect's right to be informed promptly of the nature of the charges against him has been violated. In fact, whereas at the national level, one can expect that a suspect of serious crimes would be immediately re-arrested, the context of the ICTY/ICTR may engender more problems because of the above-mentioned two-week immunity period. As already stated, all UN Member States (which must cooperate with the ICTY and ICTR) will probably do everything in their power to ensure that a suspect of serious international crimes is immediately re-arrested and brought to the jurisdiction of the Tribunals, but one cannot exclude the possibility of the suspect fleeing to a non-UN Member State (which, in principle, has no obligation to cooperate with the Tribunals) or to a State which, even though it has an obligation to cooperate, will not do so. This problem will even be greater in the context of the internationalised criminal tribunals because in that context, third States are normally not obliged to cooperate with these institutions. That could mean that a suspect of international crimes, fleeing to such a State, could effectively evade prosecution because of an irregularity which will, strictly speaking, demand the release of the suspect, but which is not considered to be so serious that jurisdiction must be refused. That is to be avoided. Although the law should obviously be obeyed, one must also be careful not to apply the law in such a strict way that it leads to great injustice: *summum ius, summa iniuria*. This constitutes another reason to continue to exercise jurisdiction in these kinds of (less serious) *male captus* cases and to grant other remedies which do not jeopardise the trial itself.

One may argue that the practical results of this construction would be the same as the remedies which are already granted in case law. That is indeed true: many cases will not lead to a refusal of jurisdiction, but to other less far-reaching remedies. However, it is submitted that the accuracy of the reasoning leading to these remedies is not unimportant either. And that accuracy in the case law can arguably be improved, see also footnote 151; judges simply grant appropriate remedies. They do not explain, for example, why they do not declare a situation of 'unlawful detention' and invoke its subsequent remedy of release when they conclude that a suspect's right to be informed promptly of the nature of the charges against him has been violated. Because of that, neither do they have to explain what kinds of problems come with a strict application of this remedy of release and how they would solve them. Perhaps, the above-mentioned construction may be helpful in that respect.

Critics may state that taking into account the seriousness of the alleged crimes of the suspect (and hence the importance of prosecution) within the examination of what the consequences of certain irregularities must be is not in conformity with the

presumption of innocence, as the quality of the *suspect* (who is, of course, innocent until proven guilty) plays a role in the judge's balancing exercise.

And indeed, it cannot be denied that there is some tension here. For example, under the abuse of process doctrine, a suspect of less serious crimes may be better off than a suspect of serious crimes. Recall (see the text following footnote 1269 and accompanying text of the previous chapter) the situation in which a suspect of minor domestic crimes becomes the victim of a kidnapping by private individuals in which the authorities of the now prosecuting forum were not involved and during which he was not mistreated before being brought to the national judge. In such a situation, it would not be surprising if the national judge were to refuse to exercise jurisdiction and to release the suspect because of, on the one hand, the rather serious *male captus* and, on the other, the minor importance of having this person prosecuted. However, if the person is charged with genocide, one can imagine that the judge (whether it be a judge at the national or at the tribunal level) would continue the case and grant the person other remedies instead. Although the seriousness of the *male captus* is the same in both cases, the importance of having this person prosecuted will probably tip the balance, ensuring that the trial will continue and that the suspect will receive other less far-reaching remedies for the wrongs he suffered.

However, as explained earlier, because of the discretionary nature of the abuse of process doctrine, the judge is able to take every single aspect of the case into account in determining whether it would contravene the court's integrity/sense of justice to continue the case, notwithstanding the irregularities. And one of these aspects is that the person standing before him is charged with very serious crimes of which the international community demands that they be prosecuted. There is no reason why this important element should not be taken into account here. In fact, the judge may be of the opinion that it would contravene the court's sense of justice and other goals of its institution, such as, in the case of the ICTY, contributing to the restoration and maintenance of peace,[156] if he were *not* to take the importance of prosecution into account.[157]

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[156] See UNSC Res. 827 of 25 May 1993: "The Security Council, (…) Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law (…) would contribute to the restoration and maintenance of peace [emphasis in original, ChP]".

[157] *Cf.* also Ryngaert 2008, p. 731, who notes with respect to the *Duch* case: "[S]erious concerns may be raised over the use of the gravity of the crime as a free-standing criterion (...) in terms of the presumption of innocence. While Duch may be accused of grave and heinous crimes, he should remain innocent until a trial judge has determined his guilt – even if he is ready to confess and reveal the crimes committed by the Khmer Rouge. It would therefore appear unfair to rely on a presumption of his having committed grave crimes, a presumption that may tip the balance in favour of not staying the proceedings. Irrespective of the gravity of his crime(s), should not every suspect be entitled to the same due-process protection?" However, in the end, Ryngaert concurs with the vision of this study, see *ibid*., p. 732 (writing on the abuse of process doctrine): "Because the tribunal's decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them."

However, this stance may be more complicated with respect to the remedy of release in the case of an unlawful arrest/detention as that remedy is not discretionary; it applies to any suspect unlawfully detained. For example, in his commentary on the ICTY Appeals Chamber's decision in *Nikolić*, Sloan notes:

> The Appeal Chamber's focus on the serious nature of the crimes and the indignation of the international community, and its willingness to balance it against violations of human rights or sovereignty (and, in the case of sovereignty, to find a good basis for not setting aside jurisdiction in the 'universally condemned' nature of the alleged offences) leaves the impression that the graver the alleged crime, the less troubled an international judicial body should be by the violation. On the question of human rights, at least, such an approach must surely be misguided: it does not appear to comport with the presumption of innocence. Indeed, if our human rights are to be meaningful, the opposite approach would appear fitting. That is to say, when an accused is charged with a very serious crime – one of the type that is likely to engender severe public outrage, or in the words of the Appeals Chamber one that triggers the 'legitimate expectation' of 'the international community' – a judicial body must be *most* scrupulous in ensuring that the accused's human rights are observed. For a court to provide no remedy for a human rights violation where the accused is charged with a traffic offence and subject to a fine would be regrettable; to provide no remedy where the accused is charged with mass murder or war crimes and subject to life imprisonment would be unconscionable [emphasis in original, ChP].[158]

Many of these words are to be welcomed; as stated earlier, it can indeed not be the case that "the graver the alleged crime, the less troubled an international judicial body should be by the violation". Furthermore, it is also not hard to agree with the idea that "a judicial body must be *most* scrupulous in ensuring that the accused's human rights are observed" and that remedies are provided if violations occur.

However, it is again (see also the text following footnote 660 and accompanying text of the previous chapter) submitted that neither should the – indeed very important – presumption of innocence be used in such a way as to lead to absurd results. One must not forget that the tribunals are prosecuting not just *any* suspects, but suspects charged with the most serious crimes known to the international community as a whole. For example, a judge at the ICTY cannot issue an arrest warrant unless he has confirmed the indictment of the Prosecution, an indictment

[158] Sloan 2006, p. 334. *Cf.* also the report *Extradition. European standards. Explanatory notes on the Council of Europe convention and protocols and the minimum standards protecting persons subject to transnational criminal proceedings*, Council of Europe, December 2006, p. 140: "Issues of unlawful arrest and transfer to an international tribunal have been raised in the cases of Todorovic, Nikolic and Krajisnik [see for this latter case n. 659 of Chapter VI, ChP] before the International Criminal Tribunal for the former Yugoslavia (ICTY). The tribunal found itself with a fundamental dilemma; namely, whether to encourage the apprehension of suspects and the bringing to justice of individuals who had engaged in serious crimes, on the one hand; or the safeguard of international legality and fundamental human rights, on the other. It seems that administration of justice considerations have prevailed in the reasoning of the ICTY, which, as mentioned above, poses certain questions concerning the presumption of innocence; an obligation found in Article 6 of the European Convention on Human Rights [original footnote omitted, ChP]."

which can only be prepared if the Prosecutor is of the opinion that a *prima facie* case exists. Although this fact does not, of course, mean that the person is guilty of the international crime – that would constitute a clear violation of the presumption of innocence – there is no reason why one should not take into account the fact that one is not dealing with a normal suspect here, but with a suspect against whom the independent Prosecutor and an impartial judge are of the opinion that a *prima facie* case exists and hence that there are reasons to assume that the person may be involved in extremely serious crimes of which the international community demands that they be prosecuted. This is not nothing. This is an important element which should be taken into account when determining the consequences of an unlawful arrest/detention. It is submitted that negating this important element and strictly applying the remedy of release in the case of an unlawful arrest/detention, a remedy which was already criticised for the fact that it can be used in a mere *pro forma* way and for the fact that it totally disregards the specifics of the exact *male captus*, can possibly lead to absurd results which no longer have anything to do with the concept of justice. For example, if a suspect of the ICTY/ICTR is not promptly informed of the reasons for his arrest, this would, strictly speaking, mean that his detention is unlawful and that he should be released. However, if the suspect is released, the Netherlands/Tanzania would not be able to re-arrest the suspect for 15 days. In that time, he could flee to a non-UN Member State (which, in principle, does not have an obligation to cooperate with the Tribunals) or to a State which, even though it has an obligation to cooperate with them, will not do so. That could mean that a suspect of international crimes, fleeing to such a State, could effectively evade prosecution because of an irregularity which is not considered so serious that jurisdiction must be refused but which, strictly speaking, would demand the release of the suspect. That is to be avoided. As stated *supra*, although the law should obviously be obeyed, one must also be careful not to apply the law in so strict a way that it leads to great injustice: *summum ius, summa iniuria*.

In short, the human rights of *all* suspects must be respected. The fact that one is dealing with suspects of international crimes cannot in any way be used as an excuse to, in the words of Sluiter, "take a more 'flexible' stance towards – read: violate"[159] human rights or to argue that no violation occurred in the first place where such a violation was clearly present.[160] Furthermore, when violations occur, appropriate

[159] Sluiter 2007, p. 15 (own translation, ChP).

[160] *Cf.* Van der Kruijs (in his practical book on pre-trial detention in the Netherlands), who explains that detention is not often labelled as unlawful in the first place: "The investigating/examining judge (*rechter-commissaris*) does not often feel inclined to qualify the detention as unlawful. Many irregularities are deemed to be too minor to meet that qualification. The criterion appears to be that one must have acted flagrantly in violation of (the meaning of) the law. (...) In addition, there is the impression that the seriousness of the suspect's alleged conduct plays a role in the sense that the more serious the fact, the more problems are ironed out by the investigating/examining judge (*rechter-commissaris*) [own translation, ChP]." (Van der Kruijs 2004, p. 8.) This attitude, which was already mentioned in Chapter III (see n. 224 and accompanying text of that chapter) and which can also be found in Mohit 2006, p. 144 ("The moment the individual's violations far outweigh the violation of the abduction, that abduction should be permissible and should not be considered a violation of human rights."), is clearly to be criticised; an irregularity does not become less irregular because one is coping

remedies must be granted. However, in granting these remedies, one must be careful that one does not potentially pave the way for absurd consequences which are counter to the concept of justice, for example, through a strict application of the remedy of release in the case of an unlawful arrest/detention. In such a case, it would arguably be better to keep a suspect of international crimes in custody and to grant appropriate and real remedies instead,[161] taking into account the seriousness of the *male captus*.[162]

One could argue that this reasoning is valid *a fortiori* with respect to persons who have already been convicted, *cf.* the inter-State case *Mullen*. Even though the person's ultimate guilt may not yet be legally established (for the person may, of course, appeal and may, perhaps, then be acquitted), his first conviction is

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with a suspect of serious crimes. However, the fact that one is dealing with such a suspect should, if possible, lead to remedies which do not jeopardise the trial because prosecution of these suspects is also of paramount importance. Arguably more correct in that sense is the reasoning of Baaijens-van Geloven. She explains, after having referred to the reasoning of the Dutch Supreme Court in its judgment of 25 June 2002 (HR 25 juni 2002, *NJ* 2002, 625) that one can take into account the seriousness of the offence (this case did not deal with an international *male captus* situation and has therefore not been included in Part 3 of this book), that there are no objections of principle to this extension of the law by the Supreme Court (in the applicable provision of the Dutch Code of Criminal Procedure on the legal consequences of non-compliance with formal requirements (Art. 359a), one will not find this factor), as long as the seriousness of the offence is regarded as a weighting factor which only plays a role in determining the legal consequence (sanction) *after* the illegality has been identified. She continues stating that there has to be room for a balancing exercise and that all kinds of factors, including the seriousness of the offence, should be able to play a role here. Nevertheless, the seriousness of the offence cannot constitute a factor which determines the initial unlawfulness. (An exception, however, is the situation in which the principles of proportionality and subsidiarity play a direct role in determining the lawfulness of an exercise of power. In such a case, the seriousness of the charges can also be of importance in determining whether the investigative acts were lawful or not. (See Baaijens-van Geloven 2004, pp. 358-359. See also n. 617 of Chapter III.)

[161] *Cf.* Rule 5 (C) of the ICTY RPE: "The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness." (See n. 558 of Chapter VI.)

[162] See also Smeulers 2007, p. 109: "The severity of the charges must not have any influence on the rights to which the accused are entitled; suspects accused of even the most serious crimes are entitled to full respect of their individual human rights. The severity of the charges might, however, influence a careful balancing of what remedies can be used in order to repair violations." One could assert that the tribunal, if it does not release a person charged with serious crimes if the Prosecution has not promptly informed the suspect of the reasons for his arrest, would also violate a human rights provision (see, for example, Art. 9, para. 4 of the ICCPR). However, one can wonder what is worse: a violation of a provision which is arguably not flawless (for example, because it is over-simplified and because it can be used as a *pro forma* remedy) or the fact that a suspect of whom there are considerable reasons to assume that he has committed a genocide escapes justice because of the simple fact that he was not promptly informed of the reasons of his arrest. In any case, the construction mentioned above, even if it may lead to a violation of a provision such as Art. 9, para. 4 of the ICCPR, cannot be used in any way as general support for reasonings which justify violations of human rights because one is dealing with suspects of international crimes. The construction can only be seen as a specific answer to a specific complication, namely on how to avoid the problems caused by the remedy of release, problems which are most clearly present in the context of the tribunals, but which are not restricted to this context.

nevertheless a fact and an important element which a judge should take into account in his balancing exercise – if he has not done so already at an earlier stage.[163]

Two issues still need to be mentioned in this chapter.

The first is that it was suggested above that "when violations occur, appropriate remedies must be granted". This should arguably mean that *all* violations which occur in the context of a tribunal case must be remedied, not only if those violations can be attributed to the tribunal (although it is, of course, clear that the involvement of the tribunal may lead to more far-reaching remedies).

This point is uncontroversial in the context of the abuse of process doctrine; in the context of the question of whether the *male captus* is so serious that the judges, in good conscience, can no longer proceed with the case, the tribunals have confirmed that they will look at the violations, irrespective of the entity responsible for those violations.[164] (As explained at the start of this section, this is also the reason why it could be argued that the tribunals do not continue to exercise jurisdiction *regardless* of the way a person was brought into their jurisdiction, that the tribunals do not adhere to the old(-fashioned) idea behind *male captus bene detentus*.)

However, this is far less certain regarding less serious violations which do not come within the domain of the abuse of process doctrine. Nevertheless, it can be argued that it would be quite odd for the tribunals to only look at the actions of third parties if those actions reach a certain seriousness. If the tribunal is willing, under the abuse of process, to take the *ultimate* responsibility for actions of third parties (namely by refusing jurisdiction), it should also be perfectly able to take responsibility for less serious violations. It would be strange for the tribunal to take responsibility for a suspect who suffered egregious violations, but to refuse to do so if the suspect suffered less serious violations because these violations could not be attributed to the tribunal. This does not matter with respect to serious violations in

[163] See Starr 2008, pp. 757*ff*, also advocating an interest-balancing approach. Starr, who is of the opinion that "[i]nterest balancing (…) is inherent to criminal procedure – even if it has been largely excluded from the *remedial* stage [emphasis in original and original footnote omitted, ChP]" (*ibid*., p. 759), believes that one can deviate from the so-called "full remedy rule" under certain circumstances, see *ibid*., pp. 763-764: "[I]n cases involving mass human rights abuses, states and international tribunals have often issued less-than-full-remedies. Scholars have defended those remedies on the basis that it would be impossible to provide full reparation to all of the victims; impossibility is a built-in exception to the full remedy rule under *Chorzów Factory* [see *ibid*., p. 699 and n. 553 and accompanying text of Chapter III for the idea behind this full remedy rule, ChP]. But in mass-abuse situations, "impossibility" is often a legal fiction. In most such cases, it would not really be *impossible* to compensate all victims who bring claims. Rather, other competing interests make it undesirable – for instance, paying out such claims would undermine the state's ability to provide services to other, innocent citizens. So a compromise approach is the best option. But if compromise is permissible in remedying the gravest human rights abuses, it is hard to see why it would not be permissible in smaller-scale cases [emphasis in original and original footnotes omitted, ChP]." One can indeed agree with this vision, but only in very clear cases where applying the normal rules may lead to absurd results, such as in the case of the remedy of release. However, in the view of this study, this interest-balancing approach should not be abused, for example, by justifying abductions of suspects of international crimes with the argument that full reparation (return of the suspect) is not necessary.

[164] See n. 88 and accompanying text.

the context of the abuse of process doctrine and neither should it matter with respect to 'normal' violations which do not lead to the ending of the case.[165] Hence, the now prosecuting forum should not be selective in such important matters but take into account *every* violation which occurred in the context of its case.

Although it could be asserted that the suspect must revert to the national level to have such violations repaired, such remedies cannot be effective once the suspect is in the custody of the tribunal. After all, even if the national judge were to decide that a suspect is entitled to be released or to have a reduction of his sentence for these violations (which one can doubt, by the way, will ever happen), the tribunal would not be bothered by these national pronouncements. Hence, to ensure that the suspect does not become the victim of the fact that his proceedings have been fragmented over two or more systems, it is fair that the final adjudicator, the tribunal, in the context of whose case these violations occurred, takes responsibility for *every* violation.[166] This in turn also implies, of course, that a judge must be able to examine how the arrest/detention/transfer was made 'on the ground', for example, whether the entities making the arrest at the behest/request of the tribunal respected all the (national) arrest procedures. After all, if an arrest was clearly made in contravention of such procedures, it is difficult to maintain that a person's right to liberty and security was not violated, even if all the rules of the tribunal (such as the issuance of a valid indictment and an arrest warrant) were adhered to.[167]

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[165] In the words of the judges of the ECCC: "Even if a violation of the Accused's right cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention. The ICTR Appeals Chamber decision in *Barayagwiza* held that a violation of an accused person's rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that violation cannot be attributed to that tribunal [original footnote omitted, ChP]." (ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16.) This task, according to the judges, was separate from the situation where "previous violations of an Accused's rights are so egregious that they may preclude or restrain the exercise of an international criminal tribunal's jurisdiction on grounds of abuse of process and violation of the fundamental rights of the accused [original footnote omitted, ChP]." (*Ibid*.) See also *ibid*., para. 35: "The case law of the ICTR Appeals Chamber nevertheless indicates that even where these violations cannot be attributed to an international tribunal or do not amount to an abuse of process, an accused may be entitled to seek a remedy for violations of his rights by national authorities [original footnote omitted, ChP]."

[166] See Sluiter 2001, p. 156: "It is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or even more jurisdictions."

[167] This does not mean that the national judge can invoke certain national irregularities to refuse the transfer of the suspect to a tribunal like the ICTY/ICTR – he cannot, see the words of Swart at n. 24 and accompanying text of Chapter VI – but the international judges should take those irregularities into account when determining an appropriate remedy, for the simple reason that these irregularities occurred in the context of their case. It must be noted that Swart admits that "[t]he only, rather theoretical, situation in which transfer might be refused is that in which *jus cogens* would forbid a State to transfer a person." (See again n. 24 and accompanying text of Chapter VI.) However, that would be the case if, for example, there is a considerable chance that the suspect be tortured by the Tribunal. In such a theoretical case (because one can assume that such a situation will indeed not occur), the national judge might validly refuse to transfer. However, that would arguably not be the case if the suspect is, for example, abducted from another State. Although the abduction may violate the *ius cogens* norm of non-intervention, the subsequent transfer of the suspect to the Tribunal, after such an abduction, does

In this specific context, tribunal decisions have been issued which follow a rather non-inquiry[168]*/male captus bene detentus*-like view and which support the idea that the legality of the national arrest/detention proceedings cannot be examined.[169] However, there are also cases which can be interpreted as meaning that the tribunal will look into what happened at the national level and will in fact repair any violation which occurred in that context, even if the tribunal is, strictly speaking, not responsible for it.[170]

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arguably not constitute, in itself, a violation of a *ius cogens* norm. Furthermore, it must also be stressed that a suspect cannot invoke an irregularity which originated from a State's failure to cooperate with the Tribunal either. For example, he cannot invoke a violation of a provision which stipulates that that State cannot transfer nationals to the Tribunal. It must concern genuine violations of real national provisions. In those cases, it can be argued that the irregularities must be considered and remedied by the judges at the Tribunal, for the simple reason that these irregularities occurred in the context of their case.

[168] See Sluiter 2003 B, p. 941.

[169] See, for example, ICTY, Trial Chamber I, *Motion on Behalf of General Djorde Djukić*, 'Decision', Case No. IT-96-19-Misc. 1, 28 February 1996, D211, ICTR, Trial Chamber II, *The Prosecutor versus Edouard Karemera*, 'Decision on the Defence Motion for the Release of the Accused', Case No. ICTR-98-44-I, 10 December 1999, para. 4.3, ICTR, Trial Chamber II, *The Prosecutor v. Matthieu Ngirumpatse*, 'Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items', Case No. ICTR-97-44-I, 10 December 1999, para. 56, ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, paras. 34-35, ICTR, Trial Chamber I, *The Prosecutor v. Siméon Nshamihigo*, 'Decision on the Defence Motion Seeking Release of the Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor', Case No. ICTR-2001-63-DP, 8 May 2002, n. 2, ICTR, Trial Chamber II, *The Prosecutor v. Joseph Nzirorera*, 'Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized', Case No. ICTR-98-44-T, 7 September 2000, para. 27 and ICTR, Trial Chamber II, *The Prosecutor v. Pauline Nyiramasuhuko*, 'Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized', Case No. ICTR-97-21-T, 12 October 2000, para. 28. It is unclear how the supporters of the idea that one cannot review the legality of the arrest/detention at the national level want to reconcile this idea with the established and uncontroversial idea that under the abuse of process doctrine, very serious violations may lead to the ending of the case, irrespective of the entity responsible, see n. 88 and accompanying text. After all, how can one establish that a serious violation has occurred if one cannot examine the national arrest/detention proceedings in the first place? See in that respect also ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, 'Decision on Submissions of the Accused Concerning Legality of Arrest' (Public), Case No. IT-05-88/2-PT, 18 December 2008, para. 12: "The circumstances surrounding the arrest of the Accused are relevant to the Trial Chamber to the extent that they may affect the jurisdiction of the Tribunal over him."

[170] See, for example, ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 85, ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 74, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, paras. 78, 87 and 125, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, paras. 226-227, 232, 255 and 322, ICTR, Trial Chamber II, *The Prosecutor v. André Rwamakuba* et alia, 'Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused', Case No. ICTR-98-44-T, 12 December 2000, para. 23, ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 218 and ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision on Appeal against Decision on Appropriate Remedy', Case No. ICTR-98-44C-A, 13 September 2007, para. 24 (although it must also

Nevertheless, if it is indeed true that the case law contains both interpretations, it is submitted that the judge should opt for the second interpretation, the one which does investigate any pre-trial irregularities and which does not demand the attribution of the violations to the tribunal/the tribunal's strict legal responsibility for the violations. Deterrence, the integrity of the proceedings and simple fairness towards the suspect (in that a suspect does not end up in a legal vacuum)[171] demand that the now prosecuting forum remedies all the violations which have been committed in the context of its case.[172] In the words of Zahar and Sluiter:

> When other entities bear primary responsibility for violations of human rights, what matters is the duty of every tribunal bench to protect the fairness and integrity of the trial by determining an appropriate remedy. Obviously, the trial does not start at the seat of the tribunal but extends to every act connected with it.[[173]] While this may be a heavy and seemingly unfair burden on the tribunals – they interact with a wide variety of actors, not all of whom may apply the highest standards of justice, and the tribunals are not in a position to change this – the reverse is even more unfair. The decision of the ICTR Trial Chamber [here, Zahar and Sluiter refer to the decisions of *Nyiramasuhuko*, *Ngirumpatse*, *Kajelijeli*, *Karemera* and *Nzirorera*, see n. 169, ChP]

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be admitted that the *Rwamakuba* case is arguably less far-going than the other above-mentioned cases). See finally also ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16 (see n. 165).

[171] *Cf.* n. 849 and accompanying text of Chapter VI (in the context of the *Barayagwiza* case).

[172] See also Sluiter 2003 B, p. 945. As explained in Chapter VI, it is, of course, difficult to define the exact meaning of violations which have been committed *in the context of a tribunal case* but one clear example which should definitely fit this definition – besides the obvious example that organs of the tribunal have committed the violations themselves – are violations in the arrest and detention executed by States/international forces if the tribunal has requested that the suspect be arrested and detained by these parties, see, for example, the declaration of Judge Lal Chand Vohrah to the 2000 *Semanza* decision: "If an accused is arrested or detained by a state at the request or under the authority of the Tribunal, even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible, and this remedy must be proportional to the violations." (ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, Declaration by Judge Lal Chand Vohrah, para. 6.) Other situations may also very well fit the "in the context of" criterion, but these could be considered on a more case-by-case basis, *cf. ibid*., para. 7, n. 7. One could think here, for example, of irregularities which occur beyond the constructive custody of the tribunal in question, but which are nevertheless to be seen as irregularities which have been taken place in the context of a tribunal case, see, for example, the *Barayagwiza* and *Duch* cases. One could also think of an abduction such as the one suffered by *Nikolić*. This irregularity could not be attributed to the Tribunal and it could certainly not be seen as an arrest at the behest/request of the Tribunal, but it is, of course, an irregularity which has taken place in the context of the Tribunal case (namely in the context of the process of bringing a suspect into the jurisdiction of the Tribunal) and which should therefore be examined by the judges.

[173] This can be seen as another way of formulating the point mentioned above (see the previous footnote) that the judges must take into account all violations *in the context of* a tribunal case. See also Sluiter 2003 B, p. 945: "[T]he ICTY or ICTR Trial Chamber should exercise supervisory powers with respect to every violation of individual rights that occurs *in the framework of its proceedings* [emphasis added, ChP]." (See also the next footnote.)

> not to review national activities is simply untenable from the perspective of the duty to ensure a fair trial [original footnote omitted, ChP].[174]

This position, which is arguably better than the second,[175] but which may admittedly be hard to accept for some practically orientated judges,[176] can also 'soften' the (unpopular) *male captus bene detentus* image that the tribunals have; providing remedies for all violations which occurred in the context of their cases shows that the tribunals are not only concerned with prosecuting suspects of international crimes but also with ensuring fair proceedings for these suspects. In that context, one can also reassure those who object to this position that granting remedies may not have drastic consequences. One can assume that very often, a judge will only be confronted by minor violations. For those kinds of violations, small remedies will be appropriate, for example, a (minor) reduction of the sentence in the case of

[174] Zahar and Sluiter 2008, pp. 285-286. See also Sluiter 2003 B, pp. 941-942: "From a practical point of view, the most vital question is, to what extent the ICTY should bear responsibility (in the sense of providing remedies) for human rights violations that have occurred in the framework of its proceedings. (…) [T]he trial forum must take account of every human rights violation that occurs in the framework of the criminal proceedings. This view finds its ultimate basis in simple fairness and in the nature of the relationship between the accused and the trial forum."

[175] See also Gordon 2007, pp. 672-673 (referring to several of the cases mentioned in n. 169): "In a string of decisions ruling on defense motions for release, the International Criminal Tribunal for Rwanda has consistently held that the Tribunal has "no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign State at the request of the Tribunal." This has resulted in questionable due process jurisprudence [original footnote omitted, ChP]." See also Sluiter 2003 B, p. 943: "When one looks at the jurisprudence of the ICTY and ICTR one notices that the Chambers are generally aware of their obligation to ensure the fairness of the trial as a whole. The decisions of Trial Chamber II of the ICTR mentioned above [Sluiter refers here to several of the cases mentioned in n. 169, ChP] should be seen as unfortunate exceptions to this rule [original footnote omitted, ChP]."

[176] See also Starr 2008, pp. 724-725: "[T]he ICTs have held that they lack jurisdiction to review national authorities' arrest methods and conditions of detention before transfer to Tribunal custody, even when the arrest and detention occur at the Tribunal Prosecutor's request. That rule has been criticized on human rights grounds. But it has an obvious remedial-cost-avoidance advantage for the Tribunals, where the capture of suspects often depends on the cooperation of states with poor human rights records. If they were to assert jurisdiction to review arrest and detention methods, the Tribunals would probably be required to grant significant remedies (perhaps even release) in many cases [original footnote omitted, ChP]." The same can, of course, be said of the quick rejections of *male captus* claims, see n. 3 of Chapter IV and ns. 138, 801 and 1286 of Chapter VI. In n. 801 of Chapter VI, reference was made to the *Akayesu* judgment. Starr (2008, pp. 725-726) writes on this judgment: "[T]he Appeals Chamber held that the defendant had waived his unlawful detention claim. This holding relied on a stricter application of the waiver doctrine than the Appeals Chamber had applied in other contexts, suggesting an ad hoc form of remedial deterrence. (…) It might be understood best as a response to the *Barayagwiza* debacle less than a year earlier. Akayesu's legal argument on appeal was based on the Appeals Chamber's original decision in *Barayagwiza*. That precedent might have required release if the Appeals Chamber had found that Akayesu had similarly been detained impermissibly – which is at least a possibility, as Akayesu was arrested by Zambian officials several months before the ICTR issued an indictment against him. And the Appeals Chamber, having barely managed to preserve the continued viability of the Tribunal via its forced retreat in the *Barayagwiza* Review Decision, of course would have been anxious not to repeat the crisis. Again, while it is impossible to show conclusively that remedial costs drove the Appeals Chamber's application of the waiver doctrine, the circumstances are suggestive [original footnotes omitted, ChP]."

conviction.[177] This ensures that both the sense of justice of the person in question (in that his violations are remedied) and of the victims/the international community as a whole (in that a suspect of international crimes, if found guilty, receives an appropriate (which very often means stern) penalty for his deeds) are met.

However, even if a tribunal issues a *male detentus* decision because of the serious *male captus* involved, one must understand that this does not mean that the suspect cannot be tried for his crimes *at all*. The fact that *this* prosecuting forum would refuse the case does not mean that the suspect cannot be tried *elsewhere*. The tribunal must not forget that it also has a responsibility to fight impunity, even if it is of the opinion that the suspect can no longer be tried before its own judges.[178] Thus, if the State of residence of the suspect requests the return of the suspect, a tribunal could decide to make this return conditional, in that the suspect would only be returned to that State if the latter's authorities are able and willing to prosecute the suspect before their own courts.[179] If this cannot be guaranteed, the tribunal should transfer the suspect to another jurisdiction which can fairly prosecute the suspect. That jurisdiction could then take into account the fact that the suspect has suffered an irregular pre-trial phase and grant him certain remedies. Otherwise, the suspect would still not have received a 'personal' remedy repairing the wrongs. (The fact that the first court refuses jurisdiction and that the second court starts a new trial is not of any 'advantage' to the suspect. Although it is not the case that every remedy must be to the benefit of the suspect, it would arguably contravene the concept of fairness if the suspect is, for example, kidnapped, brought to a court which refuses jurisdiction, brought before a new court and then tried without the latter court providing him a remedy, such as a reduction of his sentence, which, in the suspect's eyes, would effectively repair the wrongs suffered by him.)

The second and last issue which needs to be discussed before turning to Part 4 of this book, is that the previous discussion primarily focused on violations of human rights/due process considerations. However, a few words on violations of State sovereignty in the context of the tribunals should still be made.

It is the case that in the truly vertical context of the ICTY/ICTR (this is different for the internationalised criminal tribunals), "sovereignty by definition cannot play the same role"[180] as in the horizontal context of equal, sovereign States, where "it is of utmost importance that any exercise of (...) national jurisdiction be exercised in full respect of other national jurisdictions"[181] because "[o]bservance of this fundamental principle forms an important asset of peaceful co-operation between States".[182]

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[177] See the case *Semanza* (see n. 1005 and accompanying text of Chapter VI).
[178] This was a correct point of criticism vented against the first *Barayagwiza* case.
[179] See also n. 354 and accompanying text of Chapter VI.
[180] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 100.
[181] *Ibid*.
[182] *Ibid*.

Nevertheless, this does not, of course, constitute a carte blanche for such Tribunals, or States/international forces working for them, to violate the sovereignty of States.[183]

Therefore, if an abduction, violating a State's sovereignty, can be attributed to the Tribunal and if that abduction is followed by a protest and request for the return of the suspect, there is no reason why the Tribunal should not return the suspect to that State.

It has been asserted that this would make no sense because the State in question would then be under an immediate new obligation to transfer the suspect back to the Tribunal: *dolo facit qui petit quod [statim] redditurus est*.[184] However, if an abduction can be attributed to the Tribunal and if the judges of the Tribunal were to (correctly) find that this is such a serious *male captus* that jurisdiction must be refused, this maxim would arguably not apply, for there is no renewed obligation to transfer the suspect back to the Tribunal if that Tribunal has stated that it can no longer exercise jurisdiction over the case. However, as explained *supra*, what the Tribunal *could* do in such circumstances is to grant the return on a conditional basis, on the State of residence being under an obligation to prosecute the suspect itself. In less serious *male captus* cases, where the judge has not refused jurisdiction but where he may nevertheless be of the opinion that a violation of a State's sovereignty (followed by a protest and request for the return of the suspect), strictly speaking, demands that the suspect is released and returned to that injured State, it would be better for the Tribunal not to return the suspect at all. After all, in such a situation, the above-mentioned maxim *does* apply. It would be rather strange for the suspect to be returned to a State which has an immediate obligation to re-transfer the suspect back to the Tribunal (which is, after all, still capable of trying the suspect). In fact, one could argue that if it is clear that that State might not cooperate with the Tribunal, it would be rather ridiculous to return the suspect to that State.[185] Hence, it

[183] *Cf.* also Sloan 2003 B, pp. 549-550: "While it is, of course, true that different considerations must apply as regards relations between the Tribunal and member states of the UN (clearly the Tribunal could not function if its relations with states were constrained in the same manner as between states), it is submitted that there must nevertheless be *some* limits on the ICTY's power to intervene in a state. Indeed the Decision would have benefited from consideration of whether there are such limits on the ICTY, and, if so, what they are and whether Nikolić's capture in violation of the law of the FRY violated them [emphasis in original and original footnote omitted, ChP]." See also Lamb 2000, p. 223, n. 201: "Potentially at least, a State may plead lawful excuse, on the grounds that the ICTY (and hence by implication its orders) was instituted by the UN Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter. (…) However, such a plea appears unlikely to succeed, on the grounds that while arrest warrants may constitute enforcement measures, these oblige custodial States to effect arrests or direct international forces to carry them out. They stop short of authorizing such States or forces to launch incursions into third States in order to do so".

[184] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 104.

[185] *Cf.* also the UK submission in the *Todorović* case where it was argued: "It follows that even if Todorovic were to be released and returned to the FRY, the FRY would be under an absolute obligation immediately to hand him back to the Tribunal. The United Kingdom submits that it would be absurd for the Tribunal to hold that international law required it to release Todorovic and return him to the FRY

would arguably better in such a situation if the Tribunal holds the suspect in custody, continues the case and accords other remedies for the wrongs which occurred in the context of its case.

while also requiring the FRY to hand him straight back to the Tribunal. It would be even more absurd to hold that there was a duty to return him to the FRY if there were any chance that the FRY would not comply with its obligations to the Tribunal." (ICTY, Appeals Chamber, *The Prosecutor* v. *Blagoje Simi*[*ć*]*, Milan Simi*[*ć*]*, Miroslav Tadi*[*ć*]*, Stevan Todorovi*[*ć*] *and Simo Zari*[*ć*], 'Submissions of the United Kingdom Regarding Review of the Decision of Trial Chamber III, 18 October 2000', Case No. IT-95-9-AR108 *bis*, 15 November 2000, para. 31.)

PART 4

THE INTERNATIONAL CRIMINAL COURT

CHAPTER VIII
GENERAL INFORMATION ON THE ARREST AND SURRENDER REGIME

1 INTRODUCTION

This chapter will deal with the procedures as to how a suspect is arrested and brought into the jurisdiction of the ICC. The importance of these procedures cannot be stressed enough: the ICC instruments can have the most detailed provisions on, for example, the exact scope of a certain crime against humanity, the theory of command responsibility or the reparation regime for victims, but these provisions will only become truly relevant if a person is arrested and surrendered to The Hague. This is because – as has already been briefly mentioned in the very first pages of this book – the ICC does not recognise trials *in absentia*, that is, trials without the suspect (who is called the accused at trial, see footnote 1) being present in the courtroom.[1] This means that unless a person is arrested and surrendered to

[1] See Art. 63, para. 1 of the ICC Statute: "The accused shall be present during the trial." (See also Sluiter 2003 C, p. 606.) It should be clarified that this does not mean that a person, which has already been arrested and surrendered to the ICC, can never be barred from attending a session in court. For example, para. 2 of the same article states: "If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provisions for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required." However, this rule applies to the situation when the person is already in the custody of the ICC. Conversely, the prohibition of *in absentia* trials mentioned above refers to the hypothetical situation that the ICC starts a trial when the person on trial is not there because he has not been arrested and surrendered to The Hague *at all*. In that case, the ICC thus starts a trial without having the person tried in its custody. In the *in absentia* discussion, the procedure from Art. 61, para. 2 of the ICC Statute should also be mentioned. This provision states: "The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice." Although this procedure, which very much resembles the already discussed (see n. 76 and accompanying text of Chapter VI) Rule 61 of the ICTY/ICTR RPE, has more characteristics of the *in absentia* trial mentioned above, it must not be forgotten that Art. 61 of the ICC Statute 'only' deals with the *pre-trial* confirmation of charges hearing, hence taking place before the actual trial. That is also the reason why the word "truly" has been inserted

The Hague, a proper trial will not take place.[2] And if such a trial does not take place, the above-mentioned provisions can never become truly relevant. In short, if one does not want this to happen, a person needs to be arrested and surrendered first. In the words of Ruxton:

> The arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials, no development of the law by the courts; and ultimately, no international justice. (...) [W]ithout arrest mechanisms that work, nothing will be achieved.[3]

This feature is complicated by the fact (see again the very first pages of this book) that the ICC does not have its own police force. It is "a giant without arms and legs"[4] who "needs artificial limbs to walk and work"[5] so to speak, dependent on others to effectuate the arrest and surrender of the suspect to the ICC.[6]

Before looking at the more specific arrest and surrender provisions (Section 3 of this chapter), the next section (Section 2) will first examine the more general cooperation regime between these 'others' (one could hereby think of States, organisations and international forces) and the ICC. After Section 3 (where special attention will be paid to the intriguing and crucial provision of Article 59, paragraph 2 of the ICC Statute), the cooperation regime (of which the arrest and surrender provisions are obviously part) will be assessed for a second time (in Section 4) so that it is clear what kind of system 'the others' are truly involved in.

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in the main text: although some substantive concepts may already be addressed during this confirmation of charges hearing, they will only become truly relevant in the context of a proper trial.

[2] As also explained in n. 33 of Chapter I, it will be shown in Subsection 3.1 that a person can also be summoned to come to The Hague (without the necessity of arrest). However, as this book is focusing on the arrest proceedings, it has decided to give this chapter the title it now has. Finally, it must be noted that a suspect may also come voluntarily to The Hague. In that case, an arrest is, of course, not necessary either. Nevertheless, as also already discussed in n. 33 of Chapter I, one can assume that an arrest will normally be necessary (even taking into account the ICC case of Abu Garda, where this was not the case).

[3] Ruxton 2001, p. 19. See also Roper and Barria 2008, p. 458: "The inability to apprehend suspects not only undermines the credibility of a justice system but, more fundamentally, thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals as well as the establishment of a historical record which can serve as a basis for possible national reconciliation. Therefore we regard the apprehension of suspects as a more fundamental problem than just enforcement – the inability to apprehend suspects undermines the entire international human rights regime." See finally Swart 2002 C, p. 1640: "The surrender of suspects and accused to the International Criminal Court is of vital importance to its proper functioning. The duty of States to arrest and surrender persons whose presence before the Court is needed is one of the cornerstones on which the Rome Statute rests. Historical precedents make the fundamental nature of the duty to arrest and surrender abundantly clear. Attempts to create an international system for the adjudication of war crimes and other international crimes in the aftermath of World War I have largely failed because surrender of persons could not be secured. On the other hand, the successes of the International Military Tribunals of Nuremberg and Tokyo and of other tribunals erected after World War II would not have been possible without the operation of a smooth system for arresting and surrendering the accused."

[4] See Cassese's metaphor in Subsection 1.3 of Chapter I.

[5] See *ibid*.

[6] See also Swart 2002 B, p. 1589 and Sluiter 2003 C, p. 605.

2 MODEL OF COOPERATION: A FIRST APPRAISAL

To properly understand the cooperation regime of the ICC (and its position *vis-à-vis* other regimes), it may be worth briefly reviewing the two main cooperation regimes which have already been discussed in this book: the inter-State cooperation regime and the cooperation regime between States and the ICTY/ICTR.

Here, the well-known distinction between 'horizontal' and 'vertical' re-enters the scene, see Section 2 of Chapter VI. As may have become clear from n. 6 of that chapter, this book will look at the actual characteristics of a certain regime before giving it a certain label and will not use the more basic distinction that cooperation regimes between States are horizontal and cooperation regimes between States and international criminal tribunals are vertical in nature. (If one were to use that distinction, it is, of course, clear that the ICC's cooperation regime with States can be seen as vertical, as the ICC, like, for example, the ICTY and the ICTR, can be seen as a real international criminal tribunal.)

Horizontal regimes are based on consensus and equality: they are characterised by equal entities which cooperate with each other, because they *want* to do so.[7]

Conversely, vertical cooperation regimes, such as the ones regulating cooperation between States and the ICTY or the ICTR – as has already been explained in Chapter VI – are based on superiority and non-equality: States *must* cooperate with the hierarchically higher Tribunals, whether they want to or not. In other words, (the cooperation regimes of) these Tribunals have been *imposed* on States:[8] in UNSC Resolutions 827 and 955, respectively, one can read that the UNSC, on the basis of Chapter VII of the UN Charter, decided to establish these Tribunals and to clarify that all UN Member States *have* to cooperate fully with them.[9]

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[7] See also Swart 2002 B, p. 1590: "Cooperation between States in criminal matters is a matter freely entered into."

[8] See also *ibid*., p. 1592.

[9] See UNSC Res. 827 of 25 May 1993, paras. 2 and 4 ("The Security Council, (...) Acting under Chapter VII of the Charter of the United Nations, (...) Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal (...); (...) Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal (…) [emphasis in original, ChP].") and UNSC Res. 955 of 8 November 1994, paras. 1-2: "The Security Council, (...) Acting under Chapter VII of the Charter of the United Nations, (...) Decides hereby (…) to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda (…); (...) Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal (…) [emphasis in original, ChP]."

In that respect, it seems that a cooperation regime containing a duty to cooperate – and it is clear that the ICC regime contains such a provision[10] – is vertical in nature. However, this does not necessarily have to be the case. After all, one will also find obligations to cooperate in many horizontal instruments treaties. An example is Article 1 of the UN Model Treaty on Extradition,[11] which can perhaps be seen as reflecting "the broadest common international denominator in the field of extradition".[12] Article 1 (entitled 'Obligation to extradite') reads:

> Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

However, although this horizontal instrument thus contains an obligation to cooperate/extradite, it is clear that this duty can in no way be compared with provisions such as Articles 86 and 89 of the ICC Statute,[13] because the inter-State duty to extradite is applicable to both sides ("[e]ach Party agrees to extradite to the other"), whereas in the ICC context, only States are obliged to cooperate with the ICC (and not *vice versa*).[14] In that respect, reciprocity is clearly lacking.[15] In other words, even though the obligation to cooperate may not necessarily constitute a

[10] See Art. 86 of the ICC Statute for the general obligation ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.") and Art. 89, para. 1 of the ICC Statute for the more specific obligation with respect to arrest and surrender ("States Parties shall (...) comply with requests for arrest and surrender.").

[11] See the Annex to UNGA Res. 45/116 of 14 December 1990.

[12] Swart 2002 B, p. 1591. For an example of a provision in an actual treaty, see Art. 1 ('Obligation to Extradite') of the Extradition Treaty between the United States of America and the Kingdom of the Netherlands. (Conclusion: The Hague, 24 June 1980. Entry into force: 15 September 1983.) The text of this treaty can be found in Mevis, Reijntjes and Stamhuis 2004, pp. 17-23.

[13] See n. 10.

[14] Although it does not impose an obligation on the ICC to cooperate with States, it may nevertheless be interesting to note that the ICC Statute does contain a 'mutual' provision, see Art. 93, para. 10 of the ICC Statute: "(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State. (b) (i) The assistance provided under subparagraph (a) shall include, inter alia: a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and b. The questioning of any person detained by order of the Court; (ii) In the case of assistance under subparagraph (b) (i) a: a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State; b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68. (c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute." Note, however, that the ICC Statute does not speak of "mutual assistance" itself. According to Swart, this is because the Statute "tries to avoid terminology that would be reminiscent of inter-State cooperation [original footnote omitted, ChP]." (Swart 2002 B, pp. 1594-1595.) See also Rastan 2008, p. 432.

[15] See also Sluiter 2003 C, p. 613.

vertical characteristic, the version in the ICC context in fact lives up to its vertical appearance.[16]

Another vertical aspect of the ICC's cooperation regime is the ICC's position as the final arbiter in disputes.[17] Sluiter explains:

> It is unthinkable that in a horizontal cooperation relationship, either the requesting or the requested side will resolve disputes regarding the duty to provide legal assistance. There is a compulsory dispute settlement mechanism in a vertical cooperation relationship where a hierarchically superior international criminal tribunal is assisted. The task of settling disputes of the requesting party is the most fundamental deviation from the horizontal legal assistance model as it is most indicative of a legal assistance relationship based on hierarchy.[18]

The ICC's status as the final arbiter in disputes can be found in Article 119, paragraph 1 of the ICC Statute, which states: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." According to Clark, commenting on this provision, questions concerning cooperation with and judicial assistance to the Court can probably be seen as part of the judicial functions of the ICC.[19] It is interesting to note that Clark does not categorise an important point relating to the cooperation regime, namely "a failure by a State to comply with a request to cooperate",[20] under the subject of "[a]ny dispute concerning the judicial functions of the Court". However, he does refer to Article 87, paragraph 7 of the ICC Statute, which clarifies:

> Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect

[16] Nevertheless, it is not as vertical as the duty in the context of the ICTY/ICTR as the latter duty is truly general in nature. See Swart 2002 B, p. 1595: "[A] duty that is for the Tribunals to specify in individual cases and that finds its limitations only in explicit provisions of the Statutes. This is not the system of the Court's Statute. In Part 9 [This part is entitled 'International Cooperation and Judicial Assistance', ChP], the choice has been made to list the specific obligations of the States Parties exhaustively and to indicate their scope and contents as precisely as possible. It must be assumed that the general obligation to cooperate laid down in Article 86 of the Statute does not create a general supplementary and residual duty to cooperate in situations not covered by other articles. (…) In other words, while the Statutes of the Tribunals have created an 'open' system, that of the Court's Statute is, at least in principle, a 'closed' one. In that fundamental respect, the system established by the Court's Statute is more akin to the structure of inter-State cooperation [original footnotes omitted, ChP]." The words "in principle" used by Swart allude to the exception of Art. 93, para. 1 (l) of the ICC Statute which states: "States Parties shall, in accordance with the provisions of this Part [this is Part 9, ChP] and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (…) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court."

[17] See Sluiter 2003 C, pp. 613-615.

[18] *Ibid*., p. 614.

[19] Clark 2008, pp. 1729-1730.

[20] *Ibid*., p. 1731.

and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Hence, it is indeed the case that ultimately either the ASP or the UNSC may have to decide on this issue,[21] but it is the Court itself which decides whether or not this

[21] In addition, "[f]ailing any action taken or recommended by the Assembly of States Parties or the Security Council, States Parties to the Statute or any Member State of the United Nations, as the case may be, may resort to remedies generally available to them under international law, with a view to ensuring compliance with requests for cooperation by the Court." (Ciampi 2002, p. 1635.) See also Kaul and Kreß 2000, p. 169: "[R]eference to the customary international law on state responsibility is necessary to spell out the consequences of non-cooperation [original footnote omitted, ChP]." See further Rastan 2008, pp. 434-444. Strijards notes that the ICC "will be far more dependent on the willingness of States to comply with requests for cooperation" (Strijards 2001, p. 115) because it cannot, in principle, rely on "the backbone of the UN-Charter" (*ibid*.). See also Cogan 2002, p. 137. See further Scharf 2000, p. 944: "The experience of the ICTY suggests that states will frequently refuse to provide (…) cooperation despite their clear treaty obligations to comply with the Tribunal's orders. The ICC's only recourse in such a situation is to make a finding that the state has failed to cooperate and then refer the matter to the Assembly of States Parties. The Assembly's only enforcement mechanism is the issuance of a statement condemning the failure to cooperate – which is unlikely to have much effect [original footnote omitted, ChP]." See also Sluiter 2002 A, p. 134: "It is undeniable that the ICC faces greater difficulties in the field of legal assistance than the ad hoc Tribunals. The latter not only benefited from more extensive obligations for States, but also could rely, at least on paper, on the assistance of practically every State in the world." The words "at least on paper" are important here; although it is true that the ICC in principle cannot rely on the backbone of the UN Charter, the experience of the UN *ad hoc* Tribunals (see also n. 121 of Chapter VI) has shown that, even if the ICC's case is supported by a UNSC referral, such a backbone may not necessarily be of any help. See, for instance, Scharf 2000, p. 944: "[T]he experience of the ICTY indicates that, even in the most egregious of situations, the Security Council is unlikely to impose sanctions in the event of non-cooperation with the ICC, especially where the target state's trading partners include one or more of the Permanent Members of the Council which wield a veto." See also Roper and Barria 2008, p. 464: "One might argue that having a consensus of the permanent members of the Security Council would provide the ICC with greater leverage with states in securing the surrender of suspects, but the history of the ICTY and the ICTR (both created under Chapter VII authority) demonstrates that this formal power still requires the genuine co-operation of the state". See further Rastan 2008, pp. 438-439, the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at: http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, para. 5 and Gillett 2008, pp. 18-19. Like the ICTY/ICTR, the ICC will thus also very much depend on (other) mighty States and organisations in favour of its existence and functioning which are able and willing to put pressure on non-cooperative States. See also Rastan 2008, pp. 439-440 and Roper and Barria 2008, p. 467: "[W]e argue more generally that significant economic pressure may be one of the most effective tools available to third parties in order to support the activity of the ICC. (…) Especially for states which are highly export-dependent, third-party economic pressure may be one of the most important means by which the international community can assist the ICC in securing the apprehension of suspects." (See also n. 116 of Chapter VI.) As already explained in Chapter VI, such pressure may not only be based on mere politics but may also have a legal foundation; it was stated at the beginning of this footnote that such actions can be based on the law of State responsibility. In this context, mention should be made of the concepts of 'obligation to cooperate *erga omnes*' and 'obligation to cooperate *erga omnes partes*' (see also Chapter VI) – *erga omnes* meaning towards everyone, towards the international community as a whole and *erga omnes partes* meaning towards all relevant parties, for example, towards all the members of the UN or towards all the members of the ICC's ASP. *Cf*. also Kreß and Prost 2008 A, p. 1526, writing about the hypotheses of non-States Parties being obliged to cooperate with the ICC pursuant to a decision stemming from the UNSC acting under Chapter VII or

procedure will be followed. Furthermore, this provision arguably is concerned with the *consequences* of non-cooperation rather than with whether or not one can speak of non-cooperation on the part of the State in question itself. This point of law appears to be the privilege of the ICC alone.[22]

In short, there are unmistakably important vertical characteristics discernible in the general cooperation regime between the ICC and States,[23] but the previous pages have also shown that the ICC's regime may not be as vertical as that of the ICTY and the ICTR.[24] This last point can be confirmed by a key element underpinning the ICC's regime, which is that, unlike the cooperation regimes of the ICTY/ICTR, the cooperation regime of the ICC is not *imposed* on States; in principle, it is only applicable to States that decide to become a party to the ICC Statute, which is basically a normal international treaty.[25] Hence, even though the ICC cooperation regime may indeed contain important vertical elements, States can still decide for themselves whether they want to be bound by this regime or not. This is also observed by Swart, who states that

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pursuant to customary international law: "In both hypotheses the obligation applies *erga omnes* and as a consequence thereof every UN Member State or, respectively, every State has a legal interest in the non-States Parties' cooperation [original footnotes omitted, ChP]." (Note that countermeasures taken by the ASP against the non-cooperating State are based on the fact that the non-cooperative State's obligation to cooperate applies *erga omnes partes*, towards all the members of the ASP, see *ibid*., p. 1530.)

[22] See Clark 2008, p. 1730, n. 29. After having stated in the main text that "questions concerning cooperation with and judicial assistance to the Court" can probably be seen as part of the judicial functions of the ICC, Clark continues to write in the footnote: "In the event that the Court is unable to achieve what it wants from a State Party, some questions may end up before the Assembly of States Parties or the Security Council for "enforcement". See article 87 para. 7 (...). The judges would no doubt take the view that this would not be an opportunity for the Assembly to resolve the dispute by second-guessing the Court on matters of law." See finally Pellet 2002 B, p. 1843 who states about Art. 87, para. 7 of the ICC Statute that this provision "empowers the Court to make findings on all questions relating to cooperation between States and the ICC, yet leaves the last word to the Assembly of States Parties or the Security Council."

[23] Another example is provided by Currie 2007, p. 380, referring to Artt. 57, para. 3 (d) and 99, para. 4 of the ICC Statute: "Where the Pre-Trial Chamber determines that there is no competent mechanism or authority to respond to a cooperation request, it may even authorize the Prosecutor to conduct investigations on the territory of a party state, without that state's consent [original footnote omitted, ChP]." (See also Rastan 2008, pp. 437-438.) Swart, however, notes in this context: "Even so, all this is a rather far cry from the system of Articles 18 and 17 of the ad hoc Tribunals' Statutes, with their broad powers for the Prosecutor to carry out investigations on the territory of States, and from the practice that has developed on their basis. Arguably, the system of the Statute is, in these respects, definitely inferior to that of the Tribunals' Statutes, and the fear is, therefore, warranted that this will have negative consequences for the proper functioning of the Court." (Swart 2002 B, p. 1598.) See also Kaul and Kreß 2000, p. 171: "[T]he possibility for the Prosecutor to conduct on-site investigations, though at least included as such, is regrettably limited in scope."

[24] See ns. 16 and 23.

[25] See Artt. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith": *pacta sunt servanda*) and 34 ("A treaty does not create either obligations or rights for a third State without its consent": *pacta tertiis nec nocent nec prosunt*) of the Vienna Convention on the Law of Treaties. See also Swart 2002 C, p. 1686.

> [t]he general answer must surely be that the Statute has created a regime of cooperation that is a mixture of the 'horizontal' and the 'vertical'. The basic difference between the *ad hoc* Tribunals and the Court is that *the latter's Statute rests on a consensual basis* [emphasis added, ChP].[26]

One can make a comparison here with respect to cooperation between the ICC and organisations. The latter cannot become a party to the ICC Statute (which is only reserved for States) but if they *consent* to cooperate, they may nevertheless sign a cooperation agreement with the Court on the basis of Article 87, paragraph 6 of the ICC Statute.[27] In that case, it can be argued, the organisation is also obliged to cooperate with the ICC.[28] An example in that respect is the 'Agreement between the International Criminal Court and the European Union on Cooperation and Assistance',[29] which also contains a duty to cooperate for both parties.[30]

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[26] Swart 2002 B, p. 1594.

[27] "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate." Other provisions in the ICC Statute mentioning the interaction between the ICC and organisations (not focusing on the UN now) are Artt. 15, para. 2, 44, para. 4, 54, para. 3 (after the *Lubanga Dyilo* case a very well-known provision, see n. 523 and accompanying text of Chapter X), 73, 87, para. 1 (b), 93, para. 9 (b) and 116 of the ICC Statute.

[28] See also Ciampi 2002, p. 1633: "Article 87(6) does not explicitly deal with the consequences of a failure of an intergovernmental organization to cooperate with the Court. Cooperation by an intergovernmental organization or arrangement is, in principle, a voluntary one. It is perfectly conceivable, however, that an intergovernmental organization, including a peacekeeping force, might assume an international treaty obligation to cooperate or be under a corresponding obligation because of a Security Council resolution under Chapter VII of the UN Charter. In any such cases, it would incur international responsibility in case of failure to cooperate, and the Court – it is submitted – would have the inherent power to make a finding as to the organization's failure to cooperate [original footnote omitted, ChP]." See also Rastan 2008, p. 444. To this, one can add that an organisation may also be obliged to cooperate with the ICC if the obligation to cooperate stems from a customary international law rule, see Kreß and Prost 2008 A, p. 1526.

[29] 'Agreement between the International Criminal Court and the European Union on Cooperation and Assistance'. Date of signature: 10 April 2006, date of entry into force: 1 May 2006, available at: http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf (ICC-PRES/01-01-06) or at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:115:0049:0049:EN:PDF (this is the Council Decision of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance (2006/313/CFSP), OJ L 115, 28 April 2006, p. 49) and: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:115:0050:0056:EN:PDF (OJ L 115, 28 April 2006, pp. 50-56, this is the Agreement itself). It may also be interesting to note that the ICC has concluded several agreements with other organisations, such as the 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations' (ICC-ASP/3/Res.1, adopted and entered into force on 4 October 2004 and available at: http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf) and the 'Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court' (ICC-PRES/02-01-06, adopted on 29 March 2006, entered into force on 13 April 2006 and available at: http://www.icc-cpi.int/NR/rdonlyres/A542057C-FB5F-4729-8DD4-8C0699DDE0A3/140159/ICCPRES020106_English.pdf). Another, more specific agreement which

Hence, the obligation to cooperate with the ICC, in principle, only applies to entities which *agree* to cooperate with the ICC. *In principle*, because there are three situations where this is not the case.

Before reviewing these three situations, however, it is appropriate to connect the above-mentioned point regarding the cooperation between the ICC and organisations with the importance of cooperation with international (peacekeeping) forces explained in Chapter VI. As mentioned in that chapter, such assistance could be vital to the functioning of the tribunal in question. In the more specific context of the ICC,[31] one should also take into account the fact that the ICC may only start a case if, among other things, 1) there has been no national investigation or prosecution of the case; 2) the State investigating or prosecuting the case is unwilling or unable genuinely to carry out the investigation or prosecution or 3) the State has investigated and has decided not to prosecute the person concerned but the decision not to prosecute resulted from the unwillingness or inability of the State genuinely to prosecute.[32]

Hence, very often, the State which has to surrender has been unable or unwilling to investigate and prosecute a certain case itself.[33] Although this need not necessarily imply that that State is also unable or unwilling to *cooperate* with the ICC, there may still be a considerable overlap.[34] And, of course, if a State cannot or

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merits to be mentioned here is the 'Co-operation agreement between the office of the prosecutor of the International Criminal Court and the International Criminal Police Organization-Interpol', signed on 22 December 2004 and available at: http://www.interpol.com/Public/ICPO/LegalMaterials/cooperation/agreements/ICC2005.asp.

[30] See Art. 4 of the Agreement (which is entitled 'Obligation of cooperation and assistance'): "The EU and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, as appropriate, with each other and consult each other on matters of mutual interest, pursuant to the provisions of this Agreement while fully respecting the respective provisions of the EU Treaty and the Statute. In order to facilitate this obligation of cooperation and assistance, the Parties agree on the establishing of appropriate regular contacts between the Court and the EU Focal Point for the Court." The sanctions mechanism in the case of non-compliance can also be found in this Agreement, see its Art. 18 ('Settlement of Disputes'): "All differences between the EU and the Court arising out of the interpretation or application of this Agreement shall be dealt with through consultation between the Parties." For more information on the cooperation regime between the ICC and the EU, see Paulussen 2010.

[31] See also Rastan 2008, p. 444 and the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at: http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, para. 91.

[32] See Art. 17, para. 1 (a) and (b) of the ICC Statute.

[33] This is, of course, different when the surrendering State is not the same State as the State which is the subject of an ICC investigation. One could hereby think of the surrender of Bemba Gombo (see Section 3 of Chapter X): this suspect plays a central role in the ICC's investigation in the situation of the CAR but was arrested in and surrendered by Belgium.

[34] See Harmon and Gaynor 2004, p. 412, n. 26: "[T]he ICC Statute contains a potentially irreconcilable tension: on the one hand, the ICC is entirely dependent on the willingness of states to execute arrest warrants (…) and, on the other, its jurisdiction can only be exercised where a state is unable or unwilling to prosecute (…). If an accused flees to a state which is willing to locate and arrest the fugitive, all is well. But if the accused remains in the state which is unable or unwilling to prosecute him, then it is likely that the state will be unable or unwilling to arrest him." See also Ciampi 2006, p.

does not want to cooperate, the help of international forces is very welcome. Another relevant point in the context of the ICC is the previously mentioned fact (see footnote 47 of Chapter I) that the Court will often have to deal with ongoing conflicts.[35] Consequently, the assistance of peacekeeping forces on the ground may prove to be instrumental to the ICC's success.[36] One of the provisions in which

726: "Now, inability or unwillingness to prosecute the crimes within the jurisdiction of the Court cannot automatically be equated to inability or unwillingness to cooperate with the latter. The two concepts are, however, related. For example, the "total" or "substantial" collapse – or unavailability – of a national judicial system which results in the "inability" of the State to investigate and prosecute crimes before its national authorities may well also result in the inability of that State to cooperate with the Court in its investigations and prosecutions. In the case of "unwillingness", the possibility of a coincidence – between unwillingness to prosecute and unwillingness to cooperate – is even more evident." See finally Swart and Sluiter 1999, p. 92.

[35] Note that the fact that there is an ongoing conflict does not necessarily mean that it will be harder for the ICC to have a person arrested. Although Roper and Barria (2008, p. 465) "believe that the ICC will be more successful in gaining the surrender of suspects after hostilities have ended", Burke-White (2008, p. 480) has criticised this point of view, stating: "Their logic is that 'Intervening in an ongoing conflict makes the political ramifications of any investigation more acute.' True enough, but those increased political ramifications during a conflict may actually increase, rather than limit, the ICC's bargaining power. Prior to the end of a conflict, both the government of the territorial state and international actors may have particularly strong interests in apprehending a suspect, precisely because such an apprehension could help to bring about an end to the conflict. Once the conflict is over, in contrast, there may be far less urgency attached to apprehending indictees and the Court's bargaining power may decline. Compare, for example, the limited pressure to secure the apprehension of Radovan Karadžić and Ratko Mladić in Bosnia and Herzegovina, more than ten years after the end of that conflict, with the growing foreign and domestic political support for either a peace deal or the apprehension of Joseph Kony during the conflict in Uganda. The very political urgency created by an ongoing conflict may well increase the ICC's bargaining power [original footnotes omitted, ChP]." (Note, of course, that by now, Karadžić has been taken into custody by the ICTY.)

[36] See also Kreß and Prost 2008 A, p. 1527. In Chapter VI, the point was examined whether OTP staff could also be involved in the arrest itself. Zhou (2006, p. 211) argues with respect to the ICC context that "no rule in the ICC Statute prevents per se the Prosecutor from participating in enforcement operations within the limits set out under the ICTY regime. The large discretion conferred by Article 54(1)(b) [of the ICC Statute, which, among other things, states that "[t]he Prosecutor shall (…) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court", ChP], along with the use in this provision of the term 'shall', rather suggest that if the Prosecutor believes that the participation of his office in an operation to capture a person indicted by the ICC is required, he would then be under an obligation to provide the appropriate participation from his office for the operation." See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 37. Gillett (2008, p. 19) in turn notes that the augmentation of the ICC's ability to obtain suspects could be achieved "by explicitly granting the Prosecutor powers of arrest through an amendment to the Rome Statute. However, obtaining the necessary two-thirds majority of State Parties' support to amend the Statute would be difficult. The amendment would likely be seen as too great an encroachment on state sovereignty and the discretion to choose when and how to deliver an accused to the Court. Furthermore, a muscled-up Court would present a threat to the preeminence of the Security Council in the international legal order, due to the cross-border nature of such arrests." In this context, one can, of course, also mention the idea of an international arrest team executing arrest warrants for the ICC. However, as already clarified in n. 107 of Chapter VI, this does not appear to be politically feasible (yet). See also Sadat, who writes about the fact that the ICC lacks a police force and who notes that "it was unthinkable to propose one either before or during Rome, although there was at least some

interaction between the ICC and organisations is mentioned[37] is Article 54 of the ICC Statute ('Duties and powers of the Prosecutor with respect to investigations'). Paragraph 3 (c) of this article reads: "The Prosecutor may: (…) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate".[38] The word "arrangement" has been added "to ensure that peacekeeping forces are included. Even in the absence of an express reference in Article 87(6), the Court is thus in a position to cooperate with all kinds of peacekeeping forces, acting within their mandate [original footnote omitted, ChP]."[39]

As it became clear from the experience of the ICTY that commanders in the field may be reluctant to arrest and surrender suspects, especially if the mandate of the peacekeeping force they are working for is rather ambiguous (see Section 2 of Chapter VI), it is evident and paramount that such a mandate be unequivocal and specific.[40]

Preferably, the aim should be to create an explicit obligation for troops to cooperate with the ICC, comparable with the mandates of UNTAES (Croatia),

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precedent for doing so [original footnote omitted, ChP]." (Sadat 2002, p. 120.) With respect to the last point, Sadat hereby refers to Art. 25 ('International Constabulary'), para. 1 of the 1943 Draft Convention for the creation of an International Criminal Court of the London International Assembly, which states: "Near the Court there shall be a body of International Constabulary which will be charged with the execution of the orders of the Court and of the Procurator General." (Historical Survey of the Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary-General), UNGA, ILC, Lake Success, New York, 1949, UN Doc. A/CN.4/7/Rev.1, available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf, p. 102.) *Cf.* finally C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), pp. 44-45.

[37] See also n. 27.

[38] Note that this provision is very broad and thus can include many forms of assistance, not only those related to arrest and surrender, but also those which have to do, for example, with the freezing of assets of suspects. *Cf.* also n. 300.

[39] Ciampi 2002, p. 1621. Kreß and Prost (2008 A, p. 1527) note, writing on the absence of the term 'arrangement' in Art. 87, para. 6 of the ICC Statute, that "[t]his omission was not deliberate so that the general rule of systematical interpretation should apply pursuant to which the complementary rules in Part 5 [This part is entitled 'Investigation and Prosecution', ChP] and Part 9 must be coherent. The Court is thus in a position to cooperate with all kinds of peacekeeping forces within the latter's mandates. (…) Such a cooperation may extend, in particular, to the arrest and surrender of a person [original footnote omitted, ChP]." See also Rastan 2008, p. 444.

[40] See also Scharf 2000, p. 964: "If the ICC is to act in the aftermath of international or internal conflicts, it is likely that United Nations or coalition peacekeeping forces will be deployed to areas where persons indicted by the ICC are located. Where these troops are commissioned by the U.N. Security Council or a specific peace agreement, they can be given the authority to arrest such persons pursuant to the ICC's arrest warrants. The experience of the ICTY, however, suggests that the force commanders will be reluctant to undertake this role. It is therefore important that the Security Council Resolution or peace agreement specifically give the troops the responsibility as well as the authority to make arrests – the more explicit the mandate for arresting war criminals, the better."

KFOR (Kosovo) and UNMIL (Liberia),[41] although it must also be admitted that this may not always be politically feasible.[42]

Such an obligation does not appear to exist in the current mandate of peacekeeping forces active in regions where ICC suspects are present. One example relates to the situation in Uganda and the case of the LRA leaders who are believed to move between northern Uganda, eastern DRC and southern Sudan.[43] In June 2006, (then) UNSG Annan issued a report[44] (already alluded to in this book)[45] in which he looked at the possibilities of UNMIS (the UN peacekeeping force in Sudan) and MONUC (the UN peacekeeping force in the DRC) countering the threat caused by the LRA, something of which the Prosecutor would, of course, very much be in favour.[46] In relation to UNMIS, Annan stated:

> UNMIS has no mandate to arrest and can only detain individuals who attack, or threaten to attack, United Nations personnel or installations or local populations within the immediate vicinity of United Nations installations. (…) Detainees would have to be immediately handed over to the Sudanese authorities. While the Sudan is not a State party to the Rome Statute, it has signed a memorandum of understanding with the International Criminal Court pledging to hand over the indicted LRA leaders to The Hague.[47]

Hence, the situation with UNMIS is clear: UNMIS soldiers have no mandate to arrest ICC suspects, although they can detain them and deliver them to national officials who will then surrender them to The Hague if these suspects (threaten to)

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[41] See ns. 66 and 1174-1175 and accompanying text of Chapter VI.

[42] One would think that an extended mandate, in favour of the ICC, may be more easily reached in the case of a peacekeeping force under the authority of the EU (where every Member State is a party to the ICC Statute) than in the case of a peacekeeping force under the authority of the UN (where there are still many States not party to the Statute and even some opposing the Court). See also Ciampi 2006, p. 735, n. 47. *Cf.* finally C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 44, noting that an EU-led operation, because all EU States are parties to the ICC Statute, may have a duty to execute arrests.

[43] ICC, Pre-Trial Chamber II, Situation in Uganda, *In the Case of The Prosecutor vs. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, 'Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda' (Public Document), ICC-02/04-01/05, 6 October 2006, p. 2.

[44] *Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)*, 29 June 2006, S/2006/478.

[45] See n. 49 of Chapter I.

[46] See, for example, the following words from the ICC's Chief Prosecutor Moreno Ocampo, taken from the 'Eleventh Diplomatic Briefing of the International Criminal Court. Compilation of Statements', The Hague, 10 October 2007 (available at: http://www.icc-cpi.int/NR/rdonlyres/E1900488-5437-4771-BA50-45271FD9AE72/278575/ICCDB11St_en_fr.pdf), p. 6: "Joseph Kony and the three other indicted commanders have become a regional power, threatening stability in the sub region. We ask all States parties to support collaborative efforts between the DRC and Uganda to address the issue of arrests; we hope that the support of MONUC will remain forthcoming."

[47] *Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)*, 29 June 2006, S/2006/478, para. 25.

attack UN personnel or installations or local populations within the immediate vicinity of UN installations. With respect to MONUC, Annan explained:

> Through resolution 1565 (2004) and subsequent resolutions, MONUC is mandated, inter alia, to use force to deter attacks that could threaten the political process and to ensure the protection of civilians. Acting in support of the Government of National Unity and Transition of the Democratic Republic of the Congo, it should also (…) assist in the promotion and protection of human rights; and continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice.[48]

Although this statement is still couched in fairly general terms, a few paragraphs later, the UNSG turns to the specific context of the ICC:

> MONUC is aware of its mandate to detain the LRA leaders who have been indicted by the International Criminal Court, and would seek to do so if it came across them while carrying out its mandated duties. The captured LRA leaders would have to be immediately handed over to the Congolese authorities who, since the Democratic Republic of the Congo is a State party to the Rome Statute and has other agreements with the Court, would then be expected to hand over the suspects for arraignment in The Hague.[49]

This language, which closely resembles the language of the North Atlantic Council's resolution of 16 December 1995 (see Section 2 of Chapter VI), stating that "IFOR should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks", seems to mean that MONUC has certain duties, but that arresting and detaining ICC suspects is not one of them. However, if MONUC soldiers, in carrying out these duties, were to come across those suspects, they would be authorised, and indeed would try ("would seek"), to detain them. The detainees would then have to be handed over to the DRC authorities which in turn would have to surrender the suspects to the ICC.

Hence, although arrests are not excluded, they are not within the mandate (UNMIS) or within what MONUC actually should do. Arresting LRA leaders and surrendering them to the ICC is principally the responsibility of the States themselves.[50]

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[48] *Ibid*., para. 27.
[49] *Ibid*., para. 31. See for more information also Rastan 2008, pp. 445-446.
[50] *Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)*, 29 June 2006, S/2006/478, paras. 51-52: "While recognizing the threat posed by LRA, I should like to reiterate that, since UNMIS and MONUC already have challenging tasks to perform in their respective areas of responsibility, they should channel their capacities and resources primarily to address those challenges. (…) Dealing with the regional implications of LRA activities lies within the area of national responsibility of the Governments in the region. UNMIS and MONUC can provide assistance, within their existing mandates and capabilities, but should not be seen as an alternative to authorities in the LRA-affected region in the maintenance of law and order."

Another example is linked to the conflict in Darfur, Sudan. The peacekeeping force employed in that region, the joint UN/AU force UNAMID, does not – much to the ICC's displeasure – have the authority, let alone the obligation, to arrest ICC suspects.[51]

A point which should also be mentioned in this context is the fact that although one should, of course, respect the mandate of the specific international force, one should also be careful that States, which may have strict obligations to arrest and surrender suspects, do not circumvent this obligation by deploying international forces with an ambiguous mandate.[52]

Finally, it must be stressed that the exact arrest procedures of peacekeeping forces, if they have the mandate to arrest suspects, is not very clear. In the remainder of this chapter, the crucial Article 59 of the ICC Statute ('Arrest proceedings in the custodial State') will be examined in detail. However, this provision focuses on arrests by national *States* alone, see its paragraph 1: "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9."[53] Hall explains that a literal interpretation of Article 59, paragraph 2 of the ICC Statute would lead to the following scenario:

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[51] See 'UN decision on Darfur wins global applause', *Agence France Presse*, 1 August 2007 (available at: http://www.iccnow.org/?mod=newsdetail&news=1751): "The UN resolution authorises the UN-AU force to take 'the necessary action' to protect its personnel, ensure security and freedom of movement for humanitarian workers, prevent attacks and threats against civilians and back implementation of the Darfur Peace Agreement. However, it does not authorise foreign troops to pursue alleged war criminals sought by the International Criminal Court (ICC) – an omission that drew a sharp warning from the tribunal based in The Hague. 'We want to recall that the international community has called for these two arrests. This issue should not be ignored,' an advisor to ICC prosecutor Luis Moreno-Ocampo, told AFP."

[52] See also Zhou 2006, p. 215 (writing on the context of the ICTY) who notes, after having referred to the in Chapter VI mentioned (see its n. 71 and accompanying text) quotation from the *Todorović* case about the purpose of Art. 29 of the ICTY Statute: "The Tribunal foresaw and, I believe, rightfully wanted to prevent the awkward situation in which individual states are compelled to execute arrest warrants but a collective entity comprising the membership of these same individual states could evade the same request for cooperation and judicial assistance." Zhou, however, also foresees some problems with the ICC in that respect for this latter Court has created a specific procedure for organisations whereas the ICTY in the *Todorović* case simply applied the general obligation to cooperate for States to international organisations. See *ibid*., p. 216: "[A]ssuming the ICC Statute would have been the governing statute in the former Yugoslavia and all NATO states members were also States Parties of the Rome Treaty, it would have ensued that the Tribunal would have power to issue and transmit an arrest warrant to a State Party like France but could only ask NATO for its cooperation in the arrest of indicted persons found in Pale in Eastern Bosnia, which was, at the time, a sector under the authority of the French NATO forces. (…) In my view, the vital importance of the role of intergovernmental organizations should have been reflected in the ICC Statute by treating them on the same footing as the individual states."

[53] See also Sluiter 2009, p. 468: "[I]t is unclear what legal regime applies to arrests performed by non-State entities, such as (peace-keeping) forces." Similarly, it is unclear what the role of the Prosecutor can be as concerns the execution of arrest warrants in unable States, see Hall 2008 B, p. 1151: "[I]t is not clear what the scope of the Prosecutor's powers is when taking specific investigative steps pursuant to article 57 para. 3 (d) when a State Party is unable to do so. Presumably, national legislation could permit staff of the Office of the Prosecutor to carry out arrests. As noted above, however, the Court is

> [M]ilitary police of a State Party (custodial State) serving in a peace-keeping operation might carry out an arrest in the territory of another State. A literal interpretation of paragraph 2 would suggest that the military police would have to send the arrested person promptly back to a court in the custodial State, both when the courts in the territorial State were open and when the judicial system has collapsed.[54]

However, Hall also notes that

> a degree of flexibility in the implementation of article 59 that is consistent with the purpose of the *Statute* may be possible, such as bringing the person promptly before a court of the custodial State sitting in the State with jurisdiction where the person was arrested or prompt surrender to the Court, provided that the safeguards for the rights of the suspect, as envisaged in article 59, were fully respected and kidnapping in violation of international law was prohibited. In this respect, the Court should reject the approach of the ICTY in (…) [and then, reference is made to *Dokmanović* and the 2002 decision in *Nikolić*, ChP], to allegations that the accused was kidnapped in violation of international law.[55]

Of course, in the situation that the peacekeeping forces directly surrender the suspect to the ICC,[56] the judges of that latter Court must check, just as the national

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likely to be presented with a number of other novel situations not expressly addressed in article 59 [original footnotes omitted, ChP]." One of those novel situations will now be discussed in the main text.

[54] *Ibid*., p. 1151, n. 20.

[55] *Ibid*.

[56] *Cf*. Gillett 2008, p. 21, writing on "unable" States and suggesting agreements "between peacekeeping forces and the territorial State in which they were located, granting the former the authority to carry out arrests in the host state's territory. Ideally, such agreements would contain "assisted arrest" clauses allowing peace-keepers to execute arrest warrants and to hand the accused directly to the ICC in cases of substantial or total collapse of the State's judicial or governmental infrastructure." Gillett even proposes in this context the creation, by the ICC's ASP, of a multilateral reciprocal treaty, see *ibid*., p. 27: "The acceptance of *ad hoc* assisted arrest operations, while a positive development in the struggle to try those accused of the most serious crimes known to mankind, would not be an ideal long-term solution to the problem of impunity. To provide an ongoing, regulated basis for assisted arrests to be conducted in States unable to execute warrants through their own agents, the Assembly of State Parties of the ICC would need to conclude an assisted arrest agreement as a subsidiary instrument to the Rome Statute. Within this agreement, State Parties would provide a prior and continuing consent to assistance in executing ICC arrest warrants in situations where they are unable to do so through their own agents, and also would reciprocally agree to aide in the execution of ICC arrest warrants within other State Parties' territories, when those States are unable to do so [original footnote omitted, ChP]." *Cf*. also Rastan 2008, p. 454: "The 'unable' state could invite capable states or an international peacekeeping presence on its territory to assist it in fulfilling its duties towards the Court. Moreover, although the Court's non-compliance procedure is normally discussed with reference to a state's 'unwillingness' to co-operate, the Court could possibly treat 'inability' also as a failure to comply with a co-operation request. Rather than indicating the international wrongfulness of non-co-operation, the purpose of such a finding would be to invite the ASP or the Security Council, as appropriate, to consider the matter with a view to promoting co-operation. Such considerations may, for example, take the form of the Security Council modifying the mandate of relevant peacekeeping operations to enable regional co-operation and co-ordination with a territorial state that is willing but otherwise unable to perform arrest and

authority would do in normal situations (see *infra*), whether the arrest and detention was properly executed and whether the suspect's rights were respected (among other things).

Going back to the three situations where non-States Parties to the ICC Statute may be obliged to cooperate, the first of these is when the UNSC simply determines that this should be so. This can, for example, be the case if the Council, through a resolution based on Chapter VII of the UN Charter, has referred a situation to the ICC pursuant to Article 13 (b) of the ICC Statute,[57] in which it decides that States not party to the Statute must also cooperate with the ICC.[58] For example, in the previously mentioned (see Section 2 of Chapter VI) UNSC Resolution 1593 of 31 March 2005, the UNSC referred the situation of Darfur, Sudan to the ICC. The relevant section of this resolution reads:

> *The Security Council*, (...) *Acting* under Chapter VII of the Charter of the United Nations, 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court; 2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no

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surrender operations, or may lead to the exertion of political pressure through issue-linkage to secure co-operation from a hitherto 'unwilling' state [original footnote omitted, ChP]." See finally C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), pp. 42-43, writing on the situation of arrests by peacekeeping forces in *unwilling* States: "One could (…) easily imagine a Yugoslavia- or Sudan-like situation of international troops being deployed in a certain area, and the local authorities opposing this deployment and any arrest the troops may effectuate. For such a situation, a direct transfer from international custody to ICC custody, *without* the State acting as an intermediary, appears desirable. There is no legal basis in the *State*-centered Statute for such a method, though. If the territorial State is indeed not willing to cooperate, a possible solution could however be for the international forces to have the arrestee first transferred to a State that *is* willing to cooperate. After all, persons could be surrendered to the ICC by any State on the territory of which that person may be found, arguably irrespective of how their presence on that territory was brought about. In order to forestall challenges to the legality of such a detour, a UN Security Council resolution authorizing the transfer by international forces may possibly be sought [emphasis in original and original footnotes omitted, ChP]."

[57] "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (...) (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". This is one of the three possibilities for the ICC to exercise jurisdiction. The other two are a State referral (see Artt. 13 (a) and 14 of the ICC Statute) and a *proprio motu* investigation of the Prosecutor (see Artt. 13 (c) and 15 of the ICC Statute).

[58] As argued earlier (see Section 2 of Chapter VI), the referral as such does not seem to create a duty of cooperation for all UN Member States with the ICC. This arguably depends on the exact content of the decision. Note, by the way, that the UNSC may also determine that non-States Parties have to cooperate with the ICC, even if the Council has not referred a case itself to the ICC, see Ciampi 2002, p. 1611: "[A]n obligation to cooperate with the Court could also be imposed by the Security Council in cases referred to the Court by a State or initiated by the Prosecutor *proprio motu* should the Security Council decide that cooperation with the Court is needed in a situation amounting to a threat to the peace."

> obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully (…) [emphasis in original, ChP].

In other words, Sudan is also under a legal obligation to cooperate with the ICC, even though that State is not a party to the ICC.[59] The same goes for the States which can be considered "parties to the conflict in Darfur" – States which may not have ratified the ICC Statute either.

The second situation in which there exists an obligation for a State not party to the ICC Statute to cooperate is if such a State a) accepts the jurisdiction of the ICC on an *ad hoc* basis with respect to a particular crime (see Article 12, paragraph 3 of the ICC Statute),[60] or b) cooperates with the ICC "on the basis of an ad hoc arrangement, an agreement (...) or any other appropriate basis".[61] In both cases, the non-State Party has a duty to cooperate with the ICC. This is clear with respect to Article 12, paragraph 3 of the ICC Statute,[62] but less so with respect to the situation under b, pursuant to Article 87, paragraph 5 (a) of the ICC Statute, which does not explicitly mention such a duty. Nevertheless, as States cooperating under Article 87, paragraph 5 (a) of the ICC Statute are confronted by a comparable[63] sanctions

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[59] Note, however, that the UNSC does not state that other States not party to the ICC Statute (besides Sudan and those States which are not party to the ICC but which are involved in the conflict in Darfur) must cooperate with the ICC. It is therefore not very accurate to state: "The statement in Resolution 1593 ''that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'' clearly shows that *all non-party states*, including Sudan, must co-operate with and assist the ICC accordingly [emphasis added, ChP]." (Zhu 2006, p. 92.) (Unless Zhu, when speaking of "all non-party states", is, of course, only referring to the parties to the conflict in Darfur. In that case, it is true that all States have an obligation to cooperate with the ICC, whether they are parties to the ICC or not.)

[60] "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." This was done by Côte d'Ivoire in 2003, see ICC, Press Release, 'Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court', 15 February 2005, ICC-CPI-20050215-91, available at: http://www.icc-cpi.int/NR/exeres/FA0D49A0-69D4-4676-9E77-567B25321CBA.htm.

[61] Art. 87, para. 5 (a) of the ICC Statute.

[62] See the last sentence of this provision: "The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." Palmisano 1999, p. 393, states about this issue: "This means that once a State has accepted the Court's jurisdiction over a specific case, this State should no longer be considered a third State, as its position becomes equivalent to that of a State party to the Statute. (...) From the standpoint of its legal qualification, Art. 12(3) should be considered a treaty stipulation in favour of third States. This provision allows, in fact, third States interested in effectively prosecuting a given crime, to accede, in relation to that crime only, to the judicial mechanism provided for by the Statute, on condition that they expressly accept the Court's jurisdiction and the obligation of cooperation and judicial assistance set out in Part 9 of the Statute [original footnote omitted, ChP]." That would thus also mean that in the case of non-cooperation, the sanctions mechanism for 'normal' State Parties (see para. 7 of Art. 87 of the ICC Statute) would also be applicable to the 'accepting State'. Schabas is, however, not sure about this, see Schabas 2004, p. 77.

[63] The mechanism is not identical as can be seen in the following two footnotes. See also Zhu 2006, pp. 107-108, where he argues and explains that "[t]he distinction (...) shows the somewhat differing obligations, in terms of co-operation, of states parties and states not party to the Rome Statute." (*Ibid.*, p. 107.) See also Ciampi 2002, p. 1633: "The reason for the difference in wording is the belief of some

mechanism[64] as States Parties are in the case of non-cooperation,[65] it may be concluded that the former also have a duty to cooperate.[66] [67]

A third, and more 'external', duty to cooperate with the ICC for non-State Parties (but then only with respect to a specific category of war crimes) may be found in the Geneva Conventions, whose provisions must be complied with by

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delegations that weaker language should be used with respect to States not parties to the Statute. It is not easy, though, to find a solid justification for a distinction in substance as the non-cooperating State infringes its obligations in both cases [original footnote omitted, ChP]."

[64] See para. 5 (b) of Art. 87 of the ICC Statute: "Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council."

[65] See para. 7 of Art. 87 of the ICC Statute: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." See for more information on this provision, Sluiter 2003 C, pp. 615-616.

[66] See also Ciampi 2002, p. 1617: "When an *ad hoc* arrangement with respect to the investigation and prosecution of a given crime within the jurisdiction of the Court or an agreement to cooperate with the Court in a wider set of cases is concluded with a State not party, such a State undertakes an international obligation to cooperate with the Court vis-à-vis all States Parties to the Statute. (...) [T]his State is free to determine how far it is prepared to go in assuming an obligation to arrest and surrender. The extent of the obligation to cooperate will depend on the content of the agreement. In this respect, however, it seems hardly likely that a non-party State will bind itself to an obligation which is broader in scope than that provided for under the Statute for State Parties. The third State will probably accept to cooperate with the Court to a more limited extent, e.g. by only undertaking to give some, but not all, forms of cooperation specified under Part 9 [original footnote omitted, ChP]." See also Zhu 2006, p. 107.

[67] Note, however, that the sanctions mechanism of Art. 87, para. 5 (b) of the ICC Statute and the quotation of Ciampi in the previous footnote only speak of a non-State Party which has entered into an *ad hoc* arrangement or an agreement with the ICC. Does there also exist a duty to cooperate with respect to a non-State Party which has been invited by the ICC to cooperate on "any other appropriate basis"? On the one hand, one could argue that the non-reference to cooperation on "any other appropriate basis" implies that a non-State Party cooperating with the ICC on another basis than an *ad hoc* arrangement or an agreement does not have a duty to cooperate. On the other hand, one could also read these two paragraphs in context and argue that the sanctions mechanism of Art. 87, para. 5 (b) of the ICC Statute only mentions the two clearest examples of Art. 87, para. 5 (a) of the ICC Statute but that this does not mean that the safety net of Art. 87, para. 5 (a) of the ICC Statute (namely cooperation on "any other appropriate basis") is not covered by the sanctions mechanism of Art. 87, para. 5 (b) of the ICC Statute (meaning that a State cooperating on that basis also has a duty to cooperate). That a State cooperating on "any other appropriate basis" has a duty to cooperate is also confirmed by Condorelli and Ciampi. They argue: "As is well known, according to Article 86 and subsequent provisions laid down in Part IX of the Rome Statute, states party to the Statute are under an obligation to cooperate with the Court. As a treaty-based obligation, this obligation is not binding upon third states, unless they have agreed to cooperate with the Court by way of a declaration of acceptance of the jurisdiction of the Court or on an ad hoc arrangement or agreement with the Court. However, states not party to the Statute may also be brought under an international obligation to cooperate with the Court by 'any other appropriate basis'. And such an 'appropriate basis' could be provided by a resolution of the Security Council under Article 41 of the UN Charter, imposing obligations upon all Member States to apply measures to give effect to SC decisions [original footnotes omitted, ChP]." (Condorelli and Ciampi 2005, p. 593.)

every State in the world.[68] Common Article 1 of the Geneva Conventions reads that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". Furthermore, the Geneva Conventions also make it clear that States have a certain duty with respect to the perpetrators of grave breaches of the Conventions,[69] also known as war criminals.[70]

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[71]

This universally accepted *aut dedere aut iudicare* obligation with respect to grave breaches of the Geneva Conventions[72] might be read broadly so that the term *dedere* would not necessarily be limited to other States but would also apply to an international institution such as the ICC. That would mean that States have a duty either to prosecute suspects of those grave breaches or hand them over (*dedere*) to

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[68] If not because a certain State is a party to these Conventions, then surely because the Conventions can be seen as reflecting customary international law, applicable to any State. See Zhu 2006, p. 92.

[69] For GC I (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949), see its Art. 50: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." For GC II (Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949), see its Art. 51. (The text is the same as that of Art. 50 GC I.) For GC III (Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949), see its Art. 130: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." For GC IV (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949), see its Art. 147: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[70] See also International Committee of the Red Cross, *International Humanitarian Law. Answers to your Questions*, Geneva, October 2002 (available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open), p. 35.

[71] Artt. 49 GC I, 50 GC II, 129 GC III and 146 GC IV.

[72] See also n. 162 and accompanying text of Chapter III.

States or the ICC.[73] Even if such a broad reading of the Geneva Conventions were dismissed, it could be argued that the words "to ensure respect" are so broadly formulated that they could encompass a duty to cooperate with the ICC. It seems that Zhu adheres to this idea when he states:

> While legal obligations are created on the basis of the principle that it is necessary to "ensure respect" "in all circumstances," it is still not very clear from the four Geneva Conventions which steps states should take and through which procedures. However, one of the objectives of establishing the ICC is to pursue serious violations of the 1949 Geneva Conventions. States not party to the ICC but party to the Geneva Conventions are obliged to "ensure respect" "in all circumstances"; this includes the extended obligation to co-operate with the ICC. In any event, the obligation to co-operate should be understood as requiring nonparty states at least to make an effort not to block actions taken by the ICC to punish or prevent serious violations of the Geneva Conventions.[74]

[73] *Cf*. also Swart 2002 C, p. 1688: "It is widely held that the relevant provisions of the Geneva Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. In this approach, surrender of an accused to an international court constitutes compliance with the treaty obligation to extradite or prosecute [original footnote omitted, ChP]."

[74] Zhu 2006, p. 94. *Cf*. also Ciampi 2002, p. 1609: "One may argue that, according to current customary international law, all States are under an obligation to cooperate at least with respect to some of the crimes within the jurisdiction of the Court (e.g. in relation to war crimes set out in the Geneva Conventions of 12 August 1949, the provisions of which are generally held to correspond to customary rules). But it is doubtful whether a general rule of this kind – were it deemed to exist under customary international law – may imply an obligation to comply with requests by the Court for cooperation outside the Statute framework, for States which do not become a party to it [original footnote omitted, ChP]." See finally Kaul and Kreß 2000, p. 172 ("[T]he obligation of all states under customary international law not only to respect but also to ensure the respect of international humanitarian law adds a useful complement to the cooperation regime [original footnotes omitted, ChP].") and Palmisano 1999, pp. 420-421: "An obligation to cooperate with the ICC (or, better, with the States parties to the Rome Statute acting together by means of the ICC) may in fact deem to be inherent in the decision of the States parties to such conventions [Palmisano here mentions conventions such as the Geneva Conventions, the Torture Convention, the Genocide Convention and the Apartheid Convention (the latter two will be discussed in the main text in a few moments), ChP] to realize advanced forms of international cooperation in criminal matters, in order to achieve a better prevention and repression of the relevant crimes in comparison with the prevention and repression which is usually achieved unilaterally by each State or by means of bilateral (State-to-State) channels of extradition and mutual judicial assistance. In other words, these States consider clearly it to be in their common interest, and in the interest of the international community as a whole, to prosecute persons accused of war crimes or crimes against humanity in an international coordinated way. States which have solemnly accepted multilateral treaty provisions aimed at achieving prevention and punishment of specific crimes by means of international cooperation and judicial assistance cannot therefore refuse in good faith their assistance to other States parties to the same conventions, only because these latter States have decided to prosecute the crimes in question, in given cases and under particular conditions, by means of a common judicial organ [original footnote omitted, ChP]." In his footnote, Palmisano also refers to UNGA Res. 3074 (XXVII) of 3 December 1973 ('Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity') in which the UNGA stated, among other things, in para. 4 that "States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes".

In this respect, one should also mention the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[75] and the UN Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).[76] These conventions are even more specific in providing the possibility, in Articles VI and V respectively, that persons charged with genocide/apartheid[77] shall/may[78] be tried by *an international penal tribunal* which has jurisdiction over these crimes with respect to those States which have accepted that tribunal's jurisdiction.[79] Obviously, the ICC could be that international penal tribunal. However, States which are not party to the ICC Statute would then still need to accept the jurisdiction of the ICC, for example, through the previously mentioned Article 12, paragraph 3 of the ICC Statute.[80] "The real importance of these conventions",[81] Swart therefore notes, "lies elsewhere":[82]

> They both oblige all Parties to punish persons who have committed crimes of genocide or apartheid on their territory. It would seem that the parties to the conventions may be considered to have complied with that obligation by accepting the jurisdiction of the Court in the case at hand and surrendering the person concerned to the Court.[83]

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[75] Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 (entered into force: 12 January 1951).

[76] International Convention on the Suppression and Punishment of the Crime of *Apartheid,* adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973 (entered into force: 18 July 1976).

[77] The crime of apartheid also falls within the jurisdiction of the ICC, namely as a crime against humanity, see Art. 7, paras. 1 (j) and 2 (h) of the ICC Statute.

[78] The verb "shall" is used in the Genocide Convention, whereas the verb "may" is used in the Apartheid Convention.

[79] Art. VI of the Genocide Convention reads: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Art. V of the Apartheid Convention reads: "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

[80] See Swart 2002 C, p. 1687: "As long as they have not done so, it is not possible to construe a direct obligation for them to surrender persons to the Court on the basis of the two UN conventions." However, Palmisano (1999, pp. 421-423) is of the opinion that "the obligation of cooperation and judicial assistance should include, in our view, the duty upon all States parties, including those which are not parties to the Rome Statute, to cooperate directly with an organ like the ICC and upon its direct request. (…) [I]n all cases (…) an express refusal to cooperate directly with the Court, or any clear lack of good faith in granting judicial assistance to it, would constitute, in our view, a violation by third States which are parties to instruments such as the Genocide Convention or the Apartheid Convention, of the obligation to afford the greatest measure of mutual cooperation and judicial assistance imposed by them."

[81] Swart 2002 C, p. 1687.

[82] *Ibid.*

[83] *Ibid.*

It may be interesting in this context to look at the 2007 *Bosnia and Herzegovina* v. *Serbia and Montenegro* case before the ICJ. In this case, Bosnia and Herzegovina requested the Court to adjudge and declare

> [t]hat Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.[84]

This is an implicit reference to the above-mentioned (see footnote 79) Article VI of the Genocide Convention.[85] Although the ICJ concluded that Serbia[86] "cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide" (for Srebrenica is not located in the territory of Serbia),[87] it did state that Serbia had violated other obligations stemming from the Convention. It explained that once an international penal tribunal, such as the ICTY,[88] has been established,

> Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory – even if the crime of which they are accused was committed outside it – and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.[89]

This is what Serbia had not done,[90] and by failing to comply, Serbia became the first State in history to violate the Genocide Convention.[91] The considerations of the

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[84] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 'Judgment', 26 February 2007, para. 440.
[85] See *ibid*., para. 441.
[86] The proceedings were initially instituted against the FRY, but as from February 2003 (after a change of that State's name), the Respondent was Serbia and Montenegro and finally, as from 3 June 2006 (after the independence of Montenegro), the Respondent was the Republic of Serbia, see *ibid*., para. 1.
[87] *Ibid*., para. 442. See also *ibid*.: "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so."
[88] See *ibid*., para. 445.
[89] *Ibid*., para. 443.
[90] See *ibid*., paras. 448-449. The ICJ hereby paid special attention to the role of General Mladić (see *ibid*., para. 448): "[T]he Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he

ICJ in this case certainly leave room for arguing that the ICC would also come under the definition of 'international penal tribunal'. In fact, the ICC seems to fit the probable intention of the Genocide Convention's drafters even more closely than the ICTY.[92]

On a final note and moving away from specific treaties, it may be worth mentioning that Swart notes that "[t]here can be little doubt that customary international law imposes a primary duty on States which have themselves been implicated in international crimes to repress them. Surrender of the alleged offenders to the Court may free them from that obligation."[93] However, as mentioned by Swart, it must be borne in mind that in that case, the *aut dedere* (to perhaps the ICC) *aut iudicare* obligation only applies to States which are *themselves* implicated in those international crimes: "It is, however, more open to doubt whether the obligation to extradite or prosecute has become a rule of *jus cogens* with regard to other States [original footnote omitted, ChP]."[94]

Now that a few characteristics of the ICC's general cooperation regime have been presented, the next section will focus on the more specific arrest and surrender provisions.

3 THE ARREST AND SURRENDER REGIME

3.1 The arrest and surrender regime Part I

However, before doing that, it is worth pointing out that the ICC regime speaks of surrender (meaning "the delivering up of a person by a State to the Court, pursuant to this Statute")[95] and not of extradition (meaning "the delivering up of a person by

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is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time."

[91] See *ibid*., para. 471: "The Court, (…) by fourteen votes to one, *Finds* that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed to co-operate with that Tribunal".

[92] See *ibid*., para. 445: "The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, *its authors probably thought that such a court would be created by treaty*: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal [emphasis added, ChP]."

[93] Swart 2002 C, p. 1688.

[94] *Ibid*. Nevertheless, "it may well acquire that character in the future." (*Ibid*., p. 1663.)

[95] Art. 102 (a) of the ICC Statute.

one State to another as provided by treaty, convention or national legislation").[96] This difference goes beyond mere semantics and shows that the term extradition (deriving from the horizontal context), including all its characteristics, does not apply to the ICC regime.[97] Examples in that respect are the refusal to extradite

[96] Art. 102 (b) of the ICC Statute.

[97] In the words of Sluiter: "The purpose of this distinction is to ensure that traditional extradition law is not applicable, *mutatis mutandis*, to the special surrender regime. The application of traditional extradition law creates a number of obstacles to the effective and expeditious capture of war criminals. For this reason, the ICTY and ICTR statutes and rules consistently avoid the term "extradition," and instead use the word "transfer" or "surrender." (...) The drafting history illustrates that the distinction between surrender and extradition was not simply about terminology and "legal sophistry." The entire ICC legal assistance law, in addition to the ICC surrender regime, aspired to base itself on different principles and content when compared to traditional cooperation models between sovereign states [original footnotes omitted, ChP]." (Sluiter 2003 C, pp. 607-609.) See also Swart 2002 C, p. 1678: "Article 102 has been included in the Statute in order to make clear that the handing over of a person to the International Criminal Court is fundamentally different in nature from the handing over of a person within the framework of extradition between States." See also Maogoto 2004, p. 120, Prost 2005, p. 81 and Ciampi 2006, p. 721. *Cf.* also the terminology used in the context of the EAW (Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190/1 of 18 July 2002, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF.) Here also, the concept of surrender was introduced to make clear that the regime of the European Arrest Warrant could not be compared with the normal extradition context, see para. 5 of the above-mentioned Framework Decision: "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities." (See also Vierucci 2004, p. 279.) See on this point also Deen-Racsmány (2007, p. 175), who makes a comparison between ICC surrender and surrender under the EAW. In contrast to the other authors mentioned above, she believes that "[u]nlike the EAW, apart from proscribing a (semantic) distinction between 'extradition' and 'surrender' in Article 102, the ICC Statute does not evidence any intention to establish substantially new procedures. Indirectly, it even confirms the applicability of procedures existing under domestic (extradition) law to surrendering the accused to the Court [original footnote omitted, ChP]". The provisions to which she refers (Artt. 89 and 91 of the ICC Statute) to back her assertion will be further discussed *infra*. To mention a final interesting point on the interaction between the ICC and the EAW: note that the EAW, although it cannot be used *directly* between EU Member States and the ICC, can be used between EU Member States themselves. As such, it will not only be useful in national efforts to prosecute 'ICC crimes' (see Art. 2, para. 2, 30th indent of the EAW: "The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: (...) crimes within the jurisdiction of the International Criminal Court") – this is the idea of the ICC's complementarity principle – it may also be helpful with respect to efforts by the ICC to prosecute the crimes over which it has jurisdiction. In the words of Vierucci: "[A]lthough the Court may transmit a request for the arrest and surrender of a person 'to any state on the territory of which that person may be found', between the moment of transmission of the ICC request and its execution within the state, the person sought out might have crossed that state's boundaries to escape apprehension. This is likely to occur in the EU territory, given the principle and practice of free circulation of persons. In such circumstances, the EAW may constitute an effective means for an EU Member State to locate and apprehend a person wanted by the Court who has taken refuge within the EU boundaries. For example, if the Court requests Spain to hand over a national who happens to be on the territory of another EU member, the requested state, instead of simply notifying the Court that its national is no longer on its territory, may have recourse to the EAW in order to track

nationals,[98] the refusal to extradite persons accused of having committed political offences and the double criminality requirement.[99] This clearly points to a vertical rather than a horizontal regime.[100]

Now, with respect to the substantive arrest and surrender provisions, the first important provision (in the ICC Statute)[101] dealing with the arrest and surrender regime is Article 58 of the ICC Statute ('Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear'). If the Pre-Trial Chamber, on the application of the Prosecutor,[102] is satisfied that 1) there are reasonable grounds to believe that a certain person has committed a crime within the jurisdiction of the Court[103] and 2) the arrest of this person appears necessary,[104] it shall issue a (possibly sealed)[105] warrant of arrest.[106] Such an arrest warrant must contain

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down, arrest and have the person surrendered, if necessary, through the Schengen Informatic System or Interpol [original footnotes omitted, ChP]." (Vierucci 2004, p. 277.)

[98] See, however, Deen-Racsmány (2007, p. 190): "The semantic distinction between 'surrender' and 'extradition', the fact that the ICC is not a state, or even the nature and purpose of the ICC may not suffice to render a constitutional ban on the extradition of nationals inapplicable."

[99] The fact that these grounds for refusal can be invoked at the horizontal level also shows that the obligation to cooperate/extradite in that context is limited and incomparable with the obligation to cooperate/surrender in the ICC context. For more information on the question as to why these grounds for refusal are and should be invalid in the context of the ICC, see Sluiter 2003 C, pp. 636-642. For the sake of completeness, it may be good to note that the ICC Statute *does* contain, however, the (inter-State extradition) exception of speciality, see Art. 101 of the ICC Statute. Nevertheless, it should also be noted that this is not a real ground to refuse surrender. "Rather, it imposes conditions on the legal consequences of surrender." (*Ibid*., p. 643.) For criticism related to the inclusion of this exception in the ICC Statute, see *ibid.*, pp. 643-644 and Swart 2002 B, p. 1596 (or Swart 2002 C, pp. 1698-1701).

[100] See Kreß and Prost 2008 C, p. 1646 (writing on the reasons why the distinction extradition/surrender was made): "Such a clear distinction at the *terminological* level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the *substantial* differences between *horizontal* and *vertical* cooperation [emphasis in original and original footnote omitted, ChP]."

[101] Although this study will, where necessary, also look at the relevant provisions of the ICC RPE, the focus is on the ICC Statute. *Cf.* also Swart 2002 C, p. 1677, who notes that "the Rules of Procedure and Evidence (…) have a role to play, albeit a very modest one, apparently." (At the time Swart wrote his piece, the ICC RPE were not yet adopted.)

[102] This application must contain: "(a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and (e) The reason why the Prosecutor believes that the arrest of the person is necessary." (Art. 58, para. 2 of the ICC Statute.)

[103] See Art. 58, para. 1 (a) of the ICC Statute.

[104] See Art. 58, para. 1 (b) of the ICC Statute. This may be the case "(i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) 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." (*Ibid*.)

[105] In all the three ICC *male captus* cases discussed in this book (*Lubanga Dyilo*, *Bemba Gombo* and *Katanga*), the ICC used this technique stemming from the context of the UN *ad hoc* Tribunals, see ns. 1, 297 and 367 and accompanying text of Chapter X. Schabas (2007, p. 261) notes, however, that "[t]here is no explicit authorisation in the Statute or the Rules for issuance of sealed warrants, and in making the rules the Pre-Trial Chambers have cited no basis for this."

(a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) A concise statement of the facts which are alleged to constitute those crimes.[107]

Alongside an arrest warrant, the Pre-Trial Chamber may also issue a summons to appear.[108] This is a less drastic measure to make a person appear before the ICC: although it may restrict a person's liberty,[109] it does not involve arrest and detention, *cf.* also footnote 2. Thus, a summons to appear, which, by the way, contains comparable requirements to those of an arrest warrant,[110] gives the suspect a chance to 'voluntarily'[111] go to The Hague.

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[106] Note that, in contrast to the situation at the ICTY/ICTR, the ICC does not require the confirmation of the indictment (but only the reasonable grounds threshold) before arrest warrants can be issued, see n. 50 and accompanying text of Chapter VI. Sluiter (2006 A, p. 152) is of the opinion that "[t]his change in procedure is to be commended" for "[i]t avoids the need for numerous and confusing subsequent amendments in the indictment."

[107] Art. 58, para. 3 of the ICC Statute.

[108] See Art. 58, para. 7 of the ICC Statute: "As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear."

[109] One could hereby think of the measure that: "(a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber; (b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber; (c) The person must not contact directly or indirectly victims or witnesses; (d) The person must not engage in certain professional activities; (e) The person must reside at a particular address as specified by the Pre-Trial Chamber; (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber; (g) The person must post bond or provide real or personal security or surety for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber; (h) The person must supply the Registrar with all identity documents, particularly his or her passport." (Rule 119, para. 1 of the ICC RPE.)

[110] See Art. 58, para. 7 of the ICC Statute: "The summons shall contain: (a) The name of the person and any other relevant identifying information; (b) The specified date on which the person is to appear; (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and (d) A concise statement of the facts which are alleged to constitute the crime."

[111] Although this word was used by the ICC judges themselves ("In the Chamber's view, the issue raised by article 58 of the Statute is whether or not the arrests of these persons appear to be necessary. The application of article 58(7) of the Statute is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender as provided for in articles 89 and 91 of the Statute." (ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *In the Case of The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 'Decision on the Prosecutor's Application under Article 58(7) of the Statute' (Public), ICC-02/05-01/07, 27 April 2007, para. 117)), one can wonder how 'voluntary' the coming to The Hague of people *summoned* to appear really is. The formulation of Art. 60, para. 1 of the ICC Statute may also confirm this: "Upon the surrender of the person to the Court, or the person's appearance before the Court *voluntarily or pursuant to a summons*, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial [emphasis added, ChP]." See also Ciampi 2006, p. 720: "According to the Statute,

An example of the correlation between an arrest warrant and a summons to appear can be found in the case of the Sudanese suspects Ahmad Harun and Ali Kushayb.

In his application in this case,[112] the Prosecutor first opted for the summons to appear,[113] on the grounds that the Sudanese Government had previously been quite cooperative and that these summonses might therefore also have a positive result.[114] Nevertheless, the Prosecutor also remarked that his choice was based on past experiences only and that the issuance of the summonses could easily work out differently and negatively.[115] If that were to happen, the Prosecution argued, arrest warrants would have to be issued.[116] The Pre-Trial Chamber, however, decided otherwise. In its decision on the application of the Prosecutor,[117] it stated that Kushayb was detained and could therefore not be summoned to appear before the ICC.[118]

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a person may come before the ICC in three different ways: first, following the surrender of the person to the Court; second, upon the person's voluntary appearance; and, thirdly, pursuant to a summons to appear [original footnote omitted, ChP]."

[112] See ICC, Pre-Trial Chamber I, Situation in Darfur, The Sudan, 'Prosecutor's Application under Article 58(7)' (Public Redacted Version), ICC-02/05, 27 February 2007.

[113] *Ibid*., para. 273: "After a careful analysis of the relevant information, the Prosecution (…) has assessed at this stage, and respectfully submits, that a summons to appear should be the alternative first pursued by the Court. This route was introduced in Article 58 in the Statute in Rome as a less intrusive one. The Prosecution's present assessment is that a summons could prove sufficient to ensure the persons' appearance."

[114] See *ibid*., para. 274: "In particular, the Prosecution considers worthy of the Chamber's consideration that the Government of the Sudan, which would serve the summons, and would have to facilitate and follow up on the summons, thus far has in practice provided a degree of cooperation in response to the Prosecution's requests. (…) [T]he Prosecution foresees the possibility that the Government could cooperate in facilitating the appearance of those persons against whom a summons may be used."

[115] See *ibid*., para. 274: "The Prosecution cannot prejudge, as a matter proceeds to the Pre-Trial Chamber, the subsequent decisions that will be taken by the Government of the Sudan in relation to this new phase of the proceedings. The prosecution can only call the attention of the Pre-Trial Chamber to past instances."

[116] See *ibid*., para. 278: "[T]he Prosecution submits that a number of circumstances could lead it to modify its assessment of the likelihood that a summons to appear would prove sufficient in ensuring the persons' appearance. In this regard the Prosecution submits that any official response or action of the Sudanese Government, or of HARUN or KUSHAYB, to the filing of this application, to the effect that they will resist or fail to comply with any decision by the Pre-Trial Chamber on this matter, would modify this assessment of the OTP and would justify, in the Prosecution's view, and subject to the Pre-Trial Chamber's determination, the issuance of warrants of arrest."

[117] See ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *In the Case of The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 'Decision on the Prosecutor's Application under Article 58(7) of the Statute' (Public), ICC-02/05-01/07, 27 April 2007.

[118] See *ibid*., paras. 119-121: "119. Regarding Ali Kushayb, the Chamber notes that he is reported to be in prison upon a warrant of arrest issued by the Sudanese authorities and that the Prosecution has not presented any information that would lead to the conclusion that Ali Kushayb would appear voluntarily before the Court while being detained by the Sudanese authorities. 120. Moreover, the Chamber is of the view that issuing a summons to appear for a person currently detained by national authorities would be contrary to the object and purpose of article 58(7) of the Statute. Indeed, the possibility provided for in article 58(7) of the Statute to issue a summons to appear with conditions restricting liberty (other

With respect to Harun, the Pre-Trial Chamber noted that the Prosecution had found that he had shown a willingness to cooperate in the past, but that he had also concealed evidence.[119] More generally, it pointed to the fact that the Sudanese Government had stated that it would not cooperate with the ICC.[120] As a result, the requirements of Article 58, paragraph 7 of the ICC Statute (see footnote 110) were not met.[121] By contrast, the requirements of Article 58, paragraph 1 of the ICC Statute *were* met, meaning that the Pre-Trial Chamber could issue warrants of arrest for these persons,[122] which in fact it did the very same day.[123]

Whereas the summons to appear as such may lead to the appearance of the suspect at the ICC, the arrest warrant by itself is not enough. If the ICC wants a certain State to (provisionally)[124] arrest a suspect, the arrest warrant needs to be followed by a request to arrest and surrender.[125]

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than detention), and the list of those conditions provided for in rule 119 of the Rules, clearly indicate that a summons to appear is intended to apply only to persons who are not already being detained. 121. In addition, although the Prosecution alleges in its application that Ali Kushayb could appear before the Court under a summons to appear while remaining in custody in the context of the Sudanese legal proceedings, it does not indicate how this would be possible under the legal framework provided for by the Statute and the Rules. Under this framework, it is not possible to envisage a surrender, even a temporary surrender as provided for in rule 183 of the Rules and which seems to be referred to implicitly in the Prosecution Application, without the prior issuance of a warrant of arrest [original footnotes omitted, ChP]."

[119] See *ibid*., para. 122.

[120] See *ibid*., para. 123.

[121] See *ibid*., para. 124.

[122] See *ibid*., p. 43.

[123] See ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *In the Case of The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 'Warrant of Arrest for Ahmad Harun' (Public Document), ICC-02/05-01/07, 27 April 2007 and ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *In the Case of The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 'Warrant of Arrest for Ali Kushayb' (Public Document), ICC-02/05-01/07, 27 April 2007.

[124] A provisional arrest is only possible in urgent situations. See Art. 92 of the ICC Statute: "1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91 [see n. 126, ChP]. 2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain: (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location; (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime; (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and (d) A statement that a request for surrender of the person sought will follow. 3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. [According to Rule 188 of the ICC RPE, the time limit shall be 60 days from the date of the provisional arrest, ChP.] However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible. 4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date." It is interesting here to note that these provisions on provisional arrest, in contrast to their counterparts of the UN *ad hoc* Tribunals (see Section 2 of Chapter VI), do explicitly

Article 89, paragraph 1 of the ICC Statute ('Surrender of persons to the Court') reads:

> The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91,[126] to any State on the territory of which that person may be found[127] and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part [this is Part 9 of the ICC Statute, see also footnote 16, ChP] and the procedure under their national law, comply with requests for arrest and surrender.

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mention the possibility of release after a certain time-limit even *before* the surrender of the person to the ICC. As clarified in Chapter VI, the UN *ad hoc* Tribunals only mention a time-limit *after* the transfer of the person to the Tribunal. Swart therefore concludes that "[f]rom the point of view of protecting basic rights of individual persons, the system of the Statute is definitely superior to that of Rule 40 of the Rules of Procedure and Evidence." (Swart 2002 C, p. 1702.)

[125] See Art. 58, para. 5 of the ICC Statute: "On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9."

[126] Art. 91 of the ICC Statute ('Contents of request for arrest and surrender') reads: "1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a) [this general paragraph states that "[t]he Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence." ChP]. 2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by: (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location; (b) A copy of the warrant of arrest; and (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court. 3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by: (a) A copy of any warrant of arrest for that person; (b) A copy of the judgement of conviction; (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served. 4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law."

[127] Note that the ICC, in contrast to the ICTY/ICTR, can only issue 'normal' requests for arrest and surrender and not international arrest warrants, see Rule 61 of the ICTR/ICTR RPE and n. 85 and accompanying text of Chapter VI. In this context, Swart remarks: "Apparently, the framers of the Statute did not want to follow the example of the *ad hoc* Tribunals in creating a special procedure in the case of refusal of States to comply with requests for arrest and surrender, designed to provide some sort of compensation for the fact that trials *in absentia* are not allowed under the Statute." (Swart 2002 C, p. 1689.)

Here, one can see that the ICC does not view national procedural law as irrelevant to its arrest and surrender system[128] and that the regime may be even less vertical than initially thought.[129] Nevertheless, one must also understand that "national law procedures should not obstruct the surrender of accused persons to the Court".[130] With respect to national substantive law (which, by the way, may sometimes be hard to discern from national procedural law),[131] it is worth repeating that the traditional refusal grounds for extradition are not valid in the context of the ICC.[132] Nevertheless, the arrest and surrender procedures of the ICC Statute contain provisions that may be understood as referring to more substantive obstacles. For example, the above-mentioned Article 89 of the ICC Statute refers to Article 91 of the ICC Statute,[133] paragraph 4 of which states:

> Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

And Article 91, paragraph 2 (c) of the ICC Statute, in turn, states that the request for arrest and surrender shall contain or be supported by:

> Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those

[128] See also Art. 88 of the ICC Statute (entitled 'Availability of procedures under national law'): "States parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part [this is again Part 9 of the ICC Statute, ChP]."

[129] Art. 89, para. 1 of the ICC Statute refers to Art. 91 of the ICC Statute, which, in turn, refers to Art. 87 of the ICC Statute (entitled 'Requests for cooperation: general provisions'). According to the latter article's para. 1 (a), "[t]he Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession." Furthermore, para. 2 of the same Art. 87 stipulates that "[r]equests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession." Sluiter (2003 C, pp. 619-620) (see also (almost identically) Maogoto 2004, p. 118) notes that "[t]hese regulations are similar to those in the Inter-State Cooperation Model. It is clearly a concession to states in favour of a more horizontally oriented cooperation model [original footnotes omitted, ChP]." More information on Art. 87 of the ICC Statute can be found in Kreß and Prost 2008 A.

[130] Young 2001, p. 349.

[131] See *ibid*., p. 341: "Whether a national law is procedural in nature is not always easy to discern. For example, a constitutional prohibition against arbitrary arrests may be used to test the validity of the criminal process, but it is also a substantive right of the accused."

[132] Swart argues that the reference to national *procedures* "makes clear that *substantive* grounds for refusing surrender which are normal in domestic extradition law do not matter here [emphasis added, ChP]." (Swart 2002 C, p. 1680.) See also Young 2001, p. 345 ("It was understood that this qualification [in accordance with (…) the procedure under (…) national law, ChP] referred only to procedural laws and not to the substantive laws of the State.") and Kaul and Kreß 2000, pp. 166-167 ("The obligation to surrender persons to the Court is not subject to substantive national law.").

[133] See n. 126.

> requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

Although Young is of the opinion that "[a] wide interpretation of article 91(2)(c), which would open the door to (…) [the traditional grounds of refusal in extradition, ChP], should not be accepted in light of its drafting history and the principle of complementary effective prosecution",[134] he admits that the ICC Statute is ambiguous "[o]n the issue of whether States Parties may impose an evidential sufficiency requirement for surrender".[135]

Another not so vertical feature of the ICC arrest and surrender procedures can be found in the above-mentioned Article 91, paragraph 4 of the ICC Statute on consultations in the case of problems.[136] Arguably, consultations are not

[134] Young 2001, p. 350.

[135] *Ibid*. See also *ibid*., p. 346: "[A]rticle 91 was not intended to preserve or resurrect extradition refusal grounds. If article 91(2)(c) was intended to recognize any domestic authority to refuse surrender, it was only limited to cases where the evidence supporting the commission of the offence was insufficient for surrender [original footnote omitted, ChP]." Kaul and Kreß (2000, p. 166) explain that this provision constitutes a compromise package (caused by the negotiators' dilemma of "necessity, on the one hand, of meeting (...) constitutional concerns and, on the other hand, of not creating a serious loophole which could be abused to circumvent the obligation to surrender") but not a ground for refusal. Recall also the argument made by Deen-Racsmány as alluded to in n. 97 of this chapter (referring to Artt. 89 and 91 of the ICC Statute).

[136] See for another concrete example the reference to consultations in Art. 89, para. 2 of the ICC Statute, a provision which deals with *ne bis in idem* claims and which also mentions the possibility of postponement of surrender: "Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility." The general provision on consultations can be found in Art. 97 of the ICC Statute ('Consultations'): "Where a State Party receives a request under this Part [this is again Part 9 of the ICC Statute, ChP] in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*: (a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State." Another example of a provision where postponement of (surrender) requests is regulated is Art. 95 of the ICC Statute ('Postponement of execution of a request in respect of an admissibility challenge'). (Note that – the also quite generally formulated – Art. 94 of the ICC Statute ('Postponement of execution of a request in respect of ongoing investigation or prosecution') "only pertains to requests for forms of cooperation other than surrender with article 89 para. 4 being its counterpart as far as requests for surrender are concerned." (Kreß and Prost 2008 B, p. 1589.) Art. 89, para. 4 of the ICC Statute reads: "If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.")

characteristic of a vertical relationship in which the requesting actor has a hierarchically higher status and tells the 'requested' (read: ordered) entity what to do.[137]

Before addressing the remaining arrest and surrender provisions, it should be emphasised that "a person for whom a warrant of arrest or a summons to appear has been issued under article 58"[138] (as well as an accused person)[139] can make a challenge on the basis of Article 19 of the ICC Statute ('Challenges to the jurisdiction of the Court or the admissibility of a case'). Although admissibility matters are not relevant to the *male captus* discussion,[140] jurisdiction challenges most assuredly are, even if Article 19 of the ICC Statute does not explicitly mention a *male captus* situation as an example of a jurisdictional challenge. (In fact, Article 19 of the ICC Statute does not mention *any* examples of jurisdictional challenges.) One can certainly imagine that a suspect who is the victim of a serious *male captus* situation will use this provision in the future. Even if such a *male captus* challenge is, strictly speaking, not a challenge to the ICC's jurisdiction, but to its *exercise* of jurisdiction, one should not focus too strongly on this difference. After all, if a suspect making such a challenge succeeds, the ICC will refuse to exercise jurisdiction over that person, meaning that the person can no longer be tried before the ICC. In other words: it will have lost jurisdiction *ratione personae* with respect to that person.[141] Article 19 of the ICC Statute stipulates that a challenge can, in principle, only be made prior to or at the commencement of the trial.[142]

[137] See also Swart and Sluiter 1999, pp. 103-105.

[138] Art. 19, para. 2 (a) of the ICC Statute.

[139] In addition, jurisdictional challenges can also be made by States, see Art. 19, para. 2 (b) and (c) of the ICC Statute.

[140] See Art. 17, para. 1 of the ICC Statute: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court."

[141] *Cf.* also ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 19: "[T]he Appeals Chamber wishes to clarify that what is at issue here, is not jurisdiction *ratione materiae* but jurisdiction *ratione personae*. Jurisdiction *ratione materiae* depends on the nature of the crimes charges. The Accused is charged with war crimes and crimes against humanity. As such, there is no question that under the Statute, the International Tribunal does have jurisdiction *ratione materiae*. In this case, jurisdiction *ratione personae* depends instead on whether the Appeals Chamber determines that there are any circumstances relating to the Accused which would warrant setting aside jurisdiction and releasing the Accused. It is to this determination that the Chamber now turns." (See also n. 591 and accompanying text of Chapter VI.) *Cf.* finally ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206: "[T]he Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction." (See also n. 1047 and accompanying text of Chapter VI.)

[142] See Art. 19, para. 4 of the ICC Statute.

Furthermore, the Pre-Trial Chamber (prior to the confirmation of the charges) or the Trial Chamber (after confirmation of the charges) shall look at the challenges and their decisions on these challenges can be appealed to the Appeals Chamber.[143]

Returning now to the arrest and surrender provisions themselves, if a State Party has received a request for (provisional) arrest and surrender, and if (potential) problems with competing requests[144] or other international obligations States may have[145] are solved,[146] the first paragraph of Article 59 of the ICC Statute ('Arrest proceedings in the custodial State') clarifies that the State "shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9". The reference to "its laws" (which, by the way, may also refer to provisions from human rights treaties)[147] reaffirms that the arrest and surrender regime of the ICC contains horizontal elements as well. In the words of Swart:

> As is generally the case for cooperation between the Court and States under the Rome Statute, the provisions on arrest proceedings in the custodial State present an interesting mixture of elements inspired by traditional inter-State practice and the law of the *ad hoc* Tribunals.[148]

3.2 The arrest and surrender regime Part II: Article 59, paragraph 2 of the ICC Statute

After the suspect has been arrested, he

> 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:
>
> (a) The warrant applies to that person;
> (b) The person has been arrested in accordance with the proper process; and
> (c) The person's rights have been respected.[149]

As will also be shown in the next chapter (where the drafting history of this provision will be reviewed), this *habeas corpus*-like provision is one of the most important in the arrest and surrender proceedings, where the national and international levels meet, and therefore deserves a subsection of its own.

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[143] See Art. 19, para. 6 of the ICC Statute.
[144] See Art. 90 of the ICC Statute. For more information on this topic, see, for example, Sluiter 2003 C, pp. 629-631.
[145] See Art. 98 of the ICC Statute. For more information on this topic, see, for example, *ibid*., pp. 631-633.
[146] This is, of course, a huge deviation from the regimes of the ICTY/ICTR, which were covered by Art. 103 of the UN Charter ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."). See also Swart 2002 C, pp. 1680-1681, Ciampi 2002, p. 1631 and Sluiter 2003 C, pp. 612 and 629-630.
[147] See Swart 2002 A, p. 1252.
[148] *Ibid*., p. 1251.
[149] Art. 59, para. 2 of the ICC Statute.

Before turning to the main problem connected with this provision, it is worth first establishing the precise meaning of the three elements to be determined by the competent judicial authority. The first is quite plain: whether the person standing before the judicial authority is indeed the person sought by the ICC. The second and third elements are less clear, however.[150]

To start with the second, what does "arrested in accordance with the proper process" mean? This is probably different from State to State, but its scope is potentially rather broad. In the words of El Zeidy:

> One commentator argues that although Article 59(2) does not 'tackle the criteria of proper process', it implies that the arrest warrant 'be duly served on the person arrested'. This interpretation seems insufficient. What is meant by these words is a matter to be determined and clarified either through domestic implementation of the Statute or by the national judge of the requested state. Several possibilities may be taken into account in considering the implications of this provision. The first possibility is that the provision refers to the law of criminal procedure that regulates the process of arresting a person under investigation and presenting him/her to the national judge. A second possibility refers to the lawfulness of the domestic arrest warrant executing the international arrest warrant issued by the ICC.[[151]] Finally, one may extend the argument to include the way in which the person has been brought before the domestic court in general (if the means are illegal they may include: deportation, luring or trickery-abductions or other uses of force).[[152]] (...) It could be argued, therefore, that the meaning is broad enough to carry with it all unlawful means of deprivation of liberty [original footnote omitted, ChP].[153]

In addition, one must not forget (see footnote 147 and accompanying text) that the process not only needs to be in conformity with national law,[154] but that neither can this national law, of course, violate international (human rights) law.[155]

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[150] Nevertheless, one can already note that the idea that the national authority must perform these checks can be welcomed. (Recall that Swart noted in the context of the ICTY/ICTR (see Section 2 of Chapter VI) that the arrest and transfer provisions of these Tribunals are "mainly concerned on the duties of States vis-à-vis the Tribunals" (Swart 2002 A, p. 1251) and "[t]o a certain extent (...) neglect the rights of the individual persons concerned". (*Ibid.*) See also Sluiter 2003 C, p. 622.)

[151] See n. 127.

[152] Although Art. 59 of the ICC Statute ('Arrest proceedings in the custodial State') only seems to focus on the proceedings in the custodial State, and not on, for example, operations which may occur in a third State and in which a suspect may be involved before being brought before the competent judicial authority of the custodial State, one can assume (or perhaps hope) that that authority will also look at, for example, allegations of trans-border *male captus* situations. (In that respect, all the different inter-State situations discussed in Chapters IIII and V remain of relevance to the ICC context.) In addition, one must also be aware of the fact that Art. 59 of the ICC Statute assumes the issuance of a request for arrest and surrender/for provisional arrest. However, one can also imagine that a *male captus* may already have taken place before such a request has been issued. One could hereby think of a person who claims to have been placed in illegal detention even before the ICC had sent its official requests. This point will come back in the ICC cases of *Lubanga Dyilo* and *Katanga* (see Sections 2 and 4 of Chapter X). (*Cf.* also the *Duch* case, see Subsection 5.1 of Chapter VI.)

[153] El Zeidy 2006, pp. 454-455.

[154] See the words "in accordance with the law of that State". Although there is thus room for national law, it "cannot be read in a manner that defeats the object and purpose of the Statute – namely the

The third element is also not very clear. Swart writes that "[o]ne may think here of the rights of the person under national law and human rights treaties to which the requested State is a party. Equally relevant are the provisions of Article 55[[156]] of the Statute itself."[157] One could also think here of Article 21, paragraph 3 of the ICC Statute, which states, among other things, that "[t]he application and interpretation of law pursuant to this article [this is the law of the ICC as can be found in Article 21 of the ICC Statute, ChP] must be consistent with internationally recognized human rights". (This crucial provision will be discussed in detail in Section 4 of Chapter IX.)

With respect to the most important right in which this book is interested, although Article 59 of the ICC Statute does not give the arrested person an explicit right to have the lawfulness of his arrest and detention checked by a court, such a right "may nevertheless follow from human rights conventions to which the requested State is a party".[158] An analogy to international human rights law may be helpful here, even if Article 59, paragraph 2 of the ICC Statute itself does not use this term (but speaks of "[t]he person's rights"), which may mean that the drafters of the ICC Statute may have wanted to give their term a connotation other than that

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obligation to comply with the Court's requests." (*Ibid*., p. 453.) *Cf*. in that respect the already-mentioned (see n. 130 and accompanying text) remark from Young when he addressed national procedural law and stated that "national law procedures should not obstruct the surrender of accused persons to the Court." (Young 2001, p. 349.)

[155] See Hall 2008 B, p. 1152: "The arrest proceedings are governed by the law of the custodial State. Article 59 does not address the criteria of proper process. Basically, it means that the warrant be duly served on the person arrested and that the process be consistent with international law and standards [original footnotes omitted, ChP]." See also Swart 2002 A, pp. 1252-1253: "The expression 'proper process' seems primarily to refer to the national law of the requested State, including its obligations under human rights conventions."

[156] Art. 55 of the ICC Statute ('Rights of persons during an investigation') reads: "1. In respect of an investigation under this Statute, a person: (a) Shall not be compelled to incriminate himself or herself or to confess guilt; (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute. 2. 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: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

[157] Swart 2002 A, p. 1253. See also Young 2001, pp. 341, 349 and 351, Swart 2002 C, p. 1689, Sluiter 2003 C, p. 621 and Hall 2008 B, p. 1152.

[158] Swart 2002 A, p. 1252.

of 'human rights'.[159] Looking for the moment only at the human right to liberty and security – paragraph 2 (c) may, of course, encompass many other rights – and taking the ICCPR's human right to liberty and security as an example here, it was already explained in Subsection 2.2.1 of Chapter III that not only must a person's deprivation of liberty be "on such grounds and in accordance with such procedure as are established by law" (lawful); it must not be arbitrary either.[160] Hence, not only must the deprivation be legal ("on such grounds and in accordance with such procedure as are established by law"), "[t]he law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily".[161]

Now, it is true that the competent authority of the custodial State cannot check the substantive part of the legality requirement, namely whether the deprivation of liberty was made "on such grounds (...) as are established by law".[162] That is up to

[159] See also Sluiter 2003 C, pp. 622-623. It may be interesting to note that the Dutch authorities, when addressing Art. 59, para. 2 of the ICC Statute, refer to "the rights which the person pursuant to national and international law enjoys in this situation", see the Explanatory Memorandum to the International Criminal Court Implementation Act (Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 098 (R 1704), Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof), Nr. 3, Memorie van Toelichting), p. 25: "The reference to article 59, paragraph 2 of the [ICC] Statute has been included because the Statute prescribes that the public prosecutor [the *officier*] checks with respect to a(n) (provisionally) arrested person whether there is perhaps a case of mistaken identity, whether the (national) arrest procedure has been correctly applied and whether the rights which the person pursuant to national and international law enjoys in this situation, have been respected [own translation, ChP]." See also the Dutch Explanatory Memorandum to the approval of the ICC Statute (Tweede Kamer der Staten-Generaal, Vergaderjaar 2000-2001, 27 484 (R 1669). Goedkeuring van het op 17 juli 1998 totstandgekomen Statuut van Rome inzake het Internationaal Strafhof (Trb. 2000, 120), Nr. 3, Memorie van Toelichting), p. 50: "When the Dutch judge, on the basis of Article 59, para. 2 (c), assesses whether the rights of the arrested person have been respected, that assessment includes, among other things, the rights stemming from the Constitution and the ECHR [own translation, ChP]." See also Hall 2008 B, p. 1152: "The rights referred to in this Subparagraph would include both rights under national and under international law, including the rights recognized in article 55".

[160] See Nowak 2005, p. 223.

[161] *Ibid*., p. 224.

[162] Note that the Dutch Government clarifies at p. 50 of the Explanatory Memorandum to the approval of the ICC Statute (Tweede Kamer der Staten-Generaal, Vergaderjaar 2000-2001, 27 484 (R 1669). Goedkeuring van het op 17 juli 1998 totstandgekomen Statuut van Rome inzake het Internationaal Strafhof (Trb. 2000, 120), Nr. 3, Memorie van Toelichting) that "the person who has been arrested at the request of the International Criminal Court must be brought immediately before the national judge who shall determine the validness and lawfulness of the deprivation of liberty (*gegrondheid en rechtmatigheid van de vrijheidsbeneming*) [own translation, ChP]." However, this is arguably not what Art. 59 of the ICC Statute stipulates. It is not for the competent judicial authority to determine the validness/the substantive grounds for the arrest – this is the prerogative of the ICC. Hence, the national authority can only to a certain extent review the lawfulness of the deprivation of liberty. (It appears, however, that the Dutch Government, agrees with this latter point when it writes, at the same page, that "the only point which the competent judicial authority can absolutely not check is whether the Pre-Trial Chamber, in view of the parameters established by article 58 [of the ICC Statute], was entitled to issue the (in that article defined) warrant of arrest [own translation, ChP]." Hence, it seems that the Dutch Government agrees that the competent judicial authority cannot look at the correctness of the substantive grounds for/validness of the arrest after all.)

the ICC[163] and not up to the competent (judicial)[164] authority of the custodial State to decide, see Article 59, paragraph 4 of the ICC Statute: "It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)."[165]

[163] See also Rule 117, para. 3 of the ICC RPE: "A challenge as to whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide on the application without delay."

[164] Although it is possible that this will often be the same judicial authority as the one of Art. 59, para. 2 of the ICC Statute, paras. 3, 4 and 5 of Art. 59 of the ICC Statute do not speak of the competent *judicial* authority, but of the competent authority in the custodial State. Hence, it appears that no competent authority of the custodial State, whether judicial or executive, can consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b) of the ICC Statute. It seems that the idea that "[i[t shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)" has a rather broad application (see also the previous footnote and its reference to Rule 117, para. 3 of the ICC RPE, which generally states that such a challenge must be made with the ICC) but it must also be admitted that the just-quoted words can be found in a provision which deals with an application of interim release, see Art. 59, para. 4 of the ICC Statute. This may mean that the competent authority may not consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b) merely *in the context of such an application of interim release*, which does not exclude that problems related to the arrest warrant may nevertheless constitute, for example, a reason for the Executive [which, as clarified above, can also play a role in the surrender, see also n. 179, ChP] to refuse surrender altogether. See also Sluiter (2009, pp. 469-470) who, however, writes about the "national court" in the context of Art. 59, para. 4 of the ICC Statute, whereas it was clarified above that this provision speaks of "competent authority in the custodial State" more generally: "One also notices in Article 59 (4) that it is not open to the national court to consider whether the arrest warrant was properly issued in accordance with Article 58 of the Statute. However, this seems to me very much moving problems around. Whereas the national court may not do this, the executive branch could still raise this as an obstacle to cooperation, applying Article 97. Thus, a national court, which operates in extradition in conjunction with the executive, could inform the Minister of Justice of any doubts it has in relation to the legality of an arrest warrant issued by the ICC. Though this may not be a ground for interim release, it can be a reason not to cooperate [original footnotes omitted, ChP]."

[165] See for the contents of Art. 58, para. 1 (a) and (b) of the ICC Statute ns. 103-104 and accompanying text. As such, the competent authority can be *compared* (note, however, that extradition is not the correct concept in the ICC proceedings!) with a judge from a requested State who extradites a person to the court of the requesting State. (See also the Dutch Explanatory Memorandum to the approval of the ICC Statute (Tweede Kamer der Staten-Generaal, Vergaderjaar 2000-2001, 27 484 (R 1669). Goedkeuring van het op 17 juli 1998 totstandgekomen Statuut van Rome inzake het Internationaal Strafhof (Trb. 2000, 120), Nr. 3, Memorie van Toelichting), p. 50.) Such a judge cannot check either whether there are, for example, substantial grounds to believe that this person has committed a certain crime. This is the privilege of the court of the requesting State. *Cf.* in that respect also the European Commission for Democracy through Law (also known as the Venice Commission) – the Council of Europe's advisory body on constitutional matters – *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court* (adopted by the Commission at it[s] 45th Plenary Meeting (Venice, 15-16 December 2000), Strasbourg, 15 January 2001, CDL-INF (2001) 1 Or.Fr. and available at: http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-e.asp), in which it first remarked that "it has been claimed that Article 59 paras. 4 and 5 [of the ICC Statute, these provisions will be examined in a few moments in the main text, ChP] endanger the principle of habeas corpus as outlined specifically within Article 5 of the European Convention of Human Rights." The Commission then explained that "the character of deprivation of liberty in question is not of the nature foreseen in Article 5 para. 1 (c) of the European Convention of Human Rights, which states that a person may be detained "for the purpose of bringing him before the competent judicial authority on

Nevertheless, it can arguably check several other elements of the concept of the right to liberty and security, namely the procedural part of the legality requirement and, to a certain extent, the prohibition of arbitrariness.

The procedural part of the legality requirement is uncontroversial: that the competent judicial authority can check whether the arrest was made in accordance with the correct procedures can also be discerned from the previously examined Article 59, paragraph 2 (b) of the ICC Statute.

The prohibition of arbitrariness is a little more complicated: as mentioned above, it contains two elements, namely that the law on which the arrest was made (and this seems to include both substantive and procedural law) was not itself arbitrary, and that the enforcement of the law in this specific case was not arbitrary. This last element implies that one should look at the correctness of the specific manner in which an arrest was made.[166]

To start with the first element, as with the point already made that the competent (judicial) authority cannot check whether the ICC is correct in deciding that there are substantive grounds for an arrest warrant, it can be argued that neither can the competent judicial authority check whether the substantive law on which the arrest was made was arbitrary or not; whether the suspect is arrested on the basis of a national arrest warrant stemming from the custodial State's legislation implementing its cooperation obligations with the ICC or whether the suspect is arrested on the basis of the ICC request for (provisional) arrest and surrender itself, the ultimate substantive legal basis for the arrest will be the ICC Statute, and it is, of course, not for the competent judicial authority in the custodial State to determine that the ICC Statute is arbitrary. (In fact, one can safely state that the ICC Statute, even though it is not perfect, can never be awarded that accolade.) However, can the

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reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". It is rather a deprivation of liberty within the meaning of Article 5 para. 1 (f) which authorises a deprivation of liberty if it is "...the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition." In effect, the surrender of a person to an international organisation can be assimilated in this respect to an extradition. The scope of the obligation contained within Article 5 para. 4 is not identical for each type of deprivation of liberty; indeed this is particularly so as regards the scope of the judicial review required. The Convention requires a review of the necessary conditions for the legality of a deprivation of liberty of an individual in relation to paragraph 1 of Article 5. In respect of Article 5 para. 1 (f), the competent authority is not required to examine whether a "reasonable suspicion" exists to believe that the person arrested and detained has committed a crime, nor whether there is risk of fleeing, collusion or commission of other crimes. These elements are related to police custody and interim detention before criminal trial (envisaged in Article 5 para. 1 (c)). In the context of detention under Article 5 para. 1 (f), the judicial authority must investigate whether the detention was "lawful" with the frame of this provision; it must thus verify whether a procedure of extradition is effectively underway. The competent authority is not therefore asked to look into the elements referred in Article 58 paras. [1, ChP] (a) and (b) of the Statute of Rome [original footnotes omitted, ChP]." See also n. 182 and accompanying text.

[166] See also Nowak 2005, p. 225 (or n. 218 and accompanying text of Chapter III): "Cases of deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case [original footnote omitted, ChP]."

competent judicial authority verify whether the procedural legality of the deprivation of liberty was in conformity with the prohibition of arbitrariness? In principle, this would seem possible. Since the arrest is executed on the basis of national procedural law, the competent judicial authority must be able to ascertain whether these procedures are not themselves arbitrary. However, it may be assumed that this will not be the case (too often). After all, the national procedures must, of course, be in conformity with the arguably non-arbitrary ICC Statute.

Although the substantive and procedural legal bases for the deprivation of liberty will not readily be labelled arbitrary, this may be different with respect to the second element of arbitrariness, which relates to the enforcement of the law in a specific case. Even if the arrest was based on the correct grounds and executed in accordance with a prescribed procedure, and even if these substantive and procedural legal bases are generally to be viewed as non-arbitrary, the *factual* execution of the specific arrest on the ground may still be qualified as arbitrary or incorrect. And arguably, this is surely something the competent judicial authority can and should review.

The fact that Swart, Sluiter and Hall all note the relevance, for the scope of Article 59 of the ICC Statute, of Article 55 of the ICC Statute (which also mentions, in a very general way, the importance of the non-arbitrariness of arrests and detentions)[167] may constitute additional proof for the above-mentioned view.[168]

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[167] See the already-mentioned (see n. 156) Art. 55, para. 1 (d) of the ICC Statute: "In respect of an investigation under this Statute, a person: (…) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute."

[168] See Swart 2002 A, p. 1253, Sluiter 2003 C, p. 621 and Hall 2008 B, p. 1152. The fact that Swart notes that "a determination of whether there has been a violation of the person's right not to be subjected to arbitrary arrest or detention and not to be deprived of his liberty except on such grounds, and in accordance with such procedures, as are established in the Statute, mentioned in Article 55(1)(d), is largely outside the competence of the national authority" (Swart 2002 A, pp. 1253-1254), does not necessarily have to contradict this. After all, as explained in the main text, it is indeed true that a considerable part of the right to liberty and security cannot be checked by ("is largely outside the competence of") the competent (judicial) authority in the custodial State, namely the substantive part of the legality requirement and part of the prohibition of arbitrariness. However, what the competent judicial authority in the custodial State *can* arguably check is whether the arrest was made in accordance with the correct national procedures. (The reference in Art. 55, para. 1 (d) of the ICC Statute to the fact that deprivation of liberty is only possible "in accordance with such procedures as are established in this Statute" probably means that all the arrest and detention provisions in the ICC Statute, including Art. 59, which, in turn, refers to, among other things, national procedural law, must be complied with before one can speak of a proper deprivation of liberty in the context of the ICC.) Furthermore, the competent judicial authority in the custodial State can arguably also check parts of the prohibition of arbitrariness. See in that respect also Young 2001, who first notes the relevance of Art. 55 of the ICC Statute for the domestic arrest and surrender procedures (at p. 341) but then states (at pp. 352-353) that "[a] difficult issue arises when the individual raises a rights complaint which requires consideration of the merits of the allegations, such as a complaint of arbitrary detention. There are a number of reasons why national courts should defer determination of this issue to the ICC without exploring the factual underpinnings of the arrest warrant. First, the Statute provides that in deciding an interim release application, the national court is not to consider whether the warrant of arrest was properly issued. The intent of this prohibition would be undermined if an accused could circumvent it by requiring the domestic court to go behind the warrant in a complaint about arbitrary detention.

Now that the scope of these three elements has been addressed, it is time, as promised, to turn to the main problem connected with this provision, namely the indistinctness with respect to the question as to what will happen if the competent judicial authority in the custodial State finds that a person has *not* been arrested in accordance with the proper process or that his rights have *not* been respected[169] (if the person standing before that authority is not the one sought by the ICC, then he is, of course, not to be surrendered to the ICC).[170] It may be asked, for example, whether the authority in that case is authorised, after consultation with the ICC – this is obligatory, pursuant to Article 97 of the ICC Statute[171] – to actually release that person (other than granting interim release pending surrender, which is in any case a possibility pursuant to Article 59, paragraphs 3-6 of the ICC Statute (these provisions will be dealt with shortly)). In addition, it can be wondered if the national authority not only has the possibility to release a person (which, as already clarified in Subsection 4.4 of Chapter III, may not preclude the possibility of a new arrest)[172] but perhaps also has the possibility to refuse the surrender in the case of a

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Secondly, States that do not have an evidential sufficiency requirement would nevertheless be forced to review the factual allegations in an arbitrary detention challenge. Such a result would undermine the Statute's aim to ensure the least burdensome means to surrender. Thirdly, the ICC is the more suitable forum to decide an issue of arbitrary detention. The Court would be better placed to apply definitions of international crimes to standardize the legal tests for verifying the legality of the individual's detention. Furthermore, it is only after surrender that the accused is entitled to full disclosure of the prosecution's evidence, which can be extremely helpful to the defence in preparing the complaint or in deciding whether to raise the issue. Finally, there are safeguards in the Statute which attempt to minimize the degree of impairment to the individual's liberty interest [original footnotes omitted, ChP]." Arguably, this view does not seem to contradict this study's position either as it is true that it is not up to the competent judicial authority in the custodial State to consider a claim of arbitrary arrest if that means that this authority must look at the substantive legal grounds on the basis of which the arrest has been made. This is indeed the ICC's domain. However, this does not say anything about the other elements of the prohibition of arbitrariness which, it is submitted, can very well be checked by the competent judicial authority in the custodial State.

[169] See also Sluiter 2003 C, pp. 624-625.

[170] See, for example, Sections 25, 27, para. 2 and 30, para. 4 of the 'Kingdom Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions' (available at: http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/b7883c35b0a31661c1256d79005c007c!OpenDocument) (Dutch International Criminal Court Implementation Act) which clarify that the District Court in The Hague shall declare the surrender to be inadmissible in its ruling if the person brought before it is not the person whose surrender has been requested and that the Minister of Justice in that case shall refuse the ICC's request. See also Young 2001, p. 350: "If the reviewing judicial officer is not satisfied that the person named in the arrest warrant is the arrested person then that person should ordinarily be released [original footnote omitted, ChP]." This indeed seems the most logical thing to do, even if the ICC Statute does not mention this outcome. See also *ibid*., n. 112: "The Statute, however, does not expressly stipulate this. Instead, art. 97(b) simply lists this determination as an example of when the State Party must consult with the Court without delay in order to resolve the matter."

[171] See for the contents of Art. 97 of the ICC Statute n. 136.

[172] *Cf*. in that respect, for example, also the release of a provisionally arrested person "if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence" (Art. 92, para. 3 of the ICC Statute.) Para. 4 of this article stipulates: "The fact that the person sought has been released

serious[173] violation of the elements mentioned in Article 59, paragraph 2 (b) and (c) of the ICC Statute.[174]

First of all, it should be stressed that "the ICC Statute does not envisage any ground for denying a request for arrest and surrender".[175] Recall in that respect the non-applicability in the ICC context of the traditional grounds for refusal of extradition, such as the surrender of nationals, the surrender of persons accused of having committed political offences and the double criminality requirement. Nevertheless, the previously discussed unclear scope of Article 59 of the ICC Statute may perhaps create other obstacles. Although it is true that this provision does not explicitly mention the possibility of a release or, further, a refusal to surrender if the competent judicial authority in the custodial State determines that the person concerned has not been arrested in accordance with the proper process or

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from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date." See also the release in the context of Rule 182, para. 2 of the ICC RPE ("[w]hen the time limit provided for in article 89, paragraph 3 (e), has expired"): "such a release is without prejudice to a subsequent arrest of the person in accordance with the provisions of article 89 or article 92". (Art. 89, para. 3 (e) of the ICC Statute states: "If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.")

[173] A rather simple procedural violation should, of course, not lead to a refusal. See also Young 2001, p. 350: "Putting aside for the moment human rights considerations, it is difficult to accept that every procedural error should lead to the refusal of a surrender request. Most procedural breaches will likely be technical ones where the individual suffers little if any prejudice in making full answer and defence to the charges. Absent such prejudice, failing to surrender due to a procedural defect undermines the principle of effective prosecution and amounts to a failure to cooperate in breach of the Statute." Note, however, that a judge may perhaps refuse surrender in cases of violations, which may not have caused much "prejudice in making full answer and defence to the charges", but which are nevertheless to be considered very serious. As already earlier explained, most *male captus* cases will not affect the fairness of the trial in the strict sense of the word, but the concept of a fair trial broadly perceived/the integrity of the proceedings.

[174] For the sake of completeness, it may also be good to note that one can also ask oneself whether a State may also refuse surrender for quite some other reasons related to the human rights context, for instance, if there are reasonable grounds to believe that by surrendering the person to the ICC, human rights *will* be violated. Although this point, which can be connected with the well-known *Soering* case before the ECtHR (see for more information Van den Wyngaert 1990 and n. 610 of Chapter V), has nothing to do with *pre-trial* irregularities and the *male captus* discussion, it may, however, be interesting to provide one famous quote from the ECtHR in the *Naletilić* case (ECtHR (Fourth Section), 'Decision as to the admissibility of Application No. 51891/99 by Mladen Naletilić against Croatia', 4 May 2000). In this case, the suspect, who was awaiting transfer in Croatia to the ICTY, claimed, among other things, under Art. 6, para. 1 of the ECHR that the ICTY is not an independent and impartial tribunal established by law. (See *ibid.*) The European Court (*ibid.*) recalled "that exceptionally, an issue might be raised under Article 6 of the Convention by an extradition decision in circumstances where the applicant risks suffering a flagrant denial of a fair trial. However, it is not an act in the nature of an extradition which is at stake here, as the applicant seems to think. Involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence." For more information on this issue, see, for example, Sluiter 2003 C, pp. 645-648.

[175] Ciampi 2002, p. 1630. See also Prost 2005, p. 75.

that the person's right have not been respected,[176] it does not explicitly exclude these options either. An analogy can be drawn here to Article 59, paragraph 2 (a) of the ICC Statute: this provision also does not state that a State can refuse to surrender a suspect if he is not the person in whom the ICC is interested, but it is obvious that any State, after consultation with the ICC pursuant to Article 97 of the ICC Statute (it must again be stressed that this avenue is always to be taken),[177] will release a person if that person is not the person 'wanted' by the ICC.

Hence, the case is perhaps not as clear-cut as it seems.[178] It appears that it is up to the national authorities to decide in their national laws what position they wish to follow.[179] And this may differ from State to State. Of course, in this context, a

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[176] See also *ibid*., pp. 80-81: "[I]f the judge finds any procedural irregularities or a violation of the rights of the person, the ICC Statute does not authorise him or her to take remedial action in relation to such failings. In recognition of this, some domestic laws specifically prohibit such action by the domestic judge and provide for a report to be submitted back to the ICC. If the applicable legislation is not specific on this point, an argument to that effect should be mounted based on the language of the Statute [original footnote omitted, ChP]."

[177] Although Art. 97 of the ICC Statute does not mention problems related to human rights/due process considerations (it does, however, mention the problem that the arrested person is not the person in whom the ICC is interested), it must not be forgotten that the problems listed in Art. 97 of the ICC Statute ("(a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.") are not exhaustive, see the words: "Such problems may include, *inter alia*". (See n. 136.)

[178] See also Young 2001, p. 318: "The substantive problem of domestic law objections to surrender cannot be dismissed simply on the basis of the orthodox position that international law trumps national law. The Statute itself considers the processing of arrest and surrender requests as essentially a matter of national law." In that respect, the system of the ICC is clearly different from the system of the ICTY/ICTR where Rule 58 of the ICTY/ICTR RPE (see also n. 22 and accompanying text of Chapter VI) stated that "[t]he obligations laid down in Article 29 of the Statute [or Art. 28 of the ICTR Statute, ChP] shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned." See also Young 2001, p. 340.

[179] To give one concrete example of a domestic situation, in the ICC's host State, the Netherlands, it is the public prosecutor (*officier van justitie*) at The Hague District Court which questions the arrested person in accordance with, among other things, Art. 59, para. 2 of the ICC Statute, see the Dutch International Criminal Court Implementation Act (see n. 170) Sections 14 (with respect to provisional arrest) and 18 (with respect to arrest). Here, no mention is made of a possibility to release. However, according to para. 1 of Sections 16 (with respect to provisional arrest) and 20 (with respect to arrest), the investigating/examining judge (*rechter-commissaris*) may, if the ICC has been consulted on this issue, order "that on account of urgent and exceptional circumstances the deprivation of liberty (...) be ended or discontinued or suspended subject to conditions. The conditions to be imposed shall in any event be designed to prevent absconding." Although it is not clear from the text of the provision itself whether the investigating judge can only grant interim releases pending surrender (or whether he can also grant more final releases blocking the surrender), it arguably addresses interim releases only. This can be derived from the second paragraph of Section 16 (see also the second paragraph of Section 20, referring to the second paragraph of Section 16) where one can read that "[t]he investigating judge shall not make an order as referred to in subsection 1 until the ICC, having been consulted for this purpose through the intermediary of Our Minister, has made recommendations *pursuant to article 59, paragraph 5 of the Statute* within a period to be determined by Our Minister [emphasis added, ChP]."

State's view of the *male captus* discussion (see Chapter V) may perhaps also have a role to play, even if the competent judicial authority in the custodial State is not there to decide whether or not it can exercise jurisdiction over the case notwithstanding the *male captus* (because the ICC and the ICC alone will decide whether to try the case (or not)).[180] This may mean that a State in favour of the *male captus bene detentus* rule may perhaps be more readily inclined to surrender a person than a State adhering to the *male captus male detentus* rule, and *vice versa*.[181] However, it may also be the case that a judge following a *male captus bene detentus* stance in normal cases, see the English *Bennett* case, will not do so if he is not going to try the suspect, but if he is merely going to surrender him to another jurisdiction, such as the ICC, see the English *male captus bene deditus* case of Schmidt.[182] (Note that here, the cases *Bennett* and *Schmidt* have been chosen

(Art. 59, para. 5 of the ICC Statute deals with interim release (pending surrender).) In addition, it can also be derived from the fact that the judicial authority holding the surrender hearing, the District Court in The Hague (see Chapter 4 of the Dutch International Criminal Court Implementation Act), which, according to Section 26, para. 3, also has possibilities to release comparable with the one of the investigating judge, cannot declare the surrender inadmissible except for in the situation that the person brought before it is not the person whose surrender has been requested by the ICC, see Section 27. This means that the District Court, except for in the above-mentioned situation, always has to declare the surrender admissible. This, however, does not necessarily have to mean that a serious unlawful arrest, for example, can never lead to a refusal to surrender the person in question to the ICC. This is because the Dutch surrender system not only has a judicial but also a political phase, involving the Minister of Justice (see also Sluiter 2004 A, p. 163). Although the District Court apparently cannot declare the surrender inadmissible in the case of, for example, an unlawful arrest, it must send the Minister not only its ruling, but also "its advisory opinion on the action to be taken on the request for surrender." (Section 28, para. 2.) Such an advisory opinion could, of course, contain negative advice (see also *ibid*., p. 165), for example, in case a serious *male captus* situation has occurred. Now, the Minister of Justice must make the final surrender decision and there are many possibilities for him, again after having consulted with the ICC, to refuse the surrender. This may perhaps also include the possibility of the serious *male captus* situation. Although this point is not explicitly mentioned in the list of possible reasons to refuse surrender (see Section 7), this list is not limitative.

[180] See also El Zeidy 2006, p. 455 (n. 29).

[181] See also Bekou and Shah 2006, p. 528: "[S].10(1)(b) of the South African Act stipulates that persons may not be surrendered to the Court if they have not been 'arrested in accordance with procedures laid down by domestic law'. S.10(1)(c) of the Act goes on to provide that surrender may not be executed if 'the rights of the person, as contemplated in Chapter 2 of the Constitution have not been respected'. This is analogous to the approach to domestic prosecutions following procedural irregularities taken by the South African [Supreme] Court (…) in the *Ebrahim* case [original footnote omitted, ChP]." Bekou and Shah then go on noting that "[t]his emphasis on the rights of individuals [which is also present in the draft Senegalese cooperation legislation to which the authors refer on the same page, ChP] is worthy of praise, but, in terms of the processes set out by the Rome Statute, it is not compliant. A violation of an individual's rights does not constitute a reason for non-surrender to the Court." However, even though it is true that the ICC Statute does not contain an explicit reason for non-surrender because of such violations, one cannot say that such a refusal is non-compliant with the ICC law either. After all, Art. 59 of the ICC Statute is silent on the consequences of the determination, by the competent judicial authority, that the suspect has not been arrested according to the proper process or that his rights have not been respected.

[182] See also n. 165. However, as was also shown in the *Schmidt* case, one can agree with Justice Sedley of the Divisional Court in that case that all courts (whether it is a trial court or an 'extraditing' court) have an obligation to prevent abuse of their process, see n. 331 and accompanying text of Chapter V. Thus, with the exception of the marginal role of the national courts in the context of the strict

merely to illustrate the problem; in the UK, another mechanism applies concerning the cooperation with the ICC, see footnotes 187 and 190.)

The vision a certain State has on the division of responsibilities between the State and the ICC may also be important in the context of this determination. For example, a State may be of the opinion that at the stage of the proceedings of Article 59 of the ICC Statute, it is purely operating on behalf of the ICC[183] and that it is only there to (swiftly) arrest and surrender the person to the ICC. That may lead to the conclusion that the competent judicial authority in the custodial State, although it must make a determination with respect to the arrest and detention, cannot grant a remedy which would jeopardise the surrender.[184] (However, in that

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cooperation regimes of the UN *ad hoc* Tribunals (but see n. 22 of Chapter VI), one could argue that also a court which is merely there to surrender the suspect to the ICC should be careful that its process is not abused and hence that it may steps to prevent such abuse. *Cf.* also Currie 2007, pp. 385-386: "In Canada (…), where the surrender process is assimilated to the domestic extradition procedure, any request for surrender by the ICC will engage a judicial hearing wherein it is well-established that the judge is competent both to scrutinize the process for compliance with domestic human rights norms, and to adjudicate claims of abuse of process. Particularly under the latter heading, it would be entirely within the discretion of the extradition court to dismiss the surrender proceedings where the circumstances of the fugitive's detention were manifestly illegal, particularly if domestic or foreign police forces were implicated [original footnotes omitted, ChP]."

[183] *Cf.* in that respect El Zeidy 2006, p. 458. After having referred to the *Milošević v. The Netherlands* case (see ns. 222 *et seq*. and accompanying text) where the Dutch District Court stated that it lacked jurisdiction to consider an application for release filed by Milošević because the Netherlands "had transferred its jurisdiction" to the ICTY (see also n. 418 and accompanying text of Chapter VI), he explains: "Thus, it could equally be argued that at the stage when Article 59 applies, that is *after* an arrest warrant has already been issued against a person, the state in question has already transferred its jurisdiction to the ICC. Although the ICC Statute is based on the principle of complementarity, which grants primacy to national courts, technically the state in question loses its primacy and the ICC gains control over the case once the case has been rendered admissible. The fact that Article 59(2) expressly leaves part of the proceedings to national authorities does not mean that the ICC lacks competence over the case. At this stage, the state involved is executing part of the proceedings *on behalf of the ICC* [emphasis in original, ChP]."

[184] See Zhu 2006, p. 104: "In principle, in order to ensure the operation and success of the Court, the transfer of accused to the Court by states should not to be refused on any grounds." See also Young 2001, pp. 347-348: "The unique relationship between States Parties and the ICC supports an interpretation favouring a strict and unimpeded surrender regime in the Statute. Further support for this interpretation can also be found in the Statute's underlying purposes. The Statute represents an agreement amongst States Parties to enforce laws prohibiting the worst international crimes, in accordance with principles of effective prosecution and complementarity. Assuming a case is admissible, the principle of effective prosecution favours an expeditious and unimpeded surrender to the Court. Unless the Court is allowed to exercise jurisdiction, the accused will be free from prosecution. Effective prosecution can also be undermined by protracted domestic litigation over surrender. Delays will tend to jeopardize the truth-seeking function of the prosecution as witnesses tend to be more difficult to locate, and memories fade with time. Implicit in the principle of complementarity is the notion that States and the ICC have their respective spheres of competence. As States are responsible for executing arrest and surrender requests within their territory, it should be left to their courts to review the validity of that execution process. On the other hand, any issues relating to the conduct of the prosecution and trial should be left to be decided by the ICC after surrender. While the principle of complementarity involves some deference to state sovereignty interests, it should still be seen as a means to implement effective prosecution, not a substitute for such prosecution. Sensitivity to State interests should yield if the alternative to surrender is that the accused will go without

case, the determination of the competent judicial authority in the custodial State that an arrest was, for example, not executed according to the correct procedures may play a role in the proceedings before the ICC, once the suspect has been surrendered to The Hague.)[185] Currie, for example, argues: "What is missing from the Rome Statute is any entitlement of the requested state to decline to surrender a fugitive on the basis of an illegal arrest of some sort. (…) It seems clear that the intention is for the ICC to deal with any arrest irregularities itself."[186]

However, a State may also believe that its competent judicial authority has an important role in the supervision of the arrest and detention procedures as well and

prosecution. In other words, complementarity informs the question of whether the ICC or States should prosecute, but a prosecution there must be. Under Part 9, the Statute imposes obligations of 'ends' and leaves States to decide the 'means' to achieve them. The manner of implementation should be respected so long as the substance of the obligation is satisfied. Thus complementarity is best understood as affording a margin of appreciation to the manner in which States implement their Part 9 duties insofar as effective prosecution is not compromised, e.g. by creating undue delays or otherwise tainting the trial process [original footnote omitted, ChP]."

[185] See also Young 2001, p. 352: "If remedial issues for rights violation should generally be left to be decided post-surrender in the ICC, then one might ask why the custodial State should have any competence to consider such violations. It is conceivable that the custodial State may order non-trial related remedies short of releasing the individual or excluding evidence at trial, e.g. ordering damages for physical or mental harm. But more importantly, by allowing individuals to raise these issues in the domestic forum, an evidential record of the complaint may be created and used as the factual basis for an application in the ICC. The individual will likely benefit from this opportunity, while memories are fresh and witnesses are more accessible. Additionally, one should not ignore the possibility of detainees filing human rights complaints against the custodial State in international fora. Where this occurs, the international human rights tribunal will require that the applicant exhaust local remedies or otherwise demonstrate that the remedies were unavailable or ineffective [original footnote omitted, ChP]."

[186] Currie 2007, p. 374.

that this involvement does not exclude the granting of (far-reaching) remedies in the case of (serious) violations.[187] A State taking this stance may perhaps argue that its

[187] *Cf.* in that respect, for example, Sluiter who certainly sees a role for the competent judicial authority in the custodial State with respect to the supervision of human rights and who argues that the remedy of release, after consultation with the ICC, may indeed be among the remedies which the competent judicial authority in the custodial State can grant: "Do the national authorities grant the remedies they deem appropriate? Although this may follow from the role attributed to the national authorities, as envisaged by Article 59(2), the competent national court cannot grant remedies that may impede the execution of the request without first consulting with the court. As such, immediate release would be in violation of a state's obligations under the Statute [original footnotes omitted, ChP]." (Sluiter 2003 C, p. 625.) One of Sluiter's footnotes (*ibid*., n. 66) states: "The abduction of the person accompanied by serious mistreatment is an exception for egregious violations of human rights in the apprehension of the requested person. [This phrase was not correctly printed in this journal (*cf.* also n. 499 of Chapter V). It should read: "One could, however, make an exception for egregious violations of human rights in the apprehension of the requested person (for example, abduction of the person accompanied by serious mistreatment)." After the author of this study had asked Sluiter about these words, the latter confirmed this (and kindly provided the correct words), ChP.] In this situation, the competent national judge may rightfully assume that his duties under Article 59(2) do not tolerate any further detention." See also *ibid*., p. 644: "National courts should serve as the first protectors of the individual rights of arrested persons, with the ICC serving an important supervisory role." Note that the text at *ibid*., pp. 625-626 ("A court may not easily grant the release of a person accused of the most serious international crimes. However, with respect to serious human rights violation in the course of or following the arrest, the effective legal remedies provision may be indispensable in preserving the integrity of the subsequent international criminal proceedings [original footnotes omitted, ChP].") also seems to confirm that the competent judicial authority in the custodial State can grant the remedy of release, but this text has also been misprinted in the journal in question. The original (by Sluiter provided) text shows that Sluiter is not addressing the competent judicial authority in the custodial State here, but the ICC itself: "As far as the legal remedies are concerned to be provided by the Court [the capital 'C' clearly shows that Sluiter is writing about the ICC here, ChP], it is self-evident that the Court will not easily grant the release of a person accused of the most serious international crimes. Yet, in case of serious human rights violations in the course of or following arrest the provision of effective legal remedies may be indispensable with a view to preserving the integrity of the subsequent international criminal proceedings [original footnotes omitted, ChP]." Be that as it may, Sluiter is in any case of the opinion that a release is amongst the remedies available to the competent judicial authority in the custodial State confronted by a *male captus*. Whether the remedy of a refusal to surrender is also at the authority's disposal in the case of a *male captus* is less clear. Although Sluiter mentions the possibility that human rights considerations may lead to an "obstacle to surrender" – this may include a refusal to surrender, although it must be admitted that a decision to release could also already be seen as a (temporary) obstacle to surrender – see *ibid*., p. 651 ("Following the procedure envisaged by Article 97, the requested state must not be hesitant to review the surrender in light of human rights obligations and must submit to human rights considerations, if necessary, as an obstacle to surrender."), he appears to connect this remedy not with *past* human rights violations, but with possible *future* violations, see *ibid*., pp. 647-648: "[I]t may be difficult to imagine a situation in which the *Soering* jurisprudence [see ns. 610 of Chapter V and 174 of the present chapter, ChP] may prevent surrender to the court. (…) It would go too far, however, to categorically exclude the possibility of the "*Soering* ground for refusal" in relation to international criminal proceedings." Although Sluiter does refer to *male captus* situations, which may, of course, involve human rights violations (see *ibid*., pp. 648-650), he does not seem to explicitly connect the remedy of refusal to surrender to such violations. (Note nevertheless, as already mentioned in this footnote, that he *does* consider that the remedy of release may be an appropriate remedy for "egregious violations of human rights in the apprehension of the requested person", and that such a release may not be limited to a formal release, but to a real release, blocking the surrender, see also Sluiter's use of the concept of 'release' in the ICTY *Dokmanović* case, see Chapter VI.) To provide a few other positions on this point: Young first argues that not every human rights violation must lead to

competent judicial authority should in fact be able to grant remedies such as release in the case of an irregular arrest, because the ICC Statute *prima facie* does not contain this remedy (see Article 55 of the ICC Statute[188] and Chapter IX, where the

a refusal. This seems to imply that serious human rights violations *can* lead to a refusal. And indeed, he also mentions this possibility. However, a little later, he argues that the competent judicial authority should *not* have the jurisdiction to order a stay of the proceedings. See Young 2001, p. 352: "The principle of effective prosecution implies that not every violation results in a refusal to surrender, especially since rights violation can vary greatly in severity. It must be remembered that a State's refusal to surrender, when no country is willing and able to prosecute, is equivalent to a judicial stay of proceeding, which is tantamount to an acquittal. To warrant such an outcome, the rights violation must be so egregious that it is not reasonably possible for the accused to be guaranteed a fair trial. Most rights violations do not rise to this level and can be remedied by something short of a stay of the proceedings. (…) While rights violations may be remedied by a stay of proceeding or exclusion of evidence, it is suggested that the judicial officer in a surrender proceeding should not be given the jurisdiction to order these two remedies. These remedies have significant ramifications for the trial, and accordingly its implications should be left for the ICC to decide after surrender. Without the capability of obtaining all the relevant evidence, domestic courts will often be in a difficult position to decide on these issues pre-surrender." El Zeidy (2006, p. 456) is also of the opinion that "the national judge should not be competent to decline jurisdiction or stay proceedings at this point" (as is the case in the British ICC implementation act, see *ibid*. and n. 190), even though he admits that, because Art. 59 of the ICC Statute has not arranged anything in this respect, national laws (such as the ICC implementation acts of New Zealand, Australia and South Africa, see *ibid*.), may provide otherwise, see *ibid*., p. 455: "The apparent shortcoming of Article 59(2)(b) and (c) lies in the fact that the paragraphs lack any reference to a remedy in case of a state's failure to comply, thus leaving this problem to be resolved by the national authorities of the state. This leaves the national judge with wide discretionary powers to rule on the legality of the process (yet excluding the grounds set out in Article 58(1)(a) and (b)). For example, a manifest procedural error such as unlawful arrest and detention, or a violation of the person's rights, or any form of illegal rendition may sometimes result in a decision by the competent authorities to release the person in question [original footnotes omitted, ChP]." (It may be interesting to note that El Zeidy, after these words, states (in n. 29) that "[t]his may prompt the Court to decline to exercise jurisdiction" and then refers to the *male captus* discussion, mentioning both the *bene detentus* cases of *Eichmann* and *Alvarez-Machain* and the *male detentus* cases of *Hartley*, *Ebrahim* and *Toscanino*.) Hall argues that the judicial authority can award reparations in the case of violations, but that "neither the determination by the national judicial authority that the suspect's rights were violated nor the remedies it adopted could prevent surrender to the Court." (Hall 2008 B, p. 1152.) It may, however, be good to note that Hall, when writing about the possible forms of reparation, also refers to restitution. As shown in Subsection 4.1 of Chapter III, where – it must be noted – reparation was not used in the human rights context but in the context of State responsibility, restitution means the re-establishment of the situation which existed before the wrongful act was committed. Restitution in the case of an unlawful arrest could thus mean the release of the unlawfully arrested person. That would mean (if Hall also accepts this reparation/remedy in the case of an unlawful arrest) that the release does not mean that the person will not be surrendered to the ICC. After all, whatever form of reparation (including restitution which may mean the release of the unlawfully arrested person) is chosen, it will not lead, according to him, to the non-surrender of the suspect to the ICC. Be that as it may, lesser forms of reparation, such as compensation, in any case seem to be a possibility, see Oosterveld, Perry and McManus 2002, p. 785 (writing about the Swiss cooperation law with the ICC): "The Swiss Law provides compensation for unjustified detention. The procedures and conditions for awards of compensation for the unjustified detention of persons subject to arrest and surrender to the ICC are the same as those provided in Switzerland under its federal law [original footnote omitted, ChP]."

[188] Zappalà (2002 A, p. 1183) welcomes Art. 55 of the ICC Statute ("These provisions are certainly the most advanced text on the protection of pre-trial rights of persons during international criminal investigations. No such provisions were contained in the Nuremberg and Tokyo Charters, nor are present, at least certainly not in such a detailed form, in the ICTY and ICTR Statutes or RPEs. It is

drafting history of this provision will be examined) and that at least one judicial authority, be it a national or international one, should be able to grant such a remedy if the suspect is not to become the victim of a process which is fragmented over two or more legal systems – a situation which can very easily occur.[189]

The competent judicial authority could hereby refer to the important status of the remedy of release in the case of an unlawful arrest and detention, see the *habeas corpus* rights of Articles 9, paragraph 4 of the ICCPR and 5, paragraph 4 of the ECHR.[190]

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indisputable that, in the ICC Statute, there has been a clear attempt to improve the protection of rights relating to the administration of criminal justice, on the assumption that this is one of the parameters that will be examined in evaluating the fairness of the proceedings before the ICC."), but also criticises the most interesting (at least for the purpose of this book) provision here, para. 1 (d). However, he does not criticise the fact that the remedy of release is missing; he criticises the fact that the provision is in fact too *faithful* to other international texts (which, to a certain extent, is true, but also untrue given the fact that the remedy of release is missing). (The other remedy in the case of an unlawful arrest/detention (compensation) is also missing in this article, but it can be found in another article, namely in Art. 85, para. 1 of the ICC Statute.) See *ibid*., pp. 1197-1198: "[I]ts main defect is in its being too faithful to the other international texts. In particular, this fidelity becomes a defect when the ICC norm refers to other rules of the Statute without explicitly specifying which rules ('on such grounds and in accordance with such procedures as are established in the Statute'). While this kind of drafting was necessary in international instruments concerning interstate judicial cooperation as the drafters could not be aware of the content of national laws on arrest and detention, the same reasoning does not apply to the Statute. Hence, it does not seem appropriate to refer to the criteria set forth in the Statute, without referring either to the criteria themselves or to the article(s) where they are expressed. As it stands the rule does not contain any precise content and it is therefore necessary to look at other norms of the Statute to identify the precise regulation to be applied in such cases. The grounds for arrest and concrete guarantees for persons arrested are provided for in the Statute elsewhere." (And then, reference is made to Art. 58 of the ICC Statute.) See also *ibid*., p. 1202: "Finally, a substantial criticism may be raised to the regulation of the rights of individuals in the ICC Statute. It relates to the issue of personal liberty. In spite of the generally very advanced model in terms of protection of individual rights, the protection of the right to liberty does not seem sufficiently developed. The normative framework for measures for provisional detention should have been more detailed. The Statute, although respectful at least of the minimum requirements, more for its silence than for express norms, comes close to abridging international human rights standards. It can be affirmed that in the field of the right to liberty and the issue of provisional detention, the evolution from the Nuremberg model towards more developed forms of international criminal justice has been less remarkable [original footnote omitted, ChP]." The footnote in question (40) reads: "Naturally, this can be explained by the peculiar nature of these Tribunals, the absence of enforcement agents, the difficulties in securing the presence of defendants and so on. This, however, in spite being a serious problem should not be a justification for contrasts with internationally recognized standards to be applied in the administration of criminal justice."

[189] *Cf*. also Klip 1997, p. 309, writing on the inter-State context and the ECHR: "The European Convention on Human Rights was drafted on the presumption that all implementation and applicability of the law is a responsibility of a single (clearly identified) state. The developments described no longer correspond to that presumption. States can also cooperate in a violation of the Convention. It seems fair to say that, the more states are responsible for ensuring the guarantees of the Convention, the less protection exists in reality [original footnote omitted, ChP]."

[190] For another view, see Rastan 2008, p. 433: "The role of national bodies in relation to Court requests, moreover, is strictly confined. In arrest proceedings, for example, while the judicial authorities of the custodial state are to determine whether proper process has been served and the arrested person's rights have been respected, they may not examine the legality of the warrant itself or rule on a habeas corpus challenge." See also Samuels 2006, p. 19, writing about the International Criminal Court Act 2001 (implementing the Rome Statute in the law of England, Wales and Northern Ireland): "The Office of

The competent judicial authority may even decide that the stronger remedy of refusal to surrender (note again that a release does not preclude the re-arrest and hence the surrender) may be appropriate, for example, in the (admittedly rather theoretical but not inconceivable) case that the competent judicial authority has credible information that the ICC itself is responsible for a *male captus* operation. Furthermore, it may also argue that Article 59 of the ICC Statute only stipulates minimum requirements[191] and that it cannot be prevented from granting greater protection in the field of due process/human rights.[192]

What should also be taken into account is the previously mentioned point (see footnote 34 and accompanying text) which can be connected to the concepts of inability and unwillingness; very often, the State which has to surrender a person to the ICC is considered unable or unwilling to investigate and prosecute a certain case itself. Although this may not necessarily mean that that State is also unable or unwilling to *cooperate* with the ICC, there may still be a considerable overlap. Now, if a State is clearly unwilling to cooperate with the ICC, it could, of course, abuse Article 59 of the ICC Statute and argue that a person, even if this is not the case, was not arrested in accordance with the proper process or that the person's rights were not respected, and that this determination should lead to that person's release or even a refusal to surrender.[193] In such cases, one may be tempted to argue that it should not be up to the national authorities to grant far-reaching remedies or even to review the arrest and detention,[194] see also footnote 119 of Chapter VII.

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the Prosecutor will then issue a warrant, which must be endorsed in a pre-trial ICC chamber, requesting the Member State where the accused happens to be to be arrested and surrendered. The Member State, i.e. in the UK the Secretary of State, must comply; in effect the surrender will be automatic. The suspect has certain rights (…) [b]ut the warrant cannot be challenged on the merits. (…) The UK court will simply make a delivery order and he will be handed over. Reliance upon the Bail Act, habeas corpus, judicial review or Article 5 of the European Convention on Human Rights will not avail, provided that the ICC powers have been complied with. A Pinochet-type case lasting many months and going to the highest court in the land will not happen." Indeed, in Chapter 7 of this Act, one can read in Part 2 ('Arrest and Delivery of Persons') under 5 ('Proceedings for Delivery Order'), para. 8: "If the court determines (a) that the person has not been lawfully arrested in pursuance of the warrant, or (b) that the person's rights have not been respected, it shall make a declaration or declarator to that effect, but may not grant any other relief." (See also n. 187.)

[191] See Young 2001, p. 341.

[192] It should, by the way, be noted that Art. 119 of the ICC Statute ('Settlement of disputes') does not seem to jeopardise the possibility of a State granting remedies obstructing the surrender of the suspect. Although the ICC may, after the State has notified the ICC that it cannot surrender the person in question and after consultations, determine that the State in question is nevertheless obliged to surrender the person, this State can still refuse to do so. In other words: Art. 119 of the ICC Statute cannot *force* a State to surrender a person: it only gives the ICC the power to have the final say in settling the dispute. This means that the ICC, pursuant to Artt. 119 and 87, para. 7 of the ICC Statute, can make a finding that the State in question has failed to comply with the request to cooperate by the Court and refer the matter to the ASP or, where the UNSC referred the matter to the Court, to the UNSC.

[193] *Cf.* the concerns of the ICTY Prosecutor in *Todorović* and *Nikolić*, see ns. 344 and 476 of Chapter VI.

[194] Gillett (2008, p. 23, writing about the topic of "assisted arrests", arrests executed by other States or international forces, see also n. 56) suggests with respect to "unable" States that the procedure of Art. 59 of the ICC Statute may perhaps also be executed in the State assisting in the arrest: "In the scenarios

One could think here of the situation in Darfur. Even though Sudan may be obliged, pursuant to UNSC Resolution 1593 of 31 March 2005, to "cooperate fully" with the ICC (which may[195] mean it should follow the normal arrest and surrender provisions that apply to States Parties), "Sudan has always openly expressed its dissatisfaction with the Court and its intention not to cooperate".[196] Sluiter very clearly points to the dangers of abusing Article 59 of the ICC Statute in such situations:

> Elsewhere[[197]] I argue that this provision – the purpose of which is laudable, namely improving the protection of arrested persons in the custodial state – may in the hands of uncooperative states turn out to be a Trojan horse. Article 59 grants arrested individuals a number of rights, but the question is whether, in case these rights are violated, domestic courts can take binding and final decisions as to the appropriate remedy. For example, if Sudanese police officers do not comply with the proper procedural rules (Article 59(2)(b)), can the competent court decide that the arrested person has to be released, with prejudice to the arresting authorities? Article 59 does not provide for such a far-reaching remedy, but does not exclude it either. It does, however, allow for granting interim release pending the surrender process, and the ICC appears not to be able to exercise much control over this. In a way, it is a paradox that the state that is generally uncooperative is expected to implement in good faith the protection of Article 59; it is almost an invitation for abuse [original footnote omitted, ChP].[198]

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of substantial state collapse, where an assisted arrest would generally be envisaged, it is unlikely that the competent authorities in the territorial state would be operational. However, the failure to accord the accused with such an initial appearance would be a significant breach of the provisions of the Statute. Consequently, if, following an assisted arrest, the initial appearance could not be held either in the regular courts or in a specially constituted tribunal in the territorial state, then, as a fallback position, it could be held on the territory of the state making the arrest. This possibility is left open through the Statute's use of the term "custodial State" in Article 59, rather than the term "the State on the territory of which a person may be found" as is used in relation to transfers of requests for arrest [original footnote omitted, ChP]."

[195] The exact meaning of these words is, however, unfortunately unclear, see Sluiter 2008 B, pp. 876*ff*. Sluiter further shows that this uncertainty may also have its effect on a person's right to liberty and security, see *ibid*., pp. 877-878: "An individual enjoys the right not to be subjected to arbitrary arrest and detention. This implies that any deprivation of liberty should take place 'in accordance with a procedure prescribed by law'; at a minimum, procedures must have a legal basis and correspond to the requirements of foreseeability and accessibility. One may wonder whether this standard is met when the arrest and detention ultimately hinge on the vague aspiration of 'full cooperation', without further concretization. In any event, an arrested person is deprived of adequate opportunity to challenge arrest and subsequent surrender if he cannot even have the slightest clue as to the content of the obligations incumbent upon Sudan [original footnotes omitted, ChP]."

[196] *Ibid*., p. 873. For instance, even when he was not yet under investigation by the ICC himself, "President Omar Bashir took an oath "thrice in the name of Almighty Allah that I shall never hand any Sudanese national to a foreign court."" (E. Reeves, 'Darfur and the International Criminal Court', *Middle East Report Online*, 29 April 2005, available at: http://www.merip.org/mero/mero042905.html.) As noted above (see n. 47 and accompanying text), this is different for the matter of the LRA leaders as Sudan has signed a memorandum of understanding with the ICC pledging to hand over these persons to The Hague.

[197] See Sluiter 2009, p. 468.

[198] Sluiter 2008 B, pp. 882-883.

Sluiter therefore concludes, and it is hard not to agree with him, that

> Part 9 is not a very helpful legal tool in obtaining cooperation from a state like Sudan. For the future, the Assembly of States Parties would be well advised to re-assess Part 9 in light of the Court's experiences with the Darfur situation. Undeniably in my view, more corrective mechanisms must be inserted in relation to clearly uncooperative states.[199]

A view that is linked to the above-mentioned "unable or unwilling" formula is that in any case, whatever the situation may be at the national level, the ICC – if the suspect asks for this or when the ICC itself is aware of certain irregularities – should also check the correctness of the arrest and surrender procedures at the national level. This is because it may very well be the case that, if it is determined by the ICC that the State in question is unable to investigate or prosecute a case itself, the State's national legal system may be in ruins. In fact, this is not so unusual in the conflict zones or post-conflict zones in which the ICC is investigating. In this context, one can wonder how thorough the national check pursuant to Article 59, paragraph 2 of the ICC Statute will be.[200] In addition, one can imagine that a State will be under considerable pressure from the international community to surrender the person in its custody to the ICC as soon as possible. Hence, it may *at least* be wise – but probably also legally mandatory under certain circumstances; the following chapters will examine this last point in more detail – if the ICC judges were also to check for themselves, thereby functioning as an extra safety net, whether the national arrest and detention have been executed as they should have been and if not, to grant the suspect the appropriate remedies.[201]

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[199] *Ibid.*, p. 883. Sluiter therefore recommends, among other things, that "the Assembly of States Parties should recognize that Part 9 of the Statute is ill-suited for (i) Security Council referrals affecting states non-parties and (ii) uncooperative states. It is advisable to amend the Statute in two respects. First, a degree of flexibility regarding the cooperation law applicable in case of Security Council referrals is fully justified. Second, the Statute must provide for stronger corrective mechanisms in relation to uncooperative states. For example (…), the protection offered by Article 59 cannot – even in exceptional circumstances, such as an uncooperative state – result in the (interim) release of the arrested person." (*Ibid.*, p. 884.) (Arguably, the word "even" must be deleted here: Art. 59 of the ICC Statute clearly permits, and Sluiter also acknowledges this, see *ibid.*, p. 883, an interim release and perhaps also a 'real' release. However, one can agree with Sluiter that in exceptional cases, such as with uncooperative States, these remedies should not be allowed.) *Cf.* also Henquet 1999, p. 998, writing about the cooperation obligations of States in the context of a UNSC referral: "It would have been preferable if the drafters of the ICC Statute had made adequate arrangements in Part 9 of the ICC Statute."

[200] See also Sluiter 2006 A, p. 153.

[201] See also Sluiter 2003 C, pp. 644 ("National courts should serve as the first protectors of the individual rights of arrested persons, with the ICC serving an important supervisory role.") and 651, where he writes that the ICC Statute "makes the right to liberty and security of persons its primary concern by imposing clear obligations on the arresting and detaining state. The respect for this right in practice depends on the question of whether the arresting and detaining state and the ICC can mutually supervise their respective activities. Thus, the court should supervise the legality of the arrest and detention at the national level. The provision of effective legal remedies, if necessary, is an indispensable element of such supervision." See also ICC, Pre-Trial Chamber I, Situation in the

A final interesting point in this context is the previously mentioned fact[202] that, in certain situations, domestic authorities may argue that the national situation is one of emergency/war, justifying a certain derogation from human rights provisions. In such situations, domestic authorities may be of the opinion that the arrest/detention of a suspect was in accordance with the domestic procedures, even if these procedures omit human rights provisions. One can question what the ICC should do in such situations if it reviews, as an extra safety net, these national procedures. In principle, such arrests/detentions cannot indeed be seen as violating national law. Nevertheless, one can argue that the ICC should also ensure that every suspect in the context of an ICC case receives a minimum of human rights protection. See in that respect, for example, Article 55, paragraph 1 (d) of the ICC Statute which states that "[i]n respect of an investigation under this Statute, a person: (…) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute." As clarified in footnote 168, the reference in this provision to the fact that deprivation of liberty is only possible "in accordance with such procedures as are established in this Statute" probably means that all the arrest and detention provisions in the ICC Statute, including Article 59 of the ICC Statute, which, in turn, refers to, among other things, national procedural law, must be complied with before one can speak of a proper deprivation of liberty in the context of the ICC. Hence, in reviewing whether this human right has been complied with in the context of an ICC case, ICC judges should not only check whether the national procedures (which may deviate from the normal procedures

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Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 8: "[A]ccording to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the Defence, including the right "not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute"". Note that Art. 67 of the ICC Statute ('Rights of the accused'), strictly speaking, only applies to accused, to persons of whom the charges have been confirmed, to persons at the actual trial (see also n. 30 of Chapter I). However, it is also clear that some elements of this provision have a pre-trial dimension. See, for example, Rule 121 of the ICC RPE ('Proceedings before the confirmation hearing'), para. 1: "A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67." See also Schabas 2008, p. 1251: "[R]ights during an investigation are set out in a distinct provision of the *Statute*. Nevertheless, the phrase "in the determination of any charge" is essentially identical to the wording of the international models, such as article 6 para. 1 of the *European Convention on Human Rights*. The European Court of Human Rights considers this to be "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or an act that has "the implication of such an allegation and which likewise substantially affects the situation of the suspect". An individual might become "substantially affected", to borrow the Strasbourg terminology, once a State party has asked that a case be examined, or upon the application by the Prosecutor to initiate an investigation. If notions of complementarity are factored in, the right may even be extended to encompass proceedings under domestic law prior to exercise of jurisdiction of the Court [emphasis in original and original footnotes omitted, ChP]." See also n. 261.

[202] See n. 395 of Chapter III.

because of the emergency situation) have been complied with. They must also check whether the arrest/detention in general can be seen as non-arbitrary. These general words, including the still-to-discuss paragraph 3 of Article 21 of the ICC Statute (see the next chapter), can be used by the ICC judges to ensure that every suspect receives the same minimum human rights protection, whatever the domestic situation may be.[203]

The above exposition shows that it is difficult to come up with a clear-cut solution to the problems engendered by Article 59, paragraph 2 of the ICC Statute. As previously explained, much will depend on the national situation and how a State views its duties *vis-à-vis* the ICC. Nevertheless, one can agree with most authors that States should be very reluctant to refuse the surrender of a suspect. Even though the national competent judicial authority is, of course, in the best position to consider the national regulations, the ICC is seemingly best positioned to consider *all* the different elements playing a role in the process of an arrest and surrender. Hence, it would be very unfortunate if the ICC were not to even get the chance to consider these matters. The fact that under certain circumstances States could abuse Article 59 of the ICC Statute in refusing surrender also argues in favour of such a position. If a State has determined pursuant to Article 59, paragraph 2 of the ICC Statute that the arrest of the suspect was not in accordance with the proper procedure or that the rights of the suspect were not respected, but nevertheless decides to surrender the person to the ICC, its determinations can then be taken into account at the ICC level so that the ICC judges can consider them (and accord appropriate remedies).[204]

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[203] Sluiter notes that "one can imagine a difference in degree of the ICC's supervisory role; clearly, its supervision of respect for national process should be far more marginal than supervision of the internationally protected rights of each arrested person." (Sluiter 2009, p. 472.) As clarified in the main text, it is indeed true that the ICC judges should focus on human rights (so that every suspect receives the same minimum protection) rather than on national procedures (which may, after all, differ from State to State and which may be very low in protection because of a derogation caused by an emergency situation), see *ibid*., p. 474: "In my view, the purpose of Article 59 is not only to ensure the application of a (national) legal framework to the implementation of arrest warrants, but also the application of a framework and overall practice which are consistent with international human rights standards. A different view, dramatically decreases protection and subjects an arrested person to the whims of domestic law and approaches. As these may vary for each State, we furthermore may be confronted with unacceptable inequality in treatment." Nevertheless, as also clarified in the main text, one must not forget either that supervising human rights may also, *de facto*, involve a review of national procedures. For example, if the ICC wants to check whether a suspect's right to liberty and security was not violated, it must also examine whether the arrest/detention at the national level was executed in conformity with the correct (national) procedures. In addition, a focus on human rights is good, but not enough. As earlier submitted in this study, it may very well be that (serious) irregularities occur which need to be remedied, but which may, strictly speaking, not be seen as proper human rights violations. (One could hereby think of an abduction performed by private individuals. The judge reviewing this *male captus* may be of the opinion that private individuals *cannot* violate human rights and thus that no human rights violation has occurred, see n. 123 of Chapter VII and Subsection 3.2 of Chapter III.)

[204] See the already-mentioned situation in the UK as described in n. 190. See also Bekou and Shah 2006, pp. 528-529, describing the comparable approach taken by Uganda: "S.30 of the Ugandan Bill provides a detailed procedure for dealing with the irregularities of arrest. A magistrate is to investigate

Nevertheless, certain extreme circumstances – and obvious problems such as the fact that the person arrested is not the person in which the ICC is interested – may also lead to justified refusals on the part of the custodial State, for example, in the – again highly unlikely but not impossible – situation that the suspect arrived in the custody of the custodial State because of an abduction orchestrated by the ICC. Similarly, the State may refuse surrender on the basis of the *Soering* and *Naletilić* jurisprudence,[205] even though it is expected/hoped that this will not happen. If, however, the State ultimately decides not to surrender the person in question, it should try to ensure that the person is brought to justice elsewhere. The fact that the State deems the ICC not to be the appropriate authority for adjudication – for example, because of the two above-mentioned extreme circumstances – does not mean that the person in question may then not be judged by a national court which also has jurisdiction over that person and which has nothing to do with the deficiencies of the ICC, *cf.* also the point made earlier that a *male detentus* outcome cannot be equated with impunity of the suspect. (In that case, the surrendering court may perhaps request the other national court to take into account the due process/human rights violations committed at the pre-trial stage and to grant appropriate remedies.)

Although a refusal may thus be seen as an exception, a State may very well be right to argue that a release (which does not preclude a re-arrest and surrender) may constitute the correct legal remedy if one accepts that human rights law, which, in principle, includes the remedy of release as can be found in Articles 9, paragraph 4 of the ICCPR and 5, paragraph 4 of the ECHR, is to be taken into account when looking at the scope of Article 59 of the ICC Statute. Nevertheless, judges may also be of the opinion in such circumstances, see also earlier chapters of this book, that the remedy of release is problematic (because it may be seen as an over-simplified *pro forma* remedy for an unlawful detention and because it may lead to a suspect absconding) and should therefore be avoided. Judges may then argue that they will surrender the suspect instead, while requesting the ICC that the suspect receives an

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the lawfulness of arrest and determine whether the rights of the arrestee were respected or not. Should the magistrate determine that the arrest was conducted unlawfully or that the rights of the individual were violated, then a declaration should be made to that effect. Such a declaration should then be transmitted to the Court, giving the Court the opportunity to assess the allegations and, should they be upheld, to decide upon the appropriate remedy. The magistrate 'may not grant any other form of relief', apart from requiring an explanation for the unlawful behaviour. Therefore, under Ugandan legislation, surrender will still go ahead [original footnote omitted, ChP]." Bekou and Shah very much favour this approach (see *ibid.*, p. 529): "[M]any States Parties have not opted to use such processes. Instead, there is a tendency to deal with domestic procedural and rights issues themselves, rather than submit such issues for adjudication by the Court. This is understandable in the sense that to allow the Court effectively to pass judgment on the failures of a domestic system is an intrusion into the realms of State sovereignty which is, of course, zealously guarded. Such an approach is only compliant with the Rome Statute if the remedies for a rights violation do not preclude surrender to the Court. [But see n. 181, ChP.] The Ugandan method is clearly preferable and should be adopted by other African States. This approach allows the Court to determine whether a violation of the individual's rights is so grave as to constitute an abuse of process that would render a trial against the interests of justice, or, in less severe situations, compensation to be awarded [original footnote omitted, ChP]."

[205] See n. 174.

appropriate remedy for the pre-trial irregularities, taking all the different aspects of the case into account.

3.3 The arrest and surrender regime Part III

Now that paragraph 2 of Article 59 of the ICC Statute has been examined in more detail, it is time to look at its other paragraphs (and at the remaining provisions of the ICC arrest and surrender regime). Paragraphs 3-6 of Article 59 of the ICC Statute address a person's right to apply for interim release/bail[206] pending surrender (this is different from interim release *pending trial*, which will be discussed *infra*).[207] The fact that there exists such a possibility on paper constitutes an important deviation from the 'pure' vertical arrest and surrender regimes of the ICTY and ICTR where it is, in principle, impossible for national authorities to release a person pending surrender/transfer.[208] Yet it is fair to wonder how often this will actually happen in the future. According to paragraph 4 of this provision, "the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release".[209] The words "exceptional circumstances", of course, are reminiscent of the criticised Rule 65 of the ICTY/ICTR RPE which also contained (until 1999 and 2003, respectively) this requirement.[210] In addition, the national authority must also take into account the ICC's recommendations relating to the request for interim release pending surrender.[211] One can imagine that these conditions will not easily lead to an interim release. However, as also explained in Chapter VI, even though the formulation of this provision may be problematic[212]

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[206] See Prost 2005, p. 81.

[207] See Art. 59, para. 3 of the ICC Statute: "The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender."

[208] See Swart 2002 A, p. 1254, Sluiter 2003 C, p. 623 and Hall 2008 B, p. 1153. See also n. 1028 and accompanying text of Chapter VI.

[209] The remainder of this paragraph stipulates that the competent authority in the custodial State shall consider "whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)." This last point is very important and has already been discussed earlier, namely that the competent authority may not perform the substantive legality check of the *habeas corpus* concept; the authority may not examine whether the arrest was made on the correct grounds. This is the domain of the ICC alone.

[210] See n. 97 and accompanying text of Chapter VI.

[211] See Art. 59, para. 5 of the ICC Statute: "The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision." The influence of the ICC on this issue can also be identified *after* the release has been granted, see para. 6 of Art. 59 of the ICC Statute: "If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release."

[212] But see Sluiter 2009, p. 469: "[T]he reference to 'urgent and exceptional circumstances to justify interim release' is reminiscent of the ICTY and ICTR approach to pre-trial detention as a rule. However, here it is fully justified, in light of the fact that the Court has already decided pursuant to

and may receive the same criticism as the older version of Rule 65 of the ICTY/ICTR RPE,[213] one can expect that with a different provision on interim release pending surrender, the factual outcome may very well also be that detention is the rule and release the exception. And furthermore, the fact that the competent authority will not quickly provisionally release a person pending surrender in the context of ICC proceedings, may very well have justified grounds, such as social disturbance and the risk of absconding, grounds which have their origin in the seriousness of the person's alleged crimes.

A few observations from Swart about the detention pending surrender which deserve to be mentioned here is that first, "[t]he rights of the person being held in custody and the treatment he will receive are determined by the laws of the requested State";[214] secondly, that "the time spent in detention by the convicted person on the territory of the requested State in accordance with an order of the Court must be deduced from a sentence of imprisonment"[215] and thirdly, that

> Article 85(1) grants an enforceable right to compensation to anyone who has been the victim of unlawful arrest or detention. It does not seem to matter whether the unlawfulness of arrest or detention was due to the conduct of the Court or that of the requested State.[216]

Article 58 that it is necessary to arrest the person concerned, and any deviation from that decision should be based on very strong grounds."

[213] See Vandermeersch 2004, p. 153, n. 116 (writing about Art. 59, para. 4 of the ICC Statute and its counterpart in the Belgian (draft) Implementation Law): "In other words, detention is regarded as the rule to which release is the exception: this is at odds with municipal criminal law on pre-trial detention." This is also noted, for example, by Oosterveld, Perry and McManus (2002, pp. 782-783) with respect to the Swiss cooperation law: "The general principle is that persons should be kept in detention pending surrender to the Court [original footnote omitted, ChP]." See also Khan 2008, p. 1162, discussing the "onerous requirements of Article 59(4)": "Article 59 (detention in the custodial state) effectively creates a presumption in favour of custody by making detention the norm *unless* "there are urgent and exceptional circumstances to justify interim release" [original footnote omitted, ChP]." Prost (2005, p. 81) writes that "[t]he test applicable to such bail applications is a high one and probably varies from the normal tests applicable to common crimes under domestic laws." However, the test may not be that different from the national level if the national judge is not dealing with common crimes but with serious crimes, see Swart (2002 A, p. 1254), who notes that the fact that the competent authority must "balance the gravity of the alleged crimes against any urgent and exceptional circumstances that may justify interim release" reflects "current practices in the field of extradition".

[214] Swart 2002 A, p. 1255.

[215] *Ibid*. (Note that Art. 78, para. 2 of the ICC Statute also states that "[t]he Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.")

[216] *Ibid*. See also Sluiter 2009, p. 468: "[W]hen the procedure of Article 59 is not followed – or not followed correctly – there is a direct basis for the applicability of Article 85, in my view. The latter provision stipulates that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. Put in these broad terms, adopting *verbatim* the wording of Article 9 (5) ICCPR, it should not matter who was responsible for the unlawful arrest, and certainly applies in my opinion to direct violation of the Court's own statutory provision [original footnote omitted, ChP]." See finally DeFrancia 2001, p. 1408, Staker 2008, pp. 1501-1502 and Hall 2008 B, p. 1153.

The broad responsibility enclosed in this provision, which will not be found in the context of the ICTY and ICTR,[217] and which will be returned to in the remainder of this book, is to be welcomed since it minimises the chance that a suspect falls into a legal vacuum caused by the fragmentation of his criminal process over two or more legal systems.

Finally, the last paragraph of Article 59 of the ICC Statute states that "[o]nce ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible".[218]

One can imagine that a person who believes that his rights were not respected at this stage but whose claims were rejected by the custodial State, may try to argue before human rights bodies such as the ECtHR and the HRC that the custodial State, in rejecting these claims, violated its obligations under human rights treaties. Much attention has already been paid to the human rights context and the view of the human rights courts on the right to liberty and security and the right not to be arrested/detained so at this point, it will suffice to establish whether litigation before these human rights bodies is in fact possible in the context of the ICC surrender phase.[219] In addition, one might wonder what would happen if these bodies were indeed to determine that the custodial State violated certain human rights provisions to which a suspect was entitled. Would this also have an effect on the ICC proceedings, for example? Finally, the question arises as to whether ICC decisions *themselves* can also be assessed by such supervisory bodies.

First of all, it would seem, naturally taking into account that much also depends on the situation in the custodial State,[220] that a suspect may indeed file a complaint in this context[221] but that the tribunal in question will probably not wait for a decision to be rendered. The *Milošević v. The Netherlands* case may serve as an example. As was already explained in Chapter VI, after he was transferred to the ICTY on 29 June 2001, Milošević "brought summary civil proceedings (*kort geding*) against the Netherlands State before the President of the Regional Court (*arrondissementsrechtbank*) of The Hague".[222] He asked the Court primarily to

[217] See also Gordon 2007, p. 669: "Article 85 of the Rome Statute recognizes a degree of ICC "cradle-to-grave supervisory power" by granting an "enforceable right to compensation" for anyone who has been the victim of unlawful arrest or detention. Once again, there is no comparable provision in the statutes or rules of the *ad hoc* Tribunals [original footnotes omitted, ChP]."

[218] Art. 59, para. 7 of the ICC Statute.

[219] Although this topic is discussed here, in the context of the provisions where a person has not yet been surrendered to The Hague, litigation before the human rights bodies may perhaps also take place after a person's surrender to the ICC, see El Zeidy 2006, p. 460.

[220] Obviously, a State needs to be a party to a certain human rights instrument. One may also think of the question whether, if so, individuals can file complaints with the supervisory body in question.

[221] See Sluiter 2003 C, p. 625: "[D]epending on the custodial state, the arrested person may request the international human rights courts or supervisory mechanisms to review the arrest and surrender in light of the state's obligations under certain human rights treaties [original footnote omitted, ChP]."

[222] ECtHR (Second Section), 'Decision as to the admissibility of Application No. 77631/01 by Slobodan Milošević against the Netherlands', 19 March 2002, p. 3. For the Dutch *kort geding*, see Arrondissementsrechtbank 's-Gravenhage, Sector Civiel Recht – President, Vonnis in kort geding van 31 augustus 2001, gewezen in de zaak met rolnummer KG 01/975 van: Slobodan Milošević tegen de Staat der Nederlanden, LJN: AD3266. The English translation can be found at: http://icrc.org/ihl-

order the defendant, the Dutch State, to release him unconditionally because, among other things, "[t]he so-called Tribunal, elements in the Serbian government and the defendant blatantly kidnapped and abducted him in a coordinated action, which must be regarded as a flagrant breach of his human rights".[223] However, the President of the District Court in The Hague determined that the Netherlands had transferred its jurisdiction to hear an application for release from detention to the Tribunal and hence that this, or any other, Dutch court did not have jurisdiction to decide on Milošević's application for release.[224]

Such a decision would probably also be rendered in the ICC context if that context is confronted by a similar case. After all, with the exception that Dutch law would be applicable to the pre-surrender phase (see Article 59, paragraphs 1 and 2 of the ICC Statute), once the suspect has been surrendered to the ICC, he can no longer apply to the Dutch authorities for release.[225]

To return to the ICTY context, after the decision of the District Court, Milošević "lodged an appeal against this judgment, but withdrew it again as of 17 January 2002",[226] apparently because he believed that it would be to no avail since the District Court had stated that the Dutch *courts* (plural!) have no jurisdiction to decide on the application. Finally, on 20 December 2001, Milošević's counsel lodged a series of complaints with the ECtHR,[227] but the European Court quickly declared his entire application inadmissible, explaining that domestic remedies had not been exhausted. Although Milošević claimed that the judgment of the District Court (which stated that Dutch *courts* have no jurisdiction to decide on the application) showed that no adequate and effective domestic remedies were available, the ECtHR stated that

> the applicant did not make use of the opportunities offered by Netherlands law to challenge this finding; he withdrew his appeal to the Court of Appeal and in so doing also deprived himself of the possibility of lodging a subsequent appeal on points of law to the Supreme Court. The Court reiterates that the existence of mere doubts as

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nat.nsf/46707c419d6bdfa24125673e00508145/012854276cd2950dc1256da20051ac68!OpenDocument. See finally also Strijards 2001, p. 97.

[223] The English translation of the Dutch *kort geding* at: http://icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/012854276cd2950dc1256da20051ac68!OpenDocument.

[224] See *ibid*.

[225] See Bevers, Blokker and Roording 2003, p. 151: "Article 88 of the ICC Implementation Act, like Article 17 of the Implementation Act for the ICTY, provides that Dutch legislation is not applicable to detention by and on behalf of the Court in its premises." Sluiter (2004 A, p. 173, n. 50) wonders "whether this position is in line with recent jurisprudence of the European Court of Human Rights, on the basis of which a certain 'residual responsibility' could be established for the 'host-state' in respect of human rights violations committed by the international organisations on its territory." This point will also be discussed in the main text (and in n. 243) in a few moments.

[226] ECtHR (Second Section), 'Decision as to the admissibility of Application No. 77631/01 by Slobodan Milošević against the Netherlands', 19 March 2002, p. 4.

[227] Milošević claimed that the following rights of the ECHR had been violated: Art. 5, paras. 1 (among other things, because of his unlawful transfer from the FRY to The Hague), 2 and 4, Art. 6, paras. 1, 2 and 3 (c), Artt. 10, 13 and 14. See *ibid*., pp. 4-6.

> to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (...).[228]

The ICTY had not adjourned its proceedings pending the ECtHR proceedings[229] and it is to be expected that the ICC will not do so either. However, it is still unclear what would have happened if the human rights body in question *had* determined that the surrendering State had violated its human rights obligations. Would this also have an effect on the ICC proceedings? This question basically boils down to the issue of the extent to which the ICC is bound by decisions from these human rights bodies. In principle, the ICC is not bound by these decisions as it is not a party to the ECHR/ICCPR.[230] Nevertheless, as will also be shown in the next chapter, human rights law, and this includes decisions from human rights bodies, may still have considerable influence on the ICC proceedings. Therefore, the case may not be as clear-cut as initially thought. This point will be further discussed in the next chapter.

A related question is to what extent human rights bodies can review the ICC decisions *themselves*. For example, if a suspect believes that certain ICC decisions or procedures have violated his human right to liberty and security, can he then go to such supervisory bodies as the HRC and the ECtHR? Although human rights law, including decisions from human rights bodies, may influence the decisions of the ICC judges, see again the next chapter, these decisions themselves cannot be reviewed by the supervisory bodies for consistency. The ICC itself "is not subject to the human rights international supervisory mechanisms [original footnote omitted, ChP]".[231] This is because "[a]ll supervisory mechanisms regarding human rights only receive complaints against states".[232] Klip has criticised this situation[233] in the

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[228] *Ibid*., p. 6.

[229] See also El Zeidy 2006, p. 461, who likewise refers to the *Naletilić* case (see n. 174) where "the ICTY proceeded with the surrender of the accused to the Tribunal without waiting for a decision of the ECHR."

[230] See also *ibid*.

[231] Sluiter 2003 C, p. 646.

[232] Klip 1997, p. 301. See also Zappalà 2003, p. 9.

[233] See Klip 1997, p. 310: "It should not be neglected that the [European] Court [of Human Rights] itself established an important nexus: "the Convention must be interpreted in the light of present-day conditions (…) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals." In the light of the developments described in this article, it requires that complaints against two or more states concerning international cooperation and complaints against a collectivity of states concerning decisions of organisations established by these states, be declared admissible. The question of the individual responsibility of a state should be dealt with after establishing that a violation of the Convention took place. To declare an application inadmissible on the ground that it is not directed against one party but to a collectivity of states (…) would make the Convention meaningless for a lot of violations in the field of international criminal law [original footnote omitted, ChP]."

context of the ICTY/ICTR[234] and the (then future) ICC,[235] a point that has also been aired by Sluiter.[236]

One can question whether States, which have responsibilities in the field of human rights protection, do not circumvent human rights safeguards by, for example, establishing international courts whose decisions cannot be reviewed by national courts or supervisory bodies. It is interesting to refer in that respect to the 1999 case *Waite and Kennedy v. Germany* before the ECtHR, which involved another international organisation, the ESA (European Space Agency). Waite and Kennedy complained that Germany had violated Article 6, paragraph 1 of the ECHR (which, among other things, states that everyone is entitled to a hearing by a tribunal), because "they had been denied access to a court for a determination of their dispute with ESA in connection with an issue under German labour law".[237] Although Waite and Kennedy were able to bring their problem to the attention of several German courts, their applications were declared inadmissible as the German courts found that ESA could rely on its immunity from their jurisdiction[238] – an immunity which would also be available to the ICC incidentally.[239] The European Court wondered whether "this degree of access limited to a preliminary issue was sufficient to secure the applicants' "right to a court"".[240] This point also involved the matter of immunity from jurisdiction of course. In this context, the European Court stressed more generally the importance of immunity from jurisdiction accorded to international organisations,[241] but also warned:

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[234] See *ibid*., pp. 300*ff*.

[235] See *ibid*., p. 304.

[236] See, for example, Sluiter 2007, pp. 19-20. Nevertheless, Zappalà (2003, pp. 13-14) argues: "At this stage of development of the international community, an institutional relationship between human rights monitoring systems and international criminal tribunals or the ICC does not exist, nor is it realistic to think it will be set up in the near future. (…) In the international legal order each subsystem tends to be self-contained and to operate as a 'monad'. Additionally, there does not seem to be an appropriate international organ to conduct such a review: regional human rights courts, on account of their non-universal character, are not suitable as they do not have international legitimacy, while the UN Committee does not really operate as a judicial body. The most realistic perspective is to strengthen human rights protection within the system and ensure that rules are thoroughly respected both by national and international organs. Nonetheless, a monitoring process need not be realized perforce on an institutional basis, but may be effectively conducted by States, NGOs, international media, and the academic community [original footnote omitted, ChP]."

[237] ECtHR (Grand Chamber), *Case of Waite and Kennedy v. Germany*, Application No. 26083/94, 'Judgment', 18 February 1999, para. 43.

[238] See *ibid*., para. 51.

[239] See Bevers, Blokker and Roording 2003, pp. 152-153: "If a suspect appeals to a Dutch court in relation to a procedure before the ICC, the Dutch court will be obliged to honour a claim of immunity."

[240] ECtHR (Grand Chamber), *Case of Waite and Kennedy v. Germany*, Application No. 26083/94, 'Judgment', 18 February 1999, para. 58.

[241] *Ibid*., para. 63: "Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society."

> The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. (…) For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.[242]

Hence, much will also depend on the level of human rights protection afforded by international organisations in their own proceedings. If this level is adequate, then there is no need to doubt the appropriateness of the fact that their decisions cannot be reviewed by supervisory bodies. If the protection is inadequate, then the possibility cannot be excluded that the Netherlands, as the host State of the ICC, can be held internationally responsible for serious violations.[243] As the ICC instruments give such a prominent place to human rights protection (as Chapter IX will show), it is to be expected that the ECtHR, if it ever has to consider this issue, will argue that as the ICC proceedings provide sufficient human rights protection, it

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[242] *Ibid*., paras. 67-68.

[243] See also Bevers, Blokker and Roording 2003, p. 153: "The [Dutch] Minister of Justice concluded on the basis of this case law [*Waite and Kennedy v. Germany*, ChP] in the context of the ICC Implementation Act that the ECHR permits the transit of jurisdiction to an international organization, and that state responsibility only arises in exceptional cases in which there is a flagrant and gross violation of the ECHR [original footnote omitted, ChP]." *Cf.* in that respect Sluiter (referring to *Waite and Kennedy v. Germany*, but also to *Beer and Regan v. Germany* (ECtHR (Grand Chamber), *Case of Beer and Regan v. Germany*, Application No. 28934/95, 'Judgment', 18 February 1999, para. 57) and *Matthews v. United Kingdom* (ECtHR (Grand Chamber), *Case of Matthews v. the United Kingdom*, Application No. 24833/94, 'Judgment', 18 February 1999, para. 32)) who writes about the "residual responsibility" which "could be established for the 'host-state' in respect of human rights violations committed by the international organisations on its territory." (See Sluiter 2004 A, p. 173, n. 50 and n. 225 of this chapter.) See further Zappalà 2003, pp. 12-13. One may also refer to the Dutch Government's Explanatory Memorandum to the International Criminal Court Implementation Act (Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 098 (R 1704), Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof), Nr. 3, Memorie van Toelichting). Here, one can read (at pp. 6-7) that Artt. 9, para. 4 of the ICCPR and 5, para. 4 of the ECHR do not oblige the surrendering judge to assess the jurisdiction and admissibility of a case before the ICC – in fact, the ICC Statute does not allow it – but that nevertheless extraordinary cases may arise in which, because of the surrender of a person to the ICC, a (gross) violation of a ECHR right may threaten to materialise. (See also the *Naletilić* case, see ns. 174 and 229.) If such a situation occurs, then the Dutch Minister of Justice can take this into account when making his decision on the request to surrender. (The fact that the Netherlands, to a certain extent, has transferred jurisdiction to the ICC does not relieve it completely from that State's obligations stemming from other international treaties such as the ICCPR and the ECHR, see *ibid*., p. 6.)

is justified that ICC decisions cannot be challenged before national courts or supervisory bodies.[244] However, much will perhaps also depend on the actual decisions in practice and on whether they actually implement the human rights protection provided for in the ICC documents.[245] Finally, it must be remarked that the host State of the ICC, the Netherlands, has pointed out in the Explanatory Memorandum to the act regulating its cooperation obligations with the ICC that it "reserves the right to review ICC decisions which require the active cooperation of the host-state in light of obligations incumbent on the Netherlands under the ECHR [original footnote omitted, ChP]".[246]

Going back to the actual arrest and surrender provisions of the ICC, once the person is surrendered (via the territories of other States)[247] to the Court or appears in The Hague voluntarily or pursuant to a summons, "the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute".[248]

One of these rights is the (already briefly mentioned, see footnote 207 and accompanying text) right to interim release pending trial.[249] Although Article 60, paragraph 1 of the ICC Statute grants this right to any person appearing before the Court (even those voluntarily appearing in The Hague), it is arguably only relevant for arrested or detained persons as only these can be released. The first sentence of Article 60, paragraph 2 of the ICC Statute does in that respect arguably not refer to a specific situation but to the only situation applicable here: "A person subject to a warrant of arrest may apply for interim release pending trial."

Be that as it may, if an arrested person applies for interim release pending trial, he shall[250] only be released (with or without conditions) if the conditions of Article 58, paragraph 1 of the ICC Statute – these are the previously discussed conditions

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[244] Note that in the *Naletilić* case, the ECtHR remarked that the ICTY "offers all the necessary guarantees including those of impartiality and independence" (see also n. 174). This arguably also goes for the ICC. It can even be maintained that the regime of the ICC can be seen as an improvement when compared to the regime of the ICTY (and that of the ICTR), see Sluiter 2003 C, p. 647: "The ICC Statute appears to offer all the necessary safeguards during the pre-trial, trial and sentence execution phases. It is an improvement from the ICTY and ICTR legal frameworks [original footnote omitted, ChP]".

[245] See also *ibid.*, p. 648: "The proof of the pudding will, as always, be in the eating."

[246] Sluiter 2003 B, pp. 947-948 (and Sluiter 2004 A, p. 172). See Explanatory Memorandum to the International Criminal Court Implementation Act (Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 098 (R 1704), Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof), Nr. 3, Memorie van Toelichting), p. 46.

[247] See Art. 89, para. 3 of the ICC Statute for more information on the topic of transit.

[248] Art. 60, para. 1 of the ICC Statute. The fact that this article speaks about a person's appearance voluntarily *or* pursuant to a summons is additional fuel for the uncertainty regarding the idea that a summons to appear has anything to do with a voluntary coming to The Hague. See also n. 111.

[249] See Art. 60, para. 1 of the ICC Statute.

[250] There is no discretion here. See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 134.

which must be fulfilled if the ICC wants to issue an arrest warrant – are *not* met.[251] This means that a person can be released if the Pre-Trial Chamber is not satisfied that 1) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and 2) the arrest (read: the continued detention) of the person appears necessary.[252]

To give an example of the second element, in the *Lubanga Dyilo* case, the Pre-Trial Chamber found that the suspect's detention remained necessary for two reasons: to ensure his appearance at trial and to prevent him from obstructing the proceedings of the Court.[253] The Pre-Trial Chamber thereby considered, among other things, that

> because of the gravity of the crimes with which Thomas Lubanga Dyilo is charged, there is a substantial risk that he may wish to abscond from the jurisdiction of the Court[[254]] (…) and (…) that Thomas Lubanga Dyilo now knows the identities of certain witnesses; that the Prosecution states that if Thomas Lubanga Dyilo were to be released and were thus to be in a position to have completely unmonitored communications with the outside world, there would be a risk that he would, directly,

[251] See Art. 60, para. 2 of the ICC Statute: "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 forth 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."

[252] For example "(i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) 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." (See Art. 58, para. 1 (b) of the ICC Statute.)

[253] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Application for the interim release of Thomas Lubanga Dyilo' (Public Document), ICC-01/04-01/06, 18 October 2006, p. 5.

[254] The Chamber hereby refers to two judgments of the ECtHR, namely *Tomasi v. France* (ECtHR (Chamber), *Case of Tomasi v. France*, Application No. 12850/87, 'Judgment', 27 August 1992, para. 89) and *Mansur v. Turkey* (ECtHR (Chamber), *Case of Mansur v. Turkey*, Application No. 16026/90, 'Judgment', 8 June 1995, para. 52). In the first case, the Court stated with respect to the ground for continuing detention 'seriousness of the alleged offences' that "[t]he existence and persistence of serious indications of the guilt of the person concerned undoubtedly constitute relevant factors, but the Court considers, like the Commission, that they cannot alone justify such a long period of pre-trial detention." In the second case, the relevant paragraph is arguably 55 (instead of 52): "52. It falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. (…) The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty (…). 55. The Court points out that the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial".

> or indirectly with the help of others, exert pressure on the witnesses, thus obstructing or endangering the court proceedings (…) [original footnotes omitted, ChP].[255]

One can see here that the gravity of the crimes with which the suspect is charged again (see Article 59, paragraph 4 of the ICC Statute (regulating the interim release pending surrender)) is an element to be taken into account when considering an application for interim release, even if the element is referred to less directly in Article 60 of the ICC Statute than it is in Article 59 of the ICC Statute.[256]

With respect to the first element, the first sentence of Article 60, paragraph 2 of the ICC Statute refers to interim release *pending trial* and, of course, a person with respect to whom the Pre-Trial Chamber believes that there are still "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" but whose arrest/detention is not deemed necessary (for example, because that person has promised – and the judges believe him – that he will show up in court anyway), may be granted interim release pending trial. However, even though the provision speaks of "interim release pending trial", the release may also be more definite in the sense that it blocks the continuation of the trial). After all, if the Pre-Trial Chamber is of the opinion that there are *no* "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court", then there is, of course, no reason to proceed with the trial. In that case, a person should obviously not merely be granted interim release pending trial (because there will not be a trial in the future) but a 'final' release.

Every decision on a request for interim release by the Pre-Trial Chamber shall be periodically reviewed (at least every 120 days)[257] and alongside this, the Pre-Trial Chamber may also review its decision whenever the person in question or the

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[255] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Application for the interim release of Thomas Lubanga Dyilo' (Public Document), ICC-01/04-01/06, 18 October 2006, pp. 5-6. See also ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)' (Public), ICC-01/04-01/06, 1 February 2008, para. 10: "In relation to the requirements of Article 58(1)(b)(i), the Chamber considers that the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial. Furthermore, the Chamber considers that the defendant is highly unlikely to attend his trial voluntarily. For these reasons the Chamber concludes that it is necessary to continue to detain the defendant."

[256] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 136: "The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the gravity of the crimes allegedly committed by the Appellant. As the Prosecutor correctly notes, the Pre-Trial Chamber did not take into account the gravity of the crimes in isolation but as part of its consideration that the Appellant might abscond. If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond."

[257] See Rule 118, para. 2 of the ICC RPE.

Prosecutor requests the Pre-Trial Chamber to do so.[258] It is important to understand that these reviews will only take place after a decision on a request for interim release has been taken. The Pre-Trial Chamber is thus not obliged to review every 120 days the detention of a suspect who has not first requested interim release.[259]

Nevertheless, this does not mean that the ICC should disregard the total duration of the detention. This 'assignment' can be found in the rather vaguely formulated[260] paragraph 4 of Article 60 of the ICC Statute:

> The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing [there is thus no obligation to release here, ChP] the person, with or without conditions.[261]

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[258] See Art. 60, para. 3 of the ICC Statute.

[259] This was clarified in ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Application for the interim release of Thomas Lubanga Dyilo' (Public Document), ICC-01/04-01/06, 18 October 2006, p. 4: "CONSIDERING (…) that the two abovementioned provisions [namely Art. 60, para. 3 of the ICC Statute and Rule 118, para. 2 of the ICC RPE, ChP] appear after provisions which specifically deal with applications for interim release brought after the person subject to a warrant of arrest has been surrendered to the Court; CONSIDERING, therefore, that the ruling on "[…] detention" referred to in article 60(3) of the Statute and rule 118(2) of the Rules cannot be confused with the warrant of arrest issued pursuant to article 58 of the Statute ordering the initial detention of Thomas Lubanga Dyilo (…)." See also the following confirmation by the Appeals Chamber: "94. The ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2). This is clear from the order of the statutory provisions. As the Pre-Trial Chamber correctly pointed out, both article 60 (3) and Rule 118 (2), which require the Pre-Trial Chamber to review its ruling on release or detention, appear directly after provisions which provide for applications for interim release by the person subject to a warrant of arrest. It is therefore logical to interpret the review under article 60 (3) to follow from, and be dependent upon, a ruling on a previous application by the detained person for interim release. 95. The Appeals Chamber does not accept the arguments of the Appellant that the ruling referred to in article 60 (3) must be read more broadly and that the Warrant of Arrest amounts to such a ruling." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, paras. 94-95.)

[260] See Khan 2008, pp. 1167-1168.

[261] *Cf.* in that respect the more general provision in Art. 67, para. 1 (c) of the ICC Statute that an accused shall be entitled to be tried without undue delay. As stated earlier (see n. 201), although Art. 67 of the ICC Statute, in principle, applies at the trial stage, it may also have pre-trial dimensions. This also goes for Art. 67, para. 1 (c) of the ICC Statute, see Schabas 2008, pp. 1258-1259: "The provision is identical to that of its model in the *ICCPR*. (…) Case law and academic comment on the ICCPR provision have considered that the time limit begins to run at the moment the suspect or accused is informed that the authorities are taking steps towards prosecution [emphasis in original, ChP]." See also *ibid*., p. 1273: "Although article 67 applies at the trial stage of the proceedings, it may be threatened by pre-trial events, such as irregular or illegal investigation, either by the national authorities or by the Prosecutor's office. The *Statute* provides the Court with the power to exclude evidence in cases of abuse but there may be breaches of article 67 for which this may be an insufficient or inappropriate remedy. For example, what is the Court to do in cases of violation of the right to a speedy trial, set out in article 67 para. 1 (c) [emphasis in original, ChP]?"

Thus, it may very well be the case that the judges, every time they have to review the decision on interim release, are of the opinion that at that specific moment in time, detention is in principle justified, but that does not prejudice their discretion to release a person nonetheless (namely when, taking the whole period together, this person is in unreasonably long pre-trial detention because the Prosecution delays his detention unreasonably). This provision is, in other words, completely independent of the above-mentioned provision (Article 60, paragraph 2 of the ICC Statute).[262]

In finding out exactly what is meant by an "unreasonable period prior to trial due to inexcusable delay by the Prosecutor", it is first of all worth stressing that this provision focuses on the (in)activity of the Prosecutor alone. For example, if a suspect is detained by a State, at the request of the ICC, and becomes the victim of an unreasonable period of pre-trial detention caused by the fact that the Prosecutor simply forgot about the case (that this is not impossible was clearly shown in the *Barayagwiza* case),[263] a suspect, when surrendered to the ICC, may refer to Article 60, paragraph 4 of the ICC Statute. However, if the Prosecutor has done his best and if the delay is caused by (in)activity of the State itself, the person will not be released pursuant to this article. Likewise, if the Registry or another organ is responsible for the delay, release, pursuant to this provision, will not follow. This is strange and has consequently been (correctly) criticised.[264] However, again, even if in such circumstances, a suspect is not released on the basis of Article 60, paragraph

[262] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 4: "Article 60 (4) of the Statute is independent of article 60 (2) in the sense that even if a detainee is appropriately detained pursuant to article 60 (2), the Pre-Trial Chamber shall consider releasing the detainee under article 60 (4) if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor." See also *ibid*., paras. 98 and 120.

[263] See ns. 865-869 and accompanying text of Chapter VI.

[264] See Khan 2008, p. 1167, who notes that the provision "does not protect a person from unreasonable lengths of detention, but only unreasonable lengths of detention *occasioned by inexcusable delay by the Prosecutor* [emphasis added, ChP]." He then continues (*ibid*.): "There is no provision allowing for release to ameliorate a person[']s detention for an unreasonable period caused by inexcusable delay occasioned by other factors, such as insufficiency in the number of judges, lack or insufficiency of court rooms, or budgetary and resource problems. This is unsatisfactory. It will not matter to accused persons whether their detention for an "unreasonable period" is the fault of the Prosecutor, the judges, the Registry or any other third party. All organs of the Court should be clearly prohibited from unnecessary, never mind inexcusable delays, and paragraph 4 suffers from the defect of only focusing on inexcusable delay on the part of the Prosecutor." Indeed, one could refer here to the above-mentioned *Barayagwiza* case that one should be concerned about the violations, *irrespective* of the entity responsible, see the famous dictum of the ICTR at ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 73 (see n. 841 and accompanying text of Chapter VI). This reasoning was also referred to, in the context of Art. 60, para. 4 of the ICC Statute, in the still-to-discuss *Katanga* case (see Section 4 of Chapter X), see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga*, 'Response of the Defence to the Prosecution's Observations on the Pre-Trial Detention of Mr. Germain KATANGA, pursuant to the Statute and the Rules' (Public), ICC-01/04-01/07, 7 February 2008, para. 37. See also Sluiter 2009, p. 464.

4 of the ICC Statute, other bases for release may nevertheless exist in the context of the ICC. This will be discussed in greater detail in the following two chapters.

Another point must be made here. In a 2007 decision from the *Lubanga Dyilo* case, the Appeals Chamber referred to its *male captus* decision issued a couple of months earlier, a decision (also from the *Lubanga Dyilo* case) which will be examined at length in Section 2 of Chapter X, to explain the scope of Article 60, paragraph 4 of the ICC Statute. It held:

> The Appeals Chamber also sees no merit in the argument of the Appellant that the Pre-Trial Chamber in its consideration of article 60 (4) of the Statute should have taken into account the periods that the Appellant had spent in detention and house arrest in the Democratic Republic of the Congo. The Appeals Chamber has already noted in paragraph 42 of the (…) "Judgment on the Challenge to Jurisdiction" (…) that the alleged crimes for which the Appellant had been held in detention in the Democratic Republic of the Congo prior to his surrender to the Court were separate and distinct from the alleged crimes that led to the issuance of the warrant for his arrest. There is no reason to depart from this finding in the present appeal. As noted by the Appeals Chamber in paragraph 44 of the Judgment on the Challenge to Jurisdiction, issues regarding prior detention are relevant where they are part of the "process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court." As the Appellant's prior detention was not part of that process and was thus not part of the detention pursuant to the Warrant of Arrest issued by the Pre-Trial Chamber, there is no reason to take that period into account for the purpose of article 60 (4) of the Statute.[265]

It can be argued that the use of the 2006 *male captus* decision of the Appeals Chamber (which in itself can be criticised, see Section 2 of Chapter X), is odd as that decision did not look at the scope of Article 60, paragraph 4 of the ICC Statute; it looked more generally at the effect of pre-trial irregularities on the jurisdiction of the ICC. However, the fact that the Appeals Chamber, in its decision of 2006, wants to restrict itself to examining irregularities when these are part of "the process of bringing the [a]ppellant to justice for the crimes that form the subject-matter of the proceedings before the Court" does not mean that this (criticisable) scope should also be followed in the context of Article 60, paragraph 4 of the ICC Statute. That latter provision is, in principle, clear when it talks about an unreasonably long pre-trial detention due to inexcusable delay by the Prosecutor. Although that implies that the Prosecutor must be involved in the case, this does not necessarily have to be

[265] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 121. Note that this reasoning was also confirmed by the Pre-Trial Chamber in the *Katanga* case, a case which will be addressed in more detail in Chapter X as well, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 11.

triggered by an ICC arrest warrant and thus by detention based on the ICC charges. It may be the case that the suspect is already in custody at the national level for other crimes and that the Prosecutor is interested in prosecuting this case, but is not yet ready. If there is a danger that the suspect will be released at the national level, it is not impossible that the Prosecutor may informally request the national authorities to keep the suspect in custody so that he has more time to prepare the arrest warrant. If the Prosecutor in such a case also causes inexcusable delay in preparing the arrest warrant, it could very well be argued that the suspect, on arrival in The Hague, can use Article 60, paragraph 4 of the ICC Statute. Even if the national detention was based on other crimes and even if an arrest warrant was not yet issued, one could argue that in such a case, the suspect suffered from an unreasonably prolonged pre-trial detention as a result of inexcusable delay caused by the Prosecutor as well.

Now, in which other situations can one say that a person is "detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor"? In fact, this can be any delay caused by the Prosecutor which cannot be justified. Hence, the Prosecutor must be able to demonstrate that every step he took in the pre-trial stage was aimed at bringing a case to trial as soon as possible, of course acknowledging that the Prosecutor also needs time (and given the complexity of trials at the international level, a fair amount of it) to prepare his case before going to trial.[266] However, one can assume that this will normally be the case and that the Prosecutor will do everything in his power to bring a case to court as quickly as possible. If a delay nevertheless occurs in this context, for example because of the complexity of the case, it should not be qualified as unreasonable. Only if the Prosecutor is not doing his job properly and, as a result, causes an *inexcusable* delay, may the ICC judges release the suspect. In any case, much will depend on the facts of the case.[267]

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[266] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 123: "Nor is the Appeals Chamber persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the location and amount of evidence when determining the reasonableness of the period of detention because such factors would always be present in international criminal proceedings. This contention is unfounded. While it is likely that most of the cases that will come before the Court will tend to be complex, this alone does not mean that the complexity of the case, and in particular the amount and location of the evidence, cannot be taken into account when assessing the reasonableness of the period of detention pursuant to article 60 (4) of the Statute. The Appeals Chamber notes in this context the references by the Prosecutor to decisions of the ICTY and ICTR, where the complexity of the case was taken into consideration in respect of the reasonableness of the period of pre-trial detention." See also Khan 2008, p. 1168.

[267] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 122: "The Appeals Chamber agrees with the finding of the Pre-Trial Chamber that the unreasonableness of

It is unclear whether the remedy of release as mentioned in Article 60, paragraph 4 of the ICC Statute only refers to an interim release/a release *pending trial* or perhaps also to a 'final' release with prejudice/obstructing the continuation of the trial, comparable with the outcome of the first *Barayagwiza* decision.[268] As the provision is 'surrounded' by provisions in which the term 'interim release' can be found, one may think that Article 60, paragraph 4 of the ICC Statute refers only to an interim release. On the other hand, the provision itself only speaks of the general term release, which does not exclude a more permanent release,[269] see in that respect also the release of Articles 9, paragraph 4 of the ICCPR or 5, paragraph 4 of the ECHR. Although these provisions do not speak of releases with prejudice either, it is very well possible that a judge confronted by very serious violations of a person's human right to liberty and security may nevertheless be of the opinion that these provisions allow him to release a person with prejudice. *Cf.* also in that respect the reasoning mentioned above when discussing Article 60, paragraph 2 of the ICC Statute: this provision does not exclude a final release either, namely if there are no reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. The fact that the provision uses quite harsh words ("unreasonable period" and "inexcusable delay") may also lead to the assertion that a final release must not be excluded. One could hereby argue that the rights of the suspect may have been so seriously violated by the unreasonable pre-trial detention due to inexcusable delay by the Prosecutor, that it would undermine the integrity of the Court to proceed with the case. In fact, one could even refer here to the first abuse of process situation (the one on which this study did not focus and which looks at the trial proceedings itself), namely that such delay could jeopardise the fairness of the trial in the strict sense.[270] In that view, an interim release (which after all does not jeopardise the trial itself) would constitute too light a remedy for the serious violations suffered by the suspect.

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any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case." See also Khan 2008, p. 1167.

[268] See also Fernández de Gurmendi and Friman 2002, p. 305, n. 91.

[269] See, however, Knoops 2003, p. 220 (or Knoops 2002, p. 226), who argues that the remedy of release in Art. 60, para. 4 of the ICC Statute "seems to exclude the more rigorous remedy and specific view endorsed by the ICTR Appeals Chamber in both *Barayagwiza v. Prosecutor* and *Semanza v. Prosecutor*. Considering the diverse subject matter that *habeas corpus* writs may address as to the legality of detention, the "gliding scale" approach of the Appeals Chamber seems more favourable [original footnote omitted, ChP]." One can agree with Knoops on this last point, however. As earlier explained in the context of Artt. 9 of the ICCPR and 5 of the ECHR, the remedy of release is unclear and over-simplified. As a result, the judges should keep the suspect in custody and provide the most appropriate remedy, taking the exact circumstances of the case into account. *Cf.* also n. 45 and accompanying text of Chapter IX.

[270] See House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

A point that should also be made about this provision is the already briefly mentioned discretionary power of the ICC to release the person in question: "If such delay occurs, the Court *shall consider releasing* the person, with or without conditions [emphasis added, ChP]".[271] One can question whether there is not some tension between this provision and what appears to be its international human rights counterpart (although that provision seems to be more clearly focused on releases *pending trial* only) which states more pointedly that a person *shall* be released pending trial if he is not tried within a reasonable time and which does not even use the more reproachful word "inexcusable".[272] Nevertheless, the discretion from Article 60, paragraph 4 of the ICC Statute would be appropriate if the provision is indeed used as a sort of abuse of process tool: if the judge is of the opinion that this provision can be used to stop the process in very serious cases of delay, he should definitely have discretion in deciding whether or not this far-reaching remedy is to be granted, taking every single aspect of the case into consideration.[273]

A final aspect of this provision to be discussed here is that, assuming for now that this provision will only lead to a provisional release, that is, a release pending trial, one can imagine that there might indeed be good reasons not to grant interim release under this provision too readily (even when the unreasonable detention is the result of inexcusable delay caused by the Prosecutor). It should be borne in mind that when the Pre-Trial Chamber releases a person pursuant to Article 60, paragraph 4 of the ICC Statute, it does so because of an unreasonable detention due to inexcusable delay caused by the Prosecutor. It does *not* release the person because it is not convinced that 1) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and 2) the arrest (read: the continued detention) of the person appears necessary. In other words, if the Pre-Trial Chamber releases a person under Article 60, paragraph 4 of the ICC Statute, it remains convinced that the conditions of Article 58, paragraph 1 (a) and (b) of the ICC Statute apply. (If it were not so convinced, the Chamber would already have to release the person under Article 60, paragraph 2 of the ICC

[271] Note in that respect the difference with Art. 60, para. 2 of the ICC Statute where it is clarified that if the grounds for detention are lacking, "the Pre-Trial Chamber *shall release* the person, with or without conditions [emphasis added, ChP]."

[272] See, for example, Art. 9, para. 3 of the ICCPR ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.") and Art. 5, para. 3 (c) of the ECHR ("Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."). In the next chapter, the correlation between provisions of the Statute and international human right provisions will be further addressed.

[273] This would be different, however, in case it is determined that the delay has entailed that one can no longer speak of a fair trial in the strict sense of the word (see n. 270 and accompanying text). In such a case, jurisdiction should be refused, see the text following n. 159 and accompanying text of Chapter V. See also n. 138 and accompanying text of Chapter VII.

Statute.)[274] It is not unusual for the Pre-Trial Chamber not to quickly release a person if it still believes that 1) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and 2) the arrest (read: the continued detention) of the person appears necessary. After all (and again referring to the observations of the Pre-trial Chamber in that respect),

> because of the gravity of the crimes with which Thomas Lubanga Dyilo is charged, there is a substantial risk that he may wish to abscond from the jurisdiction of the Court (…) and (…) that Thomas Lubanga Dyilo now knows the identities of certain witnesses; that the Prosecution states that if Thomas Lubanga Dyilo were to be released and were thus to be in a position to have completely unmonitored communications with the outside world, there would be a risk that he would, directly, or indirectly with the help of others, exert pressure on the witnesses, thus obstructing or endangering the court proceedings (…) [original footnotes omitted, ChP].[275]

If the judges of the ICC believe that these risks remain, it is not strange for a person not to be released very quickly in the case of an unreasonably prolonged detention as a result of inexcusable delay caused by the Prosecutor. In fact, one can even assert that, besides the fact that very serious cases of delay should lead to the real ending of the case, it is rather odd to release a person in less serious cases if one is still of the opinion that arrest/detention is necessary. See in that respect also the problems related to the remedy of release in the case of an unlawful arrest/detention. Perhaps, it may also be better in the context of this provision of the ICC Statute that the remedy of release (which may lead to social disturbance and a risk of absconding) is avoided and that other, appropriate remedies for the delay are

[274] See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs.* Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire Thomas Lubanga Dyilo'' (Public), ICC-01/04-01/06, 1 November 2006, para. 19: "[I]t is only natural that before analysing the applicability of Article 60 (4) the Chamber decided to, as required by Article 60 (2), satisfy itself as to whether the conditions for detention in Article 58 continued to apply. If they did not, then the Applicant would have been entitled to release, independently of any determination under Article 60 (4), which would have actually become unnecessary. Once the Chamber satisfied itself that the condition continued to apply, it proceeded to discuss whether the requirements for release under Article 60 (4) had been met in the present case [original footnotes omitted, ChP]."

[275] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Application for the interim release of Thomas Lubanga Dyilo' (Public Document), ICC-01/04-01/06, 18 October 2006, pp. 5-6. See also ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)' (Public), ICC-01/04-01/06, 1 February 2008, para. 10: "In relation to the requirements of Article 58(1)(b)(i), the Chamber considers that the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial. Furthermore, the Chamber considers that the defendant is highly unlikely to attend his trial voluntarily. For these reasons the Chamber concludes that it is necessary to continue to detain the defendant."

granted instead.[276] Although certain conditions may prevent this[277] – conditions which are, by the way, absent from paragraph 4 of Articles 9 of the ICCPR and 5 of the ECHR – the risk of absconding may even be greater in the context of the ICC than in the context of the ICTY/ICTR. After all, whereas all UN Member States are obliged to cooperate with the ICTY/ICTR, there are many States in the world which do not need to cooperate with the ICC because they are not States Parties. If a suspect were able to flee to such a State, he might very well escape justice. Such an escape is possible as the ICC and its host State, the Netherlands, have agreed – like the ICTY has done with the Netherlands and the ICTR has done with Tanzania[278] – that the Netherlands cannot re-arrest a suspect released from the ICC without conviction for a period of fifteen days.[279]

Be that as it may, one cannot escape the more general observation, considering that releases will not be granted too readily in the context of ICC proceedings (see both the interim release pending surrender and (perhaps to a lesser extent)[280] the interim release pending trial), that the international human rights rule that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody"[281] will probably not apply to the ICC[282] (or perhaps to any international criminal

[276] One could hereby think of a reduction of the sentence or financial compensation, comparable with the *Barayagwiza* solution. The reduction or compensation could then depend on the question how unreasonable the detention (caused by the inexcusable delay by the Prosecutor) was. (Note that compensation is already a remedy for unlawful arrest/detention more generally (whether a person is acquitted or not) accepted by the Statute, see Art. 85, para. 1 of the ICC Statute. See also Rules 173-175 of the ICC RPE.) See also n. 269.

[277] "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, *with* or without *conditions* [emphasis added, ChP]."

[278] See n. 243 of Chapter VI.

[279] See Art. 51 ('Limitation to the exercise of jurisdiction by the host State') of the 'Headquarters Agreement between the International Criminal Court and the Host State' (ICC-BD/04-01-08, Date of entry into force: 1 March 2008): "1. The host State shall not exercise its jurisdiction or proceed with a request for assistance or extradition from another State with regard to persons surrendered to the Court in accordance with Part 9 of the Statute, persons granted interim release or persons who appear before the Court voluntarily or pursuant to a summons, for any acts, omissions or convictions prior to the surrender, the transfer or the appearance before the Court except as provided for in the Statute and the Rules of Procedure and Evidence. 2. Where a person referred to in paragraph 1 of this article is, for any reason, released from the custody of the Court without conviction, that paragraph shall continue to apply for a period of fifteen consecutive days from the date of his or her release."

[280] See Khan 2008, pp. 1162-1163: "Article 59 (detention in the custodial state) effectively creates a presumption in favour of custody by making detention the norm *unless* "there are urgent and exceptional circumstances to justify interim release". The same language, however, is absent from Article 60. It is suggested that absent such clear language, the onerous requirements of Article 59(4) should not be transplanted or read into Article 60 in any way [original footnotes omitted, ChP]." See also O'Dowd 2004, p. 99: "The criteria applicable by the national authority appear more restrictive than those governing the ICC's power to grant interim release".

[281] Art. 9, para. 3 of the ICCPR.

[282] See also O'Dowd 2004, p. 99: "The relevant provisions of Articles 59 and 60 have already been the subject of scholarly comment and analysis. There seems to be a general consensus that, whatever formal doctrine the ICC adopts on the question, in practice detention will be the norm and release the

tribunal, *cf.* the discussion in Chapter VI on Rule 65 of the ICTY/ICTR RPE).[283] However, as previously explained, the fact that release will not often[284] be granted may have legitimate grounds, such as the risk of absconding and social disturbance – grounds which have their origin in the seriousness of the person's alleged crimes.

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exception, given the gravity of the crimes within the court's jurisdiction [original footnotes omitted, ChP]."

[283] See the text following n. 93 and accompanying text of Chapter VI. See also n. 4 of Chapter VI (with respect to the IMTs of Nuremberg and Tokyo) and C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 55. It may be interesting to note that the remark of STL Pre-Trial Judge Fransen that "freedom is the principle, detention the exception" (see n. 1299 and accompanying text of Chapter VI), and his subsequent order to provisionally release the generals in question, can in that respect be seen as break with this situation. However, the kinds of crimes prosecuted at the STL (which is, by the way, not a 'real' international criminal tribunal, but an internationalised criminal tribunal) may also play a role here. Although they are of a serious nature, they fall outside the category of core international crimes prosecuted by, for example, the ICTY/ICTR/ICC (and the IMTs of Nuremberg and Tokyo), see Swart 2007, pp. 1153-1154.

[284] Although the ICC keeps repeating that pre-trial detention is not the general rule but the exception (see, for example, ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, pp. 6-7; ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Conditions of the Pre-Trial Detention of Germain Katanga' (Public Document), ICC-01/04-01/07, 21 April 2008, p. 6; ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on Application for Interim Release' (Public), ICC-01/05-01/08, 16 December 2008, para. 31; ICC, Pre-Trial Chamber II, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on Application for Interim Release' (Public), ICC-01/05-01/08, 14 April 2009, para. 36 and ICC, Pre-Trial Chamber II, Situation in the Central African Republic, *In the Case of 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' (Public Document), ICC-01/05-01/08, 14 August 2009, paras. 36 and 77), in practice, one can expect not many provisional releases. An exception in that respect can be found in the Pre-Trial Chamber II's decision of 14 August 2009 in the *Bemba Gombo* case (see ICC, Pre-Trial Chamber II, Situation in the Central African Republic, *In the Case of 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' (Public Document), ICC-01/05-01/08, 14 August 2009) but in the end, this decision, by which Judge Trendafilova ordered the conditional interim release of Bemba Gombo, was also reversed by the Appeals Chamber, see ICC, Appeals Chamber, Situation in the Central African Republic, In the Case of The Prosecutor v. Jean-Pierre 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"' (Public Redacted Version), ICC-01/05-01/08 OA 2, 2 December 2009. *Cf.* also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), pp. 56-57.

Furthermore, neither must one forget that this situation may also very well be applicable to national courts dealing with serious/international crimes.[285]

Leaving this interesting matter for now and taking the above-mentioned Articles 59 (including 55) and 60 of the ICC Statute together, it can be asserted that they cover quite a considerable part of the important *habeas corpus* concept as laid down in Articles 9, paragraph 4 of the ICCPR and 5, paragraph 4 of the ECHR[286] and as such constitute improvements when compared to the legal context of the ICTY and ICTR.[287] For example, Article 60, paragraph 2 of the ICC Statute ensures that the ICC judges address the substantive legality part (namely that the deprivation of liberty must be on such grounds as are established by law) and provides the remedy of release if these grounds are lacking. In addition, the national authority must verify whether the person was arrested in accordance with the proper process, thereby fulfilling the procedural legality part (namely that the deprivation of liberty must take place in accordance with such procedure as is established by law). In addition, the prohibition of arbitrariness also enters the ICC's arrest and surrender regime via Article 55 of the ICC Statute. However, as already explained, the exact scope of these provisions and the exact division between the national authority and the ICC is not very clear. Hence, it is equally unclear whether the ICC arrest and surrender regime is in full conformity with the above-mentioned international *habeas corpus* rights.[288] This could have been solved if an unequivocal right were

[285] See n. 213 and the remark of Swart.

[286] See in that respect also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007 (…)' (Public Document), ICC-01/04-01/06 OA8, 13 June 2007, para. 13: "The human right [and then the ICC judges refer to Artt. 21, para. 3 of the ICC Statute, 9, para. 4 of the ICCPR, 5, para. 4 of the ECHR and 7, para. 6 of the ACHR, ChP] of a person to have recourse to judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute [original footnote omitted, ChP]."

[287] See Sluiter 2009, p. 462. See also *ibid.*, p. 467.

[288] It may be interesting to note that the Dutch Government is, however, of the opinion that Artt. 59 and 60 of the ICC Statute do not violate the Dutch version of the Artt. 9, para. 4 of the ICCPR and 5, para. 4 of the ECHR: Art. 15, para. 2 of the Dutch Constitution (see also Bevers, Blokker and Roording 2003, p. 137). This provision reads: "Anyone who has been deprived of his liberty other than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down by Act of Parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful." (Note, by the way, that this provision also speaks of release if the deprivation of liberty more generally is unlawful and not merely of release if the detention is unlawful, see n. 583 and accompanying text of Chapter III.) (For more information on Art. 15 of the Dutch Constitution, see Mevis and Blom 2000.) In its Explanatory Memorandum to the approval of the ICC Statute (Tweede Kamer der Staten-Generaal, Vergaderjaar 2000-2001, 27 484 (R 1669). Goedkeuring van het op 17 juli 1998 totstandgekomen Statuut van Rome inzake het Internationaal Strafhof (Trb. 2000, 120), Nr. 3, Memorie van Toelichting), the Dutch Government addresses Art. 15, para. 2 of the Dutch Constitution and then states at p. 8: "Now that the Rome Statute contains a provision dealing with judicial intervention in case of a deprivation of liberty, one cannot object to approval from this point of view. In that respect, one can refer to Articles 59 and 60 of the Rome Statute (and their clarifications). Therefrom, it is shown that an arrested person has the right to request the national judge for interim release and, at a later stage of the procedure, the Pre-Trial Chamber of the ICC for provisional or interim release [own translation, ChP]." However, as mentioned in the main text,

included in the ICC regime (whether at the national or at the international ICC level) for a suspect to challenge the legality of his arrest and detention and to be released if his deprivation of liberty is deemed unlawful. However, such a right is missing, which is rather peculiar, given the fact that the entire right to liberty and security, including its *habeas corpus* part, can be considered to have, at least, the status of customary international law/general international law.[289] This intriguing point will be returned to in the next chapter.

Returning to the actual arrest and surrender provisions, "within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial".[290] On the basis of this hearing to confirm the charges, which under certain circumstances may be held in the absence of the person in question,[291] the Pre-Trial Chamber shall "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".[292] If the judges believe that there is sufficient evidence to confirm the charges, then the person in question will be committed to a Trial Chamber for trial on the confirmed charges.[293] In that case, the trial phase before the ICC will commence, thereby ending the pre-trial phase (and this chapter's section).

4 MODEL OF COOPERATION: A SECOND APPRAISAL

Now that the more specific arrest and surrender regime (which is part of the general cooperation regime) has been discussed, the nature of the ICC cooperation regime can be determined more accurately. Section 2 has shown that the ICC's cooperation regime – in particular[294] because States can in principle decide for themselves whether they want to be bound by it – is already less vertical than, for example, the

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one can wonder whether this fully covers the *habeas corpus* concept (as mentioned in Artt. 15, para. 2 of the Dutch Constitution, 9, para. 4 of the ICCPR or 5, para. 4 of the ECHR).

[289] See Chapter III of this book.

[290] Art. 61, para. 1 of the ICC Statute.

[291] See Art. 61, para. 2 of the ICC Statute: "The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice." See also n. 1. See finally n. 76 and accompanying text of Chapter VI for more information on a comparable provision in the context of the ICTY/ICTR: Rule 61 of the ICTY/ICTR RPE.

[292] Art. 61, para. 7 of the ICC Statute.

[293] See Art. 61, para. 7 (a) of the ICC Statute. The same article explains (see (b) and (c)) the other possible outcomes of the confirmation of the charges hearing. The Pre-Trial Chamber shall "(b) Decline to confirm those charges in relation to which it has been determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court."

[294] See, however, also ns. 16 and 23.

cooperation regime between the ICTY or the ICTR and States, but the previous section has identified even more horizontal elements.

For example, the ICC arrest and surrender regime contains the (inter-State extradition) exception of speciality,[295] generally pays much attention to national procedural law, specifies possibilities to consult with the ICC and even to postpone[296] requests for arrest and surrender (to which the quite horizontal general provisions related to requests for cooperation also apply),[297] acknowledges to a certain extent an evidentiary requirement,[298] regulates potential problems with competing requests and other international obligations States may have and authorises (at least on paper) interim releases at the national level.

No longer restricting the focus on the arrest and surrender regime, one can see comparable horizontal elements in the ICC cooperation regime more generally.[299] In fact, with respect to requests for assistance other than for arrest and surrender,[300]

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[295] See n. 99.
[296] See n. 136.
[297] See Art. 87 of the ICC Statute and n. 129.
[298] See Art. 91, para. 2 (c) of the ICC Statute.
[299] See, for example, Artt. 73 ("If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation to confidentiality to the originator.") and 93, para. 9 (i) of the ICC Statute ("In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request."). Swart (2002 B, p. 1595) notes that national authorities have much more discretion in handling requests of assistance than they had in the context of the ICTY/ICTR: "Here, the Statute appears to steer a middle course between the law of the Tribunals and the practice of inter-State cooperation."
[300] Note that such requests may also be useful to boost the pressure on suspects and their support networks and, as such, may contribute to more arrests and surrenders, see, for example, Art. 93, para. 1 (k) of the ICC Statute: "States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (…) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties". Prost (2005, p. 91) notes that "[t]he ICC Statute does not specifically provide for the Court to issue a freezing or seizure order with respect to assets. However, it is possible that the Pre-Trial Chamber may be empowered to do so under Article 57(3)(a) by the Prosecutor [original footnote omitted, ChP]." This provision reads: "In addition to its other functions under this Statute, the Pre-Trial Chamber may: (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation". See also n. 38 and accompanying text and its reference to the broad provision Art. 54, para. 3 (c) of the ICC Statute ("The Prosecutor may: (…) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate"). Furthermore, asset freezing could, of course, also be imposed by the UNSC when a situation has been referred to the ICC by the UNSC, *cf.* in that respect also the words of Scharf, see n. 115 of Chapter VI.

there are even clauses which "come close to a ground for refusal",[301] such as when a particular measure of assistance is prohibited in the requested State on the basis of an existing fundamental legal principle of general application (Article 93, paragraph 3 of the ICC Statute) or when a request concerns the production of documents or disclosure of evidence which relates to the State's national security (Article 93, paragraph 4 of the ICC Statute).[302] It is because of characteristics of this kind that Kaul and Kreß rightfully state, after having reiterated the point already alluded to above that "[t]he Statute's cooperation regime does not include the traditional interstate grounds for refusal to cooperate",[303] that "Part 9 rather makes use of more sophisticated instruments of conflict resolution".[304]

In other words, the ICC's cooperation regime (including its arrest and surrender rules) does have vertical characteristics, but it is clearly not as vertical in nature as that of the ICTY and the ICTR.[305] This is recognised by many authors, who use, however, different ways to describe this point. Sluiter (and subsequently Maogoto),[306] for example, admitting that the ICC regime is not as vertical as that of the ICTY and the ICTR,[307] concludes "that the ICC surrender regime is still of predominantly hierarchical, vertical nature".[308] Swart (and subsequently Rastan)[309] for his part makes the more neutral statement that "the Statute has created a regime of cooperation that is a mixture of the 'horizontal' and the 'vertical'".[310] Prost

[301] Kaul and Kreß 2000, p. 170.
[302] See also Art. 72 of the ICC Statute ('Protection of national security information'). Ciampi (2002, p. 1630) notes that "with respect to a request by the Court for a type of assistance which is not specified under Article 93(1)(a)-(k), the obligation is limited to assistance 'which is not prohibited by the law of the requested State' (Article 93 (1)(l)".
[303] Kaul and Kreß 2000, p. 170.
[304] *Ibid. Cf.* also Rastan 2008, p. 433: "[C]o-operation is made subject to numerous qualifications, any one of which could impact on the provision of judicial assistance."
[305] See also Fernández de Gurmendi and Friman 2002, pp. 328-329.
[306] See Maogoto 2004, p. 133.
[307] See Sluiter 2003 C, pp. 650-651: "In general, the ICC surrender regime is weaker than that of the ICTY and ICTR. (...) From the perspective of the ad hoc tribunals, the ICC cooperation model is disappointing."
[308] Sluiter 2003 C, p. 651. *Cf.* also the view of the Dutch Government: "The relationship between the International Criminal Court on the one hand and the national legal system on the other hand is *more vertical* than horizontal [own translation and emphasis added, ChP]." (Explanatory Memorandum to the International Criminal Court Implementation Act (Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 098 (R 1704), Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof), Nr. 3, Memorie van Toelichting), p. 4.) See finally Bevers, Blokker and Roording 2003, p. 142: "The relations between states in inter-state extradition procedures are of a horizontal nature. In this case, however, the relationship is *more hierarchical*, whereby the Criminal Court is placed above the national legal orders [emphasis added, ChP]."
[309] See Rastan 2008, p. 432.
[310] Swart 2002 B, p. 1594. See also Swart 2002 C, p. 1640: "It is clear that these provisions [the provisions of the Rome Statute with regard to arrest and surrender, ChP] have been strongly influenced by the examples of both *ad hoc* international criminal tribunals and that lessons have been drawn from their experiences. On the other hand, there is much in them that reminds one of the traditional features of extradition law. In a sense, the system of the Rome Statute is a compromise between traditional extradition law and the 'new law' of the *ad hoc* Tribunals."

asserts that the regime is "modelled on State to State schemes for international cooperation, but there are important differences".[311] A new and original way to typify the ICC (cooperation) regime, hence deserving some more attention here, is presented by Currie. He introduces the term 'lateral'.

> [I]t may be useful to identify, if not a new paradigm, then at least a new label that defines the unique set of relationships within which the ICC exists. A term that suggests itself is "lateral". Without delving too deeply into dictionary definitions of the term, it is appealing because it evokes a sort of continuum, where the Court and states are always to one side of each other. Certainly as between the Court and member states the relationship is not "horizontal," as the member states do bear certain obligations to surrender jurisdiction to the Court in some circumstances and are obligated to cooperate with the Court in various ways when this occurs. Neither, however, is the relationship "vertical," as there is a substantial measure of primacy accorded to the exercise of criminal jurisdiction by the states themselves, and even the cooperation obligations are tempered and qualified in various ways that differentiate the relationship from that, say, between the ICTY and UN member states [original footnote omitted, ChP].[312]

This may still be somewhat difficult to visualise, but Currie's explanation of the lateral effect of the complementarity principle (as stated above, Currie discusses the term lateral not only in the context of the ICC cooperation regime but in the context of the ICC regime as a whole) is perhaps clearer (at least for persons familiar with the beautiful game of rugby):

> The convoluted design of the complementarity regime was deliberate, the objective being both to create opportunities for legitimate international criminal trials, and "to encourage national institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute". This, arguably, is the "lateral" effect of complementarity – in the sense of a lateral pass on the rugby pitch, where the player best-placed to pursue the objective is handed the ball, but with more of a compulsory flavour [original footnote omitted, ChP].[313]

But even if this does not ring a bell,[314] Currie also explains his term very clearly in the context of the cooperation regime:

> The system (...) is one of mutual support (and doubtless no little friction) between the Court and state parties. The Rome Statute envisions a Court with some power but mandates ongoing consultations and negotiations as the mode by which the criminal justice work gets done in the pre-trial phase. Formally states must cooperate, but there are roadblocks to be thrown up and some provisions that may amount to

[311] Prost 2005, p. 73.
[312] Currie 2007, p. 378.
[313] *Ibid*., p. 379.
[314] Those who wish to *become* familiar with (the lateral pass in) rugby are commended to the information available at this site: http://www.coachingrugby.com/rugby/coaching/indskills/passing/lateral.htm.

> grounds for refusal of a Court request. Both vertical and horizontal approaches were combined, and distorted, in order to produce a mutually agreeable package. The Court and its members work laterally, in parallel fashion, ostensibly moving towards the same goal of ensuring international crime is punished and impunity extinguished.[315]

Currie's metaphor of the rugby pitch and the term 'lateral' will be returned to later in this book (this was also the reason why different descriptions of his submission have been presented here), but now that the ICC's cooperation regime (and the arrest and surrender provisions in particular) have been clarified in more detail, it is time to first address the internal evaluative framework of this book.

[315] Currie 2007, p. 382.

CHAPTER IX
CREATING AN INTERNAL EVALUATIVE FRAMEWORK: ARTICLE 21 OF THE ICC STATUTE

1 INTRODUCTION

As stated in Section 2 of this book's first chapter, this study does not merely want to describe and analyse the current ICC position on the *male captus* issue (this will be done in the next chapter), it also wants to assess it. In Part 3 of this book, an external framework was created which should enable the reader, after having read the following chapter, to see how similar or different the ICC position with respect to the *male captus* issue is in comparison with the position of other courts. However, the aim of this study's assessment is broader than comparing the ICC decisions with decisions from other courts. It will also include an internal evaluative assessment, which focuses on what the ICC is actually obliged to do according to its own legal framework. With the help of this less non-committal framework, one should be able to see how the ICC decisions are doing *vis-à-vis* its *own* law.

The central provision of this framework is Article 21 of the ICC Statute (entitled: 'applicable law').[1]

It constitutes "the first codification of sources of international criminal law"[2] and is one of the most complicated articles in the ICC Statute.[3] It reads:

[1] Note that the discussion on the law of the ICC is predominantly, and, taking into account the *nullum crimen sine lege* principle (of Art. 22 of the ICC Statute), understandably, focused on *substantive* law issues, such as the exact scope of the crimes which the ICC must adjudicate. See also Edwards 2001, p. 369, n. 193. Nevertheless, as Art. 21 of the ICC Statute refers to, among other things, documents which discuss many issues of procedural law (such as the Statute and the Rules of Procedure and Evidence) and human rights (which arguably also cover procedural human rights), it is submitted that Art. 21 of the ICC Statute also has a procedural law dimension and may thus also be looked at for the present procedural law discussion on *male captus bene/male detentus*. *Cf.* also Caracciolo 2000, p. 225, Edwards 2001, p. 368 and Degan 2005, p. 79.

[2] Hafner and Binder 2004, p. 165. See also McAuliffe deGuzman 2008, p. 703.

[3] See Pellet 2002 A, p. 1053: "[T]he system of sources to which the Statute refers is extremely complex, sometimes even uncertain, and the order of precedence between the different provisions is equally ambiguous."

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

In the following pages, these paragraphs will be looked at in detail to determine their exact scope. It must be emphasised that the entire article will be reviewed so that the reader has sufficient information on all these provisions, even if this study comes to the conclusion that the answer to the *male captus* problem can already be found in an early paragraph, thereby perhaps – this will be dealt with in the following pages – making it unnecessary to continue looking for answers.

2 ARTICLE 21, PARAGRAPH 1

2.1 Correlation between the three parts of paragraph 1

Before examining the actual content of the first part – part (a) – of paragraph 1, it is worth first reviewing the correlation between that paragraph's three parts. One may encounter some problems here. On the one hand, one could argue that the sources mentioned in part (a) are clearly superior to those of part (b) and (c) given the words "in the first place" (part (a)), "in the second place, where appropriate" (part (b)) and "failing that" (part (c)).[4] In the words of Edwards:

[4] See also, for example, Pellet 2002 A, p. 1078: "Article 21 (…) stipulates the superiority of the Statute compared with the other sources of law which the Court may apply. This is witnessed by the enumeration of the sources itself: 'in the first place…', the Statute; 'in the second place', and only 'where appropriate', treaties and the principles and rules of international law; and, 'failing that', general principles of law [original footnote omitted, ChP]."

> Article 21 provides that all law to be applied by the Court to resolve all issues is to be drawn from seven sources of "applicable law" listed within article 21. The sources are listed hierarchically, in a manner reminiscent of the sources of international law contained in article 38 of the Statute of the International Court of Justice. Thus, the applicable law is to be consulted in the following order: (1) the Rome Statute itself; (2) the Elements of Crimes; (3) the Rules of Procedure; (4) "where appropriate,[5] applicable treaties;" (5) "where appropriate…the principles and rules of international law, including the established principles of the international law of armed conflict;" (6) "general principles of law derived by the Court from national laws of legal systems of the world;" and (7) "principles and rules of law as interpreted" in previous Court decisions.[6] The Court is instructed to begin with the first-listed source and proceed to a lower-ranked source only if the first source proves inadequate, until the Court identifies the appropriate law to resolve the issue at hand [original footnotes omitted, ChP].[7]

On the other hand, Verhoeven is of the opinion that "[i]ntrinsic primacy of those rules [namely the rules from part (a), ChP] over the treaties and principles of international law referred to in paragraph 1(b) of Article 21 does not exist".[8] One can, however, wonder in that case as to the meaning of the words "in the second place, where appropriate". Verhoeven explains:

> The mention of a 'second place' only means that such treaties, principles or rules only apply to issues that are not settled by the first category rules, either because the Statute is incomplete in certain respects, or because the point at stake is not as such concerned with its provisions (the existence of a state of war or the validity of a treaty, for instance), i.e., with the (judicial) activity of the ICC. This is probably the meaning that is to be given to the rather strange terms: 'where appropriate' (should ever a rule be applied 'where inappropriate'?). Needless to say, such a 'complementarity' does not imply or entail any 'superiority' of the rules of the first category over the ones of the second.[9]

Thus, Verhoeven, in contrast to Edwards, is of the opinion that part (b) is equal in status to part (a), meaning that those parts should be considered together. The terminology used in Article 21 may lead to the same conclusion. The fact that part

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[5] The meaning of "where appropriate" is not clear to Edwards, see Edwards 2001, p. 384, n. 264 ("The Rome Statute suffers from its use of the unfortunate adjective "appropriate" to describe the "applicable treaties" as a source of law in article 21(1)(b).") and p. 385, n. 266: "Again, we have the imprecise and ambiguous "where appropriate" language. "Appropriate" has been defined as: "suitable or fitting for a particular purpose." This offers little guidance."

[6] Note that the seventh source is not part of para. 1, but of para. 2 of Art. 21 of the ICC Statute. As such, it is not part of the hierarchy of para. 1 either; it is only a discretionary source ("The Court *may* apply principles and rules of law as interpreted in its previous decisions [emphasis added, ChP]") which the ICC may seemingly always apply, not only when the first six sources have brought no relief.

[7] Edwards 2001, pp. 369-370.

[8] Verhoeven 2004, p. 11.

[9] *Ibid*. Following that reasoning, one could also argue that part (c) complements parts (a) and (b) (namely if the latter parts have brought no relief) and as such should not be seen as inferior to these parts either. That conclusion, however, is not explicitly mentioned by Verhoeven.

(c) begins with the words "failing that" seems to mean that it can only be applied when the above-mentioned provisions, namely parts (a) *and* (b), have brought no relief, hence implying that those parts should be considered together. Stated otherwise, if one is of the opinion that part (b) can only be looked to if part (a) has left a legal lacuna, then why does part (b) not start with the identical words "failing that"?[10] If one accepts this view, then part (b) should not only be looked to if part (a) has not brought a solution to the case at hand but in fact every time part (a) is applied.

Now, if part (a) does not provide an answer to a certain problem, one can, of course, turn to the rules from part (b) (comparable with the view of Edwards). However, what happens if part (a) *does* provide an answer and that answer is inconsistent with part (b)? One can argue that, in Edwards' view, part (a) must then be followed as one should only turn to part (b) if part (a) has not provided the answer to the problem. However, what is Verhoeven's position on this? This is not very clear: the above-mentioned quotation seems to indicate that such a problem will never occur as the rules from part (b), even though they should be considered when applying part (a), will only be followed if part (a) leaves a legal lacuna, see the words "such treaties, principles or rules only apply to issues that are not settled by the first category rules".[11] Nevertheless, Verhoeven also explains:

> General international law should indeed be duly taken into consideration – even if it is not strictly 'applicable' – when applying the first category rules. There is no reason to construe the latter in a way that is inconsistent with the former, if this is not clearly the intent of the drafters of the statute; the rarity of general international law rules governing either the functioning of courts or the punishment of crimes considerably limits, however, the practical relevance of this point. But it concerns in any case general international law only, i.e., rules that are necessarily in force between all the

[10] See also an older (namely the 1993) version of Art. 21 (then Art. 28) which read: "The Court shall apply: (a) this Statute; (b) applicable treaties and the rules and principles of general international law; (c) as a subsidiary source, any applicable rule of national law." (*Report of the Working Group on a Draft Statute for an International Criminal Court*, to be found in: *Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993*, UNGA OR, Forty-eighth session, Supplement No. 10, A/48/10, p. 111.)

[11] See also Verhoeven 2004, pp. 8-9: "Apart from treaties expressly aimed at in the Rome Statute, there is no difficulty in accepting that other 'treaties' or 'rules of international law' could normally be applicable *to the extent they are relevant to deciding issues which are not dealt with in the specific ICC provisions*, i.e., in the Statute, in the Elements of Crime or in the Rules of Procedure and Evidence [emphasis added and original footnote omitted, ChP]." With "treaties expressly aimed at in the Rome Statute", Verhoeven means, for example, Art. 98 of the ICC Statute (see *ibid*., p. 8, n. 5). This article ('Cooperation with respect to waiver of immunity and consent to surrender') reads: "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

> members of the international community; it cannot be maintained when treaties, i.e., rules specific to some states only are concerned, provided they are not declaratory of customary international law.[12]

Does this mean that general international law (and treaties which are declaratory of customary international law) are also applied if part (a) does provide an answer and that, in such an event, part (b) supersedes part (a) unless this was clearly not the drafters' intent? The words "[g]eneral international law should indeed be duly taken into consideration – even if it is not strictly 'applicable' – when applying the first category rules. There is no reason to construe the latter in a way that is inconsistent with the former" appear to indicate this, but this seemingly contrasts with Verhoeven's earlier remarks that part (b) only applies to issues which are not settled by part (a). In other words: Verhoeven argues that "[t]here is no reason to construe the latter in a way that is inconsistent with the former", but how can one construe part (a) inconsistently with part (b) if part (a) does not say anything?

The remainder of Verhoeven's words do not clarify this. They read as follows:

> To the extent the application of treaties and general international law rules results from the existence of lacunae in the statute, the (b) of paragraph 1 could have started with terms identical to the ones used at the beginning of its (c): 'failing that', i.e., failing – as far as (b) is concerned – an adequate answer in the rules referred to in the (a) of the paragraph.[13]

The words "[t]o the extent the application of treaties and general international law rules results from the existence of lacunae in the statute [emphasis added, ChP]" show that treaties and general international law may also be applied by the judges in cases other than those where part (a) has left lacunae. However, this may mean two different things. On the one hand, this may confirm the idea presented above that part (b) must be applied, even if part (a) does provide an answer. On the other hand, "[t]o the extent the application of treaties and general international law rules results from the existence of lacunae in the statute" may also confirm the previously mentioned idea that part (b) may only be applied if part (a) has left a legal lacuna because part (a), in itself, can also refer, for example, to treaties, see footnote 11 and the reference to Article 98 of the ICC Statute. In such a case, the judges will also apply treaties, not as part (b) (because part (a) has left a legal lacuna), but simply as part (a).

Leaving aside these scholarly discussions for now, it may be worth noting that the ICC has also pronounced itself on the issue of the exact correlation between part (a) and the other parts of paragraph 1 of Article 21 of the ICC Statute. In the still-to-discuss *male captus* decision of Lubanga Dyilo (see Section 2 of Chapter X), the Appeals Chamber explained, referring to another decision from the Appeals Chamber issued half a year earlier, that

[12] *Ibid.*, p. 11.
[13] *Ibid.*, pp. 11-12.

> [t]he previous decision of the Appeals Chamber in *Situation in the Democratic Republic of the Congo* "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" is instructive on the interpretation of article 21 (1) of the Statute of the Statute, particularly whether a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence, because in that case no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject [original footnote omitted, ChP].[14]

The Appeals Chamber states here that if part (a) is exhaustive on the matter, there is no need to look to parts (b) and (c) of paragraph 1 of Article 21 of the ICC Statute.[15]

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[14] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 34.

[15] It should be noted that this idea is probably from the Appeals Chamber in its decision of December 2006 *itself* because the Appeals Chamber's decision of 13 July 2006 (to which the December decision refers) can, strictly speaking, not be seen as support for that view. In that case, a case involving the issue of victim participation, the Prosecution did not agree with a decision of Pre-Trial Chamber I to uphold a certain application of victims to participate in the proceedings related to the situation in the DRC. (See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 1.) It sought leave to appeal this decision under Art. 82 ('Appeal against other decisions'), para. 1 (d) of the ICC Statute which reads: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (…) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." However, this appeal was refused. (See *ibid*., para. 2.) As a consequence, the Prosecution sought "the review of the above decision, albeit a review of an extraordinary nature, styled "Extraordinary Review", in that no provision is made in the Statute or the Rules of Procedure and Evidence for such an "extraordinary" step." (*Ibid*., para. 3.) According to the Prosecution, the Statute left "a lacuna apt to be filled by the provisions of article 21 (1) (c) of the Statute introducing what are termed general principles of law deriving (…) from the national legislation of countries adhering to "the principal legal systems of the world" [original footnote omitted, ChP]". (*Ibid*., para. 5.) The Appeals Chamber did not agree. It found that the Prosecution's general principle of law did not exist (see *ibid*., para. 32) and that, perhaps even more importantly, part (c) of para. 1 of Art. 21 of the ICC Statute could not be looked at in the first place (see *ibid*.). This was because part (a) was exhaustive of the matter; there was no gap/legal lacuna here to be filled by part (c) (see *ibid*., para. 39). However, this statement can arguably not be seen as evidence for the idea that *part (b)* (which was not under examination in this decision) cannot be applied either if part (a) is exhaustive on the matter. It is recalled that part (c) starts with the words "[f]ailing that", words which are absent in the context of part (b). That may mean that it is indeed true that part (c) can only be looked at if parts (a) and (b) have left a legal lacuna, but that does not say anything on the (perhaps different) correlation between parts (a) and (b). In that sense, the Appeals Chamber, in its December 2006 decision, is probably only referring to the July 2006 decision because the latter is instructive on the question as to whether a certain issue is exhaustively dealt with by the ICC legislation or not. In any case, the July 2006 decision can arguably not be seen as evidence for the idea that one may not turn to parts *(b) and* (c) if part (a) is exhaustive on the matter because part (b) was simply not discussed in this decision. For another opinion on this matter, see Bitti 2009, p. 296: "[T]he decision by the Appeals Chamber is a clear affirmation that the external sources of law described in Article 21 (1) (b) and (c) are subsidiary sources of law and not additional sources of law. They will

This view is similar to that of Edwards and to that of Verhoeven, if one is of the opinion that Verhoeven's words must be interpreted to mean that parts (b) and (c) will only be applied if part (a) has left a legal lacuna. However, the Appeals Chamber's view contrasts with Verhoeven's position if one is of the opinion that Verhoeven's words must be interpreted to mean that part (b) must also be looked to if part (a) *does* provide an answer and that part (a) can only overrule part (b) if this was clearly the intent of the drafters (because part (a), in principle, cannot be construed inconsistently with part (b)).

It must be stressed that the views of authors like Edwards and Verhoeven, even if they are not followed by the ICC in a certain decision, will remain interesting for the future because the ICC, see Article 21, paragraph 2 of the ICC Statute, is not *obliged* to follow its own decisions.[16] That may mean that later Chambers may not follow the above-mentioned decision of the Appeals Chamber and may turn instead to the theories of authors like Edwards and Verhoeven to solve their problems.

Almost a year later, a Trial Chamber also discussed the correlation between the different elements of paragraph 1 of Article 21 of the ICC Statute, see the following passage (which is about the issue of whether 'witness proofing' – the preparation of witnesses before trial – can be applied in the context of the ICC).

> [I]f ICC legislation is not definitive on the issue, the Trial Chamber should apply, *where appropriate*, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, *ipso facto*, prevent all procedural issues from scrutiny under Article 21(l)(b),[17] the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.
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> 45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context

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only be applied when a gap arises in the application of the Statute or the Rules of Procedure and Evidence which has to be filled by subsidiary sources in order to give effect to the provisions of the Statute or the Rules of Procedure and Evidence."

[16] "The Court *may* apply principles and rules of law as interpreted in its previous decisions [emphasis added, ChP]."

[17] This is, by the way, additional evidence for the assertion that Art. 21 of the ICC Statute has a procedural dimension as well (as was argued in the first footnote of this chapter).

> of preparation of witnesses for trial, is appropriate [emphasis in original and original footnote omitted, ChP].[18]

Unfortunately, this passage does not go into the question of whether principles and rules of international law must also be looked at if part (a) *does* provide an answer to a certain problem. It only says that the judges should apply, where appropriate, principles and rules of international law if ICC legislation is *not* definitive on the issue. These words as such do not exclude that the ICC may also apply principles and rules of international law if the ICC legislation *does* provide an answer to a certain matter.[19] After all, they do not say that the principles and rules of international law will *only* be looked if ICC legislation does not provide an answer. Nevertheless, the passage is still interesting. Not only for a question which still needs to be discussed *infra*, but also for the fact that it clarifies the rather unclear[20] words "where appropriate". These words must apparently be understood to mean: 'where it (according to the judges) fits' (the quite specific system of the ICC). This signifies that if the instruments of part (a) leave a legal lacuna, which will probably not happen too readily given their highly detailed character,[21] the ICC must ("shall")[22] apply solutions from applicable treaties and the principles and rules of international law, but only if the judges find it appropriate to transplant these solutions into the *sui generis* system of the ICC. Hence, the obligation to apply ("shall") is tempered with discretion ("where appropriate").[23]

2.2 Article 21, paragraph 1 (a)

Leaving aside this issue for now and focusing on the actual content of part (a), only the Statute and the Rules of Procedure and Evidence need to be examined here, as the Elements of Crimes focus merely on substantive law issues. (They "shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]".)[24] Although they are not explicitly mentioned in part (a), the Regulations of the Court, which were adopted for the Court's routine functioning,[25] may also be looked at.[26]

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[18] ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial' (Public), ICC-01/04-01/06, 30 November 2007, paras. 44-45.

[19] Although it must, of course, be recalled that if the ICC judges were to take that stance, they would not follow the (still authoritative) Appeals Chamber's position on this matter, see *supra*.

[20] See n. 5 and n. 9 and accompanying text.

[21] See Bitti 2009, pp. 295-296 and 300, Nerlich 2009, p. 316 and Vasiliev 2009, pp. 212-213.

[22] See the first words of Art. 21 of the ICC Statute: "The Court shall apply".

[23] See in that respect also the meaning attached to these words by McAuliffe deGuzman: "The inclusion of the phrase "where appropriate" serves to emphasize the discretion that the Court enjoys in determining when treaties or principles and rules of international law are applicable." (McAuliffe deGuzman 2008, p. 705.)

[24] Art. 9, para. 1 of the ICC Statute.

[25] See Art. 52, para. 1 of the ICC Statute.

Do these documents take a position on the *male captus bene/male detentus* discussion? One can be very brief here; none of these instruments say anything on this subject.

Now, silence on the part of the proper instruments of the ICC does not necessarily mean that there is a lacuna which must be filled by parts (b) or (c) of paragraph 1 of Article 21 of the ICC Statute.[27] In this context, one should turn to Article 31 of the Vienna Convention on the Law of Treaties (the general rule of interpretation)[28] and the supplementary means of interpretation as found in Article 32 of the same Convention.[29] After all, in the end, the ICC Statute is 'just' a normal international treaty between States as any other treaty to which this Convention applies.[30] Via textual/contextual/teleological interpretation (Article 31, paragraph

[26] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (Public Document), ICC-01/04-01/06, 8 November 2006, para. 28 where the Pre-Trial Chamber includes the regulations under the scope of Art. 21, para. 1 (a) of the ICC Statute: "Unlike the first component of the definition of the practice of witness proofing advanced by the Prosecution, the Chamber observes that the goals and measures encompassed by the second component of such a definition are *not covered by any provision of the Statute, the Rules or the Regulations*. Therefore, the Chamber, prior to undertaking any analysis under article 21 (3) of the Statute, shall first analyse whether this second component is embraced by any provision, rule or principle which could be considered as part of the applicable law of the Court pursuant to article 21 (1) (b) and (c) of the Statute [emphasis added, ChP]." See also *ibid*., para. 11. Although there are more regulations within the context of the ICC (such as the Regulations of the Registry), what is meant here are the Regulations of the Court, see *ibid*. See also Nerlich 2009, pp. 311-312 and n. 29. The hierarchy between the proper instruments of the ICC is: Statute > RPE > Regulations of the Court, see Pellet 2002 A, p. 1077. Note, however, that Vasiliev (2009, p. 213) also mentions the Regulations of the Registry within the context of part (a) of para. 1 of Art. 21 of the ICC Statute.

[27] See also Nerlich 2009, p. 312, n. 31: "[T]he mere fact that the legal instruments of the ICC are silent on a specific issue or do not provide for a specific remedy does not necessarily mean that (…) a *lacuna* exists. Rather, it has to be analysed whether the fact that the founding documents do not provide for a specific rule must be construed as a decision against such a rule, or whether the non-existence of such a rule is unintended. Only in the latter case may the ICC rely on the sources listed in Article 21 (1) (b) or Article 21 (1) (c) of the Statute."

[28] "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

[29] "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."

[30] See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006

1)[31] or recourse to the *travaux préparatoires* of the treaty (Article 32), one can find out how a certain provision is to be understood if this is not entirely clear. It may be that these means of interpretation show that it was the clear intention of the drafters *not* to include a certain rule/remedy in the treaty. In that case, there is, of course, no legal uncertainty or lacuna because the Statute *is* clear, namely that the remedy/rule *cannot* be relied upon in the context of the ICC. This will be further discussed *infra*, in the context of a problem related to the *male captus* issue, namely the fact that the ICC Statute contains a right to liberty and security but not (see also Chapter VIII) its remedy of release. Via the above-mentioned means of interpretation, one may be able to ascertain whether the fact that the remedy of release was not incorporated in the right to liberty and security was a deliberate choice by the drafters (in which case there would not be a lacuna) or whether it is unclear why this remedy is lacking (in which case there would be a lacuna, justifying recourse to parts (b) and (c) of paragraph 1 of Article 21 of the ICC Statute). This method is unproblematic in the context of the right to liberty and security as there is at least a provision whose terms can be interpreted. However, this is not the case with respect to the *male captus* issue as the proper instruments of the ICC do not seem to say *anything* on the problem as to the effect of a *male captus* on the exercise of jurisdiction by the ICC.

However, perhaps an examination of a number of provisions from the proper instruments of the ICC which could be seen as being (indirectly) relevant to the *male captus* discussion may show that the drafters were more in favour of either *male captus bene detentus* or *male captus male detentus*. Likewise, it is conceivable that an examination of the *travaux préparatoires* may shed some light on this issue.

To start with an examination of the ICC's proper instruments; in the Preamble of the ICC's Statute (which is "an integral part of the Statute"),[32] one can find a very

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Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 33: "The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32 [original footnote omitted, ChP]." See also *ibid*., para. 6. See also ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (Under Seal, Ex Parte, Prosecution Only), ICC-01/04-01/07, 10 February 2006 (see Annex 2 to ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Court Record not available, confidential document, ICC-01/04-02/06, 10 February 2006), para. 43. See finally Edwards 2001, p. 363.

[31] *Cf.* also ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *v.* Thomas Lubanga Dyilo, 'Decision on the Final System of Disclosure and the Establishment of a Timetable' (Public Document), ICC-01/04-01/06, 15 May 2006, Annex I ('Discussion of the Decision on the Final System of Disclosure'), para. 1 and ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (Public Document), ICC-01/04-01/06, 8 November 2006, para. 8.

[32] Bergsmo and Triffterer 2008, p. 4. See also para. 2 of Art. 31 ('General rule of interpretation') of the Vienna Convention on the Law of Treaties: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble* and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty [emphasis added, ChP]."

important, if not the most important, objective of the ICC, namely "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured".[33] One can imagine that such a goal might perhaps lead to the acceptance, if not explicitly then implicitly, of *male captus bene detentus*.

Nevertheless, the fact that the Preamble, which reminds States that the ICC is complementary to the national level and thus that national States also have an important task in the prosecution of suspects of international crimes,[34] warns those States that "nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State",[35] arguably tends towards a more general disapproval of *male captus bene detentus*. Although a condemnation of a *male captus* technique[36] which violates the non-intervention principle does not, as such, exclude the application of the maxim *male captus bene detentus*, one can assume that an entity condemning such a technique may have more problems in upholding the *male captus bene detentus* maxim than an entity not publicly denouncing such a technique. The words 'more general disapproval' have been chosen here as this warning is addressed to States and not (so much) to the ICC itself. Nevertheless, the ICC also seems to take this warning into account when more generally stating in the Preamble: "Reaffirming the Purposes and Principles of the Charter of the United Nations [emphasis in original, ChP]".[37] In addition, such warnings are not limited to purely inter-State situations, for example where a

[33] See also Young 2001, p. 321, writing on the "overriding purpose of effective prosecution". See also *ibid*., p. 355: "The principle of effective prosecution is the Court's *raison d'être*."

[34] See the following words from the Preamble: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"; "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions [emphasis in original, ChP]".

[35] See also the following words from the Preamble: "Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations [emphasis in original, ChP]". (However, one must also be aware of the fact that these latter words were mainly inserted to emphasise that States must not commence wars, because wars lead to the crimes which the ICC wishes to prevent, see Bergsmo and Triffterer 2008, p. 12.)

[36] It may be good to mention that the ICC Statute itself condemns abduction, namely in the context of enforced disappearances (as a possible crime against humanity), see Art. 7, paras. 1 (i) and 2 (i) of the ICC Statute.

[37] One investigative possibility of the ICC Prosecutor may perhaps be seen as going against these principles, see again (see also n. 23 of the previous chapter) Currie 2007, p. 380, referring to Artt. 57, para. 3 (d) and 99, para. 4 of the ICC Statute: "Where the Pre-Trial Chamber determines that there is no competent mechanism or authority to respond to a cooperation request, it may even authorize the Prosecutor to conduct investigations on the territory of a party state, without that state's consent [original footnote omitted, ChP]." However, besides the fact that this possibility is not without conditions (such as the fact that the Prosecutor must first send a request for assistance), it cannot be seen as a possible *male captus* route as Art. 99, para. 4 is only applicable to the requests of Artt. 93 and 96 of the ICC Statute, which deal with other forms of assistance than arrest and surrender. Furthermore, the provision can only be used for requests "which can be executed without any compulsory measures". (Art. 99, para. 4 of the ICC Statute.) One could hereby think, for example, of "the interview of or taking evidence from a person on a voluntary basis". (*Ibid*.)

suspect of international crimes is not (initially) 'wanted' by the ICC.[38] Such warnings also apply to situations where the States interact with the ICC. One could hereby think of the situation where State A threatens to abduct an 'ICC wanted' person from State B before surrendering him to the ICC premises in The Hague, see the remark of Museveni in the very first chapter of this book. Thus, the Statute warns States not to violate international law not only in the inter-State context, but also in the context of the ICC, namely when those States are part of that permanent Court's enforcement mechanism.

Another feature of the ICC, mentioned in the Preamble,[39] which can be taken into account here is the fact that it is permanent.[40] This feature has also been briefly mentioned in the first chapter of this study. What if the ICC were an *ad hoc* tribunal whose mandate was ending some day and what if, for example, Al Bashir, suspect in the Darfur case, were still not apprehended because Sudan continued to refuse to cooperate with the ICC? It is not difficult to imagine that an *ad hoc* tribunal, under pressure by the international community and the victims, both demanding results, might perhaps be more easily inclined than a permanent court to look for more 'creative' (and perhaps even illegal) methods in arresting the suspect. This is not because a permanent court may not feel the heat from the international community or victims at a certain point: it will (see also Subsection 1.3 of the first chapter).[41] However, if the ICTY in its final days of existence is involved in a not-wholly legal operation to bring Mladić before the Tribunal and if the judges, because of the seriousness of the crimes with which the suspect is charged, decide not to refuse jurisdiction, the ICTY may receive criticism for both actions but such criticism would be irrelevant for its future success as the ICTY will cease to exist. The ICC, on the other hand, is permanent and will need the *constant* goodwill of the international community (read: its enforcers) if it wants to have suspects surrendered to The Hague. It can be argued that such a feature may make an operation such as that mentioned above, in a way 'approved' by a *male captus bene detentus* decision, less likely.

Of course, it may also be argued that some States may criticise the Court if it were to issue a *male captus male detentus* decision in such a situation, *cf.* the reaction of Rwanda in the context of the first *Barayagwiza* decision. However, one must not forget that the criticism in that decision was perhaps not so much directed

[38] See the following words from the Preamble: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [emphasis in original, ChP]".
[39] And also in Art. 1 of the ICC Statute.
[40] See the Preamble ("Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court [emphasis in original, ChP]") and Art. 1 of the ICC Statute: "An International Criminal Court (…) is hereby established. It shall be a permanent institution".
[41] The moment the international community or the victims get impatient and start mounting pressure is, of course, not linked with the (non-)permanent character of the court in question. After all, although the ICC may be permanent, the victims do not have eternal life. The same goes, of course, also for the suspects themselves as justice cannot be done if they have already deceased. Expeditiousness is thus required, whether a court is permanent in nature or not.

towards the fact that the ICTR *can* issue a *male captus male detentus* decision, but more that it did so in *this* specific case (where the violations were probably indeed not so serious as to refuse jurisdiction) and that it did not properly take care of the aftermath of its decision, forgetting that it has a more general responsibility to fight impunity, whether before the ICTR or not. It may very well be the case that the ICC will have to make a *male captus male detentus* decision in the future. However, if it does, it must clearly explain to the international community why such a decision would be necessary under the specific circumstances and what it has done to ensure that the suspect, now that he can no longer be tried before the ICC, will be tried elsewhere.

Alongside the more general international law dimension, to be found in the ICC Statute's Preamble, the Statute also has a clear human rights dimension, even if the protection of the human rights of the suspect/accused is not mentioned as an explicit[42] objective of the ICC Statute as such.[43] One of the most important provisions in that respect is paragraph 3 of Article 21 of the ICC Statute, which states, among other things, that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".

In an effort not to complicate matters too much at this stage, this crucial provision will only be discussed at the end of this chapter. The fact that this is the final paragraph of Article 21 of the ICC Statute also justifies this. Nevertheless, it can already be clarified here that there is no internationally recognised human right to a *male captus male detentus* outcome. Hence, this provision does not seem to provide new insights into the present *male captus* discussion, although it does, of course, stress the importance of human rights in the context of the ICC.

Another general human rights provision can be found in Article 54 ('Duties and powers of the Prosecutor with respect to investigations'), paragraph 1 (c) of the ICC Statute, which states that "[t]he Prosecutor shall (…) Fully respect the rights of persons arising under this Statute".

In addition to these general provisions, there are more specific rights which may be of interest here.

A number of them were already mentioned in the previous chapter where the arrest and surrender provisions were examined.[44] Although, as already explained at

[42] Note, however, that, as already explained, the ICC reaffirms the purposes and principles of the Charter of the United Nations and that purpose number three has a clear human rights dimension: "*To achieve international co-operation* in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion* [emphasis added, ChP]". See also Edwards 2001, p. 366.

[43] See *ibid*.: "Though the Preamble reaffirms the principles of the U.N. Charter, which endorse international human rights, it does not expressly state that human rights safeguards are an object or purpose of the Rome Statute."

[44] An interesting provision which has not yet been mentioned earlier (because it is not part of the ICC's arrest and surrender provisions) is Art. 85, para. 3 of the ICC Statute. This provision states: "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from

the beginning of this subsection, none of them explicitly take a position on the *male captus* discussion, there is one provision which could perhaps be seen as constituting a possible *male detentus* avenue for a serious *male captus*, namely Article 60, paragraph 4 of the ICC Statute.[45] However, if so, that provision is restricted to irregular detentions. Is the ICC Statute silent on irregular arrests?

Here, one must turn to Article 55, paragraph 1 (d) of the ICC Statute, a provision which has already been reviewed in Chapter VIII. This article reads: "In respect of an investigation under this Statute, a person: (…) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute." Although this right does not explicitly take a position on the *male captus* discussion and although the inclusion of this right does not necessarily mean that the ICC would never issue a decision which could be summarised with the words *male captus bene detentus*,[46] one could argue that serious violations of this right may nevertheless lead to a *male detentus* outcome. However, this previously mentioned idea, that serious violations of the right to liberty and security can lead, not to 'merely' a normal release, but to a real ending of the case/a *male detentus* outcome,[47] of course, first assumes the existence of the remedy of release. However,

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detention following a final decision of acquittal or a termination of the proceedings for that reason." It could perhaps be argued that a serious *male captus* can be seen as a grave and manifest miscarriage of justice which may lead to the termination of the proceedings. However, even though the concept of miscarriage of justice has been addressed in the context of *male captus* cases, see, for example, the case of Dokmanović (see n. 187 and accompanying text of Chapter VI) the case of Barayagwiza (see ns. 817 and 918 and accompanying text of Chapter VI), the case of Semanza (see n. 960 and accompanying text of Chapter VI) and (especially) the case of Rwamakuba, see ns. 1130, 1134, 1136 and 1138 and accompanying text of Chapter VI, these cases also show that the concept of 'miscarriage of justice' is not so much linked with the question as to how a person came into the jurisdiction of the now prosecuting court but more with the question as to whether the judges can fairly establish if the person standing before them is guilty or not. One may hereby think, in particular, of evidentiary issues. For example, if evidence has been manipulated or withheld to enforce a conviction from the judges, a miscarriage of justice has occurred, as a result of which that person has been wrongfully detained and can claim compensation. Although such irregularities may, of course, very well be committed in the context of a *male captus* situation, the *male captus* situation *itself* does arguably not constitute the miscarriage of justice. Another provision which may finally be mentioned here is Art. 55, para. 1 (b) of the ICC Statute, which could be relevant for *male captus* situations involving serious mistreatment: "In respect of an investigation under this Statute, a person: (…) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment".

[45] "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions." *Cf.* in that respect also the more general provision in Art. 67, para. 1 (c) of the ICC Statute that an accused shall be entitled to be tried without undue delay, see also ns. 201 and 261 of Chapter VIII.

[46] See, however, Gillett 2008, p. 24. After having discussed the *male captus bene detentus* approach, he argues: "However, in addition to the questionable legal and political merits of the doctrine, Article 55(1)(d) of the Rome Statute makes it very clear that there is no room for such an approach before the ICC." (See also n. 43 of Chapter I.)

[47] See the following, already earlier-mentioned, words of Swart 2001, p. 206: "[B]oth Article 9 of the ICCPR and Article 5 of the ECHR make it imperative that a person be released if his detention was

the remedy of release is missing here; as mentioned in the previous chapter, the ICC Statute does not contain a *habeas corpus* provision comparable with Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 5 of the ECHR which entitles a person to challenge the legality of his arrest and detention and to be released if his (arrest and) detention is deemed unlawful.[48]

This is rather strange, given the fact that the *entire* right to liberty and security, including its *habeas corpus* element, can be considered to have, at least, the status of customary international law/general international law.[49] This point was already observed by the Lawyers Committee for Human Rights in 1999:

> The ICC Statute does not include the right of a person provisionally arrested or arrested to a judicial determination without delay on the lawfulness of detention and to release if detention is unlawful, as provided for in Article 9 (4) of the ICCPR and Principles 32[[50]] and 37[[51]] of the Body of Principles. The Statute provides for the right of a person arrested by national authorities (under Article 59) or surrendered to the Court (under Article 60) to apply for interim release pending surrender or trial, respectively, but does not provide for the right to challenge the lawfulness of detention. The draft Rules should explicitly provide for this very important right. Its omission is curious given that the Statute, in Article 85 (1), grants an "enforceable right" to compensation to "anyone who has been the victim of unlawful arrest or detention," in accordance with Article 9 (5) of the ICCPR.[52]

The question of how the omission of this remedy from the right to liberty and security must be interpreted will be examined *infra*, but first, this study will delve into the ICC's *travaux préparatoires* to see whether they say anything on the real

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unlawful. I take it for granted that, in the case of more serious violations of these Articles, the nature of this particular remedy rules out any possibility of re-arresting the suspect or the accused."

[48] See also Hall 2008 A, p. 1105.

[49] See Chapter III of this book.

[50] Principle 32 of the Body of Principles (for the Protection of All Persons under Any Form of Detention or Imprisonment) (UNGA Res. 43/173 of 9 December 1988, available at: http://www2.ohchr.org/english/law/bodyprinciples.htm) reads: "1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority."

[51] Principle 37 of the Body of Principles (for the Protection of All Persons under Any Form of Detention or Imprisonment) (UNGA Res. 43/173 of 9 December 1988, available at: http://www2.ohchr.org/english/law/bodyprinciples.htm) reads: "A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody."

[52] Lawyers Committee for Human Rights, 'Pre-Trial Rights in the Rules of Procedure and Evidence', International Criminal Court Briefing Series, Vol. 2, No. 3, February 1999, available at: http://www.iccnow.org/documents/LCHRPreTrialRightsFeb99.pdf. See also Edwards 2001, pp. 329-330, n. 21.

male captus issue. This is not only interesting, but in fact necessary as the above-mentioned examination has not clarified whether the provisions in the ICC Statute, including its object and purpose, can be seen as clearly in favour of either *male captus bene detentus* or *male captus male detentus*. After all, it is indeed true that the main purpose of the ICC is to effectively prosecute suspects of international crimes (which would suggest more easily *male captus bene detentus*) but it is also clear that this goal cannot be pursued at any cost; international law, due process and human rights (including the right to a fair trial) must also be respected.[53] That, including the fact that the ICC is of a permanent character and thus in need of the constant goodwill of the international community, may lead more readily to *male captus male detentus*.

[53] See also the very first Strategic Goal ('Quality of Justice') as can be found in the ICC's first Strategic Plan (ICC, ASP, Fifth session, The Hague, 23 November to 1 December 2006, 'Strategic Plan of the International Criminal Court', ICC-ASP/5/6, 4 August 2006 (available at: http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-6_English.pdf), p. 5: "*Conduct fair, effective and expeditious public proceedings in accordance with the Rome Statute and with high legal standards, ensuring full exercise of the rights of all participants* [emphasis in original, ChP]". See also the mission of the ICC at p. 4 of the same plan: "As an independent judicial institution in the emerging international justice system, the International Criminal Court will: ▪ Fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes; ▪ Act transparently and efficiently; and ▪ Contribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against impunity." See finally on this plan its para. 22, which states: "The core functions of the Court are to carry out investigations, prosecutions and trials. The manner in which these activities are conducted is fundamental to the Court's achieving the aims of the Rome Statute. The Court can only realize these aims if its activities are fair, effective and impartial." In 2008, the 'Revised strategic goals and objectives of the International Criminal Court 2009 – 2018' were issued, but the first goal of the ICC (now entitled 'A Model of International Criminal Justice') has not changed, see the Annex to ICC, ASP, Seventh session, The Hague, 14 – 22 November 2008, *Report on the activities of the Court*, ICC-ASP/7/25, 29 October 2008 (available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-25%20English.pdf). See further ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 37: "The self-evident purpose of the Statute is to make internationally punishable the heinous crimes specified therein *in accordance with the principles and the procedure institutionalized thereby* [emphasis added, ChP]." See also the 1993 preliminary version of the 1994 ILC Draft Statute, in which one can read the following commentary on the purpose of the future ICC: "The purpose of the establishment of the Tribunal, contemplated in *article 1*, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be otherwise less preferable." (*Report of the Working Group on a Draft Statute for an International Criminal Court*, to be found in: *Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993*, UNGA OR, Forty-eighth session, Supplement No. 10, A/48/10, p. 101.) See finally Edwards 2001, pp. 366-367 and Young (2001, p. 321) who first notes that "[t]he principle of effective prosecution requires that conditions exist to contribute to a reliable outcome at trial [original footnote omitted, ChP]" and then states, among other things, that the ICC requires "strict impartiality and fairness from the prosecutors". (*Ibid*.)

Although it is often stated that the ICC has no official *travaux préparatoires*,[54] the documents which come closest to the official records of the Rome Conference may be found in paragraph 23 of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (although these may not give the full picture to some).[55] Here, it is stated that the Conference drew up the ICC Statute on the basis of:

> the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR.9) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR.42) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L/64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and 91) (…).[56]

In addition to this, it may also be worth looking at pre-Rome documents. This may not only be instructive;[57] one could even argue that these documents fall under the legal definition of the *travaux préparatoires*. In the words of Ris:

> *Travaux préparatoires* consist of the written record of negotiations preceding the conclusion of a treaty. Lord McNair defined *travaux préparatoires* as "all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation." *Travaux préparatoires* thus include materials which documents

[54] See Cassese 1999, p. 145: "First of all, unlike most multilateral treaties concluded under the auspices of the United Nations, in the case of the Rome Statute there hardly exist preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference."

[55] See Edwards 2001, p. 368, n. 191: "Some would argue that the *travaux pr*[*é*]*paratoires* can only consist of official documentation, as otherwise the door would be open for fraudulent assertions of what transpired during the negotiations. Like news reports, the unofficial documents are unchecked for accuracy by the delegates. The Final Act of the Rome Conference identified the recording of the Rome Conference deliberations as follows: "On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR.9) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR.42) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L/64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and 91), the Conference drew up the Rome Statute of the International Criminal Court." (…) However, it is abundantly clear that voluminous written material, and oral discussions were not memorialized in the conference records referred to in the Final Act."

[56] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (to be found in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. I: Final Documents, A/CONF.183/13 (Vol. I), pp. 65*ff*), para. 23 (p. 69 of the above-mentioned document A/CONF.183/13 (Vol. I)).

[57] See the 'Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council', 15 July 2005 (S/2005/458), Annex II: *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, para. 452: "There is no authoritative compilation of *travaux préparatoires* for the Statute that may serve as a supplementary means of interpretation in accordance with article 32 of the Vienna Convention. Nonetheless, references to drafts negotiated in advance of the Rome Conference may be instructive."

> the negotiations and other circumstances that culminated in the formal conclusion of a treaty [original footnotes omitted, ChP].[58]

If *travaux préparatoires* consist of all the documents that culminated in the formal conclusion of a treaty (including drafts of the treaty in question) then there is no reason to maintain that the *travaux préparatoires* can only be found in the period of the Rome Conference itself (the summer of 1998) as the negotiations for the ICC Statute (including the drafting of statutes) started much earlier.

Before the Statute was negotiated in Rome in the summer of 1998, several drafts and reports on the ICC had already been prepared by commissions and committees. The following documents were reviewed:[59] the 1993 *Report of the Working Group on a Draft Statute for an International Criminal Court*,[60] the 1994 ILC's Draft Statute for an International Criminal Court,[61] the 1995 *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*,[62] the 1996 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)[63] and Volume II (Compilation of Proposals),[64] the Draft Statute for the International Criminal Court as can be found in the 1998 *Report of the Inter-Sessional Meeting* – again of the Preparatory Committee – *from 19 to 30 January 1998 in Zutphen, the Netherlands*[65] and the Draft Statute for the International Criminal Court as can be found in the final 1998 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*.[66]

In one of these pre-Rome documents, one can find a small surprise. In paragraph 122 of the 1996 *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Volume I: 'Proceedings of the Preparatory

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[58] Ris 1991, p. 112.

[59] One could go even further back in time. Edwards (2001, pp. 341 and 343), for example, also mentions the 1951 and 1953 ILC Draft Statutes and the 1981 Bassiouni Draft. Nevertheless, it is submitted that the 1993 document, the first document reviewed here, is certainly 'old' enough, as the ILC Draft, a document which appeared one year later, "was used as a starting point for negotiations at formal and informal pre-Rome Conference sessions". (*Ibid*., p. 351.) *Cf*. also Arsanjani 1999, p. 22: "The Rome Conference was the culmination of a negotiating process that began in 1989 with a request by the General Assembly to the International law Commission to address the establishment of an international criminal court. In 1993 the Assembly asked the Commission to elaborate a draft statute for such a court as a matter of priority. The Commission completed its draft in 1994 [original footnotes omitted, ChP]."

[60] See the *Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993*, UNGA OR, Forty-eighth session, Supplement No. 10, A/48/10, pp. 100-132.

[61] See the Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, pp. 43*ff*.

[62] UNGA OR, Fiftieth Session, Supplement No. 22 (A/50/22, 6 September 1995).

[63] UNGA OR, Fifty-first Session Supplement No. 22 (A/51/22, 13 September 1996).

[64] UNGA OR, Fifty-first Session Supplement No. 22A (A/51/22, 13 September 1996).

[65] Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, UNGA A/AC.249/1998/L.13, 4 February 1998.

[66] This report (A/CONF.183/2, 14 April 1998) can be found in: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), pp. 5-92.

Committee during March-April and August 1996'),[67] which falls under the general problem of the trigger mechanism of the ICC and the more specific issue 'Acceptance of the Court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction: articles 21 and 22',[68] one can read:

> Some delegations supported the requirement, set out in article 21 (1) (b), calling for the consent of the custodial State and the State where the crime was committed. In their view, such a consent requirement was essential, since the Court could not function without the cooperation of these States. *A comment was made that custody over a suspect, however, should be in accordance with international law; the maxim male captus, bene detentus should have no application to the jurisdiction of the Court.* It was further stated that, as a general rule, the number of States whose consent was required should be kept to the minimum. Otherwise, the likelihood of one of these States not being party to the Statute would increase, precluding the Court from initiating proceedings [underlined emphasis in original and italicised emphasis added, ChP].[69]

This comment, which seems to have been made particularly in the context of international law in general (and not so much in the context of international human rights law),[70] was made by the Jamaican delegate Patrick Robinson[71] and repeated by him in 1997 during the 52nd session of the UNGA's Sixth (Legal) Committee:

> We would also wish to emphasize, as we did in our Statement at the 49th Session that, if a system is adopted whereby acceptance of the Court's jurisdiction is required by the custodial State in relation to a specific crime, the Statute must stipulate that such a State must have acquired custody in accordance with international law. For we cannot presume to be establishing a Court on the basis of the principles of international law, and at the same time, give succour to the maxim, *male captus, bene detentus.*[72]

Comparable statements, although it is not sure whether the words *male captus bene detentus* were also used, were issued during the Rome negotiations. The first statement is again from Patrick Robinson, made during the 30th meeting of the Committee of the Whole on 9 July 1998.[73] In the 'Summary records of the meetings

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[67] UNGA OR, Fifty-first Session Supplement No. 22 (A/51/22, 13 September 1996).
[68] *Ibid*., p. 28.
[69] See also Preparatory Committee on the Establishment of an International Criminal Court, 25 March – 12 April 1996, 'Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996', Rapporteur: Mr Jun Yoshida (Japan), A/AC.249/1, 7 May 1996, para. 139.
[70] See the context in which this comment was made, namely the question of States' consent in the process of cooperation with the ICC.
[71] Although this study could merely assume that it was Mr Robinson who made the statement (see his comparable statement in the next footnote and accompanying text), Mr Robinson himself was so kind as to confirm this assumption.
[72] 'Statement by Mr. Patrick Robinson, of the Jamaican delegation to the Sixth Committee on Agenda Item 150: Establishment of an International Criminal Court' (23 October 1997, New York), available at: http://www.un.int/jamaica/item150.htm.
[73] See document A/CONF.183/C.1/SR.30 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy,

of the Committee of the Whole', one can read: "He [Patrick Robinson, ChP] supported option 3 for article 7, paragraph 1,[74] but proposed the addition at the end of subparagraph (*b*) of the phrase "in accordance with international law". The Court should not have jurisdiction on the basis of an unlawful arrest."[75]

The second statement was made a couple of hours later by the Mexican delegate González Gálvez, during the 31st meeting of the Committee of the Whole.[76] In the 'Summary records of the meetings of the Committee of the Whole', one can read the following words, which (again) focused on traditional international law (between States):

> Option 1 in article 7 was the most promising,[77] subject to certain amendments. Its paragraph 1 (*b*) should be amended by the addition of the words "in accordance with

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15 June – 17 July 1998, Committee of the Whole, Summary Record of the 30th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 3 p.m.) or pp. 305*ff* of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[74] See p. 11 of document A/CONF.183/C.1/L.53 of 6 July 1998 (Discussion Paper prepared by the Bureau of the Committee of the Whole on Part 2 of the Draft Statute: Jurisdiction, Admissibility and Applicable Law): "Option 3 Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the following States are Parties to the Statute or have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter: (a) The State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; and (b) The State that has custody of the suspect with respect to the crime."

[75] Para. 14 of document A/CONF.183/C.1/SR.30 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Committee of the Whole, Summary Record of the 30th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 3 p.m.) or p. 306 of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[76] See document A/CONF.183/C.1/SR.31 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Committee of the Whole, Summary Record of the 31st Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 6 p.m.) or pp. 313*ff* of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[77] See pp. 10-11 of document A/CONF.183/C.1/L.53 of 6 July 1998 (Discussion Paper prepared by the Bureau of the Committee of the Whole on Part 2 of the Draft Statute: Jurisdiction, Admissibility and Applicable Law): "Option 1 In the case of article 6, paragraph (a) or (c), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute, or have accepted jurisdiction in accordance with article 7ter: (a) The State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State that has custody of the

> international law", to exclude the possibility of nationals of one country being kidnapped and brought before the courts of another country in violation of the rights of the territorial State.[78]

González Gálvez made a comparable statement four days later, during the 34th meeting of the Committee of the Whole on 13 July 1998.[79] In the 'Summary records of the meetings of the Committee of the Whole', one can read: "In article 7, he [González Gálvez, ChP] was in favour of option 1 for paragraph 2,[[80]] but there was a problem regarding subparagraph (*b*), which could be solved by the addition of the words "as long as the detention was in accordance with international law"."[81] However, the different options (to which both delegates made suggestions) did not make it through. Although this fact seems to have been one of the reasons for at least one delegation (namely the Mexican one) to abstain in the vote,[82] the non-

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suspect with respect to the crime; (c) The State of which the accused of the crime is a national; or (d) The State of which the victim is a national."

[78] Para. 35 of document A/CONF.183/C.1/SR.31 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Committee of the Whole, Summary Record of the 31st Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 6 p.m.) or p. 317 of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[79] See document A/CONF.183/C.1/SR.34 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Committee of the Whole, Summary Record of the 34th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 13 July 1998, at 3 p.m.) or pp. 327*ff* of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[80] See p. 9 of document A/CONF.183/C.1/L.59 of 10 July 1998 (A proposal by the Bureau of the Committee of the Whole on Part 2 of the Draft Statute (Jurisdiction, Admissibility and Applicable Law): "Option 1 In the case of article 6, paragraph (a) or (c), the Court may exercise its jurisdiction with respect to a crime referred to in articles 5 ter and 5 quarter if one or more of the following States have accepted jurisdiction in accordance with article 7 bis or ter: (a) The State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State that has custody of the accused/suspect with respect to the crime; (c) The State of which the accused/suspect of the crime is a national; or (d) The State of which the victim is a national."

[81] Para. 113 of document A/CONF.183/C.1/SR.34 of 20 November 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Committee of the Whole, Summary Record of the 34th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 13 July 1998, at 3 p.m.) or p. 334 of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[82] In the 'Summary records of the meetings of the Committee of the Whole', one can read: "Further specific reservations by his [González Gálvez, ChP] delegation pertained (…) to the powers given to the Court to override national law and authorize the kidnapping of Mexican citizens in order to bring them

inclusion of the suggested words of these two delegates does not say much about the *general* opinion of the 120 States which voted in favour of the ICC Statute with respect to the *male captus* issue as the relevant documents do not clarify why these suggestions were not accepted. It may indeed be that they were not accepted because the other delegations were of the opinion that the ICC should follow the *male captus bene detentus* rule, but it may also have been the case, and this is more likely, that they were not accepted for other reasons, for example, because the other delegates did not agree with the exact formulation. As explained earlier in this book, because many different *male captus* situations can be identified, one should be wary of making general statements on the *male captus bene/male detentus* maxim. The other delegations may have been of the opinion that the suggestions mentioned above were too generally formulated, and that these matters should not be regulated *in abstracto* in the ICC Statute itself, but that it should be up to the judges to determine, on a case-by-case basis, and taking every aspect of the specific case into account, what the consequences of a certain *male captus* will be.

Be that as it may, the examination of several provisions from the ICC Statute and its *travaux préparatoires* have brought no clarity with respect to the *male captus* issue. Hence, this arguably means that on this issue, there is a legal lacuna which must be filled by looking at parts (b) and (c) of paragraph 1 of Article 21 of the ICC Statute.

However, before doing so, it is time to return to the problem related to the *male captus* issue, that of the release in the case of an unlawful arrest/detention. As explained earlier, how should the deletion of the remedy of release from the right to liberty and security, as can be found in Article 55, paragraph 1 (d) of the ICC Statute, be viewed? Should it be seen as a deliberate choice by the drafters that this remedy is not applicable to suspects or was it simply forgotten or not deemed essential enough to mention in the ICC Statute?

It would, of course, be far clearer if the ICC Statute were unequivocally to have stated that the remedy is *not* applicable to suspects unlawfully arrested or detained, but that is not the case here.

Furthermore, neither does the context of a provision such as Article 55 of the ICC Statute bring any relief. On the one hand, one could argue that the fact that that other, and also very broadly formulated,[83] remedy in the case of an unlawful arrest/detention – financial compensation – was *not* left out of the ICC Statute, see

to trial in foreign countries." See para. 67 of document A/CONF.183/SR.9 of 25 January 1999 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Summary Record of the 9th Plenary Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Friday, 17 July 1998, at 10.30 p.m.) or p. 126 of document A/CONF.183/13 (Vol. II): United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole).

[83] See ns. 216-217 of the previous chapter.

Article 85, paragraph 1,[84] may mean that the negotiators did not want to connect the general remedy of release with the right of liberty and security. This is the *expressio unius est exclusio alterius* argument: "[t]he expression of one thing is the exclusion of another".[85] On the other hand, one could also assert that this provision is in fact the best evidence that there is hence a right to challenge the lawfulness of one's arrest and detention (which normally includes the remedy of release if that arrest/detention is unlawful).[86] The fact that the remedy of release is missing does not necessarily mean it is unavailable. *Cf.* in that respect the discussion in the previous chapter with respect to Article 59 of the ICC Statute. Neither does this provision mention the remedy of release/refusal of surrender if the competent judicial authority determines that the person standing before it is not the one in whom the ICC is interested, but it is, of course, obvious that that authority can release the person/refuse surrender of that person if that person is not the one whom the ICC seeks to prosecute. In this context, one could also refer to Rule 185 of the ICC RPE ('Release of a person from the custody of the Court other than upon completion of sentence'), paragraph 1, which may perhaps be seen as evidence for the assertion that the remedy of release in the case of an unlawful arrest/detention is covered by the proper instruments of the ICC:

> Subject to sub-rule 2, *where a person surrendered to the Court is released from the custody of the Court* because the Court does not have jurisdiction, the case is inadmissible under article 17, paragraph 1 (b), (c) or (d), the charges have not been confirmed under article 61, the person has been acquitted at trial or on appeal, *or for any other reason*, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State. In this case, the host State shall facilitate the transfer in accordance with the agreement referred to in article 3, paragraph 2, and the related arrangements [emphasis added, ChP].

Nevertheless, it is also clear that this provision is very generally formulated.

Finally, the object and purpose of the ICC Statute are not very illuminating either as both the importance of prosecution (which may more readily lead to a denial of the remedy) and prosecution in a correct, human rights respecting way (which may

[84] "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." See also Chapter 10 of the RPE.

[85] Garner 2004, p. 1717. *Cf.* also Edwards 2001, p. 371, writing about the (comparable) *inclusio unius est exclusio alterius* argument. See finally Acquaviva 2007, p. 633 (writing on Art. 85 of the ICC Statute more generally): "[T]hat rule would seem to exclude the possibility of immediate release of the accused subject to the most serious violations, a remedy still contemplated by ICTY judges, at least in extreme cases."

[86] See also Zappalà 2003, p. 77: "[I]t must be remembered that the fact that Article 85 of the ICC Statute provides for a right of compensation for unlawful arrest necessarily implies the existence of a right to challenge the lawfulness of arrest."

more readily lead to an acceptance of the remedy) are stressed, see also *supra* (in the context of the *male captus* problem).

As textual/contextual/teleological interpretation of this provision has brought no relief (Article 31 of the Vienna Convention on the Law of Treaties), one should turn, again, to the *travaux préparatoires* of the ICC Statute (Article 32 of the Vienna Convention on the Law of Treaties). These may possibly shed a light on the question why this remedy of release is lacking in the ICC Statute. It is important to find out whether the drafters – perhaps anticipating the problems of a court without an enforcement arm[87] or being aware of the problems of the remedy already identified in Chapter III of this study – may have deliberately left out this remedy of release in the case of an unlawful arrest/detention. After all, if that were the case, then part (b) of paragraph 1 of Article 21 of the ICC Statute (which, as will be shown, *does* include this remedy of release) cannot be looked at because part (a) is clear – in that the remedy of release is not available to suspects unlawfully arrested/detained – and hence does not leave a legal lacuna which must be filled by part (b). That would not only be the position of Edwards, but also of the judges in the December 2006 decision of the Appeals Chamber mentioned *supra*. They would argue that ICC legislation is exhaustive on the matter (namely in that the drafters only wanted to maintain the general words which can be connected to the right to liberty and security[88] and not the more specific remedy of a release in the case of an unlawful arrest/detention) and hence that part (b) does not need to be looked to. Finally, one could argue that the views of Verhoeven would also lead to this result. This is, of course, unproblematic if one interprets Verhoeven's words to support the idea that part (b) will only be applied if part (a) has left a legal lacuna. However, even if one follows the interpretation that Verhoeven's words mean that part (b) must also be applied if part (a) *does* provide an answer, one would reach the same result because "[t]here is no reason to construe the latter in a way that is inconsistent with the former, *if this is not clearly the intent of the drafters of the statute* [emphasis added, ChP]". Hence, even if part (b) can be applied if part (a) has provided an answer and even if part (a) cannot be construed inconsistently with general international law, this is different when this was clearly the drafters' intent. If it was clearly the drafters' intention to leave out the remedy of release, then part (b)/general international law cannot be applied in this view.

However, if it is not clear that the drafters intended to delete this remedy (for example, because an examination of the *travaux préparatoires* shows that the deletion may have been caused by the complexities of the negotiations leading up to the ICC Statute),[89] then part (a) of paragraph 1 of Article 21 of the ICC Statute can be qualified as unclear, leaving a legal lacuna and justifying looking to part (b).

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[87] *Cf.* the final words of n. 188 of the previous chapter.

[88] Namely that a person shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

[89] *Cf.* in that respect Edwards, writing about the search and seizure right to privacy: "It might be argued that the conspicuous omission of the express search and seizure privacy right evidences the drafters' intent to excise the right from Rome Statute coverage. However, the express search and seizure privacy

In short, one must now turn to the *travaux préparatoires* of the ICC Statute to see whether these provide an answer to this issue. In this context, the same documents which were examined with respect to the *male captus* issue will be reviewed here.

First of all, the documents which come closest to the official records of the Rome Conference, which can be found in paragraph 23 of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,[90] say nothing on the omission of the remedy of release.

Thus, it may be good to also look at the pre-Rome documents, namely the 1994 ILC's Draft Statute for an International Criminal Court,[91] the 1995 *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*,[92] the 1996 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)[93] and Volume II (Compilation of Proposals),[94] the Draft Statute for the International Criminal Court as can be found in the 1998 *Report of the Inter-Sessional Meeting* – again of the Preparatory Committee – *from 19 to 30 January 1998 in Zutphen, the Netherlands*[95] and the Draft Statute for the International Criminal Court as can be found in the final 1998 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*.[96]

With respect to the 1994 document, it is first interesting to note that the provision on arrest (Article 28) says nothing on illegal arrests or detentions or their consequences.[97] Nevertheless, in the commentary to this provision, the more general

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right was omitted not because the drafters believed that suspects and accused persons did not deserve the right, but rather because delegates believed that the right was or should be incorporated elsewhere in the treaty's collateral instruments." (Edwards 2001, p. 349.)

[90] See n. 55 and accompanying text.

[91] See the Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, pp. 43*ff*. Note that the 1993 preliminary version of this Draft Statute will not be mentioned in this overview as it does not deal with releases in the case of unlawful arrests/detentions. (It only addresses releases on bail, see Art. 35, *Report of the Working Group on a Draft Statute for an International Criminal Court*, to be found in: *Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993*, UNGA OR, Forty-eighth session, Supplement No. 10, A/48/10, p. 116.)

[92] UNGA OR, Fiftieth Session, Supplement No. 22 (A/50/22, 6 September 1995).

[93] UNGA OR, Fifty-first Session Supplement No. 22 (A/51/22, 13 September 1996).

[94] UNGA OR, Fifty-first Session Supplement No. 22A (A/51/22, 13 September 1996).

[95] Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, UNGA A/AC.249/1998/L.13, 4 February 1998.

[96] This report (A/CONF.183/2, 14 April 1998) can be found in: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), pp. 5-92.

[97] However, para. 2 does clarify that a provisional detention, without a confirmation of the indictment, cannot last forever: "A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow." See the Draft Statute for an International Criminal Court, to be found in: *Report*

remark is made that "[p]rovisions dealing with the arrest and detention of an accused person are drafted so as to ensure compliance with relevant provisions of the ICCPR, especially article 9".[98] Article 29 ('Pre-trial detention or release') is more specific and most interesting for this discussion. Here, the right to liberty and security can be found, including the remedy of release if the arrest or detention[99] is deemed unlawful.[100] What does the commentary to this provision say? First, the general remark is again made that this provision "is drafted so as to ensure conformity with article 9 of the ICCPR".[101] What follows next, at first sight, quite clearly describes the different responsibilities of the national judicial officer and the ICC in the arrest and detention procedure and therefore merits reproduction here in its entirety:

> It requires that any person arrested pursuant to a warrant issued under article 28 should be brought promptly before a judicial officer of the State in which the arrest occurred, who should determine, in accordance with the procedures applicable in that State, whether the warrant has been duly served and that the rights of the accused have been respected. The Commission acknowledges that there is some risk in entrusting these powers to a State official (usually a magistrate or some similar person exercising similar functions under national law) rather than before an organ of the Court. However, it is essential under article 9 (3) of the ICCPR that this preliminary opportunity for review of the arrest be provided promptly, and in practice this can only be done in this way. Since ex hypothesi the arresting State will be cooperating with the Court, there is no reason to expect that this preliminary procedure will cause difficulties. (…) On the other hand, release whether unconditionally or on bail pending trial is a matter for the Presidency. In conformity with article 9 (4) of the

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of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, p. 97.

[98] Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, p. 97.

[99] This, by the way, again confirms the position taken in this study that a judge must not only release a person if he finds that his detention is unlawful, but also if his arrest is unlawful. This is arguably to be welcomed for it is the entire deprivation of liberty (arrest and detention) which should matter. See n. 583 and accompanying text of Chapter III.

[100] See *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, p. 98: "1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected. 2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial. 3. *A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.* 4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State [emphasis added, ChP]."

[101] Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, p. 98.

> ICCPR, it is provided that a person arrested pursuant to a warrant issued under article 28 may apply to the Court for a determination of the lawfulness under this Statute of the arrest or detention: see paragraph 3. The Court must decide whether the arrest and detention were lawful, and if not it shall order the release of the accused. In the case of wrongful arrest it may award compensation accordingly, as required by article 9 (5) of the ICCPR (…). The Commission believes that the full range of guarantees to suspects and accused persons should be provided in the draft Statute.[102]

Hence, in this version of the right, both the national judicial officer and the ICC review the legality of the arrest (and detention). Notwithstanding this, only the ICC, in the form of the Presidency, has the power to release a person. The national authorities are merely there to check whether the rights of the suspect have been respected. In that respect, one can wonder why the Commission states that it is aware of the fact "that there is some risk in entrusting these powers to a State official (…) rather than before an organ of the Court". After all, the national authorities cannot release the suspect. An explanation may therefore be that the ICC finds it risky to involve the national authorities, not in the enforcement of ICC requests to arrest and the like (which is, of course, a normal feature of an international criminal court without its own police force), but in the actual legal process, for example, because a legal determination of what happened in the pre-trial phase made at the national level may have consequences for the legal phase in The Hague.

Be that as it may, it is also interesting to note that the following phrase from Article 29, paragraph 3 of this 1994 document, even though it states quite generally that "[i]f the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation",[103] is preceded by the words: "A person arrested may apply to the Presidency for a determination of *the lawfulness under this Statute* of the arrest or detention [emphasis added, ChP]". This is reminiscent, of course, of the present Article 55, paragraph 1 (d) of the ICC Statute, stating that a person under investigation "[s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures *as are established in this Statute* [emphasis added, ChP]". In Chapter VIII, see footnote 168 of that chapter, it was argued that this probably means that all the arrest and detention provisions in the ICC Statute, including Article 59 of the ICC Statute, which in turn refers to, among other things, national procedural law, must be complied with before one can speak of a proper deprivation of liberty in the context of the ICC. In that respect, national law would also enter this *habeas corpus* provision. The reference to national law in the 1994 document is not absent either, although it is more restricted.[104] One can, of course, speculate as to what would happen under this

[102] Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, pp. 98-99.
[103] See n. 100.
[104] See Art. 29, para. 1 of the 1994 document (see n. 100).

regime if a suspect were arrested or detained in clear contravention of the *national* legal rules of the State where he was arrested/detained (including that State's international legal (human rights) obligations). It seems that in such a case, the national legal authority would conclude that the suspect's rights were violated but would not have the power to order his release. Although this power of release is explicitly granted to the Presidency, the latter would only release a person if the arrest/detention was unlawful *under the Statute*. And since the reference to national law, in this 1994 Statute, is quite restricted, one can wonder whether the Presidency could release a person in such a case. A more general statement that an arrest or detention cannot be arbitrary (which is present in the current Statute) might have solved this, but such a general statement is lacking in the 1994 document.

Perhaps because of this possible lacuna in the suspect's human rights protection, questions regarding the exact scope of this right cropped up in the 1995 Ad Hoc Committee's report. For example, Annex I of this report (entitled 'Guidelines for the consideration of the question of the relationship between States parties, non-States parties and the International Criminal Court') includes the following questions on the issue 'accused's challenges to the lawfulness of detention':

> - Decided by the court (art. 29(3)) or by national authorities? - Does recourse to the court under article 29(3) exclude accused's fundamental rights under national law to challenge in national courts the lawfulness of detention? If not, what is locus standi of the international criminal court in proceedings before a national court?[105]

In the 1996 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, another effort was made to divide the responsibility between the national authorities and the ICC in the context of reviewing the legality of the actual arrest and detention. In Volume I of this report, suggestions were made to shift responsibility to review the legality of the arrest and detention to the national authorities. The ICC could then review such issues as the legality of the arrest warrant and the orders for detention. Although it is not mentioned very clearly, it seems that the national authority would in that case also be authorised to release a person in the case of an unlawful arrest or detention – though the Statute must make guidelines (for the national authorities?) "for the grounds for detention and release for those occasions when the Court [through the national authorities?, ChP] has custody of the suspect".[106] Another excerpt from the report related to this discussion

[105] See UNGA OR, Fiftieth Session, Supplement No. 22 (A/50/22, 6 September 1995), p. 53. In the report itself (and not its annex), one can read comparable information in paras. 147-152 and in paras. 204 and 216.

[106] UNGA OR, Fifty-first Session Supplement No. 22 (A/51/22, 13 September 1996), para. 243. The entire paragraph goes: "It was felt that article 29 on pre-trial detention or release needed further clarification in respect, inter alia, of the determination by the judicial officer of the warrant duly served and the purpose of such determination. *It was suggested that the determination of the lawfulness of the arrest or detention*, as well as bail, *should be made by the relevant national authorities*. A view was expressed that what the Court could determine was the lawfulness of its arrest warrants and its requests for the detention of the suspect. However, *the Statute should provide guidelines for the grounds for*

is not very clear either. Although it states (arguably quite broadly) "that the requested State should ensure that the views of the Prosecutor in regard to *any* release of the suspect or the accused should be brought to the attention of the judicial officer [emphasis added, ChP]"[107] (this could thus also encompass a release after a determination of the unlawfulness of the arrest or detention), this sentence is preceded by the words: "It was further suggested that issues of detention prior to surrender, including bail or provisional release, should be determined by national authorities and not by the International Criminal Court, as envisaged in the draft statute."[108] The words "issues of detention prior to surrender" could, of course, include the situation that the surrender would never take place because a person has already been released as a result of an unlawful arrest or detention, but is seems that the sentence containing the words "any release" seems more focused on 'mere' interim releases pending/prior to surrender/trial.

However, in Volume II of the 1996 report, under the question 'If the Court (or the appropriate national authorities) decides that the arrest or detention was illegal, what are the consequences of that decision?',[109] the proposals not only state that the ICC must review the legality of the arrest warrants and the orders for detention (as

detention and release for those occasions when the Court had custody of the suspect [emphasis added, ChP]."

[107] *Ibid*., para. 323. The entire paragraph goes: "On the question of the role of national authorities, in particular the judiciary, in the execution of the Court's requests for provisional arrest, pre-surrender detention or surrender of the accused to the Court, there was general support for the view that the Statute should permit involvement of national courts in the application of national law where those requirements were considered fundamental, especially to protect the rights of individuals, as well as to verify procedural legality. Mention was made in this connection, of the difficulties that many States would have with a direct enforcement of an arrest warrant issued by the Court, as opposed to an indirect enforcement through available national mechanisms. It was suggested that, as a minimum, it should be possible to challenge in a national court of the requested State a document purporting to be a warrant – without the examination of the warrant in relation to substantive law – and that there should be a national forum in which to adjudicate upon any admissibility dispute, at least as regards double jeopardy. It was further suggested that issues of detention prior to surrender, including bail or provisional release, should be determined by national authorities and not by the International Criminal Court, as envisaged in the draft statute. It was considered necessary, however, that the requested State should ensure that the views of the Prosecutor in regard to *any* release of the suspect or the accused should be brought to the attention of the judicial officer. In this regard, it was emphasized that there must be a very close working relationship between the Prosecutor and States parties in implementing the Court's request for assistance and surrender, and that the Statute should be sufficiently flexible so as to take this into account, while at the same time giving due attention to the rights of the individuals and the State's international obligations. The view was also expressed that the transfer of the accused to the Court or to the detaining State could be an appropriate point for shifting the primary responsibility over the accused from the national authorities to the International Criminal Court. With regard to the question of who should execute surrender, it was suggested that, for practical reasons, the Statute should provide for an option for execution by the custodial State, although there was also the view in favour of execution, in principle, by officials of the Court only [emphasis added, ChP]."

[108] *Ibid*. (See the previous footnote).

[109] UNGA OR, Fifty-first Session Supplement No. 22A (A/51/22, 13 September 1996), p. 143.

one can find back in Volume I),[110] but also that the ICC must decide more generally on the lawfulness of the arrest and detention.[111] This possible discrepancy between Volume I and Volume II may be explained by the fact that these proposals are not exhaustive,[112] but they show in any case that there was as yet no clear consensus in 1996 on the division of responsibility in this area and on the exact scope of the right, including perhaps (but probably not) the question of whether or not the remedy of release was to be included in this right.[113] A final interesting point from Volume II

[110] See, for example, Proposal No. 4: "If the Presidency decides that the arrest warrant or order of detention was unlawful, it shall order the withdrawal of all requests for surrender and for provisional arrest made pursuant to the warrant of order, and may award compensation." (*Ibid*., p. 143.)

[111] See *ibid*., pp. 143-144. Proposal No. 1 (identical to the 1994 ILC Draft) goes: "A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation." (*Ibid*., p. 143.) Proposal No. 2 reads: "If the Preliminary Investigations Chamber decides to release the person concerned because his arrest or detention was unlawful, it may award him compensation." (*Ibid*.) Proposals Nos. 3 and 5 do not go into the matter of release. Proposal No. 3 goes: "The Court shall make compensation to those who were: (a) pronounced innocent by an irrevocable adjudication; (b) arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place; (c) arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or (d) illegally inflicted losses upon by an officer of the Court, intentionally or negligently in the course of performing its duties. Procedures and criteria for compensation shall be provided in the rules, including the expenses to be borne by a complaint State if that State lodged a complaint without enough reason." (*Ibid*.) The (incomplete) Proposal No. 5 reads: "A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. The Presidency shall in any case review ex officio every 30 days the lawfulness under this Statute of the arrest or detention. If the Presidency decides...[emphasis in original, ChP]". (*Ibid*.) The last proposal, No. 6, is a combination of Proposals Nos. 1, 2 and 4. It does state more generally that the reviewing authority shall order the release in the case of an unlawful arrest or detention, but this sentence is preceded by the sentence in which the request of the accused is limited to the lawfulness 'of any arrest warrant or order of determination': "A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of any arrest warrant or order of determination issued by the Court. If the Presidency decides that the arrest or detention was unlawful under the Statute, it shall order the release of the accused, and may award compensation." (*Ibid*., p. 144.)

[112] See the note at *ibid*., p. 108 (where Part 4 ('Investigation and Prosecution') starts): "The following is a compilation prepared by an informal group dealing with procedural questions, fair trial and rights of the accused covering parts 4, 5 and 6. It neither represents a text agreed upon among delegations nor suggests that every provision should be included in the Statute. It contains only written proposals. Proposals for some of the articles have been consolidated to various degrees by some of their authors and may not necessarily represent the views of all the delegations who submitted proposals. The order of the articles as well as the proposed content and headings are only of an indicative character and have not been finally agreed upon. The compilation does not prejudice discussion on other topics related to the establishment of an international criminal court."

[113] One could argue that the proposals mentioned in ns. 110-111 in general would accept this remedy. It is true that Proposal No. 3 does not mention the remedy of release, but this proposal only seems to focus on the question in which situations one should provide compensation. Proposal No. 4 does not mention release either but it seems clear that if the ICC withdraws requests for surrender, the person who was to be surrendered will also be released. Finally, Proposal No. 5 does not mention release either but this proposal is incomplete. Besides the proposals mentioned under the question 'If the Court (or the appropriate national authorities) decides that the arrest or detention was illegal, what are the consequences of that decision?', it may also be good, for the sake of completeness, to refer to a proposal for the entire Art. 29 prepared by the informal group on judicial cooperation and enforcement. See

of the 1996 report is that the following general statement (which was still lacking) was proposed: "No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court."[114] Even if the last sentence were only to refer to the provisions of the Statute (and not, for example, to national procedures, although provisions in the Statute may, of course, in turn refer to national procedures), the first sentence is generally formulated and, given the word "nor", clearly separated from the second sentence, which would mean that *any* deprivation of liberty in the context of an ICC case, including the crucial part at the national level, must be non-arbitrary.

During the Inter-Sessional Meeting of the Preparatory Committee in Zutphen in January 1998, another Draft Statute was prepared.

In the new Article 29 (Article 53), the division of responsibility had apparently finally been settled: the national judicial authority was there to "determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected".[115] What would happen were the national judge to decide that the person had been arrested or detained unlawfully remains unclear. In any case, the remedy of release is not explicitly mentioned.[116] Conversely, the ICC *does* have the explicit power to release a person but here again, the formulation of the provision is quite ambiguous. Although it states quite generally that the ICC – whether in the form of the Presidency or the Pre-Trial Chamber – shall order the release of the person in the case of an unlawful arrest or detention under the Statute[117] – note, however, the previously mentioned and possibly restrictive power of the words "under the Statute"[118] – this sentence is preceded by the following

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UNGA OR, Fifty-first Session Supplement No. 22A (A/51/22, 13 September 1996), p. 145. Paras. 2 and 3 go as follows: "2. A person arrested shall be brought promptly before a judicial officer in the custodial State who shall determine, in accordance with the law of that State, that the person has been arrested in accordance with the proper process and that the person's rights have been respected. 3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of any arrest warrant or order of determination issued by the Court. If the Presidency decides that the arrest or detention was unlawful under the Statute, it shall order the release of the accused, and may award compensation." This proposal is very much reminiscent of the old Art. 29 (paras. 1 and 3) from the 1994 ILC document, see n. 100.

[114] See Proposal No. 4 (at UNGA OR, Fifty-first Session Supplement No. 22A (A/51/22, 13 September 1996), p. 130) to the question "Is it possible – and on which grounds – to order measures restricting or suppressing the liberty of an accused before the indictment?" (*ibid*., p. 128).

[115] Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, UNGA A/AC.249/1998/L.13, 4 February 1998, p. 102, para. 2.

[116] The national judicial authority, on the other hand, *does* have the explicit right to grant interim release but that is, of course, quite another issue. (See *ibid*., para. 3.) The same right is explicitly granted to the ICC as well, see *ibid*., para. 4.

[117] See *ibid*., para. 8: "If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article...] [original footnote omitted, ChP]."

[118] However, note also that that refers to the provisions in the Statute, which, in turn, may refer to national proceedings (which are more often mentioned in this document than in the one of 1994). It must be remarked that also in the Zutphen document (*cf.* n. 65 and accompanying text), mention was made of

restricting words: "A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court." The question thus arises as to whether the ICC would also have the power to release a person if more generally it finds that his arrest or detention was unlawful under the Statute or whether this remedy would only be granted if the arrest warrant or order of detention is found to be unlawful.

The final pre-Rome document, the report of the Preparatory Committee from 14 April 1998,[119] presents two options for the present discussion. In the provision on pre-trial detention or release (now numbered as Article 60), one can read that the national judicial authority and the ICC have exactly the same authority as already granted to them in the Zutphen Draft.[120] Nevertheless, one page later, one will find a heading entitled 'Further option for articles 58 to 61'. In a footnote in this report, one can read the rationale behind this inclusion, which, by the way, also received criticism for omitting "procedures of a substantive nature which have been included in the text of the same articles above":[121]

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the following general statement which could offer a broad protection, both with respect to the provisions of the ICC Statute and the national law provisions on arrest and detention. This statement was made in the context of (then) Art. 52 (*cf.* the old Art. 28 from the 1994 Draft), the provision on arrest: "No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court." (Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, UNGA A/AC.249/1998/L.13, 4 February 1998, p. 100, para. 1.) In a footnote attached to this statement (see *ibid.*, n. 171), which was put between brackets, one can read that "[i]t was suggested that this provision could be moved to article 47[26], paragraph 6."

[119] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Document A/CONF.183/2, 14 April 1998, to be found in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), pp. 5-92.

[120] For the national context, see United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), pp. 48-49 (Art. 60, para. 3): "A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected." For the international context, see *ibid.*, p. 49 (Art. 60, para. 9): "A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article...] [original footnote omitted, ChP]." Note also that the general statement, which could be found in Art. 52 of the Zutphen Draft and about which it was suggested that it be moved to another provision (see n. 118), can now be found in the new provision on arrest (Art. 59), but also here, one can read, again in a footnote (see *ibid.*, p. 48, n. 156), that "[i]t was suggested that this provision could be moved to article 54, paragraph 10."

[121] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), p. 50, n. 167.

> The proposal represents a simplified and somewhat restructured text for articles 58 to 61. This simplified version of these articles has been achieved as a result of the adoption of the framework outlined in document A/AC.249/1998/WG.4/DP.36 and the withdrawal or abbreviation by many delegations of their proposals currently contained in document A/AC.249/1998/L.13 [this is the Zutphen Draft, ChP]. This reflects a decision by many of the authors to move away from national positions towards a single, straightforward procedural approach, acceptable to delegations representing different national legal systems. The proposal does not attempt to resolve issues such as the trigger mechanism or powers of the Prosecutor. Similarly, it does not attempt to incorporate at this time procedures relating to challenges to admissibility or jurisdiction. The purpose of the proposed text, if delegations agree, is to provide a basis for a more focused and efficient discussion in Rome of the procedural stages addressed in the above articles 58 to 61.[122]

Although the most relevant article for the present discussion so far was entitled 'Pre-trial detention or release', the remedy of release was left out in the title of the most relevant article under this new proposal: Article 59 ('Arrest proceedings in the custodial State'). In this article, one can read that the national judicial authority has maintained its powers, which again do not explicitly mention a remedy (including the remedy of release) if this authority determines that a person was not arrested according to the proper process or that his rights were violated.[123] With respect to the ICC's role in this context, it states:

> [4. Pending a decision on [surrender][extradition], a person may apply to the Pre-Trial Chamber for a determination of the lawfulness under this Statute of any arrest warrant issued by the Court. If the Pre-Trial Chamber decides that the arrest warrant was unlawful under the Statute, it shall order the release of the person. [original footnote omitted, ChP]][124]

What one can see here is that the legality test of the ICC has been restricted to the arrest warrant alone.[125] The previously mentioned and broader formulation "if the Presidency/Pre-Trial Chamber decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person" has suddenly disappeared. Moreover, the footnote attached to this proposal reads: "Serious questions were

[122] *Ibid*., p. 50, n. 166.
[123] See *ibid*., p. 51, Art. 59, para. 2: "A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected."
[124] *Ibid*., p. 51, Art. 59, para. 4.
[125] Note, however, that in document A/CONF.183/C.1/WGPM/L.40 of 1 July 1998 – a discussion paper of the Committee of the Whole's Working Group on Procedural Matters – one can see that the scope of Art. 59, para. 4 was apparently perceived to be bigger. The Working Group listed a number of (potential) functions of the Pre-Trial Chamber and (potential) function 12 reads: "Determination of lawfulness of arrest pending surrender. Article 59 (4)." See also the French version of this document: "Déterminer la légalité de l'arrestation en attendant la remise. Article 59 [(]4)." The Spanish version *does*, however, focus on the arrest warrant alone: "Determinación de la legalidad de la orden de detención en espera de una decisión sobre la entrega. Artículo 59(4)."

raised about the grounds on which such a challenge would be based and whether this provision was needed at all in the light of the procedures for judicial review of the arrest warrant and judicial confirmation of the charges for trial."[126]

As can be seen in the final Statute, the new streamlined proposal ('Further option for articles 58 to 61') was indeed accepted to a great extent. This means that first, the role of the national judicial authority was maintained (without explicitly mentioning the possibility for this authority to release a person if it is decided that the person was not arrested according to the proper process or that his rights were violated)[127] and secondly, that the more generally formulated power of the ICC to release a person in the case of an unlawful arrest or detention (which could still be found in the first (but not second, streamlined) option of the final report of the Preparatory Committee) was deleted. The new and restricted power of the ICC as proposed in the streamlined proposal, namely to release a person in the case of an unlawful arrest warrant, was also deleted,[128] following the remark mentioned above, namely "whether this provision was needed at all".[129]

Has this review brought a solution to the question of whether it was clearly the intent of the drafters of the ICC Statute not to grant the remedy of release to a person unlawfully arrested or detained? This is an important question but also one which is very difficult to answer.

On the one hand, one could argue that this was indeed the intention of the drafters. After all, how else can one explain the fact that this remedy was omitted in the final Statute whereas one could still read the following words in the 1998 final report of the Preparatory Committee (this is not the streamlined proposal): "If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article…] [original footnote omitted, ChP]."[130] This can only point to a deliberate choice not to grant this remedy to persons unlawfully arrested or detained.

On the other hand, one could also argue that it is not clear that the drafters of the ICC really wanted this remedy not to be available to suspects and that it may very

[126] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), p. 51, n. 172.

[127] See also Sluiter 2003 C, pp. 624-625: "[T]he provision is silent as to what happens upon a determination that a person's rights have in fact been violated. Do the national authorities grant the remedies they deem appropriate?"

[128] See also the version of Art. 59 from the *Report of the Working Group on Procedural Matters* (A/CONF.183/C.1/WGPM/L.2 of 24 June 1998).

[129] See n. 126 and accompanying text.

[130] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, OR, Vol. III, Reports and other documents (A/CONF.183/13 (Vol. III)), p. 49 (Art. 60, para. 9). Note, however, the possible restrictions of this article, namely the fact that it speaks of "unlawful *under the Statute* [emphasis added, ChP]" and the fact that this phrase was preceded by this one: "A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute *of any arrest warrant or order of detention issued by the Court* [emphasis added, ChP]."

well be the case that they thought that the remedy would be moved to another part of the Statute or that it was unnecessary to mention it at all (because it was clear that such a remedy, perhaps on the basis of implied powers,[131] could be granted in situations of unlawful arrest and detention). That view can be supported by the following three arguments.

The first argument has to do with the disappearance of the above-mentioned words that "If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article…] [original footnote omitted, ChP]." This deletion was triggered by the new streamlined proposal in the final report of the Preparatory Committee. This (simplified!) proposal was 'only' negotiated "to provide a basis for a more focused and efficient discussion in Rome of the procedural stages in the above articles 58 to 61". This purpose, combined with the proposal's disclaimer that it "does not attempt to incorporate at this time procedures relating to challenges to admissibility or jurisdiction", may be used as an argument to state that the negotiators did not want to delete the remedy of release in the case of an unlawful arrest/detention altogether, but only at this time (to speed up the negotiations) and only in this place (the negotiators may have thought that the remedy was perhaps going to be included in the articles pertaining to the challenges to admissibility or jurisdiction). In that context, one may again refer, see *supra*, to the release from Rule 185 ('Release of a person from the custody of the Court other than upon completion of sentence'), paragraph 1 of the ICC RPE.

The second argument is that the drafters may have thought that the possibility for release in the case of an unlawful arrest or detention was included in the powers of the national judicial authority. In the first (1996) report of the Preparatory Committee, it was stated "that the transfer of the accused to the Court or to the detaining State could be an appropriate point for shifting the primary responsibility over the accused from the national authorities to the International Criminal Court".[132] That could mean that the ICC is of the opinion that the pre-surrender phase is mainly the responsibility of the national judicial authority and that – apart

[131] See El Zeidy 2006, p. 458: "[T]he ICC 'must be deemed' to have implied powers to rule on any violation resulting from the non-compliance with the terms of the Statute, which are essential to the 'performance' of its functions, despite the lack of an explicit provision to that effect." That is indeed true, although it must also be stressed that one must not resort to implied powers too quickly in the context of the ICC either. See Swart and Sluiter 1999, pp. 102-103: "Can it be excluded that the Court will, in the future, assert powers which, "although not expressly conferred, arise by necessary implication as being essential to the performance of its duties"? In our view, this question should not *a priori* be answered in the affirmative, although it should be borne in mind that given the detailed character of the Statute, it was clearly the objective of the framers to limit the powers of the Court to those set out in the Statute [original footnote omitted, ChP]." See also *ibid*., p. 96: "In Rome, there was an overall and widely supported desire to eliminate the need for judge-made law of the kind developed by the *ad hoc* Tribunal for the former Yugoslavia." See finally Ciampi 2003, pp. 1614-1615 and the ICC OTP's 'Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', 2003, available at: http://www2.icc-cpi.int/NR/rdonlyres/490C317B-5D8E-4131-8170-7568911F6EB2/248459/372616.PDF, paras. 9-10.

[132] UNGA OR, Fifty-first Session Supplement No. 22 (A/51/22, 13 September 1996), para. 323.

from the fact that the ICC ensures that the national judicial authority, *at a minimum*, follows the procedure mentioned in Article 59, paragraph 2 of the ICC Statute[133] and is able to grant the suspect interim release pending surrender[134] – it is up to the national judicial authority to determine what happens if it finds that a person was, for example, not arrested in accordance with the proper process or that his rights were not respected. Although this runs counter the fact that the remedy of release has never been explicitly mentioned in the context of the powers of the national judicial authority[135] and that the commentary of the first Draft Statute was quite clear in that respect (namely that the national authority would *not* have that power), the indistinctness of Article 59, paragraph 2 of the ICC Statute (see Chapter VIII and the scholarly views presented there) may not exclude such power either.

If that were indeed the division of responsibility envisaged (which, by the way, was never very clear),[136] then it would be less strange for the remedy of release in the international context, which was already focused on the ICC procedures as from 1994,[137] to 'shrink' even more in subsequent years.[138] After all, in that division, one can assume, at least in theory, that if a suspect is surrendered to the Court and if the national judicial authority had indeed the possibility to release a person in the case of an unlawful arrest or detention, then the fact that he *is* being surrendered means that his arrest and detention were in fact lawful. In other words: if his arrest and

[133] Namely to determine that: "(a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person's rights have been respected." One may argue that even though this procedure is not formulated as a right/remedy, it very much resembles the idea of *habeas corpus*.

[134] See Art. 59, paras. 3-6 of the ICC Statute.

[135] See Art. 29, para. 1 of the 1994 ILC Draft, Art. 53, para. 2 of the 1998 Zutphen Draft and Art. 59, para. 2 of the 1998 Draft Statute in the final report of the Preparatory Committee (streamlined version).

[136] See UNGA OR, Fiftieth Session, Supplement No. 22 (A/50/22, 6 September 1995), p. 53 where one can read the following questions on the issue 'accused's challenges to the lawfulness of detention': "- Decided by the court (art. 29(3)) or by national authorities? - Does recourse to the court under article 29(3) exclude accused's fundamental rights under national law to challenge in national courts the lawfulness of detention? If not, what is locus standi of the international criminal court in proceedings before a national court?"

[137] See the words "lawfulness under this Statute" in Art. 29, para. 3 of the 1994 ILC Draft.

[138] From a quite full (but again possibly restricted, see the previous footnote) remedy in the case of an unlawful arrest or detention (Art. 29, para. 3 of the 1994 ILC Draft: "A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation."), via a remedy which looks the same as the ILC one but which is preceded by more restrictive words (Art. 53, para. 8 of the 1998 Zutphen Draft: "A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article...] [original footnote omitted, ChP]."") to the (ultimately deleted) remedy of release if the arrest warrant was found unlawful (Art. 59, para. 4 of the 1998 Draft Statute in the final report of the Preparatory Committee (streamlined version): "[4. Pending a decision on [surrender][extradition], a person may apply to the Pre-Trial Chamber for a determination of the lawfulness under this Statute of any arrest warrant issued by the Court. If the Pre-Trial Chamber decides that the arrest warrant was unlawful under the Statute, it shall order the release of the person. [original footnote omitted, ChP]]").

detention were already found to be lawful by the national judicial authority (evidenced by the fact that the suspect was not released but in fact surrendered), then one could argue that there would be no need for the ICC to grant a remedy of release and thus to include it in the Statute.[139] Nevertheless, the fact that *the ICC itself* would not be able to grant a remedy of release is not the same as arguing that a person unlawfully arrested or detained *in the context of the ICC case* does not deserve the remedy of release altogether.

The third argument to argue that it is very unlikely that the drafters really did not want suspects of the ICC to enjoy the (customary international law) remedy of release in the case of an unlawful arrest or detention can be explained by the fact that the ICC has granted a prominent position to human rights law in the ICC Statute. This can not only be inferred from the still-to-discuss paragraph 3 of Article 21, but also from, for example, the explicit idea mentioned in the 1994 Draft Statute that the drafters wanted the provisions on arrest and detention to be in conformity with the ICCPR. Hence, in the same way as the authorities mentioned in footnote 863 of Chapter VI argued that a *habeas corpus* remedy is present in the legal frameworks of their Tribunals, even if their Statutes/Rules do not contain such an explicit remedy, it could be argued that the ICC must have this power.[140] In this context, it could be asserted that *only* granting compensation to persons unlawfully arrested/detained does not comply with (the preventative objective of) human rights law.[141]

Because of the above-mentioned arguments, it is the belief of this study that it is hard to maintain that it is *clear* that the drafters of the ICC Statute intentionally deleted the remedy of release because they did not want this remedy to be available for a suspect unlawfully arrested or detained. Since the ICC legislation is arguably unclear on this point, and thus leaves a legal lacuna, there is justification for looking to part (b) of paragraph 1 of Article 21 of the ICC Statute.

In short, part (b) must be looked to, not only in the case of the real *male captus bene/male detentus* question, but also in the case of the issue related to the *male captus* discussion, namely the remedy of release in the case of an unlawful arrest/detention (because the ICC instruments are unclear and thus also leave a legal lacuna on this matter).

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[139] One could, however, wonder in that case why the remedy of compensation, in contrast to release, *was* included but that may then be explained by the fact that the ICC may have thought it appropriate, even if the suspect was already released by the national judicial authority, to compensate him financially because it was in the context of the ICC proceedings against him that he was unlawfully arrested or detained.

[140] See also Hall 2008 A p. 1105: "Perhaps the most important right which has not been expressly recognized in the Rome Statute is the right guaranteed in article 9 para. 4 of the ICCPR (…) to have the Court review the lawfulness of detention and, if that detention is unlawful, to be released. Although the Court has the inherent power to provide this remedy, the failure to include it expressly in the Rome Statute is certainly to be regretted [original footnote omitted, ChP]." Hall's footnote (n. 53) refers to a number of authorities also mentioned in n. 863 of Chapter VI.

[141] *Cf.* in that respect DeFrancia 2001, p. 1409: "An enforceable right to compensation in the case of illegal arrest will not necessarily serve as a deterrent to unlawful detention and could potentially lead to an enforcement scheme in which violations of due process are merely bought off."

2.3 Article 21, paragraph 1 (b)

Article 21, paragraph 1 (b) reads: "In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". This part, including the third part, which will be addressed in a moment ('general principles of law'), is reminiscent of Article 38, paragraph 1 of the ICJ Statute,[142] which is "widely recognised as the most authoritative statement as to the sources of international law [original footnote omitted, ChP]".[143] This is not that strange as these parts were indeed inspired by Article 38 of the ICJ Statute.[144]

2.3.1 Applicable treaties

There are a number of treaties which could be applied by the ICC, of which two important ones shall be mentioned here. However, before doing so, it should first be stated that these treaties are silent on the *male captus* issue. As a result, they are only of interest with respect to related issues, such as, for example, the remedy of release in the case of an unlawful arrest/detention.

The first treaty is the previously mentioned (and used) Vienna Convention on the Law of Treaties. As clarified earlier, in the end, the ICC Statute is 'just' a normal international treaty between States as any other treaty to which this Convention applies.[145]

The second treaty which is often viewed as applicable to the ICC and which may be interesting here is the ICCPR. In the words of Edwards:

> The ICCPR and other such treaties will likely be deemed "applicable treaties" because a substantial number of Rome Statute signatories and ratifiers have adhered to the ICCPR; the *travaux pr*[*é*]*paratoires* repeatedly refer to incorporation of ICCPR provisions into the Rome Statute;[[146]] ICCPR rights are customary international law, which is an article 21 source of applicable law [this will be discussed when addressing the terms "principles and rules of international law", ChP]; and because the ICC's status as an inter-governmental organization created under U.N. auspices renders the ICCPR applicable to the ICC.[147]

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[142] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[143] Shaw 2003, p. 66. See in that respect also Raimondo 2008, p. 150: "In Article 21, paragraph 1 one may identify the so-called 'proper law' of the ICC (…) and the traditional sources of international law, namely conventions, custom, and general principles of law, notwithstanding the peculiar wording employed by the drafters of the Statute [original footnotes omitted, ChP]."

[144] See Arsanjani 1999, p. 28.

[145] See also Edwards 2001, p. 385.

[146] See n. 30 and accompanying text.

[147] Edwards 2001, p. 384.

McAuliffe deGuzman, when writing about the term 'applicable treaties', also mentions the ICCPR:

> Treaties may be relevant for two purposes. First, a particular treaty may have a direct bearing on a case. For example, the International Covenant on Civil and Political Rights is relevant to determining the international human rights of the accused.[148] Second, widely ratified treaties may be viewed as evidence of the "rules and principles of international law". In this regard, for example, the Genocide Convention, along with its [*travaux*], and the Hague and Geneva Conventions may be relevant to the determination of an issue before the Court.[149]

The second example of McAuliffe deGuzman is connected to another part of Article 21 (namely the part "rules and principles of international law") and will be discussed in a few moments, but her first example apparently views the ICCPR as a treaty that can be applied as such, under the terms "applicable treaties", in part (b). Pellet has criticised this observation, however. He is of the opinion that all these treaties referred to (except for one) have to be seen as part of the "rules and principles of international law."[150] However, whether one agrees with this or not does not really matter with respect to the practical outcome: *if* it is determined that

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[148] See also Degan 2005, p. 80: "The applicable treaties (other than the Rome Statute itself) may, for instance, include the 1966 International Covenant on Civil and Political Rights, or regional conventions such as the 1950 European Convention on the Human Rights and Fundamental Freedoms with protocols attached to it. The provisions of these applicable treaties concerning fair trial and similar problems that are perhaps not entirely regulated by the Statute and the Rules of Procedure and Evidence of the ICC can be of special importance."

[149] McAuliffe deGuzman 1999, p. 440.

[150] See Pellet 2002 A, pp. 1068-1070. After having presented the exact same observation of McAuliffe deGuzman as mentioned here, he states: "This is not very convincing. In neither of these two cases are the treaties in question applicable as such. Although it is true that the 1966 Covenant (or the 1907 and 1949 Conventions) may be relevant in determining the principles to be applied by the Court, the latter will be seen as principles and rules of general international law, and not as conventional norms. The ICTY has proceeded in this manner on several occasions. (...) It is difficult to imagine, however, a situation in which the Court would have to apply a treaty other than its Statute, unless two or more States agreed to accord it some specific jurisdiction or to require the application of particular principles. In any case, it is most unlikely, given that the Court has only been granted limited subject-matter jurisdiction, that it would be obliged, or even able, to apply such agreements. There is, however, an exception to this general principle. It is a consequence of the unfortunate drafting of Article 8(2)(a) of the Statute, which defines war crimes, in particular as '[g]rave breaches of the Geneva Conventions of 12 August 1949'. (...) This is regrettable for a number of reasons. In the first place, Article 8(2)(a) (...) rewrites common Article 3 of the Geneva Conventions. (...) Secondly, the express reference to the 1949 Convention only serves to underline the absence of any reference to the 1977 Protocols (...). Finally, and most importantly, rather than being a step forward, the express reference to the Geneva Conventions is a step back compared with the London and Tokyo Statutes of the International Military Tribunals, which did not refer to any text in particular: 'conventionalizing' the incrimination gives the false impression that the right to pursue criminals depends on the ratification of the treaty in question. The universal character of the crime and its customary definition are thus weakened. As for the reference to 'applicable treaties' in Article 21 of the Rome Statute, the reference to the 1949 Conventions, pointless and open to criticism, stems from the eminently debatable criminal law vision, according to which only written law is of a nature to assure respect for the *nullum crimen* principle [original footnotes omitted, ChP]."

part (a) leaves a legal lacuna (as was argued *supra*), then part (b), which both authors believe covers the ICCPR, may be applied, whether one views the ICCPR to be an applicable treaty or a rule/principle of international law. Whether the judges actually apply provisions from the ICCPR, which includes the remedy of release in the case of an unlawful arrest/detention, will then depend on the question as to whether they believe it is also appropriate to transplant the remedy of release into the specific context of the ICC – recall the words "where appropriate".[151] As already clarified several times in this study, the remedy of release in the case of an unlawful arrest/detention is not without problems. This may convince the judges, even though they may have to admit that they are, in principle, obliged to apply the remedy ("shall"), will use their discretion not to do so.

2.3.2 Principles and rules of international law

The exact meaning of the remainder of the above-mentioned part of the first paragraph of Article 21 of the ICC Statute is also unclear: "the principles and rules of international law, including the established principles of the international law of armed conflict".[152] First, it is appropriate to determine whether there is a clear difference between rules and principles and if so, what this difference encompasses. McAuliffe deGuzman addresses both categories separately and is thus of the opinion

[151] See n. 20 and accompanying text.

[152] In contrast, the more on substantive law issues focused "established principles of the international law of armed conflict" seem less vague but they do not say anything about the *male captus* discussion. Well-known principles in this context are, for example, the principles of necessity and proportionality. See for more concrete rules Degan 2005, pp. 80-81: "Established principles of the international law of armed conflict consist most often of customary rules confirmed in codification conventions. Hence, they include numerous provisions from the four 1949 Geneva Conventions and the two 1977 Protocols, but not the definitions of their "grave breaches". These "established principles" may include, *inter alia*, rules concerning proper qualification of armed conflicts; specific prohibitions of reprisals against protected persons, buildings or equipment; localities and zones under special protection and on demilitarized zones; conditions to be fulfilled for belligerent occupation; neutrality in a conflict; or rules of the warfare at sea, when there is room for their application. These rules are most often conventional, but can also be found in the practice of warfare." Note, by the way, that these "established principles of the international law of armed conflict" may very well be identified in decisions from institutions specifically dealing with the international law of armed conflict such as the ICTY and ICTR. However, as will be shown *infra*: if one is of the view that the principles and rules of international law (of which the established principles of the international law of armed conflict form part) in essence mean customary international law and if one follows the traditional (statal) concept of customary international law, then these decisions can only identify existing and not create new principles. (See also the discussion on this point in the examination of the *Al-Moayad* case, see Subsection 2.2 of Chapter V.) For an arguably middle-road solution (using the word "consolidate": strengthen), see Caracciolo 2000, p. 227: "[T]he explicit reference to the established principles of the international law of armed conflict seems excessive, since it is in any case a branch of international law, even though it could enable the Court to apply those principles consolidated in the decisions of the *ad hoc* tribunals for Former Yugoslavia and Rwanda." Nevertheless, even though the jurisprudence of the UN *ad hoc* Tribunals may thus perhaps be looked at to examine the more substantive principles of the international law of armed conflict, this does not mean that the jurisprudence of international criminal tribunals on more procedural issues such as *male captus* situations also fall under this term. (It may perhaps fall, however, under the more general notion "principles and rules of international law" but that will be discussed *infra*.)

that principles and rules should be distinguished from each other. She believes that "[t]he "principles" of international law referred to in article 21 include such widely recognized principles as the principles of proportionality and the principle of legality (*nullum crimen sine lege*) [original footnote omitted, ChP]"[153] whereas the phrase "rules of international law", even though its exact content is not clear, in any case covers customary international law:

> Apart from treaties, rules of customary law are traditionally treated as the most persuasive source of international law. It is unclear, therefore, why the drafters of the ICC Statute eschewed use of the word "custom" in identifying the applicable law. It may be that the concept of gradually evolving custom was considered too imprecise for the purposes of international *criminal* law. Nonetheless, since custom represents the primary source of rules in the international legal system, the phrase "rules of international law" must be interpreted as encompassing customary rules.[154]

On the other hand, Pellet believes that, although a distinction may be drawn between the principles and rules of international law,[155] both in fact refer to customary norms.[156] He thus argues, when discussing the "principles and rules of international law" in general: "The sibylline drafting of this provision (...) gives cause for perplexity. Why use such an indirect expression when a simple reference to international custom would have sufficed?"[157] This again is reminiscent of the

[153] Less certain about the meaning of the principles of international law is Verhoeven, see Verhoeven 2004, p. 9: "Customary rules are surely part of the 'rules' referred to in the (b) of paragraph 1 of Article 21, their 'generality' contrasting with the 'particular' character of conventional rules binding only the contracting states this is clear. The mention of 'principles', apart from rules, is, however, vague. What is indeed the exact nature of those 'principles', as distinguished from rules? Normally, they should be different from the 'general principles of law' aimed at in the (c) of said paragraph, ... at least to avoid confusions. But what then are those 'principles' and where are they coming from? One explanation could be that they constitute what is referred to in French doctrine as the '*principes généraux* du *droit internationa*[*l*]', as opposed to the '*principes généraux* de *droit international*', i.e. general rules making explicit some basic requirements of interstate relations whose binding character does not rest on a general practice of states as 'vitalized' by the *opinio juris*, which makes the issue somewhat mysterious. That said, the explanation possibly is also that the reference to 'principles' is simply illustrating an – unfortunate – language habit aiming at basic customary rules ... which clearly is the case as far as the 'established principles of the international law of armed conflicts' mentioned at the end of the (b) of paragraph 1 are concerned."

[154] McAuliffe deGuzman 1999, p. 442.

[155] See Pellet 2002 A, p. 1072: "Is it necessary to make a distinction between 'principles' of international law on the one hand, and 'rules' on the other? Undoubtedly not, at least with regard to their nature: in both cases, they are customary norms. One may thus consider that the double reference is a verbal tic, a 'ready-made' expression to refer to custom. It remains that under international criminal law, the appropriateness of reliance on 'principles' (except as an aid to interpretation of 'rules') is open to question. Upon a more rigorous inspection, the word 'rules' has a more precise connotation and implies a higher degree of determinacy than the term 'principles'; and the *nullum crimen* principle could be breached by the undiscerning application of the latter if they were to be relied upon to found a conviction [original footnote omitted, ChP]."

[156] See also Vasiliev 2009, pp. 210-211, n. 63, criticising McAuliffe deGuzman.

[157] Pellet 2002 A, p. 1070. See also *ibid*, p. 1071: "It may be that the letter of Article 21(1)(b) of the Statute should not be accorded an unmerited importance. In reality, there is little doubt that this

above-mentioned Article 38 of the ICJ Statute which states that the ICJ shall apply, among other things, "international custom, as evidence of a general practice accepted as law". Although it may seem practical and logical to draw an analogy to Article 38 of the ICJ Statute (as already mentioned: the drafters of the ICC Statute were also inspired by this article), one should not forget that the words used in the Statute are different from those of Article 38 of the ICJ Statute and thus may have a different meaning.[158] Edwards, for example, asserts that the words "international law" in Article 21, paragraph 1 (b) of the ICC Statute is broader than customary international law.[159] It may indeed be the case that the "principles and rules of international law" are broader than mere customary international law, but many agree that the principles and rules of international law, in any case, cover customary international law.[160] Hence, before delving into the question of whether the principles and rules of international law also cover more than just customary international law, the latter concept will first be examined.

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provision refers, exclusively, to customary international law, of which the 'established principles of the international law of armed conflict' clearly form an integral part." It is not very clear whether Pellet is of the opinion that the whole of Article 21 (1)(b) is referring to customary international law or only the part "the principles and rules of international law, including the established principles of the international law of armed conflict". Although the above-mentioned quotation can be found under the heading 'The Principles and Rules of International Law', he is in fact referring twice to "Article 21 (1)(b)" which includes "applicable treaties". However, this may not be that important as Pellet, in contrast to the "principles and rules of international law", does not give much weight to the reference "applicable treaties": "That is not to say that (...) [the reference to treaties among the sources of law to be applied by the Court] is clearly indispensable, or even useful." (*Ibid*., p. 1068.)

[158] *Cf*. also Arsanjani 1999, p. 28 (who served as the Secretary of the Committee of the Whole of the Rome Conference, the organ of the Conference responsible for the development of the ICC Statute): "Even though the three categories [this is 1) the three sources mentioned in para. 1 (a); 2) the two sources mentioned in para. 1 (b) and 3) the source mentioned in para. 1 (c), ChP] were inspired by Article 38 of the Statute of the International Court of Justice, they are substantially and structurally different from that article." See in that respect also McAuliffe deGuzman 1999, p. 436: "The applicable law elaborated in article 21 derive generally from the sources enumerated in article 38 of the ICJ Statute. Article 38 of the ICJ Statute represents the most authoritative statement of the sources of general international law. The ICC Statute modifies the approach taken in the ICJ Statute to fit the context of international *criminal* law [original footnote omitted, ChP]."

[159] See Edwards 2001, p. 387: "Under Rome Statute, article 21(1)(b), "international law" (or public international law) includes bodies of law beyond just customary international law. For example, under article 21(1)(b), "international law" also includes the areas of international human rights law and international humanitarian law [original footnotes omitted, ChP]."

[160] See Sadat 2000, p. 918: "[T]he Statute itself contemplates that the Court will use customary international law outside the ICC Statute in its decisions. Article 21, on applicable law, permits the Court to apply "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict [original footnote omitted, ChP]."" See also Caracciolo 2000, p. 227 ("Since the Court constitutes an international jurisdiction (...) the second category of sources of law which it can apply could only be treaties and customary international law [original footnote omitted, ChP]"), Gallant 2003 A, p. 787 ("[P]rinciples and rules of international law (presumably meaning international custom) [original footnote omitted, ChP]"), Schabas 2004, pp. 91-92 ("There is no express mention of customary international law, but it is surely covered by the reference to 'principles and rules of international law'.") and Degan 2005, p. 80. See finally Vasiliev 2009, p. 210 and Nerlich 2009, p. 313.

2.3.2.1 Customary international law…

What does customary international law say on the *male captus* problem? To answer this question, one may turn to the conclusion of Section 2 of Chapter VII of this book. And now, something special has cropped up; even though the non-committal external evaluative framework of this study was (merely) created to see how different or similar the current ICC position on the *male captus* problem is in comparison with the position of other courts, this external evaluative framework has now entered, via the concept of customary international law, the less non-committal internal evaluative framework, a framework established to see how the actual ICC position should be assessed in view of the Court's own law.

Section 2 of Chapter VII of this book has clarified that one cannot generally state that either *male captus bene detentus* or *male captus male detentus* has reached customary international law status, because such general assertions do not do justice to the enormous variety of possible *male captus* situations and the different ways how those varying situations were received by courts. In fact, Chapter VII concluded that only one *male captus* situation can probably be seen as having customary international law status, namely the situation that judges will refuse jurisdiction in the case of an abduction performed by the authorities of the prosecuting forum followed by a protest and request for the return of the suspect by the injured State. That would mean that in such a situation, the ICC, if it is also of the opinion that the principles and rules of international law cover customary international law, and if it believes that it is appropriate to transplant this rule into the specific system of the Court, would have to refuse jurisdiction. As also pointed out in the context of the ICTY and ICTR, however,[161] one can ask whether this would indeed be appropriate as one could argue that national courts would probably refuse jurisdiction in such cases to protect the fragile international legal order based on the equality of States (and to repair what the Executive should have done). However, for the ICTY and ICTR – and this also goes for the ICC (but to a lesser extent)[162] – the concept of State sovereignty plays a less important role (even if that observation, of course, cannot constitute a carte blanche to violate State sovereignty); a protest from a State will have less influence in the rather vertical context of the ICC than it will have in the horizontal context of States. However, even if this customary international law rule, for that reason, cannot be transplanted into the context of the ICC, and that Court would hence not *have* to follow it, it is submitted that the ICC, like the ICTY and ICTR, *should* resolutely refuse jurisdiction if it were implicated in an abduction, whether or not that abduction was followed by a protest and request for the return of the suspect from the injured State.

Of course, a very interesting and exciting[163] question to be addressed now is whether Section 3 of Chapter VII (the principles distilled from the

[161] See n. 652 of Chapter VI.
[162] Because the ICC is not as 'vertical' as the ICTY and ICTR are, see Chapter VIII of this study.
[163] See also Bitti 2009, p. 296: "The most exciting issue in relation to Article 21 (1) (b) has been the relevance of the jurisprudence of the *ad hoc* tribunals in the context of the ICC proceedings."

international(ised) criminal tribunals' *male captus* case law) may also enter the internal evaluative framework. Can these principles perhaps also fall under the notion of customary international law?

Focusing first on the decisions of the ICTY/ICTR, this would seem difficult to accept under the traditional concept of customary international law, whose two constituent elements are 1) *State* practice ("the actual behaviour of states")[164] and 2) *opinio iuris sive necessitates* ("the belief by a state that behaved in a certain way that it was under a legal obligation to act that way").[165] As explained earlier in Chapter V (in the context of the *Al-Moayad* case), decisions from international criminal tribunals can, of course, be consulted to find out whether a certain rule exists in State practice as many of these international cases, see also Chapter VI of this book, include overviews of national positions on certain matters.[166] It is unproblematic if those overviews (and hence the decisions to be found in those overviews) are examined by judges to determine the position of States towards a certain rule. However, decisions of international tribunals *as such* (which do not delve into the practice of States) arguably have nothing to do with the practice of *States*, even though these tribunals were established by States.

However, this may perhaps be different with respect to (the decisions of) internationalised criminal tribunals, such as the ECCC. Although it is true that these Extraordinary Chambers are established and supported with help of the international community and that they try international crimes, they also form part of the domestic system of Cambodia. It could be asserted that although their decisions are issued by chambers in which both national and international judges participate (the majority are however of local origin), they are nevertheless to be seen as decisions from, in essence, a Cambodian court and thus as evidence of the practice of Cambodia. This may be different, however, with respect to other internationalised criminal tribunals such as the SCSL, which is arguably more 'international' in nature than the ECCC because the majority of the SCSL judges are international and because the Court does not form part of the domestic system of Sierra Leone. In short, it is clear that much will depend on the specific nature of these tribunals to find out whether their decisions can be seen as expressions of State practice.

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[164] Shaw 2003, p. 70.
[165] *Ibid*., p. 71.
[166] *Cf.* also *ibid*., p. 78, explaining that rules of State practice can be found in, for example, the decisions of international judicial institutions: "It is how states behave in practice that forms the basis of customary law, but evidence of what a state does can be obtained from numerous sources. A state is not a living entity, but consists of governmental departments and thousands of officials, and state activity is spread throughout a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activity which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do. The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. (...) In addition, one may note resolutions in the General Assembly, comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organisations [original footnotes omitted, ChP]."

Nevertheless, the above-mentioned observations are based on the traditional concept of customary international law, which is interested in the practice of *States*. However, one can ask whether the formation of customary international law can still be seen as the privilege of States. It is clear that in today's world, the monopoly of States on the international scene is diminishing and the influence of non-State entities such as international organisations and tribunals is growing, especially in the field of international criminal law.[167] One could argue that this development demands that, if one wants to determine whether a certain rule exists in customary international law, one should look to the practice of the international community in general and not only to the statal dimension of this community.[168] See, in that respect, the following words on the concept of customary international law from the German *Al-Moayad* case:

> [I]ts evolution depends on two preconditions: firstly, on conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of states *and other subjects of international law with law-making authority*; secondly on the opinion that is behind this practice "to act in the framework of what is required and permitted or necessary under international law" (*opinio iuris sive necessitatis* (…)) [emphasis added, ChP].[169]

It is therefore legitimate to ask oneself questions such as:

> Has the concept of state practice as an element of custom become outdated, at least in some fields of international law? On the same vein, how much does the jurisprudence of the courts like the ICTY have influence on the subsequent practice and *opinio juris*, or could it be said that decisions themselves crystallize or even create new customary norms [emphasis in original, ChP]?[170]

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[167] See also Zahar and Sluiter 2008, p. 93: "The formula of state practice plus *opinio juris* represents the theory of 'custom' in its elementary form, yet in a world of non-state organizations whose purpose is to unite, regulate, critique, or compete with states, the notion of customary law and the mechanisms of its formation have been broadened".

[168] It appears that tribunals themselves have already accepted this, see, for example, Degan 2005, p. 75 (who, by the way, also notes that "the ICJ tried to legislate by asserting the existence of new "customary rules" without proof of any former State practice and *opinio juris* [original footnote omitted, ChP]"): "The ICTY and ICTR (…) do not refer in their decisions to former State practice and *opinio juris* as the only, or even as the main, evidence of customary law. They rather rely on the practice of former *ad hoc* military tribunals established by Allied Powers after World War II in occupied Germany and in the Far East, as well as to their own practice. They thus call that former judicial practice, as a whole, "customary law" [original footnote omitted, ChP]." *Cf.* also Verhoeven 2004, p. 18: "[T]here does not exist many conventional or customary rules concerning the punishment of criminals in international law, despite the few elements contained in the statutes or case-law of the ad hoc international tribunals that were established as a result of conflicts".

[169] German Federal Constitutional Court: In the Proceedings on the Constitutional Complaint of Mr. Al-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, B., I., para. 3 a)), 43 *International Legal Materials* (2004), p. 782.

[170] Working Group on International Criminal Law, European University Institute (Law Department), Meeting of 9 May 2007 (devoted to the issue of : 'Customary International Law in International Criminal Tribunals' – introduced and presented by Noora Arajärvi), available at:

Arajärvi has dedicated an entire doctoral thesis to these questions,[171] which are important and very interesting, but clearly go beyond the compass of the present study. Because the results of Arajärvi's research are not available yet, this study will play safe and use the traditional notion of customary international law, which focuses on what *States* do/believe.[172]

However, that does not mean that the decisions from the ICTY and ICTR on the *male captus* issue may not enter the internal evaluative framework of this study in another way. This will be discussed in the next subsection when addressing the question of whether the concept of "principles and rules of international law" encompasses more than just customary international law.

However, before doing so, a few words must be dedicated to the remedy of release in the case of an unlawful arrest/detention. One can be very brief here: as already explained earlier in this book, the right to liberty and security, including the remedy of release in the case of an unlawful arrest/detention, can be seen as having customary international law status. One can refer here, for example, to the fact that the ICCPR has many (165) States Parties. Thus, if the (ICCPR) remedy of release would not already fall under the notion "applicable treaties", it will in any case be covered by the "principles and rules of international law". Hence, it is definite that this remedy falls under part (b) of paragraph 1 of Article 21 of the ICC Statute.

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http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/WGOnCriminalLaw9May07.pdf, p. 15.

[171] *Ibid*., p. 2: "Noora [Arajärvi] subsequently illustrated some of the main research questions on which her PhD will focus, for instance: whether it is necessary to use the 'words and language' of traditional customary international law for international customary *criminal* law; whether the case-law and jurisprudence of the ad hoc Tribunals represent a 'new source' of law; whether the concept of 'state practice' in customary law is out of date [emphasis in original, ChP]."

[172] This does not mean, however, that this study is not aware of the fact that in the world of today, in which non-State entities play an increasingly important role, 'modern' customary international law may be more focused on *opinio iuris* than on State practice. See Roberts 2001, p. 758: "What I have termed traditional custom results from general and consistent practice followed by states from a sense of legal obligation. It focuses primarily on state practice in the form of interstate interaction and acquiescence. *Opinio juris* is a secondary consideration invoked to distinguish between legal and nonlegal obligations. Traditional custom is evolutionary and is identified through an *inductive* process in which a general custom is derived from specific instances of state practice. (…) By contrast, modern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice. This approach emphazises *opinio juris* rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deducted from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs and generate new customs [emphasis in original and original footnotes omitted, ChP]." However, this is clearly a different discussion than the questions posted by Arajärvi. Roberts indeed shows that modern customary international law tends to look more at *opinio iuris*, but she is still focused, like this research, on what *States* do (or more importantly in modern customary international law: what *States*, for example in international organizations such as the UNGA, declare to which rules they will abide by). Thus, Roberts' customary international law definition is still focused on the statal context. The emphasis is, however, more on what States declare than on what they actually do. Arajärvi arguably goes a step further and wonders whether this statal context *altogether* (whether the focus is on State practice or on the *opinio iuris* of States) in itself is losing importance to, for example, the context of international criminal tribunals in the formation of customary international law.

However, here also (see the final words of Subsection 2.3.1), it must be stressed that the ICC will only apply that remedy if it is of the opinion that it is appropriate to transplant this remedy into the specific context of the ICC, which may be difficult in view of the identified problems which can be connected to this remedy.

2.3.2.2 …or more?

Although many agree that customary international law is covered by the concept of "principles and rules of international law", this notion may encompass more than just customary international law.[173] Might it be possible that the practice of the international criminal tribunals (which do not fall under the traditional concept of *State* practice/customary international law) falls under the term 'principles and rules of international law'? Even if the practice of other international (criminal) tribunals may not easily fit into the specific system of the ICC (in the sense that it would often not be "appropriate" to apply solutions from other international criminal jurisdictions), one can ask why the words "international law" would be *ab initio* restricted to the traditional, statal context of international law. This is especially odd for the international criminal law context in which the ICC operates and in which the practice of the other international criminal tribunals (but also the practice of human rights bodies) may be of particular interest. Although it is true that it is often stated that the principles and rules of international law refer to customary international law, which, if one follows the traditional view, is limited to the statal context, it is also true that the words *do* say something different and that the ICC might use this different terminology to include the practice of other international (criminal) institutions not also linked to the statal context.[174]

In fact, it seems that the ICC itself holds the same opinion on this issue. At the beginning of this chapter, a passage from the *Lubanga Dyilo* case about 'witness proofing' (the preparation of witnesses before trial) was presented in the context of explaining the correlation between parts (a) and (b) of Article 21, paragraph 1 of the ICC Statute. (This was the passage in which the meaning of the words "where appropriate" was also elucidated.) It had already been revealed by then that this excerpt was also very interesting for the discussion as to whether the practice of the other international criminal tribunals may fall under the notion "principles and rules of international law". The more complete passage goes as follows:

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[173] See in that respect the already-mentioned words (see n. 159 and accompanying text) of Edwards: "Under Rome Statute, article 21(1)(b), "international law" (or public international law) includes bodies of law beyond just customary international law. For example, under article 21(1)(b), "international law" also includes the areas of international human rights law and international humanitarian law [original footnotes omitted, ChP]." (Edwards 2001, p. 387.) See also Nerlich 2009, p. 313: "[I]t is submitted that certain principles of international criminal law (…) may be subsumed under this term."

[174] See Degan 2005. p. 80: "Under "principles and rules of international law", it should be understood to include customary rules of general international law. Probably because of the frequent misuse of these terms in the past, they were not referred to as such. But this less precise wording has the advantage that the Court will not need to prove the customary character of "principles and rules" it wishes to apply, especially not the *communis opinio juris*."

43. Turning to the practices of international criminal tribunals and courts, the prosecution submitted that the practice of witness proofing is here permissible, endorsed and well established. The Trial Chamber notes, as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.

44. However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, *where appropriate*, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, *ipso facto*, prevent all procedural issues from scrutiny under Article 21(l)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.

45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate [emphasis in original and original footnotes omitted, ChP].[175]

[175] ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial' (Public), ICC-01/04-01/06, 30 November 2007, paras. 43-45. See also the Pre-Trial Chamber's decision in the same case where the judges did not concur with the conclusion of the Prosecutor but did not seem to disapprove of the idea that decisions from other tribunals might be used under certain circumstances either: "29. The Prosecution asserts that the practice of witness proofing as defined by the Prosecution "is a widely accepted practice in international criminal law" and therefore the Prosecution implies that it should be considered as part of the applicable law of the Court pursuant to article 21 (1) (b) of the Statute. 30. In support of this submission, the Prosecution cites (i) two Trial Chamber decisions of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"); (ii) one Trial Chamber decision of the Sierra Leone Special Court ("the SLSC"); and (iii) the statement of Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda ("the ICTR"), to the UN Security Council on 29 June 2004. 31. Firstly, the Chamber observes that the Prosecution has not put forward any jurisprudence from the ICTR authorising the practice of witness proofing as defined by the Prosecution. The Chamber also observes that the precedent from the SLSC relied on by the Prosecution does not deal with the practice of witness proofing but addresses "the related legal issues of the exclusion of supplemental statements of prosecution witnesses on the grounds that they contain or introduce new allegations against the Accused persons, and whether, if the allegations are new, there has been a breach of Rule 66 of the Rules on the

Thus, even though the practice of the ICTY/ICTR (and this may perhaps also be valid for other international (judicial) institutions such as the HRC, the ECtHR and certain internationalised criminal tribunals) is not automatically applicable to/binding on the ICC system (which, of course, seems very logical given the latter's relative *sui generis* character),[176] neither is it impossible that it might be applied by the ICC judges if those judges, after a detailed analysis, are of the opinion that certain practices from these tribunals can be transplanted into the specific system of the ICC *as a principle/rule of international law*. In that case, the jurisprudence of the other tribunals is not merely a source from which inspiration may be drawn (which is, of course, always possible),[177] but a source which can identify law which

part of the Prosecution." Moreover, the Chamber finds that out of the two ICTY Trial Chamber decisions cited by the Prosecution, the decision in the *Jelisić* case does not refer to the practice of witness proofing prior to the witness testimony because it is confined to the issue of contact with a witness once the witness has taken the stand and made the solemn undertaking. 32. Hence, the only decision identified by the Prosecution in which the practice of witness proofing is expressly authorised is the 10 December 2004 decision of Pre-Trial Chamber II of the ICTY in the *Limaj* case. Moreover, such a decision, despite authorising the practice of witness proofing, does not regulate in detail the content of such a practice. 33. Under these circumstances the Chamber finds that the Prosecution assertion that the practice of witness proofing as defined by the Prosecution in the Prosecution Information "is a widely accepted practice in international criminal law", is unsupported [original footnotes omitted, ChP]." (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (Public Document), ICC-01/04-01/06, 8 November 2006, paras. 29-33.) Bitti 2009, pp. 297-298 notes with respect to this decision that "[t]he question which should have been answered first is to what extent "practices in international criminal law" may be seen as "principles and rules of international law" under Article 21 (1) (b) of the Rome Statute."

[176] *Cf.* also Bitti 2009, p. 296.

[177] See, for example, ICC, Pre-Trial Chamber II, Situation in Uganda, 'Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58' (Under Seal, Ex Parte, Prosecutor Only), ICC-02/04-01/05, 19 August 2005, paras. 18 *et seq*., where reference is made to the case law of the ICTY, ICTR and SCSL and ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 'Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPSR4, VPSR5 and VPRS6' (Public Redacted Version), ICC-01/04, 17 January 2006, paras. 51-53, where the Pre-Trial Chamber referred to several cases of the ECtHR and the IACtHR to back its opinion on the role of the victims in the proceedings of the ICC. See also El Zeidy 2006, p. 462 and Nerlich 2009, pp. 305-306, n. 3. See finally the ICC's *male captus* decisions of 3 October 2006 and 14 December 2006 (to be discussed in the second section of the next chapter), where reference was made to *male captus* cases from human rights bodies and the ICTY/ICTR.

is applicable to the ICC, namely principles and rules of international law.[178] Hence, in that case, the conclusions from Section 3 of Chapter VII, the conclusions with

[178] See also Friman 2003, p. 380 (writing about the law on evidence): "It is not entirely clear (…) on which basis the ICC may make use of the laws of evidence as developed by the Tribunals. However, it is arguable that such practice constitutes "principles and rules of international law" and, thus is applicable "where appropriate"." See also El Zeidy 2006, p. 462: "Although Article 21 does not state clearly whether decisions of the other international judicial bodies is considered an applicable source of law, arguably the phrase 'principles and rules of international law' mentioned in Article 21(1)(b) covers those decisions as a secondary source." El Zeidy (*ibid*.) then refers to a decision by the ICC's Pre-Trial Chamber II which, according to him, "treated the jurisprudence of the ad hoc tribunals as being covered by the 'principles and rules of international law' as long as they do not go 'beyond the scope of article 21' [original footnote omitted, ChP]." The decision El Zeidy refers to is ICC, Pre-Trial Chamber II, *Situation in Uganda*, 'Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes From the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification' (Public Document), ICC-01/04-01/05, 28 October 2005 and the paragraph in question (19) reads: "As to the relevance of the case law of the *ad hoc* tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. Article 21, paragraph 1, of the Statute mandates the Court to apply its Statute, Elements of Crimes and Rules of Procedure and Evidence "in the first place" and only "in the second place" and "where appropriate", "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such "applicable law" before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute." Vasiliev is a little more hesitant in that respect. He explains, referring to the words of El Zeidy and this paragraph: "Although it is sometimes accepted that the case law of other international criminal tribunals could become applicable at the ICC as 'the principles and rules of international law' under Article 21(1)(b), it is more accurate to say that this jurisprudence is not a source, but only serves, where appropriate, as the evidence of such principles and rules. If one were to borrow the formula of the ICJ Statute, it would amount to a 'subsidiary means for the determination of the rules of law' by the ICC in the context of its own procedural regime. The emerging ICC jurisprudence has embraced this view [original footnotes omitted, ChP]." (Vasiliev 2009, p. 222.) *Cf.* also Nerlich 2009, p. 313: "[I]n order to identify principles and rules of international law, the ICC may turn to the jurisprudence of the *ad hoc* tribunals as well as the jurisprudence of other international courts." However, it is submitted that the judges can not only use the jurisprudence of other tribunals to identify principles and rules of international law stemming from other sources; if the judges are of the opinion that certain practices of these tribunals, in themselves, constitute principles and rules of international law, such principles and rules can, of course, also be applied. In any case, prudence is warranted here. See Kreß 2007, p. 543: "Pre-Trial Chamber II has already stressed, and rightly so, that anyone should, in the ongoing process of moulding the pertinent law, beware of hastily adopting the established *acquis* of both ad hoc Tribunals." See also Schabas 2007, p. 196: "[O]ne of the Pre-Trial Chambers of the International Criminal Court has cautioned against mechanistic application of the case law of the *ad hoc* tribunals". See finally, and very eloquently, Nerlich 2009, p. 325: "[T]he ICC will not have to reinvent the wheels that have already been invented by the *ad hoc* tribunals. But before mounting such wheels, the Court will have to consider carefully whether they really fit. Otherwise, the ICC may jolt, and the reliance on the jurisprudence of the *ad hoc* tribunals would not strengthen, but weaken the jurisprudence of the Court." A last interesting point that should be mentioned here has to do with the 1993 preliminary version of the 1994 ILC Draft. In that 1993 version, Art. 21 (then 28) read: "The Court shall apply: (a) this Statute; (b) applicable treaties and the rules and principles of general international law; (c) as a subsidiary source, any applicable rule of national law." In the commentary to this provision, one can read: "[I]t is (…) understood that the expression "rules and principles of general international law" includes "general principles of law", so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice,

respect to the external evaluative framework of this study which focused on the international(ised) criminal tribunals, may also enter the internal evaluative framework of this study via the concept of "principles and rules of international law".

That would mean that certain established practices of the international criminal tribunals which can be linked to the *male captus* discussion can also be applied by the ICC if the judges are of the opinion that it is appropriate to transplant those practices, as principles/rules of international law, into the specific ICC system. One could hereby think of the acceptance of a broad concept of abuse of process (in that jurisdiction may be refused in very serious *male captus* cases, irrespective of the entity responsible) and the fact that the seriousness of the crimes with which the suspect is charged can be taken into account when applying the abuse of process doctrine. With respect to the related issue of the remedy of release, one could think of the fact that all these tribunals have stressed the importance of *habeas corpus*, even if the regulatory instruments of the tribunal in question did not explicitly contain such a provision.

However, if the ICC judges were of the opinion that it would not be appropriate to transplant the established practices of the international criminal tribunals with respect to the *male captus* issue, as principles and rules of international law, into the specific system of the ICC, or if they were of the opinion that one should not look at the jurisprudence of these tribunals in the context of this provision *at all*, then part (c) of paragraph 1 of Article 21 of the ICC Statute must be examined. Perhaps this part may then bring more clarification on how the ICC judges should decide a particular *male captus* case.

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whenever it needs guidance on matters not clearly regulated by treaty." (*Report of the Working Group on a Draft Statute for an International Criminal Court*, to be found in: *Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993*, UNGA OR, Forty-eighth session, Supplement No. 10, A/48/10, p. 111.) (See also the Draft Statute for an International Criminal Court, to be found in: *Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994*, UNGA OR, Forty-ninth session, Supplement No. 10, A/49/10, p. 103.) This could be seen as additional evidence for the assertion that the practice of other international criminal tribunals could fall under part (b). Even though this passage has been criticised, see Pellet 2002 A, p. 1071 ("why [corpus of] *criminal* law, given that the Article related to *international* law?") and n. 113 ("The ILC here confuses the general principles of international law (which are of a customary nature) and the general principles of law mentioned in Art. 38(1)(c) of the Statute of the ICJ"), the ICC Prosecutor has already referred to it to back his assertion that "[t]he applicability of the jurisprudence of international Tribunals is supported by Article 21 of the Rome Statute and its drafting history." (ICC, Pre-Trial Chamber II, Situation in Uganda, *Case 01/05*, 'Update of Proposed Treatment of All Relevant Documents of the Record and Application for Entry of Reasons for Sealing into Public Record' (Public Document), ICC-01/04-01/05, 14 November 2005, p. 5, n. 3.)

2.4 Article 21, paragraph 1 (c)

This third part of paragraph 1 reads:

> Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

One would only turn to this source, "the most controversial aspect of article 21",[179] if sources such as the proper instruments of the ICC (paragraph 1 (a)) and those focused on international law (paragraph 1 (b)) bring no relief ("failing that"). In the words of Edwards:

> [I]t was evident to the drafters that the lacuna might need to be filled, as it was impractical, if not impossible, for each applicable rule or principle of law to be enumerated in the Rome Statute. Instances would undoubtedly arise in which superior sources of international law contained in the hierarchy would either be silent or would fail to provide a relevant, appropriate law to apply. The drafters concluded that the Court would turn to national law, but would only glean principles from it without adopting it wholesale. (…) The rationale is that if a common principle exists within the domestic laws of nations, such a principle ought to be attributable to international law to fill in the gap [original footnotes omitted, ChP].[180]

Now, can one identify a general principle of law with respect to the *male captus* problem?[181] To answer this, one must first know what, according to this article, a general principle of law is and how it can be found. Pellet is of the opinion that these general principles of law "are covered by section (c) of the above provision [this is Article 38, paragraph 1 of the ICJ Statute, ChP] under the title 'general principles of

[179] McAuliffe deGuzman 1999. p. 442. See also *ibid*., p. 437.
[180] Edwards 2001, pp. 406-407.
[181] It must again (see also n. 1) be stressed that although these principles are predominantly referred to when discussing *substantive* law issues, it is submitted that these principles may also relate to the *procedural* context. After all, national law is used to fill the legal lacunae of the other sources of Art. 21 but the latter may not be restricted to substantive law issues only. As a result, national law may also be looked at if parts (a) and (b) of para. 1 of Art. 21 of the ICC Statute have no answer to a certain procedural question. *Cf.* in that respect the scope of the "general principles of law recognized by civilised nations" (Art. 38, para. 1 of the ICJ Statute) with which the general principles of law from Art. 21 of the ICC Statute may be compared (see also the following footnote and accompanying text): "The importance of the "general principles" in litigation before international tribunals is not limited to the area of substantive law. Many questions of procedure and evidence (...), which necessarily arise in treaty and non-treaty cases alike, are not regulated by specific provisions of treaty or charter; in filling the gap, an international court will expressly or silently resort to procedural and evidentiary principles which are felt to be inherent in all civilized legal systems [original footnote omitted, ChP]." (Schlesinger 1957, p. 736.)

law recognized by civilised nations' [original footnote omitted, ChP]".[182] According to him, "the general principles of law require a triple mental operation: a comparison between national systems, the search for common 'principles', and their transposition to the international sphere".[183] He explains that it is not necessary, however, to make a comparison of all national legal systems as the Statute refers to national laws *of legal systems of the world*.[184]

> [I]t is (…) necessary (…) only to ensure, by 'polling', that the norms in question are effectively found in the 'principal legal systems of the world'. These can probably be reduced to a small number in the contemporary world: the family of civil-law

[182] Pellet 2002 A, p. 1073. In the *travaux préparatoires* of Art. 38, para. 1 of the ICJ Statute, one can find, among other things, the following two well-known examples of general principles of law: *res iudicata* and good faith, see Cheng 1953, p. 25. In Appendix 1 of his book, entitled 'Draft Code of General Principles of Law', Cheng enumerates 16 articles, among which the above-mentioned two, but also other interesting examples, such as Art. 3: "Responsibility involves an obligation on the part of the State concerned to make integral reparation for the damage caused, in so far as it is the proximate result of the failure to comply with the international obligation. The State shall, wherever possible, make restitution in kind. If this is not possible, a sum corresponding to the value which restitution in kind would bear shall be paid. Whenever restitution in kind, or payment in lieu of it, does not cover the entire loss suffered, damages shall be paid in order that the injured party may be fully compensated. The damage suffered shall be deemed to be the proximate result of an act if it is the normal and natural consequence thereof, or if it would have been foreseen by a reasonable man in the position of the author of the act, or if it is the intended result of the act." (*Ibid*., p. 397.) (*Cf*. n. 553 of Chapter III and its reference to the *Chorzów* case.) In addition, on p. 187 of his book, Cheng speaks of the "general principle: *ex injuria non oritur jus*." However, one can seriously doubt whether this latter principle is still valid in the context of this book's topic, given the fact that Chapter VII has clearly shown that many decisions can still be qualified as *male captus bene detentus* cases, see also n. 208.

[183] Pellet 2002 A, p. 1073. It is clear that domestic views cannot automatically be transplanted into the specific international system of the law. Hence, also here, the ICC judges appear to have a certain discretion before they apply the national views, *cf*. the words "where appropriate" in the context of part (b) of para. 1 of Art. 21 of the ICC Statute. Pellet hereby refers to a quotation from the *Blaškić* case (see *ibid*., p. 1074) in which the Trial Chamber applied the national (US) 'ripeness doctrine' (under which "a court should refrain from determining issues that are only hypothetical or speculative, or at any rate devoid of sufficient immediacy and reality as to warrant adjudication" (ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', Case No. IT-95-14-AR108 *bis*, 29 October 1997, para. 22)). The Appeals Chamber however determined "that it is inappropriate to resort to this doctrine in these proceedings" (*ibid*.) because, amongst other things, "it appears to the Appeals Chamber to be inapposite to transpose it into international criminal proceedings. The Appeals Chamber holds that domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings." (*Ibid*., para. 23.) See also the (by Pellet applauded, see Pellet 2002 A, pp. 1075-1076) words of Cassese in the *Erdemović* case: ICTY, Appeals Chamber, *Prosecutor v. Dražen Erdemović*, 'Separate and Dissenting Opinion of Judge Cassese', Case No. IT-96-22-A, 7 October 1997, paras. 2-6. See finally Bitti 2009, p. 300: "[E]ven if such a principle existed, it would be difficult to apply it before an international criminal court since the structure of courts in a State is fundamentally different from the structure of an international court."

[184] See Pellet 2002 A, p. 1073. Pellets on the same page also refers to the indeed clearer French version of these terms: les lois nationales représentant les différents systèmes juridiques du monde, this is the national laws representing the different legal systems of the world.

> countries, the common law, and, perhaps, Islamic law [original footnotes omitted, ChP].[185]

This view was also used by the Prosecutor in his 'Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal',[186] in which he delved into "the law of 24 national jurisdictions representing both the Civil [sometimes also referred to as "Romano-Germanic",[187] ChP] and the Common law traditions, and the law of a further three jurisdictions with a strong Islamic law component"[188] in order to find a general principle of law.[189]

However, Article 21, paragraph 1 (c) of the ICC Statute goes further. It talks of

> general principles of law derived by the Court from national laws of legal systems of the world *including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards* [emphasis added, ChP].

According to Pellet, it seems legitimate that the ICC, on the basis of the first part of the italicised words, "give[s] priority to the legal systems with which the defendant is familiar [original footnote omitted, ChP]."[190] Verhoeven explains that "the intent probably is to refer to the state or states which would be competent according to the connecting criteria traditionally used by states to determine criminal jurisdiction (place of the crime, nationality of the accused or of the victim, etc.)".[191]

That national aspect will, however, not be analysed in this research because the framework of this chapter aims to be of general application, potentially interesting for every *male captus* case the ICC is confronted by. Thus, what is sought here are the general principles which may be applicable to *any* case/defendant and not to a specific crime/case/defendant. This means that one cannot look to "the national laws

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[185] *Ibid*., pp. 1073-1074.

[186] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 24 April 2006, para. 16 (explicitly referring to Pellet).

[187] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 25. See also ns. 5 and 8 and accompanying text of Chapter IV.

[188] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 24 April 2006, para. 21.

[189] It must be noted that although the Appeals Chamber dismissed the Prosecutor's application because it found, among other things, 1) that his suggested principle did not exist and 2) that Art. 21, para. 1 (c) of the ICC Statute did not have to be looked at in the first place (see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 32, see also n. 15) it arguably did not attack the Prosecutor's *method* in finding his general principle of law.

[190] Pellet 2002 A, p. 1075.

[191] Verhoeven 2004, p. 10.

of States that would normally exercise jurisdiction over the crime" as a general framework is supposed to be 'crime/case/defendant-neutral'. Of course, when deciding a specific *male captus* case, the ICC judges may perhaps look at "the national laws of States that would normally exercise jurisdiction over the crime" – even if this study is of the opinion that this appears to be in contradiction with the concept of *general* principles[192] – but it goes beyond the scope of this general framework to take this element into account.[193] In addition, even if the ICC judges were to look to the general principles of law derived from "the national laws of States that would normally exercise jurisdiction over the crime",[194] those principles

[192] Saland shows that this provision (like many others in the Statute) was not so much the result of legal logic, but rather of political compromise: "Where views diverged widely was on the direct applicability of national law. Some thought that national law was directly applicable. Others were of the view that national law should only be an indirect source, with the Court deriving common principles from the different legal systems. The debate showed a great majority in favor of the latter approach which was subsequently reflected in sub-paragraph (c), but the former represented a view held strongly by Japan (which later changed position), China, some Arab countries and Israel. During the Rome Conference the issue of the role of national law was settled by a compromise originally proposed by Norway and followed up by Canada and the United States. After the reference to "national laws of legal systems of the world", from which the Court would derive general principles, it was inserted that those national laws would include "as appropriate, the national laws of States that would normally exercise jurisdiction over the crime." There is of course a certain contradiction between the idea of deriving general principles, which indicates that this process could take place before a certain case is adjudicated, and that of looking also to particular national laws of relevance to a certain case; but that price had to be paid in order to reach a compromise." (Saland 1999, pp. 214-215.) *Cf.* also Verhoeven 2004, p. 10: "[T]he exact purpose of that specification ('including …') remains unclear. Apparently, a national law as such is not a legal system; if it were, the reference to the latter would indeed be useless. But how could a national law not be part of a legal system if it does not by itself constitute such a system? This is difficult to understand. In other words, the national laws of the legal systems of the world' necessarily include – at least at first sight – 'the national laws of states that would normally exercise jurisdiction over the crime'. What then is the reason for making a reference to them expressly?"

[193] Furthermore, it has also been argued that these specific words of part (c) of para. 1 of Art. 21 of the ICC Statute only relate to substantive criminal law issues, and not to procedural criminal law issues (such as the ones discussed in this book), see the following words of Klamberg on his very practical 'ICL Database & Commentary' (available at: http://www.iclklamberg.com/Statute.htm): "It is submitted that the first part of Article 21(1)(c) covers principles relating to substantive as well as procedural law, while the latter part of the article, which allows the Court to also apply "the national laws of States that would normally exercise jurisdiction over the crime provided", relates only to national substantive criminal law (such as practice regarding prison sentences) and not procedural rules." See also Pellet 2002 A, p. 1075, n. 138: "This system brings to mind the directions set out in Arts. 24 and 23, respectively, of the Statutes of the ICTY and ICTR, which invite the *ad hoc* Tribunals to 'have recourse to the general practice regarding prison sentences in the courts' of, respectively, former Yugoslavia and Rwanda."

[194] It is to be stressed that if the judges were to do so, they would have to focus on the general principles derived from those national laws and not on the national laws themselves. See Pellet 2002 A, p. 1076: "[T]here is never any question of purely and simply applying the law of any State; for which one may give thanks. As has been pointed out, '[t]he application as such of national law before an international tribunal is very problematic for a variety of reasons, not least the variation and possible inconsistency of relevant domestic norms with regard to the same international situation. Reference to national legal concepts via, for example, general principles of law, on the other hand, is accepted international practice'. This provides a marginal but useful safety net that can help to fill any deficiency in treaty or

still have to be consistent with "this Statute and with international law and internationally recognized norms and standards" (the second part of the italicised words).[195] Furthermore, also here, it seems that those principles can only be applied if the ICC judges are of the opinion that it is appropriate to transplant those principles into the context of the ICC case ("as appropriate"). Hence, the importance of the national legal context is perhaps less significant than this provision suggests. This seems apt: if this were not the case, then a suspect from State A may be confronted by a different legal system than a suspect from State B, even if they are both prosecuted before the same international court. This is clearly to be avoided for reasons of legal certainty and equality.[196] In addition, it would also obstruct the development of international criminal law as a distinct field of law.[197]

With respect to the exact meaning of the words "not inconsistent with this Statute and with international law and internationally recognized norms and standards", they are reminiscent of the previously discussed paragraph 1 (b) ("the principles and rules of international law") and the still-to-discuss paragraph 3 ("internationally recognized human rights") of Article 21 of the ICC Statute. It is hereby submitted that the words "international law and internationally recognized norms and standards" are indeed covered by the words from paragraph 1 (b) and paragraph 3 and therefore will not be examined here separately.[198]

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customary law which may become apparent [original footnote omitted, ChP]." See also McAuliffe deGuzman 1999, p. 443.

[195] McAuliffe deGuzman states on these words: "Provided that the Court conducts broad comparative law analysis in arriving at general principles, this provision should prove relatively unimportant. Such general principles constitute international law and therefore cannot, by definition, be inconsistent with international law. They are also unlikely to conflict with the ICC Statute, which represents a codification of international law. Nonetheless, this qualifier is significant in that it emphasizes that the Statute and norms of international law always take precedence over principles derived from national laws [original footnote omitted, ChP]." (McAuliffe deGuzman 1999, p. 444.) Moreover, Verhoeven quite rightly points out: "Since the general principles referred to in (c) are only applicable in the absence of one of the rules referred to in paragraph 1, (a) (Statute, Elements of Crimes, Rules of Procedure and Evidence) or (b) ('treaties and rules and principles of international law'), it is difficult to understand how they could be contradicting a – by hypothesis – non-existent rule." (Verhoeven 2004, p. 12.)

[196] See also Chin 1998, p. 341: "The principles which the Court applies must be independent of links to the individual case in question. To provide otherwise would be to risk breaching the principle of equality before the law in that different principles might be applied depending on which states would "normally exercise jurisdiction" in that particular case. What the Court should be doing is deriving these general principles from an overall survey of the legal systems of the world without giving particular attention to any one national legal system [original footnote omitted, ChP]."

[197] See Shaw 1998, pp. 68-69: "The dangers of importing into international criminal proceedings, norms of national law, which may vary from instance to instance depending upon the identity of the accused, must be clear. Inconsistency and lack of clarity would become distinct risks and the concept of autonomous international criminal law in practice threatened. International courts are used to dealing with municipal law concepts within the context of general principles of law as means of filling lacunae in the norms of public international law. Using the particular national laws of particular states as a direct source of law for an international criminal court should be avoided [original footnote omitted, ChP]." See also McAuliffe deGuzman 1999, p. 439 (and n. 25 in specific), presenting the arguments of those opposing the importance of national law, and Caracciolo 2000, p. 223.

[198] *Cf.* in that respect also, for example, Human Rights Watch's 'Summary Of The Key Provisions Of The ICC Statute' (from September 1998), available at: http://www.hrw.org/campaigns/icc/docs/icc-

It is now worth looking at whether there exist general principles of law which can be connected to the *male captus* problem. Which *exact* sources must be consulted to find them? The ICC Statute speaks of "general principles of law derived by the Court from national *laws* of legal systems of the world". This seems to point to legislation/statutory law, including perhaps constitutions (as they can be seen as the supreme laws of States). However, in the common law system, legal rules/'the law' are/is not only formed by legislators but to a great extent also by judges. For example, when the Prosecutor in his above-mentioned application reviewed the civil law system, the focus was clearly on statutory law such as national codes of criminal procedure,[199] but in his review of the common law system, he looked at both statutory law (including a constitution)[200] and law formed by case law[201] to find out 'the law' of these legal systems in relation to his claimed principle.[202] Hence, it seems, even though it must be admitted that this matter

statute.htm). Here, it used the words "international human rights" to refer to the last words of (now) Art. 21, para. 1 (c) of the ICC Statute: "Article 33 provides that the law to be applied by the court will be firstly, the statute, elements of crimes and the rules of evidence and procedure, secondly, international law and thirdly, general principles derived from national systems so far as consistent with international human rights." See also Degan 2005, p. 81.

[199] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 24 April 2006, ns. 24-25 and paras. 24-25.

[200] See *ibid*., para. 26.

[201] See *ibid*.

[202] See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, paras. 26 ("To begin the Prosecutor referred the Appeals Chamber to the relevant law finding application in fourteen countries belonging to the Romano-Germanic system of justice (...) exemplifying in his view a practice recognizing competence to the appeals court to review decisions disallowing an appeal. A right to do so is conferred by statutory law, often referred to as a "complaint motion" [original footnotes omitted, ChP].") and 28 ("The citations of the Prosecutor with regard to countries adhering to the common law system of justice (...) are on the one hand confined as in the case of the Romano-Germanic systems of law to statutory provisions allowing for a decision by the hierarchically higher court to grant "special leave" to hear an appeal and on the other hand to the jurisdiction of an hierarchically higher court to grant writs of certiorari and mandamus. These writs derive[d] from England [and] evolved in the context of common law, acknowledging power to the High Court a branch of the Supreme Court to oversee the exercise of judicial functions by inferior courts [original footnotes omitted, ChP]".). See also the following decision of the ICC's Trial Chamber in the *Lubanga Dyilo* case: "[T]he Trial Chamber does not consider that a general principle of law allowing the substantive preparation of witnesses prior to testimony can be derived from national legal systems worldwide, pursuant to Article 21(1)(c) of the Statute. Although this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submissions *with regard to national jurisprudence* did not include any citations from the Romano-Germanic legal system [emphasis added and original footnote omitted, ChP]." (ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial' (Public), ICC-01/04-01/06, 30 November 2007, para. 41.)

remains quite unclear,[203] that case law may be looked at in the common law context.[204] Indeed, one could argue that case law may be looked at in the context of the civil law system as well if a topic is not regulated in legislation and if judges consequently have created 'the law' on this issue themselves. As was shown earlier, the *male captus bene/male detentus* problem seems to be such an area: it appears that how a judge is to decide on a *male captus* is not normally prescribed by legislation; it is often left to the discretion of the judge himself to decide what the consequences of a certain *male captus* on the jurisdiction of the court are.[205] As a consequence, the analysis of decisions from judges can arguably be resorted to in order to determine 'the law' of a certain legal system. (In addition, one could argue that a certain rule in case law may also say something about the written law – if there exists such written law – as most judges will merely apply the existing law instead of creating new law themselves.) As a result, it is submitted that the overviews of Chapter V – which focused on, but which were not restricted to, the common and civil law context[206] – and the principles distilled in Section 2 of

[203] See Cogan 2002, p. 117, n. 30: "It is unclear whether domestic case law can be considered under the Article 21(1)(c) rubric "general principles of law derived by the Court from national laws of legal systems of the world"."

[204] *Cf.* also Bos 1984, p. 270: "Examining continental legal orders or systems, codes are destined to figure prominently on the list of objects for study. In common law countries, case-law will command most of one's attention. Generally speaking, legal doctrine should be looked at closely [original footnote omitted, ChP]."

[205] *Cf.* also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 28: "The power to stay proceedings is *par excellence* a power assumed by the guardians of the judicial process, the judges, to see that the stream of justice flows unpolluted."

[206] Note that cases from States with an Islamic law component were not absent either in these overviews (see, for example, ns. 623 and 630 of Chapter V) but it must be admitted that their influence on the *male captus* discussion does not seem to be grand. In that context, one may also refer to Hamid's article from 2004 which was used in this study as well. The fact that Hamid, in 2004 an associate professor and now a professor of law at the International Islamic University Malaysia, did not refer in his overview of the practice of national courts towards the *male captus* rule to States with an Islamic law component (other than the Israeli courts in *Eichmann*), may also constitute evidence for the assertion that there are not many (known) *male captus* cases from the Islamic law tradition. Be that as it may, it must also be stressed that in order to find a general principle of law, one could argue that the principle must, at least, be found in the common *and* civil law system, arguably still the most important systems of law for the ICC, see also n. 7 and accompanying text from Chapter IV. (See also the hesitant ("perhaps") referral by Pellet to the Islamic law tradition (Pellet 2002 A, pp. 1073-1074: "[I]t is (…) necessary (…) only to ensure, by 'polling', that the norms in question are effectively found in the 'principal legal systems of the world'. These can probably be reduced to a small number in the contemporary world: the family of civil-law countries, the common law, and, perhaps, Islamic law [original footnotes omitted, ChP].") That means that if the overviews of Chapter V, which mainly addressed (but again, were not limited to) the common and civil law context, do not bring about a common principle, one could argue that there *is* no general principle of law which could be applied by the ICC. See in that respect also ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial' (Public), ICC-01/04-01/06, 30 November 2007, para. 41: "[T]he Trial Chamber does not consider that a general principle of law allowing the substantive preparation of

Chapter VII can be used to determine whether there exist general principles related to the *male captus* problem. Hence, here also, the results from the external evaluative framework can be used for the internal evaluative framework.

With respect to the *male captus bene/male detentus* maxim itself, the overviews of Chapter V have clearly shown that one cannot make the general assertion that one of these maxims can be seen as a general principle of law nowadays. After all, many different *male captus* decisions were issued, one leading to a *bene detentus* and another leading to a *male detentus* outcome, depending on the exact circumstances of the case. Hence, even if it could be argued that *male captus bene detentus* was a general principle of law in the old days[207] (but see the French *Jolis* case), it can be maintained that this is not the case in this day and age. Likewise, because decisions are still issued which could be seen as *male captus bene detentus* decisions, it is arguably also very hard to maintain that the *male captus male detentus/ex iniuria ius non oritur* maxim can be seen as a general principle of law.[208]

However, there are certainly elements from the *male captus* case law which were shared by most systems of law, elements which may perhaps – again taking into account the overviews of this study being extensive but not exhaustive – be seen as general principles of law falling under the terminology used in Article 21, paragraph 1 (c) of the ICC Statute.[209] For example, one could think of the fact that most courts confronted by a *male captus* will use their discretion, for instance (in the common law system) under the abuse of process doctrine, to balance all the different elements of the case to decide whether or not the *male captus* is so serious that

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witnesses prior to testimony can be derived from national legal systems worldwide, pursuant to Article 21(1)(c) of the Statute. Although this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system [original footnote omitted, ChP]."

[207] See Borelli 2004, p. 654. (Note only that Borelli is not referring here to Art. 21 of the ICC Statute but to the concept as mentioned in Art. 38 of the ICJ Statute ('general principles of law recognized by civilized nations').)

[208] See also Bugnion 2002, p. 531 (who, like Borelli (see the previous footnote), is also writing on the concept as can be found in Art. 38 of the ICJ Statute): "En doctrine, on doit en premier lieu constater que la maxime *"ex iniuria jus non oritur"* connaît de sérieuses exceptions, aussi bien dans l'ordre interne qu'en droit international, de telle sorte qu'il n'est pas certain qu'on puisse y reconnaître l'un des principes généraux du droit mentionnés à l'article 38, chiffre 1, lettre c, du Statut de la Cour internationale de Justice [original footnote omitted, ChP]." See also *ibid*., p. 531, n. 16: "En ce qui concerne le droit interne, on peut mentionner la maxime *"male captus, bene judicatus"* en vertu de laquelle une cour pénale se déclare compétente pour juger un prévenu, même si ce dernier a été conduit devant elle par des moyens illégaux, par exemple à la suite d'un enlèvement dans un autre État." But see Shaw 2003, p. 98 (writing on general principles of law): "A further principle to be noted is that of *ex injuria jus non oritur*, which posits that facts flowing from wrongful conduct cannot determine the law [original footnote omitted, ChP]." See also n. 182.

[209] It must be noted that to find these elements, one can look at *all* the *male captus* decisions and not only at those where the courts issued a certain decision because they were of the opinion that international law dictated them to do so. That latter point is only important for the customary international law question, which is not being addressed here.

jurisdiction must be refused.[210] In addition, most courts seem to refuse jurisdiction only if their own authorities are involved in the *male captus*. Finally, it appears that quite a number of courts – although it is unclear whether "quite a number" is enough to lead to a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute – would also take into account the seriousness of the crimes with which the victim of the *male captus* is charged in deciding whether or not jurisdiction must be refused.

The above-mentioned elements can be connected with the actual *male captus* problem itself, but it is also worth addressing the related issue of the remedy of release here. Can this remedy, of which it was earlier established that it has customary international law/general international law status, be seen as a general principle of law?

In this context, it may be instructive to refer to the 1993 research from Cherif Bassiouni, who reviewed all the national legal systems having a written constitution (139 in total)[211] in order to see whether certain rights had become general principles (of international law).[212] Of the 11 rights examined,[213] at least two should be

[210] It may be interesting to note that Starr, whose support for an interest-balancing approach was already mentioned in n. 163 of Chapter VII, is of the opinion that such an approach can find support in the concept of equity, a concept which has been qualified as a general principle of law recognised by civilised nations under Art. 38, para. 1 (c) of the ICJ Statute. See Starr 2008, p. 764: "[I]nternational courts could find support for an interest-balancing approach in the tradition of equity, which has often been treated as a source of international law. The case law of the ICJ has increasingly incorporated certain equitable principles, and arbitral tribunals have long done so. One influential early argument for equity as a formal source of international law came from Judge Hudson's separate opinion in the *River Meuse* case [PCIJ, *The Diversion of Water from the Meuse*, 'Judgment', 28 June 1937, *Publications of the Permanent Court of International Justice*, Series A./B., Fascicule No. 70 (pp. 73-80), ChP], in which he argued for application of the "clean hands" principle. Judge Hudson wrote that "principles of equity have long been considered to constitute a part of international law" and, specifically, qualify as "general principles of law recognized by civilized nations" – a source of law under the ICJ Statute. While stating that the *Chorzów Factory* rule [see n. 553 and accompanying text of Chapter III and n. 182 of the present chapter, ChP] is "sound" as a "general principle," he argued that courts devising remedies in particular cases "cannot ignore special circumstances which may call for the consideration of equitable principles." [original footnotes omitted, ChP]" In fact, even the ICC Prosecutor, in its examination of Art. 21 of the ICC Statute and its nexus with Art. 38 of the ICJ Statute, has referred to the same case of the PCIJ, see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 24 April 2006, para. 19: "The jurisprudence stemming from the Permanent Court of International Justice, the International Court of Justice, the Iran-U.S. Mixed Claims Tribunal and the ICTY provides relevant examples of the type of general principles of law identified and applied by international judicial bodies: ○ *The Diversion of Water from the Meuse Case*: Lord Hudson held that "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party." He thus appears to have understood "principles of equity" as being principles common to national legal systems generally and part of international law by virtue of article 38 (…) (3) of the Statute of the PCIJ [original footnotes omitted, ChP]."

[211] See Cherif Bassiouni 1993, p. 244: "This research focuses on all national legal systems which have a written constitution irrespective of their inclusion in any one of the major families of legal systems."

[212] Although Cherif Bassiouni in the end was trying to find "internationally recognized general principles" (*ibid*., p. 239) or "general principles of international law" (*ibid*., p. 243) (he also looked

mentioned here.[214] The first is the more general right to life, liberty and security of the person, "a cornerstone of international human rights law and of civil rights in all countries which recognize the supremacy of the rule of law".[215] Cherif Bassiouni concludes that this right can be found explicitly, "(in whole or in part) sometimes together and sometimes separately",[216] in 51 national constitutions. The more specific right to be free from arbitrary arrest and detention was even found in at least 119 constitutions (including constitutions adhering to the Islamic law system).[217] Of

whether the rights examined were found in ten international instruments), it is fair to say that the part of his study dedicated to the national context can be compared with the present discussion on the national general principles of law. See *ibid*., p. 247: "[T]he identification of principles of criminal justice procedures is done by identifying and then comparing basic criminal procedure rights in various national legal systems in order to determine the existence of "general principles" common to the major legal systems of the world." (It is therefore perhaps a little confusing that he also refers to "general principles" when he arguably means "internationally recognized general principles"/"general principles of international law", see *ibid*., p. 239: "The rights found in the [international] instruments evidence their international recognition, while their counterparts in the national constitutions evidence national legal recognition. The congruence of both indicate the existence of a "general principle"." See also *ibid*., pp. 239-240: "This study uses a purely empirical model of searching for repetition and similarity among the various rights to prove that similar rights evidence the existence of principles common to international law and national law, and that they are binding "general principles of law".")

[213] Those 11 are the following: 1) the right to life, liberty, and security of the person (pp. 254*ff*), 2) the right to recognition before the law and equal protection of the law (pp. 258*ff*), 3) the right to be free from arbitrary arrest and detention (pp. 259*ff*), 4) the right to freedom from torture and cruel, inhuman, and degrading treatment or punishment (pp. 262*ff*), 5) the right to be presumed innocent (pp. 265*ff*), 6) the right to a fair trial and corresponding subrights (such as the right to have procedures established by law) (pp. 267*ff*), 7) the right to assistance of counsel and corresponding subrights (pp. 280*ff*), 8) the right to a speedy trial (pp. 285*ff*), 9) the right to appeal (p. 286), 10) the right to be protected from double jeopardy (pp. 288*ff*) and 11) the right to be protected from *ex post facto* laws (pp. 290*ff*).

[214] Other interesting rights are for example the right to freedom from torture and cruel, inhuman, and degrading treatment or punishment and the right to a fair trial and corresponding subrights (such as the right to have procedures established by law).

[215] Cherif Bassiouni 1993, p. 254. This crucial right can at least be traced back to Art. 39 of the 1215 Magna Carta: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any other way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." (Howard 1998, p. 45.)

[216] Cherif Bassiouni 1993, p. 255.

[217] See *ibid*., p. 261. See also n. 239 of Chapter V of this book, where the following view of the US Court of Appeals for the Ninth Circuit in the context of the civil case of Alvarez-Machain was presented: "Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions." (US Court of Appeals, Ninth Circuit, *Alvarez-Machain v. United States et al.* (No. 99-56762) and *Alvarez-Machain v. Sosa et al.* (No. 99-56880), 3 June 2003 (331 F.3d 604), p. 620.) Not very surprisingly, the Court of Appeals also referred here to the study of Cherif Bassiouni. The Supreme Court in the same case agreed that Cherif Bassiouni's study showed "that many nations recognize a norm against arbitrary detention" (US Supreme Court, *Sosa v. Alvarez-Machain et al.* (No. 03-339) and *United States v. Alvarez-Machain et al.* (No. 03-485), 29 June 2004 (542 US 692), p. 736, n. 27) but it was also of the opinion that this was to no avail to Alvarez-Machain, who, it is recalled, was arguing that there exists, in customary international law, "a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." (*Ibid*., p. 736.) This was, according to the Supreme Court, because the consensus of the States examined by Bassiouni "is at a high level of generality." (*Ibid*., p. 736, n. 27.)

all 11 rights examined, none is acknowledged more frequently.[218] Hence, one can safely conclude that the right to liberty and security/the right not to be arrested or detained arbitrarily can be seen as a general principle of law.[219]

However, can the more specific remedy of release (in contrast to the more general right to liberty and security or the right not to be arrested or detained arbitrarily) also be seen as a general principle of law? Although Cherif Bassiouni's survey does not explicitly say so, one can argue that this is indeed the case. To back this assertion, it is arguably not necessary to examine all the constitutions reviewed by Cherif Bassiouni. As was already shown in Chapter III and as will again be shown *infra* when discussing paragraph 3 of Article 21 of the ICC Statute, the ICCPR, in which the right to liberty and security, including the remedy of release, can be found, has many (165) States Parties. The fact that a State has joined an international treaty means that the content of that treaty is part of that State's law, whether that State adheres to a dualistic system of law (by which international law must be implemented in national laws first) or a monistic system of law (by which international is directly applicable in the national State).

A study by Maki shows that the remedy of release in the case of an unlawful (arrest or) detention was accepted by many States even before the ICCPR was drafted. In her article 'General Principles of Human Rights Law Recognized by All Nations: Freedom From Arbitrary Arrest and Detention', she refers to the previously mentioned[220] 1964 UN Commission on Human Rights' 'Study of the Right to Everyone to be Free from Arbitrary Arrest, Detention and Exile'.[221] Maki explains that the Commission first examined various national arrest and detention procedures and then prepared the so-called "Draft Articles" on the right to be free from arbitrary arrest and detention.[222]

> The Draft Articles were a compilation of selected laws from various countries, which rendered the fullest protection of the right to liberty and security of person in regard to arrest and detention. The Draft Articles represent the highest standards for individual protection as determined by the Commission; they represent those standards to which laws and practice *should* conform [emphasis in original, ChP].[223]

These Draft Articles were then sent to UN Member States for comment. "The comments received were individual state assessments of the Draft Articles *vis-à-vis*

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[218] See Cherif Bassiouni 1993, p. 292.
[219] *Cf.* also Rayfuse 1993, pp. 890-891 (who is also claiming that these rights have customary international law status, see n. 197 and accompanying text of Chapter III): "Among the most well-recognised and documented fundamental human rights are the right to liberty and security of the person and the right to freedom from arbitrary arrest and detention. (…) These rights are (…) guaranteed by the constitutions of many nations".
[220] See ns. 216 and 583 of Chapter III.
[221] Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1 (1964).
[222] See Maki 1980, p. 284.
[223] *Ibid*., p. 285.

each state's own existing legal system."[224] It turned out that the 48 governments submitting comments – and "representing a wide diversity of legal systems"[225] – were "in surprising agreement"[226] with these Draft Articles. Maki argues that

> [a] careful examination of the comments to the Draft Articles indicates that certain provisions of the Draft Articles can be summarized into principles upon which all commenting countries can agree. (…) The summaries are meant to include only those principles of the Draft Articles which are totally acceptable to the countries submitting comments.[227]

Alongside the main summarised principle that "no one shall be subjected to arbitrary arrest or detention",[228] the second summarised principle reads: "Anyone who is arrested or detained shall be entitled to initiate proceedings before an authority in order to challenge the legality of his arrest or detention and obtain his release from that authority without delay if it is unlawful."[229] Maki notes: "It is significant that none of the countries submitting comments to the Draft Articles suggested that the result of the proceeding be anything but the detainee's release, if the arrest or detention is unlawful."[230] According to Maki, additional information on States' municipal laws and procedures regarding this topic, to be found in the 1950 *Yearbook on Human Rights*[231] "supports the assertion that the summarized principles are general principles of law recognized by all nations".[232]

Hence, one could conclude that not only the general right to liberty and security/the right not to be arrested or detained arbitrarily but also its more specific *habeas corpus* provision (including release in the case of an unlawful (arrest or) detention) can be seen as a general principle of law. This is also confirmed by Rodley. After having concluded that there is strong evidence that the following two elements, namely "(a) the right in criminal cases of a detained person to be brought promptly before a judge and (b) the right of anyone deprived of liberty to challenge the lawfulness of detention and to be released if the detention is found to be unlawful",[233] express a rule of general international law,[234] he turns to the national level, explaining:

> While (...) the rights referred to here are frequently not respected, yet there are few legal systems that do not have provisions reflecting them in their ordinary law. This suggests that, rather than binding only the parties to the relevant instruments, the

[224] *Ibid*.
[225] *Ibid*., pp. 285-286.
[226] *Ibid*., p. 286.
[227] *Ibid*.
[228] *Ibid*.
[229] *Ibid*., p. 295.
[230] *Ibid*.
[231] See *ibid*., p. 300.
[232] *Ibid*., p. 301.
[233] Rodley 1999, p. 340. See also n. 416 of Chapter III.
[234] See *ibid*.

> principles have universal application, reflecting as they appear to do 'general principles of law recognized by civilized nations' (...) [original footnote omitted, ChP].[235]

Finally, reference should be made to the following words from a very recent report, which, even though it is limited in scope,[236] confirms the importance of the remedy of release in the case of an unlawful (arrest and) detention, although it is also true that special procedures may apply to high level suspects such as alleged terrorists:[237]

> Lawful detention (…) requires not only a procedure prescribed by law and that everyone who is arrested is informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him, but as an extra safeguard that everyone arrested or detained is entitled to take proceedings by which the lawfulness of such deprivation of liberty will be decided speedily by a court and his release ordered if the detention is not lawful (*habeas corpus*). Although countries report that special conditions and procedures apply with regard to special categories of detainees (notably organised criminals and terrorists), (…) by and large under normal circumstances they all comply with these requirements.[238]

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[235] *Ibid*., pp. 340-341.

[236] See Brants 2009, p. 2: "The AIDC [Académie Internationale de Droit Comparé/International Academy of Comparative Law, ChP] reporters received answers to their questionnaire from fourteen countries, in alphabetical order: the Republic of Croatia, the Czech Republic, England & Wales, Finland, France, Germany, the Netherlands, Romania, South Africa, Spain, Switzerland, Taiwan, the United States of America and Venezuela [original footnote omitted, ChP]." With respect to Switzerland, Brants explains (at *ibid*., p. 2, n. 5): "Partly because of the unique situation in Switzerland, where profound reforms of criminal process are taking place, the Swiss reporter was unable to answer the questionnaire in a form that made comparison feasible. For this reason, the reporters have elected to omit references to Switzerland from the general report as reproduced here." See also *ibid*., p. 5 (writing on both the AIDC report and a report from AIDP, the Association Internationale de Droit Pénal/International Association of Penal Law, a report which examined 17 States, namely Argentina, Austria, Belgium, Brazil, Colombia, Croatia, Finland, Germany, Hungary, Italy, the Netherlands, Poland, Romania, Spain, Turkey, the United Kingdom and the United States): "In conclusion, what do these two general reports have to tell us about the state of criminal justice in the world in what must surely be termed a troubled global era? As a prior remark, it should be noted that it is difficult to generalise about the world, with ten of the fourteen national reports for the AIDC and thirteen of the seventeen for the AIDP being from European countries. South American and Asian countries are sorely underrepresented, and the continent of Africa not at all (with the exception of South Africa, which is hardly the most representative of African nations)."

[237] This is elaborated in more detail in the AIDP report (see the previous footnote), under the question whether the legal system of the State in question allows for limiting the right to *habeas corpus* with respect to serious offences, see Vervaele 2009, p. 89: "[I]n all reporting countries, except in the US, the right to *habeas corpus* applies to all offences, including serious offences and terrorist offences. No special rules of proactive detention have been elaborated, but some countries do report administrative forms of liberty-limiting or liberty-depriving measures. What has changed in some reporting countries is the moment *ab quo* when the *habeas corpus* procedure can be triggered, in other words the delay between the police detention and the subsequent judicial review. (…) What has also changed is the maximum duration of pre-trial detention."

[238] Brants and Franken 2009, p. 31.

Concluding this subsection, one can argue that if the ICC judges are of the opinion that parts (a) and (b) of paragraph 1 of Article 21 of the ICC Statute have brought no relief, then one may turn to part (c) and that following elements may perhaps be applied by the ICC judges as general principles of law, namely the fact that discretion can be used to decide whether or not the *male captus* is so serious that jurisdiction must be refused, that jurisdiction will normally only be refused if the prosecuting forum's own authorities are involved in the *male captus* and that unlawfully arrested/detained persons must be released. Furthermore (but it is less clear whether this may also constitute a principle), in the balancing exercise, the seriousness of the crimes with which the victim of the *male captus* is charged can be taken into account.

However, also with respect to part (c) (*cf.* the words "where appropriate" in the context of part (b)), the ICC judges will probably only use these solutions from the national level if they believe that it is appropriate to transplant these solutions into the specific context of the ICC, recall again the words of Pellet: "[T]he general principles of law require a triple mental operation: a comparison between national systems, the search for common 'principles', *and their transposition to the international sphere* [emphasis added, ChP]".[239] That could mean that the ICC judges may follow the principles which can be related to the proper *male captus* issue mentioned above but may be more reluctant with respect to the problematic remedy of release in the case of an unlawful arrest/detention.

3 ARTICLE 21, PARAGRAPH 2

This paragraph states that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions". The word "may" shows that other ICC decisions do not *need* to be followed by the ICC judges examining a *male captus* situation and hence cannot be part of an internal evaluative framework which is aimed at finding out whether certain ICC decisions are in conformity with what the law of the ICC *prescribes* the judges to decide. After all, and in contrast to the first paragraph ("[t]he Court *shall* apply [emphasis added, ChP]") and the still-to-discuss third paragraph ("[t]he application and interpretation of law pursuant to this article *must* be consistent with [emphasis added, ChP]"), the second paragraph is non-obligatory in nature. If the ICC is not obliged to follow its own decisions, if there is no *stare decisis*, a view stating that although a certain ICC decision has outcome A, but ought to have outcome B (because the ICC, in another decision, reached that outcome B) is, of course, not convincing. In other words, one cannot assert, on the basis that the ICC previously reached outcome B, that the ICC must now also follow that conclusion if the Court is not obliged to follow that decision. This is clearly different from paragraph 1, discussed above, and paragraph 3, which will be addressed in the following section: as their language is mandatory, their content can

[239] Pellet 2002 A, p. 1073. See also n. 183 and accompanying text.

easily be used in an internal evaluative framework to find out whether a certain ICC decision is in conformity with those paragraphs.[240]

4 ARTICLE 21, PARAGRAPH 3

The third and final paragraph of this crucial article in the ICC Statute reads:

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3,[[241]] age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

It can be argued that paragraph 3, in principle, is not a source of law as such, but a provision stating that the application and interpretation of law from the first two paragraphs must be consistent with the principle of non-discrimination (which will not be further discussed here) and internationally recognised human rights.[242] In that

[240] Even though the ICC judges do not need to follow previous ICC case law, one can imagine that judges will often refer to decisions of other Chambers. Indeed, this has already happened. (See Bitti 2009, pp. 292-293.) In that context, one can also wonder whether the case law of the Appeals Chamber, in practice, will be considered by other Chambers to be of special importance. (See also Degan 2005, p. 82.) This is not the case (which is consistent with the Statute), but Bitti also rightly shows that this may cause some problems in the future: "[T]he case-law of the Appeals Chamber does not seem to be placed on a higher level than the case-law of other Chambers of the Court, which seems to be in line with the wording of Article 21 (2) which refers to the Court and does not give a particular weight to the jurisprudence of the Appeals Chamber. This will certainly produce some instability in the jurisprudence of the ICC for the next decades as Chambers are not bound by their previous case law and the modification of their composition, taking into consideration the fact that judges shall hold office for a term of nine years and are not eligible for re-election, may provoke important changes in the jurisprudence in all Chambers of the ICC, including the Appeals Chamber [original footnote omitted, ChP]."

[241] This provision reads: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

[242] See, for example, Edwards 2001, p. 369: "Recognizing that international law is dynamic and always evolving, the Rome Statute drafters noted the impracticality of precisely delineating within the Rome Statute or its collateral instruments every principle and rule of law to be used by the Court. They arguably saw a need for flexibility, while incorporating precision and certainty in identifying the applicable law to be used. Therefore, a balance was struck between a full exposition and a flexible approach, resulting in a list of sources of law, identified in articles 21(1) and 21(2), as constrained by article 21(3) in their interpretation and application [original footnotes omitted, ChP]." Note, however, the following words of Bitti: "The most important source of law (in addition to the Statute and Rules of Procedure and Evidence), is likely to be Article 21 (3) of the Statute, i. e., "internationally recognized human rights"." (Bitti 2009, p. 300.) See also *ibid.*, p. 304: "[I]nternationally recognized human rights may constitute an additional source of law." Nevertheless, even though these words can be interpreted as meaning that Bitti is of the opinion that para. 1 and para. 3 present the same kinds of sources, it will be explained in n. 253 that Bitti believes that there is certainly an important difference here, namely in that para. 1 enumerates the *formal* sources of law, whereas para. 3 provides a *material* source of law, *cf.* also the still-to-discuss vision of Pellet (see n. 253 and accompanying text), explaining the difference between sources and norms.

respect, it 'only' colours the application and interpretation of law from the first two paragraphs and hence in principle does not 'produce' new law itself.[243] Nevertheless, such a consistency test may go a relatively long way and may, although strictly speaking perhaps not as such,[244] but nevertheless *de facto*, function as a provision allowing the entry of new law into the ICC context.[245] This can be explained as follows: when one is looking for a provision/rule under paragraph 1 of Article 21 of the ICC Statute, one should not only take into account the most specific provision of the ICC Statute relevant to the case at bar, but also the more general provisions which are always applicable to any ICC case. If those generally formulated provisions were also subject to a consistency test with internationally

[243] See Edwards 2001, p. 370: "When the Court resolves a legal issue, it must identify the "applicable law" from the article 21 sources list before determining the "consistency question". See also the following and already-mentioned (see n. 26) quotation from the ICC decision on 'witness proofing': "Unlike the first component of the definition of the practice of witness proofing advanced by the Prosecution, the Chamber observes that the goal and measures encompassed by the second component of such a definition are not covered by any provision of the Statute, the Rules or the Regulations. Therefore, the Chamber, *prior to undertaking any analysis under article 21 (3) of the Statute, shall first analyse whether this second component is embraced by any provision, rule or principle which could be considered as part of the applicable law* of the Court pursuant to article 21 (1) (b) and (c) of the Statute [emphasis added, ChP]." (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (Public Document), ICC-01/04-01/06, 8 November 2006, para. 28.) See also *ibid*., para. 10: "[T]he Chamber recalls the general principle of interpretation set out in article 21 (3) of the Statute, according to which "the application and the interpretation of law pursuant to this article must be consistent with internationally recognized human rights". In this regard, the Chamber considers that *prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand* [emphasis added, ChP]."

[244] See Vasiliev 2009, pp. 218-219: "The provision does not serve as a regular channel for the direct import of 'external' human rights standards, but as a principle guiding the interpretation and application of the ICC's own legal framework. Indeed, in exceptional circumstances, the Article could be used for interpreting and applying that framework in a manner that comes close to devising a new procedural remedy. However, seeing it as an extraordinary trouble-shooting device would not be fully accurate. Even where not explicitly foreseen in the Statute or Rules, the said remedy will certainly lie in the broad competences of the judges and/or the relevant rights of the participants (for example, the duty to ensure and the right to receive a fair trial). Thus, the 'revelation' of a potential remedy by the judges would not be gap-filling by way of direct application of the standards specified in Article 21(3), but rather a logical corollary of the interpretation and application of the ICC in light of those standards [original footnotes omitted, ChP]."

[245] *Cf.* also Arsanjani 1999, p. 29: "While the original intent behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters." See also Sluiter 2009, p. 464: "[T]he potential of Article 21 (3) is enormous, especially from a defence perspective. The provision is a clear rejection of 'black letter lawyering', and entails that the effect and importance of written law is quite relative." However, notwithstanding this potential, Sluiter is pessimistic about the actual effect of Art. 21, para. 3 of the ICC Statute in the future, see *ibid*., pp. 466-467: "One wonders whether Article 21 (3) may have any effect in filling gaps within the Statute; in other words, could it serve as a basis for some sort of law-making by the judiciary? (…) As in a number of areas, (…) the Judges have already turned the Statute into something which it is not and which i[t] i[s] not intended to be, I am therefore not confident that Article 21 (3) will in practice have the effect, which it should have bearing in mind its ordinary meaning and its object and purpose."

recognised human rights, new law may indeed enter into the ICC context (although some will say that this is not new law, but the existing law, interpreted and applied consistently with internationally recognised human rights). One could hereby think, for example, of Article 1 of the ICC Statute which states:

> An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

It could be argued that this entails that whenever the ICC exercises its jurisdiction, whenever it is involved in a case, that involvement, that exercise of jurisdiction, must be applied and interpreted in conformity with those internationally recognised human rights which are relevant to the ICC's functioning. That exercise of jurisdiction/involvement, of course, includes the proceedings in the courtroom, when the ICC is actually trying the case, but it would also include the exercise of jurisdiction/involvement in the pre-trial phase[246] and hence also, for example, the actions of third parties when these parties make arrests/detentions/surrenders at the request of the ICC, even though Article 21, paragraph 3 of the ICC Statute seems to apply to the ICC only.[247] Before continuing on this topic, it should be remarked that this is the path the ICC should follow *in any case*: ensuring that whenever the ICC is involved in a case (including the actions of third parties working at the behest of the ICC), that involvement is consistent with internationally recognised human rights. However, it can be argued that it would even be fairer for the ICC to take its responsibility for violations in the context of its case more generally. Although arrests/detentions made at the behest of the ICC will cover a large part of the ICC's arrest/detention 'stock', the ICC may always be confronted by *male captus* claims which go beyond such situations (*cf.* abduction by private individuals). It would be highly just if the ICC, as the ultimate prosecuting forum, would also repair those violations, even if it was not involved in the *male captus*.

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[246] See *ibid*., p. 465: "The protection of Article 21 (3), like the protection of the right to a fair trial, should extend to the pre-trial phase. Any other approach deprives individuals of essential protection and may make the Court the beneficiary of activities it would not wish to be associated with." See also *ibid*., pp. 472 and 474 (where he connects Art. 21, para. 3 of the ICC Statute with Art. 59 of the ICC Statute). On the last page, he writes, for example, that "[t]he proposed interpretation is therefore that the reference to 'rights' in Article 59 (2) be interpreted independently from the national law; what matters are internationally protected rights of the arrested person."

[247] See Edwards 2001, p. 348: "The human rights obligations imposed by article 21(3) extend to all law to be applied and interpreted by the ICC, and to all aspects of the operation of the Court, including acts of the Prosecutor, the judges, and the Assembly of States Parties, and, quite probably, to acts of States parties themselves, IGOs [inter-governmental organisations, ChP] and others who cooperate with the ICC [original footnotes omitted, ChP]." See also *ibid*., n. 93: "Though article 21(3) arguably may not directly apply to States Parties, IGOs, or others who might engage in cooperation with the ICC, States Parties and other entities that do cooperate may be required to comply with norms contained in article 21(3)." *Cf.* finally Hafner and Binder 2004, p. 173.

Returning to the internationally recognised human rights which are relevant to the ICC's functioning in the context of the pre-trial phase, one could think here, for example, of a broad concept of the right to a fair trial, a right which should, as will be shown *infra*, definitely be seen as an internationally recognised human right.[248] Thus, one may argue that the complete exercise of the ICC's jurisdiction, the entire proceedings must be in conformity with those internationally recognised human rights which are relevant to the ICC, even if these rights are not explicitly mentioned in the ICC Statute. See also in that respect the following words of Edwards:

> Perhaps the most compelling argument favoring the existence of a search and seizure privacy right under the Rome Statute [which does not mention this right, ChP] is that the right is an "internationally recognized human right," which must be enforced by the Court because Rome Statute, article 21(3) mandates the Court to apply all law "consistent with internationally recognized human rights." Thus, all "internationally recognized human rights" relevant to the Court's functioning must be enforced. Since the search and seizure right to privacy is relevant to the right to a fair trial, such privacy rights must be enforced [original footnote omitted, ChP].[249]

In such cases, no conflict will arise as there is no original provision from the ICC Statute which can be viewed as being in contrast with the newly applied human right. However, what happens if there *does* exist a provision in the Statute, but that provision is viewed as being incompatible with internationally recognised human rights? Arsanjani writes on this subject:

> While the original intent behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all three categories in Article 21. For instance, if the court decides that certain provisions of the Elements of Crimes or the Rules of Procedure and Evidence are not compatible with the standards set out

[248] Note that the ICC Statute does not contain an explicit provision entitled 'the right to a fair trial', but many aspects of this right are regulated in several provisions of the ICC Statute. One could hereby think, for instance, of Art. 64, para. 2 ("The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses"), Art. 67 (entitled 'Rights of the accused') and Art. 69, para. 4 ("The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence") of the ICC Statute.

[249] Edwards 2001, p. 372. See also Gallant 1999, p. 707 (also writing on this right): "[T]he Court must apply all internationally recognized human rights relevant to its activities [original footnote omitted, ChP]." See also Hafner and Binder 2004, p. 172: "[A]ny discriminatory application of the Statute would be prevented by paragraph 3. Furthermore, the measures designed to implement the duties arising from the Statute have to be taken with due respect for human rights. In other words, an arrest or a house search of a suspect will have to be guided by the relevant human rights standards (i.e. the right to privacy), even if these are not explicitly mentioned in the Statute [original footnote omitted, ChP]."

> in paragraph 3 of Article 21, it would not have to apply them. The provision also lays down special rules of interpretation for Article 21.[250]

Although Arsanjani in 1999 was still uncertain about this paragraph's exact scope (see the words "could" in the above-mentioned quotation), Pellet (in 2002) is more confident. After having referred to part of the above-mentioned quotation by Arsanjani, Pellet states: "Nothing then, should prevent the Court from refusing to apply an Element of Crimes, a Rule of Procedure and Evidence, or even a provision of its Statute, if its application were considered to infringe an 'internationally recognized human right'."[251] This is because the words of paragraph 3 indicate that "these 'internationally recognized human rights' take precedence over all other applicable rules [original footnote omitted, ChP]."[252] Pellet explains in that context that the

> formal hierarchy created between the *sources* of applicable law is overlaid by another substantial hierarchy between the applicable *norms*: some are superior to others, not by reason of their formal source, but due to their subject-matter or their veritable substance [emphasis in original, ChP].[253]

In that sense, the previously explained correlation between the different parts of paragraph 1 of Article 21 of the ICC Statute should be re-assessed. (This was also the reason not to discuss paragraph 3 in the context of paragraph 1 for it would unnecessarily complicate matters at that stage.) After all, part (a) of paragraph 1 of Article 21 of the ICC Statute must be interpreted and applied in accordance with the internationally recognised human rights of paragraph 3. That means that one would have to take into account this third paragraph before one could conclude whether or not part (a) of paragraph 1 leaves a legal lacuna which must be filled by parts (b) and (c).[254] In other words, one would have to take one additional step, the

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[250] Arsanjani 1999, p. 29.

[251] Pellet 2002 A, p. 1080.

[252] *Ibid*. See also Sluiter 2002 C, p. 46.

[253] Pellet 2002 A, p. 1077. See also Vasiliev 2009, pp. 214-215: "Norms falling under internationally recognized human rights and the non-discrimination principle remain valid at all stages of the law determination process under Article 21(1), no matter what source they are derived from. These norms defy the 'hierarchy of sources', since their applicability is not dependent on the category of sources indicated in Article 21(1)(a) to (c). As vigilant 'watchdogs' entrusted with a task to ensure order within the boundaries of the ICC legal regime, the standards specified in Article 21(3) prevail, by virtue of higher normative force, over any other applicable norm of the ICC law, by shaping the manner in which it must be interpreted and applied. In this sense, the said standards are 'extra-hierarchical' [original footnotes omitted, ChP]." *Cf.* also Bitti, referring to Pellet, who is of the opinion that para. 3 constitutes a material source of law (as opposed to the formal sources of law as can be found in para. 1). See Bitti 2009, pp. 287-288. See also *ibid*., pp. 293-294. (See also n. 242.)

[254] See also the following words from the *Al Bashir* case: "[T]he consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on*

consistency test of paragraph 3, in examining part (a) of paragraph 1. However, that also means that if there are certain rules of customary international law (part (b)) or general principles of law (part (c)) which can be seen as representing internationally recognised human rights (paragraph 3), these rules already become relevant in examining the law of part (a), namely as part of the consistency test of paragraph 3 with which part (a) must comply. Put another way, one can still be of the opinion that part (b) can only be looked to if part (a) has left a legal lacuna, and that part (c) will only be examined if parts (a) and (b) have brought no relief, but this correlation is only valid *to the extent that* parts (b) and (c) do not represent internationally recognised human rights. If they do, they become part of paragraph 3 and thus of the examination of part (a) of paragraph 1. In the same vein, and returning to the words of Verhoeven: if his words must be interpreted to mean that parts (a) and (b) of paragraph 1 of Article 21 of the ICC Statute ought to be considered together and that part (b) will supersede part (a) in the case of conflict, unless it was the specific intention of the drafters that part (a) be inconsistent with part (b), this position may still be valid, but *not* if the norms of part (b) can be seen as internationally recognised human rights. If that were the case, then part (b), 'coloured' by paragraph 3, would take precedence, even if this would go against the intention of the drafters.[255]

Hafner and Binder, however, disagree with Pellet's view of the 'super-legality'[256] of internationally recognised human rights.[257] They present seven considerations which, according to them, indicate the superiority of the Statute over

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the Law of the (…) *Treaties* and article 21(3) of the Statute [original footnote omitted, ChP]." (ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *In the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' (Public Redacted Version), ICC-02/05-01/09, 4 March 2009, para. 44.) See also *ibid*., para. 126.

[255] *Cf.* on this issue also Vasiliev 2009, p. 214 (following the view of Pellet): "In case of a – at this stage admittedly hypothetical – collision of a statutory norm with a rule of customary law or a general principle of law, the norm originating from the Statute would not prevail over such a rule or principle automatically, solely on the basis of its origin in the Statute. Consideration has to be given to the normative weight of the provision derived from the source other than the Statute, as it may hold a higher position in the normative hierarchy. Specifically in the ICC context, a hallmark of the norms occupying a supreme position in such hierarchy is their subject-matter: more precisely, the pertinence to internationally recognized human rights and non-discrimination principle according to Article 21(3). This Article requires the Court to apply and interpret the law flowing from the sources listed in Article 21(1)(a) to (c) in the manner consistent with these standards [original footnote omitted, ChP]."

[256] See Pellet 2002 A, pp. 1079-1081.

[257] See also Gallant 1999, pp. 702-703: "[I]nternationally recognized human rights are adopted as part of the ICC Statute, and are superior to Rules of Procedure and Evidence adopted under the Statute. They are not stated as superior to the ICC Statute itself. (...) Thus, should there be an explicit inconsistency between a provision of the ICC Statute and an internationally recognized human right, there is no automatic preference for the right." *Cf.* also Verhoeven 2004, pp. 14-15, arguing the same, but then with respect to the substantive provisions of the ICC Statute, see *ibid*., p. 15: "[I]t could probably be contrary to the very purpose of the Rome statute to look at its – at least substantial as opposed to procedural or organizational – criminal provisions as not being of a 'general' nature. If this is true, there cannot be an 'automatic' primacy of human rights over those provisions, both having a *jus cogens* character."

paragraph 3.[258] Although Hafner and Binder, as well as Pellet are of the opinion that this discussion is mainly an academic one as the Statute will not easily contradict internationally recognised human rights,[259] the previous pages have clarified that this may not always be that easy to determine.

The remedy of release in the case of an unlawful arrest/detention constitutes, of course, an excellent example in that respect. It was argued *supra* that it is not clear that the drafters of the Statute intentionally deleted the remedy of release in the case of an unlawful arrest/detention from the general right to liberty and security/the right not to be arrested or detained arbitrarily. Because of that, it was submitted, part (b) (which includes customary international law and hence the remedy of release) could be applied by the ICC judges, "where appropriate", because part (a) left a legal lacuna. It was also argued that the remedy of release could be applied by the judges if they were of the opinion that parts (a) and (b) had failed to provide an answer to the problem. In that case, the remedy of release could be applied as a general principle of law under part (c) (if the judges are of the opinion that this domestic principle can be transplanted into the context of the ICC).

The information on paragraph 3 has changed this position, however. After all, in interpreting part (a) of paragraph 1 (the right to liberty and security without the remedy of release in the case of an unlawful arrest/detention), the ICC judges must take into account paragraph 3. Assuming for now that the remedy of release can be seen as (part of) an internationally recognised human right (which, given its customary international law/general international law status, appears to be the case, although this will be examined in more detail *infra*), this entails that the right to liberty and security, as can be found in the ICC Statute, must be interpreted as encompassing the remedy of release in the case of an unlawful arrest/detention. Although this may seem to engender the same outcome as that of the position discussed earlier (where it was said that the remedy of release could be applied as a rule of customary international law or as a general principle of law) this is arguably not the case. After all, the remedy of release from part (b) could only be applied by the judges "where appropriate", if the judges were of the opinion that this solution could be transplanted into the specific context of the ICC. Likewise, the remedy of release as a general principle of law had to be transposed in the international sphere, to use the words of Pellet. That may mean that judges may modify a certain principle from the national level so that it can 'fit' the specific ICC context. Hence, in these two situations, the judges have some freedom of movement with respect to the rules of customary international law/general principles of law. However, that does not seem to be the case with respect to paragraph 3. The law to be applied and interpreted *must* be in accordance with paragraph 3.[260]

[258] See Hafner and Binder 2004, pp. 173*ff*.
[259] See *ibid*., p. 173, n. 42 and Pellet 2002 A, p. 1082.
[260] *Cf*. also Sluiter 2009, p. 463: "The provision (…) posits the view that 'internationally recognised human rights' are applicable fully, and thus need not be 're-interpreted' in light of the unique mandate and context of the ICC. More concretely, the mandatory and specific content of Article 21 (3) of the Statute appears to prevent Judges from adjusting the content of human rights law to the unique ICC-context".

That would mean that the remedy of release, in principle, would *have* to be applied. Not taking into account for the moment the problems which can be related to this remedy and how these problems are to be solved (this will be discussed *infra*), this outcome is perhaps not so problematic because this study argued that it was not clearly established that the drafters of the ICC Statute intentionally wanted to delete this remedy. However, matters may turn out to be more complicated if one is of the opinion, on the basis of the information presented in the previous pages, that it *was* in fact clearly the intention of the drafters to delete this remedy. In that case, one must ascertain which solution takes precedence here: the intention of the drafters (no remedy of release) or the remedy of release pursuant to paragraph 3 (again assuming for now that this remedy can be seen as (part of) an internationally recognised human right). In that case, one may either follow Pellet (whose approach would lead to the remedy of release) or Hafner and Binder (whose approach would not lead to the remedy of release).[261]

Returning now to the seven considerations presented by Hafner and Binder, the first is that "[t]he literal interpretation of Article 21(3) can be seen as expressing the primacy of the ICC Statute".[262] Although it is true that paragraph 3 of Article 21 of the ICC Statute does not explicitly mention the superiority of the human rights, it *does* state that the interpretation and application of the ICC law (including the Statute) must be consistent with internationally recognised human rights, thereby apparently granting a higher status to human rights. The second consideration has to do with the formulation and the structure of Article 21 of the ICC Statute. Hafner and Binder state:

> If the drafters had wanted to introduce a super-legality of human rights, they would have had to draft Article 21 in a different way. For instance, the drafters could have made the consistency of the applicable law with human rights a precondition for its application by the Court. (i.e. with the formulation: "subject to its consistency with human rights, the Court shall apply […]"). Furthermore, if a super-legality of human rights had been intended, it would have been more sensible to place the duty to comply with them at the beginning of Article 21 rather than simply adding a paragraph 3.[263]

This is not very convincing. It may be true that the phrase should have been formulated differently and placed at the beginning of Article 21 of the ICC Statute if a 'super-legality of human rights' was intended (although one could even doubt that),[264] but this in no way prejudices the above-mentioned meaning of the present

[261] According to Sluiter, practice is not clear yet, although the provision does not seem to be used as a corrective tool for the ICC Statute: "Looking at the practice of the ICC, one has difficulty assessing the effect of Article 21 (3) of the Statute. In my view, it tends to be used to confirm provisions and practice in place; any corrective force cannot (yet?) be discerned." (*Ibid*., p. 464.)
[262] Hafner and Binder 2004, p. 174.
[263] *Ibid*.
[264] It is arguably not that strange to first explain what the law is and then to explain how this law should be interpreted and applied.

phrase, which is formulated as it is and which is placed at the end of Article 21 of the ICC Statute.

The third consideration explains that in several cases in the ICC Statute, such as Article 69, paragraph 7[265] and Article 17, paragraph 2,[266]

> international human rights standards are directly referred to in the Statute on an equal footing and have the same status in the hierarchy of norms as the Statute itself. In fact, these provisions would not be necessary, if the superiority of human rights were established by Article 21(3).[267]

Although this is undoubtedly true, it may be that Hafner and Binder have perhaps too much faith in the internal consistency of the Statute, a treaty whose different parts were drafted by different working groups. It may very well be that these inconsistencies are only drafting inaccuracies which do not bring with them the meaning argued by Hafner and Binder.[268]

The fourth, and more convincing, consideration argues that "the ICC Statute establishes an extensive and well considered set of rules and mechanisms to achieve its object and purpose"[269] and that "[i]f one allows a notion as imprecise as "internationally recognized human rights" to trump the Statute, the sophisticated mechanism of the Statute seems at risk [original footnote omitted, ChP]".[270] It is indeed true that the ICC Statute is quite sophisticated – note, however, the possible drafting inaccuracies mentioned above – and that "the entire Statute demonstrates an effort to restrain the margin of appreciation of the judges to the greatest possible extent [original footnote omitted, ChP]".[271] Nevertheless, it must also have been clear to the drafters that they could not foresee every detail by which the ICC judges

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[265] "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

[266] "In order to determine unwillingness [of a State to carry out the investigation or prosecution, ChP] in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether …".

[267] Hafner and Binder 2004, p. 175.

[268] See also Pellet 2002 A, p. 1083: "[T]he Statute bears the mark of the rush with which it was drafted and the process of compromise, which are ominous for its credibility. Some of the formulae finally retained are open to technical criticism, or incoherent. Others are useless." See also n. 192, where Saland explained that a certain provision may not have been the result of legal logic, but rather of political compromise. See further Edwards 2001, p. 343, n. 70: "The divergent backgrounds and relative levels of expertise and experience of Rome Conference delegates contributed to internal inconsistencies in the Rome Statute and its collateral instruments, and contributed to the lack of clarity on various treaty terms". *Cf.* finally Henquet 1999, p. 986, writing on another inaccuracy in the ICC Statute: "Pursuant to article 59(7), the custodial state is to deliver the person to the ICC when so "ordered." This is confusing because (…) the term 'order' does not feature in Part 9 of the ICC Statute. Perhaps this is the result of the speedy and somewhat isolated negotiations of the Working Group on International Co-operation and Judicial Assistance, and the Working Group on Procedural Matters at the Rome Conference."

[269] Hafner and Binder 2004, p. 175.

[270] *Ibid.*

[271] *Ibid.*

could be confronted in the future. Although it seems indeed correct, especially within the context of a criminal court, that judges should first and foremost follow the proper instruments of the ICC, it also seems reasonable that a provision which is in contravention of an internationally recognised human right – on the exact meaning of this concept, see *infra* – should not be applied by them.

The fifth consideration is more of an exception to the fourth consideration. It states that "an exception exists which results from the inviolability of certain core human rights, namely those considered to constitute peremptory norms of general international law (*ius cogens*). They trump the provisions of the ICC Statute by their very nature."[272] This point is related to the actual content of the term internationally recognised human rights and will be examined *infra*.

The sixth observation is a summary of the previous five[273] and the seventh explains that everything referred to above only concerns the Statute as the other rules from Article 21 must indeed be consistent with internationally recognised human rights.[274]

It has probably become clear from the above-mentioned comments with respect to the views of Hafner and Binder that this study is more in favour of Pellet's view. However, the considerations also showed that the meaning of the concept of internationally recognised human rights is still unclear. What can be said on this issue? Pellet explains in this context:

> One cannot help but think, in this respect, of 'peremptory norms of general international law', as defined in Article 53 of the Vienna Convention on the Law of Treaties. Without doubt, Article 21(3) of the Statute does not give the ICC express jurisdiction to declare null the totality of a treaty, or even one of its provisions, which is contrary to 'internationally recognized human rights', although this would be the effect of a breach of *jus cogens* under Article 53 of the Vienna Convention. Nevertheless, it creates a sort of international 'super-legality' by clearly authorizing the Court to hold such a norm to be '*ultra vires*' and thus inapplicable. This provision is all the more remarkable because it extends the ambit of this 'super-legality' not

[272] *Ibid*. See also Degan 2005, pp. 82-83: "The matter is here not of "super-legality". The matter is only of confirmation of peremptory norms of general international law in that domain, including the principle of non-discrimination. These norms are obligatory for judges in any national or international criminal proceedings, even if they were not expressly provided."

[273] Hafner and Binder 2004, p. 176: "One can conclude from the above and notwithstanding the exception concerning peremptory norms that wording, structure and context of Article 21 indicate a primacy of the Statute."

[274] *Ibid*., pp. 176-177: "The wording of paragraph 3 (…) suggests that rules that are guiding the application and interpretation of the Statute (as are the Rules of Procedure and Evidence as well as the Elements of Crimes) would be trumped in case of an inconsistency with "internationally recognized human rights". (…) As regards Article 21(1.b) (…) one can easily argue that a treaty inconsistent with human rights should not be applied by the Court. It would simply not be "appropriate" to apply a treaty or a rule of international law contradicting human rights. [It is hard not to agree with this. However, why then would it be possible to apply the Statute (also a treaty) if it would contradict human rights? Would that then be "appropriate"?, ChP.] In the case of Article 21(1.c), the necessary consistency of general principles of law with human rights is established in this provision itself [original footnotes omitted, ChP]."

> only to *fundamental* human rights, traditionally quoted as examples of peremptory rules, but to all internationally recognized human rights [emphasis in original and original footnotes omitted, ChP].[275]

Although this quotation explains that these rights are not restricted to fundamental human rights/peremptory norms (of general international law)/*ius cogens*,[276] their exact scope is still not clear. According to Hafner and Binder, who look at both the use of these words in international instruments and their literal interpretation,

> [n]o uniform content is attributed to the phrase in international relations. One can however presume that rights considered as peremptory norms as well as [universal, ChP][[277]] customary international law classify as "internationally recognized". The rights stipulated in the major universal human rights instruments (UDHR, CESR, CCPR, CERD, CAT, CEDAW, CRC) enjoy a *presumptio iuris* of international recognition unless the contrary has been established.[278]

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[275] Pellet 2002 A, pp. 1080-1081. See for this difference also the already discussed (see Chapter III) American Law Institute, Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, para. 702 ('Customary International Law of Human Rights'), comment under 'm' ('Consistent pattern of gross violations of human rights'): "All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants (...) are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity."

[276] *Cf.* also Vasiliev 2009, p. 214, n. 76: "It appears reasonable to argue that *jus cogens* should also be read into Article 21(3)."

[277] See Hafner and Binder 2004, pp. 186-187, explaining that this term "covers all human rights recognized as universal customary international law. (…) [A] practice has to be accepted as law by the subjects of international law, which could participate in this practice or whose interests are affected. These States should represent the different geographic regions as well as the different socio-political systems of the world although there is no requirement that all States participated in the creation of the norm [original footnote omitted, ChP]." Hence, even though the rights must have universal (and not merely regional) customary international law-status, it is not required that the rights are universally recognised (recognised by *all* States). See *ibid*., p. 185: "[P]roposals to use "universal human rights" or "universally recognized human rights" were rejected by either the Preparatory Committee or the Rome Conference as they were considered to be too limiting. Therefore, one can conclude that for a human right to be accepted as "internationally recognized" standard in terms of paragraph 3, recognition by the international community needs to be widespread but not total [original footnotes omitted, ChP]." See also see Edwards 2001, p. 377: "Article 7(1)(h) and Draft Elements, article 7(1)(h)(3), in reciting a list of anti-discrimination groups or collectivities, might easily have described the groups or collectivities as "internationally recognized" (as in article 21(3)) rather than as "universally recognized." This suggests that "universally recognized" differs from "internationally recognized," and that in fact "universally recognized" reflects a more select group than "internationally recognized," and that proof of "universally recognized" would have a higher threshold than proof for "internationally recognized." (…) [I]t is appreciated that "internationally recognized" is perhaps not be defined as "universally recognized," and that "universally recognized" is the narrower of the two categories [original footnotes omitted, ChP]." See finally Bitti 2009, p. 301. Nevertheless, it must also be noted that in para. 38 of ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, the judges used the words "internationally" and "universally" (recognised human rights) interchangeably.

[278] Hafner and Binder 2004, p. 190.

Finally, ICC judge Pikis stated in the *Lubanga Dyilo* case that "[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions".[279]

One could argue that the *habeas corpus* right, the right to challenge the lawfulness of one's detention and to be released in the case of an unlawful arrest/detention, can definitely be seen as an internationally recognised human right. This was already assumed because of its customary international law/general international law status as established in Chapter III of this book, but the above-mentioned observations on the meaning of this specific ICC term do not contradict this.

This – again – means that the ICC judges, if they were to follow the view of Pellet, must apply this remedy, even if it was clearly the intention of the drafters not to grant it. However, as clarified, that problem does not arise here as this study is of the opinion that it cannot clearly be established that it was the intention of the drafters to delete this remedy in the context of the ICC.

This may indeed be the case, but the fact that the remedy of release, in principle, should be applied by the ICC judges does not make the problems which can be related to this over-simplified and *pro forma* remedy and which were discussed at length in this study suddenly disappear. Because of this, judges, it is submitted, could opt for the solution presented in this research; they could, while realising that this remedy, in principle, has to be respected and thus that remedies must be granted in the case of an unlawful arrest/detention, keep the suspect in custody instead and grant proper remedies, depending on the exact circumstances of the case.[280]

They could thereby also rely on the right to an effective remedy, a right which can certainly be seen as an internationally recognised human right. Support for that view can be found in the ICTR *Rwamakuba* case, in which the judges explained that a right to an effective remedy for violations of human rights "undoubtedly forms part of customary international law"[281] and is expressly provided for in many international human rights instruments.[282] In addition, the judges stated,

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[279] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Public Document), ICC-01/04-01/06, 12 September 2006, Separate opinion of Judge Georghios M. Pikis, para. 3.

[280] The idea that one has, in principle, to respect the remedy of release in the case of an unlawful arrest/detention, even if one does not apply this remedy, is important. After all, if one does not even assume that one has, in theory, an obligation to grant the remedy of release in the case of an unlawful arrest/detention first, one will not be very inclined either to grant other remedies replacing that remedy of release (such as a reduction of the sentence or financial compensation). See in that respect also the comments made in the context of the *Kanyabashi* case, see n. 863 of Chapter VI.

[281] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 40. See also M. Federova, S. Verhoeven and J. Wouters, 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings', Working Paper No. 27 – June 2009, Leuven Centre for Global Governance Studies (available at: http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp27.pdf), p. 21.

[282] See ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 40. In more detail: "[T]he Universal

> [r]elying upon international human rights instruments, and particularly the International Covenant on Civil and Political Rights, the Appeals Chamber of this Tribunal has recognized on several occasions [the judges refer here to the cases of *Barayagwiza, Semanza* and *Kajelijeli*, ChP][283] that an Accused has a right to an effective remedy [original footnote omitted, ChP].[284]

The judges then concluded that they had the power to grant an effective remedy for human rights violations and that this power arose out of "the combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms".[285]

It was explained at the beginning of this section that internationally recognised human rights, and thus also the granting of remedies for violations, would be applicable whenever the ICC exercises its jurisdiction, whenever the ICC is involved in a specific case, including the actions of third parties working at the behest of the ICC. However, it was also argued that it would even be fairer for the ICC to remedy any violation in the context of its case more generally, whether or not the ICC was involved in the case.

In granting the remedies, the ICC judges should, of course, give proper weight to, among other things, the (seriousness of the) human rights violations which occurred in the case in question and the involvement of the ICC in the violations.[286]

Declaration of Human Rights, the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the ECHR, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights [original footnotes omitted, ChP]." (*Ibid*.)

[283] See ns. 919, 997 and 1081 and accompanying text of Chapter VI. See also n. 1124 and accompanying text of the same chapter.

[284] ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Decision on Appropriate Remedy', Case No. ICTR-98-44C-T, 31 January 2007, para. 41.

[285] *Ibid*., para. 45. See also *ibid*., para. 47: "[T]his power is essential for the carrying out of judicial functions, including the fair and proper administration of justice."

[286] *Cf.* also Sluiter 2009, pp. 470-471. At these pages, Sluiter writes about violations in the context of Art. 59 of the ICC Statute. As argued before, violations in which the ICC (or third parties working at the behest of the ICC) is involved already fall under the scope of Art. 21, para. 3 of the ICC Statute. This means that in such cases, the ICC would be obliged pursuant to this latter provision (which includes the right to an effective remedy) to repair violations. However, even though Sluiter writes about Art. 59 of the ICC Statute, his words at the end of this footnote can arguably also be seen as support for the idea in the main text that the ICC should remedy any violation occurring in the context of its case more generally, whether or not the ICC (or third parties working at its behest) was involved in the violations: "It is self-evident that violations in the application of Article 59 need to be addressed by the Court. Only the latter is in a position to effectively address any violation and has in that respect an obligation to ensure the fairness of the trial as a whole. In itself, this imposes a duty upon the Court to address relevant violations, including those committed by others than organs of the Court. Traditionally, one can identify three compelling reasons to do so: 1. to offer a remedy for violation of rights (cp. Article 85); 2. to prevent future violations, via deterrence; 3. to preserve the integrity of court proceedings. [This (hopefully) reminds the reader of the *Barayagwiza* case, see n. 849 and accompanying text of Chapter VI. See also n. 171 and accompanying text of Chapter VII, ChP.] These are alternative reasons and depending upon the degree and nature of violation as well as the involvement of actors the Court can

This may then lead to a refusal of jurisdiction (and a 'real' release, *cf*. the abuse of process doctrine) or to the continuation of the trial and other, less far-reaching remedies such as a reduction of the sentence or financial compensation.[287] This is arguably the fairest solution for the suspect (and also, by the way, for the other interests involved here).[288]

Three points still need to be discussed in this chapter. The first is that the above-mentioned words of Hafner and Binder only refer to truly international treaties. Although one could argue that the rights which can be found in regional instruments (such as the ACHR) and which have been clarified by regional institutions (such as the ECtHR) are to a certain extent also international (namely inter-State) in nature, Hafner and Binder are of the opinion that "[t]he *epitheton* "international" (...) must be understood as reaching beyond a solely regional recognition. This particular interpretation does not only result from the practice of international negotiations, but also from the global significance of the ICC."[289] Notwithstanding this, one can assume that the ICC will probably also refer to regional treaties and case law from regional supervisory bodies interpreting those regional treaties if these constitute support for the assertion that a certain human right must be seen as internationally recognised or if they shed an authoritative light on how to interpret certain provisions from the ICC instruments.[290] (This also means that all the cases from the human rights supervisory bodies discussed in this book, not only those from the

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decide how to react. For example, the very fact that there has not been concerted action between the ICC Prosecutor and national authorities may result in the non-applicability of the second rationale, but does not mean that measures should not be taken sub 1 or 3 [original footnote omitted, ChP]."

[287] Perhaps, the remainder of the already-mentioned words of Sluiter (see n. 260) may be viewed as support for the idea that the problematic remedy of release may be replaced by other appropriate remedies: "The provision (…) posits the view that 'internationally recognised human rights' are applicable fully, and thus need not be 're-interpreted' in light of the unique mandate and context of the ICC. More concretely, the mandatory and specific content of Article 21 (3) of the Statute appears to prevent Judges from adjusting the content of human rights law to the unique ICC-context; while this offers certain safeguards, a too rigid stance on this matter should be rejected. What matters is not that human rights cannot be re-interpreted, but that this exercise should be conducted on adequate reasons, cautiously and not by definition result in a loss of protection." (Sluiter 2009, p. 463.)

[288] As explained earlier, the right to a fair trial can definitely be seen as an internationally recognised human right under para. 3 of Art. 21 of the ICC Statute. See in that respect the remainder of the already-mentioned (see n. 279 and accompanying text) words of Judge Pikis in the *Lubanga Dyilo* case: "Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions. The right to a fair trial belongs to this class of rights." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Public Document), ICC-01/04-01/06, 12 September 2006, Separate opinion of Judge Georghios M. Pikis, para. 3.) See also Verhoeven 2004, p. 14.

[289] Hafner and Binder 2004, pp. 187-188.

[290] *Cf*. also Sluiter 2002 C, p. 46: "Given the universal aspiration of the Court, it first and foremost includes universal human rights law, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), and the Convention on the Rights of the Child (CROC). Regional human rights treaties play in principle a less prominent role, but may be applied in practice frequently, because of the highly developed character of certain regional human rights systems, such as the ECHR."

HRC, but also from, for example, the ECmHR and ECtHR, may become relevant for the ICC judges under this provision.) In fact, it seems that the ICC has already adopted this stance.[291] One very interesting example in that respect[292] is the

[291] See also Bitti 2009, p. 301: "It seems that the jurisprudence of the Court has given a broad meaning to "internationally recognized human rights". It has relied heavily on the jurisprudence of regional courts such as the European Court of Human Rights and the Inter American Court of Human Rights, and also on resolutions adopted by the United Nations General Assembly." See also Sluiter 2009, p. 466.

[292] However, there are more examples. See, for example, ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (Under Seal, Ex Parte, Prosecution Only), ICC-01/04-01/07, 10 February 2006 (see Annex 2 to ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Court Record not available, confidential document, ICC-01/04-02/06, 10 February 2006), paras. 11-12: "In the Chamber's view, the review which article 58 (1) of the Statute requires that the Chamber undertake is consistent with the fact that, apart from other collateral consequences of being the subject of a case before the Court, the fundamental right of the relevant person to his liberty is at stake. Accordingly, the Chamber emphasises that it will not take any decision limiting such a right on the basis of applications where key factual allegations are fully unsupported. As required by article 21 (3) of the Statute, the Chamber considers this to be the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5 (1) (c) of the European Convention on Human Rights and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the American Convention on Human Rights [original footnotes omitted, ChP]." See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 38, where the judges use the words "internationally" and "universally" (recognised human rights) interchangeably and even introduce a new term, namely 'indispensable right of man': "Like every other article of the Statute, article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in article 21 (3) of the Statute. Is a right to appeal against every decision of a hierarchically subordinate court to a court of appeal, or specifically an interlocutory decision of a criminal court to the court of appeal, acknowledged by universally recognized human rights norms? The answer is in the negative. Only final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict are assured as an indispensable right of man. This is reflected in article 14 (5) of the International Covenant on Civil and Political Rights and many regional conventions and treaties giving effect to universally recognized human rights norms. This right is assured to the accused under article 81 of the Statute [original footnote omitted, ChP]." See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Public Document), ICC-01/04-01/06, 12 September 2006, Separate opinion of Judge Georghios M. Pikis, paras. 3 and 6, ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 'Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPSR4, VPSR5 and VPRS6' (Public Redacted Version), ICC-01/04, 17 January 2006, paras. 81, 115-116, 131, 145-146, 161, 172 and 182, ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor vs. Thomas Lubanga Dyilo*, 'Decision on the Application for the interim release of Thomas Lubanga Dyilo' (Public Document), ICC-01/04-01/06, 18 October 2006, pp. 5-8 and ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the confirmation of charges' (Public Redacted Version with Annex I), ICC-01/04-01/06, 29 January 2007, para. 38 (referring to case law of the ECtHR): "To define the concept of "substantial grounds to believe", the Chamber relies on internationally recognised human rights jurisprudence." See finally ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the confirmation of charges' (Public Redacted Version), ICC-01/04-01/07, 30 September 2008, para. 65 (referring to the above-mentioned decision of 29 January 2007 in the *Lubanga Dyilo* case): "In the Decision on the

following statement of Judge Pikis in his separate opinion to a(nother) decision from the *Lubanga Dyilo* case:

> Article 21 (3) of the Statute ordains the application and interpretation of every provision of the Statute in a manner consistent with internationally recognized human rights. Internationally recognized human rights in this area, as may be distilled from the Universal Declaration of Human Rights and international *and regional treaties and conventions on human rights*, acknowledge a right to an arrested person to have access to a court of law vested with jurisdiction to adjudicate upon the lawfulness and justification of his/her detention. Such a right is afforded to the arrestee from the outset [emphasis added and original footnotes omitted, ChP].[293]

These words can not only be seen as evidence for the above-mentioned idea that regional human rights treaties may also be relevant in the context of paragraph 3,[294] but also as additional evidence for the idea that a person arrested/detained is entitled to challenge the lawfulness of his detention[295] and, in principle (but see: *supra*), to be released in the case of an unlawful arrest/detention, even though the remedy of release is not explicitly mentioned here by Pikis.[296] This is so, even if the proper instruments of the ICC do not explicitly contain this right.

Confirmation of Charges ("the *Lubanga* Decision") in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("the *Lubanga* case"), the Chamber relied on internationally recognised human rights jurisprudence for its interpretation of the evidentiary standard of "substantial grounds to believe" in accordance with article 21(3) of the Statute. In the current case, the Chamber sees no compelling reason to depart from its application of the standard as established in the *Lubanga* case".

[293] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, Separate Opinion of Judge Georghios M. Pikis, para. 16.

[294] See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Public Document), ICC-01/04-01/06, 12 September 2006, Separate opinion of Judge Georghios M. Pikis, para. 3, where Judge Pikis refers to the UDHR, ICCPR, ECHR, ACHR and ACHPR to argue that "[t]he extent to which the right to a fair trial has been proclaimed as a legal norm and its incorporation in international instruments denotes comprehensive assent to its emergence as a principle of customary international law [original footnote omitted, ChP]." See also Verhoeven 2004, p. 14, commenting on para. 3: "[T]hose rights normally are the rights listed in the universal *or* regional treaties protecting human rights, to the extent at least that they have a customary (general) character [emphasis added, ChP]."

[295] See also n. 201 of the previous chapter. (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 8: "[A]ccording to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the Defence, including the right "not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute"".)

[296] But see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February

The second point which still needs to be addressed here is the following. In the examination of paragraph 3, the problem with respect to the remedy of release was discussed. The real *male captus* problem was not examined as it could be argued – this may already have become clear from information provided earlier in this book – that there is no internationally recognised right to a *male captus male detentus* outcome. Notwithstanding this, paragraph 3 may still become relevant for the real *male captus* problem, namely for its human rights dimension. As explained at the beginning of this section, judges may look to paragraph 3, not only with respect to specific provisions of part (a), but also with respect to the more general provisions which are always applicable to any ICC case (such as Article 1 of the ICC Statute). Thus, they may be of the opinion that any exercise of jurisdiction, whenever the ICC is involved in a case, that exercise of jurisdiction, that involvement must be in conformity with internationally recognised human rights. Although there is no internationally recognised human right to a *male captus male detentus* outcome, judges may nevertheless be of the opinion that serious violations of *other* internationally recognised human rights, such as the right to liberty and security and the right to a fair trial broadly perceived, should lead to a refusal of jurisdiction nonetheless. In that case, part (a), interpreted and applied consistently with paragraph 3, may already solve the problem, in which case there would be no need to resort to parts (b) and (c) of paragraph 1 of Article 21 of the ICC Statute. However, it must also be understood that this would 'only' cover the human rights dimension of the *male captus* issue, an issue which clearly goes beyond that dimension. (Recall the other values which can be violated by a *male captus* situation, such as State sovereignty and the rule of law.)

The third and final point that should be mentioned here is what happens if the judges cannot decide the case on the basis of Article 21 of the ICC Statute. What if paragraph 1, interpreted and applied consistently with paragraph 3, leaves a legal lacuna and subsequently resorting to paragraph 2, again interpreted and applied consistently with paragraph 3, brings no relief either? What should the judges do in such a case of *non liquet*?[297] Should the judges permit a certain rule advocated by either the Defence or the Prosecution, stating that it can be allowed now that it is not prohibited? Or should they opt for a more restrictive approach, arguing that it is prohibited, now that it is not allowed? This is not very clear. However, perhaps, the

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2007, Separate Opinion of Judge Georghios M. Pikis, para. 16, ns. 19 and 20. In these footnotes, which can be connected to the words "international [footnote 19] and regional [footnote 20] treaties" in the main text, one will find references to the *entire* Artt. 9 of the ICCPR and 5 of the ECHR (and other regional provisions on the right to liberty and security). *Cf.* also n. 286 of the previous chapter. (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007 (…)' (Public Document), ICC-01/04-01/06 OA8, 13 June 2007, para. 13: "The human right [and then the ICC judges refer to Artt. 21, para. 3 of the ICC Statute, 9, para. 4 of the ICCPR, 5, para. 4 of the ECHR and 7, para. 6 of the ACHR, ChP] of a person to have recourse to judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute [original footnote omitted, ChP].")

[297] See also Vasiliev 2009, pp. 228-229.

fact that the Appeals Chamber has stated (see also *supra*) that one can only resort to part (b) of paragraph 1 of Article 21 of the ICC Statute if part (a) is not *exhaustive* on a certain matter may mean that it is more in favour of the restrictive approach.[298]

Be that as it may, one can also assume that a *non liquet* will not occur too often, given the extensive regulation of the law within the ICC's proper instruments. This is especially so if one agrees with the argument made above that one should also apply and interpret the more general provisions of the ICC Statute (such as its Article 1) consistently with internationally recognised human rights. And if that brings no relief, one can always resort to the safety net of parts (b) and (c) of paragraph 1 and finally to paragraph 2 (all interpreted and applied consistently with paragraph 3).

Now that the law which the ICC judges must apply in deciding their cases has been examined in detail, it is time to determine the current ICC position on the *male captus* issue. This will be done in the next chapter, the final chapter of this part of the book.

[298] See *ibid*., p. 229.

CHAPTER X
FINDING THE CURRENT ICC POSITION ON THE *MALE CAPTUS* ISSUE

1 INTRODUCTION

In this chapter, the current ICC position on the *male captus* issue will be sought. Section 2 will deal with arguably the most authoritative case of the ICC, that of Thomas Lubanga Dyilo, which relates to the situation in the DRC. The third section will address the allegations of irregularities in the surrender of Jean-Pierre Bemba Gombo, a case stemming from the situation in the CAR. In this case, the allegations were less serious and the *male captus* issue less prominent in the discussions, meriting a briefer examination of the case. Finally, Section 4 will examine the (aftermath of the) *male captus* allegations of Germain Katanga, whose case also pertains to the situation in the DRC. Admittedly, the examinations of the cases of Lubanga Dyilo and Katanga are quite extensive, closely following the original texts of the different motions/responses/observations/decisions, but this can be explained by the fact that in this chapter, the two main subjects of this book, the *male captus* topic and the ICC context come together. This deserves more detailed examination, especially now that in only those two cases, the *male captus* topic played a major role.

2 *LUBANGA DYILO*

Already in the very first case in which a suspect was surrendered to the ICC, that of Lubanga Dyilo, a(n alleged) *male captus* problem occurred. On 10 February 2006, Pre-Trial Chamber I of the ICC issued a sealed warrant of arrest against Thomas Lubanga Dyilo, charging him with the war crime of enlisting children under the age of fifteen, the war crime of conscripting children under the age of fifteen and the war crime of using children under the age of fifteen to participate actively in hostilities.[1] After a request for his arrest and surrender (dated 24 February 2006)[2]

[1] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *v*. Thomas Lubanga Dyilo, 'Warrant of Arrest' (Under seal), ICC-01/04-01/06, 10 February 2006, p. 4.

[2] See CPI, La Chambre Préliminaire I, Situation en République Démocratique du Congo, Affaire *Le Procureur c/ Thomas Lubanga Dyilo*, 'Demande d'arrestation et de remise de M. Thomas Lubanga

was sent to the authorities in the DRC on 14 March 2006, Lubanga Dyilo was formally arrested within the context of the ICC proceedings on 16 March 2006 and surrendered to The Hague the following day. However, by that time, he was already in custody. Lubanga Dyilo claimed that had been illegally deprived of his liberty by the Congolese authorities from as early as August 2003. In more detail, counsel for Lubanga Dyilo asserted on 23 May 2006:

> Mr Thomas Lubanga Dyilo travelled to Kinshasa in July/August 2003 in connection with the policy of reconciliation and integration of the political forces in Ituri into national politics at the invitation of the national government and the international community. Nonetheless, he was deprived of his liberty when he arrived in Kinshasa and was placed under house arrest from 13 August 2006[3] and prohibited from leaving the town. No arrest warrant was issued against him. No order was issued in this respect.[4]

Counsel continued, stating that two years later, on 2 March 2005, Lubanga Dyilo was imprisoned at the *Centre pénitencier/pénitentiaire*[5] *et de rééducation de Kinshasa*.[6] Here also, irregularities allegedly occurred:

> No arrest warrant was served on him at that time or subsequently. Two supposed "arrest warrants" appear in the case-file: - the document dated 19 March 2006[7] for "endangering national security", bearing no confirmation of receipt signature, - the document dated 29 March 2006[8] for "murder and unlawful detention followed by torture," bearing no confirmation of receipt signature (…)[.] During his detention in the DRC, he did not appear before an *auditeur militaire* each month, as required by military law, or where appropriate, *quod non*.[9]

Dyilo adressée à la République Démocratique du Congo' (Sous scellés), ICC-01/04-01/06, 24 février 2006.

[3] This must be: 13 August 2003, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 9.

[4] *Ibid*., para. 3.

[5] Although the Defence writes *pénitencier* here, the organs of the ICC use the term *pénitentiaire*, see, for example, n. 371 and accompanying text.

[6] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 3.

[7] Given the fact that by that time, Lubanga Dyilo was already in The Hague, this date is obviously incorrect. It must be 19 March *2005*, see also ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Submission of Further Information and Materials' (Under Seal, Ex Parte, Prosecutor Only), ICC-01/04-01/06, 25 January 2006, para. 3: "The detention file on Thomas LUBANGA DYILO contains the DRC arrest warrants against him of 19 March 2005 and of 29 March 2005."

[8] See the previous footnote.

[9] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 3.

According to Lubanga Dyilo's counsel, these points, namely Lubanga Dyilo's "arbitrary detention with no judicial examination phase against him"[10] and the "fact that he was never heard by any Congolese court",[11] were repeated when Lubanga Dyilo appeared on 16 March 2006 before the representative of the *Auditeur Général des FARDC (Forces Armées de la République Démocratique du Congo*: the DRC armed forces), the *Premier Avocat Général des FARDC*/of the DRC armed forces (in the context of the ICC surrender proceedings).[12] The allegations were, however, very swiftly rejected by the *Premier Avocat Général* the same day:

> - [*A*]*s regards the arbitrary detention, that such was warranted by the existence of serious, grave and corroborating indicia against the accused and the risk that he might abscond; - that if he was not heard by any Congolese court it was because his case was still investigated by the state prosecution officer* [emphasis in original, ChP];[13]

The fact that the *Premier Avocat Général/Auditeur Général* of the DRC armed forces looked into these allegations (even if only briefly) shows that the review of the competent judicial authority in the context of Article 59 of the ICC Statute may not be restricted to the correctness of the official ICC arrest procedures, but may also include the domestic phase prior to the official ICC arrest. That is to be welcomed. After all, it may very well be the case that this part must be seen as falling within the context of an ICC case and it is important that every alleged violation which took place in that context is considered and, if needed, remedied.

After having provided the above-mentioned background information, counsel for Lubanga Dyilo turned to the merits of his case. He divided this part of the application in three sections: 1. Unlawful detention in the DRC prior to 16 March 2006 (paragraphs 8-20 of the application), 2. Violations of the Rome Statute (paragraphs 21-23 of the application) and 3. Violations of the Rules of Procedure and Evidence (paragraphs 24-29 of the application).

With respect to the first section, he maintained that the above-mentioned irregularities in the DRC had brought about a number of violations of (inter)national

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[10] *Ibid*., para. 6.

[11] *Ibid*. See also the arguments of Lubanga Dyilo's counsel Flamme during Lubanga Dyilo's initial appearance before the ICC on 20 March 2006 (the transcripts of this session are available at: http://www.amicc.org/docs/Lubanga%20Arraignment.pdf): "We have to realise that my client has been deprived of his liberty since August 2003. He has been confined to forced residence in Kinshasa, and following that he was incarcerated on the date which is in the record. If I remember correctly, in March 2005. I questioned my client concerning the conditions in which he was arrested and deprived of his liberty and incarcerated. I was informed that this arrest was not under any specific warrant and that no hearing was held such as should have been held according to national and international standards, and therefore he was kept incarcerated for approximately one year without having right -- access to any trial and without having been informed of any of the charges held against him." (P. 9 of the document.)

[12] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 6.

[13] *Ibid*.

law provisions, such as Articles 17,[14] 18[15] and 19, paragraph 2[16] of the Congolese Constitution,[17] Article 9 of the ICCPR[18] and Articles 5 and 6 of the ECHR.[19]

In this context, counsel for Lubanga Dyilo interestingly (see also footnote 395 and accompanying text of Chapter III and footnote 202 and accompanying text of Chapter VIII) turned to the topic of derogation, maintaining "that there existed no situation within the DRC (insofar as it existed in Kinshasa at the time, *quod non*) that justified suspending the legal safeguards against arbitrary arrests and unlawful detention".[20]

Counsel then turned to the violations in more detail, some of which were mentioned earlier.[21] It was also emphasised that it had been unlawful to bring Lubanga Dyilo before the *military* judicial authorities because he was "president of the UPC (*Union des Patriotes Congolais*) political party"[22] and "was never a soldier (…) in the official Congolese army or, insofar as it is relevant, in the FPLC [*Forces Patriotiques pour la Libération du Congo*, ChP]".[23] According to him, this had led to a violation of the right to a fair and impartial trial, a violation which had not

[14] "*A person's individual freedom shall be guaranteed. This shall be the rule and detention shall be the exception. A person may be prosecuted, arrested, detained or convicted only under the law and in the forms which* [*it*] *provides* [emphasis in original, ChP][.]" (*Ibid*., para. 8.)

[15] "*Any person arrested must be informed forthwith of the reasons for his arrest and of any charges against him in a language which he understands. He must be informed of his rights forthwith. Any person kept in police custody shall have the right to contact his family or lawyer immediately. The period spent in police custody may not exceed 48 hours. Upon expiry of this period, any person in custody must be released or made available to the competent judicial authority* [emphasis in original, ChP]." (*Ibid*.)

[16] "*All persons shall be entitled to have their case heard by a competent judge within a reasonable time* [emphasis in original, ChP][.]" (*Ibid*.)

[17] Counsel for Lubanga Dyilo also referred to violations of the Congolese Code of Criminal Procedure, see *ibid*., para. 11.

[18] See *ibid*., para. 8.

[19] See *ibid*., para. 13.

[20] *Ibid*., para. 8.

[21] See *ibid*., para. 9: "The applicant was not informed of the grounds for his arrest (…) when he was deprived of his liberty on 13 August 2003 or when he was imprisoned on 2 March 2005. No warrant of arrest was served on him. No case file was made available to him. No judicial examination was conducted. He was not therefore informed of the grounds for his arrest or of the charges against him. He was kept in detention arbitrarily for over 18 months. [These 18 months probably refer to his alleged arbitrary *deprivation of liberty before his detention* (between 13 August 2003 and 2 March 2005) and not to his alleged arbitrary detention, which 'only' lasted for about a year, ChP.] Furthermore, the applicant was not brought before the competent judicial authority within the 48 hour time-limit." It was also maintained that "the two supposed arrest warrants" (*ibid.*) (see also ns. 7-9 and accompanying text) did not change this, see *ibid*.: "[E]ven if the documents entitled "arrest warrant" are considered valid and as having been served upon the applicant, note must be taken of the fact that the charges are not clearly set out therein: - the two arrest warrants specify completely different charges which, furthermore, also differ from those specified in the documents entitled "decision on extension of provisional detention" in which "genocide" and "crimes (…) against humanity" are stated; - the two supposed arrest warrants do not set out any facts. It follows that the applicant was never informed of the charges against him or of the reasons for those charges."

[22] *Ibid*., para. 10.

[23] *Ibid*.

suddenly disappeared now that the ICC had taken over the case.[24] Counsel argued that even if Lubanga Dyilo had to be brought before the military authorities, these military proceedings were nonetheless characterised by many irregularities.[25]

He concluded this section of the application, stating that because of his arbitrary arrest and unlawful detention at the national level, Lubanga Dyilo should have been released in the DRC.[26] Now that this had not happened, his subsequent surrender to the ICC also had to be considered unlawful.[27] What mattered greatly to the Defence was also the fact that the ICC "took into consideration the possibility that the applicant had been arbitrarily arrested and that he might subsequently be released".[28] In other words, the Defence claimed that the ICC issued the arrest warrant against Lubanga Dyilo, among other things, because it was aware of the possibility that Lubanga Dyilo was indeed arbitrarily arrested/detained at the national level and that that could lead to his release. According to the Defence, this was "tantamount to saying that the ICC did not meet its obligations as set out in this application, that is, to ensure that arrests and detentions effected under national law are lawful".[29] It must be noted that it is, of course, primarily the obligation of the arresting/detaining State to ensure that arrests and detentions are executed in accordance with national law.[30] Nevertheless, as explained earlier, as one can assume that the national review of Article 59 of the ICC Statute may not always be very thorough, it would be wise for the ICC, as an extra safety net, to supervise the legality of the national proceedings in that respect. In fact, it would not only be wise,[31] it would arguably even be mandatory if the arrest/detention were seen as falling within the context of the ICC's investigation (see Article 55, paragraph 1 (d) of the ICC Statute:[32]

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[24] See *ibid*.: "The subsequent referral of his case-file to the ICC cannot "cleanse" the proceedings and "wash away" the initial violations of the right to a fair and impartial trial."

[25] See *ibid*., paras. 14-19. To provide a few examples, it was argued that no order was issued by the *auditeur militaire* to restrict his liberty on 13 August 2003 (see *ibid*., para. 15), that "the commander of the unit of which the applicant is alleged to be a member (*quod non*) was not kept informed" (*ibid*.), that no arrest warrant was served on him (see *ibid*., para. 16), that the so-called arrest warrants (see again ns. 7-9 and accompanying text) were "not dated with the day of the arrest but with a latter date" (*ibid*.) (note that in this paragraph, the application confusingly states that the date of arrest was 2 March 2006, instead of 2 March 2005), that he "did not appear before the *auditeur militaire* each month, as should have been the case" (*ibid*., para. 17), that no investigation was carried out (see *ibid*.), that "the extension of detention on remand was not authorised by the competent court and no hearing was held nor any order issued in this respect" (*ibid*., para. 18) and that the 16 March 2006 hearing was out of time and carried out before an incompetent court (see *ibid*., para. 19).

[26] See *ibid*.

[27] See *ibid*.

[28] *Ibid*., para. 20.

[29] *Ibid*.

[30] See Art. 59, para. 1 of the ICC Statute: "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9." See also Art. 89, para. 1 of the ICC Statute: "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender."

[31] See also n. 201 and accompanying text of Chapter VIII.

[32] "In respect of an investigation under this Statute, a person: (…) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in

applicable as from the initiation of the investigation) or if the ICC were otherwise involved in that arrest/detention (see Article 21, paragraph 3 of the ICC Statute: applicable as from the moment the ICC gets involved in the case). These provisions arguably *demand* such a supervisory role. With respect to the last provision, it is worth recalling (see Section 4 of the previous chapter) that Article 21, paragraph 3 of the ICC Statute undoubtedly contains the right to an effective remedy. Hence, it can be argued that Article 21, paragraph 3 of the ICC Statute *prescribes* that the final adjudicator, the ICC, ensures that violations which occur as from the moment the ICC is involved in a case are remedied.

With respect to the second section (violations of the Rome/ICC Statute), counsel for Lubanga Dyilo claimed, not very surprisingly (see *supra*), that Article 55, paragraph 1 (d) of the ICC Statute was violated; according to the Defence, this was in fact acknowledged by the Congolese judicial authorities.[33] Furthermore, the Defence was of the opinion that because the ICC's Prosecutor had decided to disregard this unlawfulness, the formal ICC arrest had to be considered illegal as well.[34]

Alongside Article 55, paragraph 1 (d) of the ICC Statute, it was argued that "a flagrant violation"[35] of Article 59, paragraphs 1-3 of the ICC Statute had occurred.[36] Finally, Article 89, paragraph 1 of the ICC Statute had allegedly been violated.[37]

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accordance with such procedures as are established in this Statute." This provision arguably entails that the ICC has an obligation to repair violations of the suspect's right to liberty and security which take place in the context of an ICC's investigation, violations which by definition take place at the national level. However, although this provision will cover most part of an ICC case, it is submitted that the ICC should go one step further and also accept responsibility for violations which more generally occur *in the context of an ICC case*. After all, Art. 55, para. 1 (d) of the ICC Statute 'only' speaks of rights "[i]n respect of an investigation". However, situations may occur which, strictly speaking, cannot be seen as falling within the ICC investigation, but which are nevertheless to be seen as falling more generally within the context of the ICC case and as such should be considered by the judges. One could hereby think of the irregular arrest and detention of a person about whom the arresting authority has stated for years that this person ought to be tried by the ICC and that it will hold the suspect in detention until the ICC makes a move. If the ICC indeed consequently starts an official investigation and requests the surrender of the person, the ICC judges may be of the opinion that the irregular arrest and detention has to be seen as falling within the context of the ICC case, even if the investigation, at the time of the irregular arrest and detention, was not yet officially initiated. *Cf.* also Hall 2008 A, p. 1093: "The chapeau of paragraph 1 states expressly that it applies "[i]n respect of an investigation". However, it is likely that the Court will hold that the fundamental rights recognized in article 55 para. 1 apply at other stages of proceedings and even before an investigation is opened, including during a preliminary examination."

[33] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 21. See also *ibid*., para. 19.

[34] See *ibid*., para. 21.

[35] *Ibid*., para. 22.

[36] See *ibid*.: "- the applicant was *not* arrested in accordance with its laws, - he did *not* appear before the competent judicial authority, - the authority before which he appeared disregarded the fact that the applicant had not been arrested according to the normal procedure, in spite of the fact that this was acknowledged in the reasons given in its order, - that same authority failed to have regard for the fact that the applicant's rights had not been respected. One of the direct consequences of the fact that the applicant did not appear before the competent authority in accordance with the procedures laid down is

With respect to the third section (violations of the ICC RPE), counsel for Lubanga Dyilo argued that Rules 117, paragraph 1[38] and 121, paragraph 1[39] of the ICC RPE had been violated.

Regarding the first rule, the Defence claimed that the ICC had not fulfilled its duty in ensuring that Lubanga Dyilo's detention in the DRC was lawful and that it had not verified "the lawfulness of the proceedings relating to the arrest and detention of the applicant in the DRC". As stated above, one can easily argue that the ICC should indeed be the final supervisor of the legality of a suspect's arrest and detention, at least as from the moment the ICC is involved in a case. However, whether this assumed task can be derived from Rule 117, paragraph 1 of the ICC RPE, which, among other things, only states that the ICC "shall take measures to ensure that it is informed of the arrest", seems doubtful. The Defence also claimed that this rule was violated because Lubanga Dyilo had only received a copy of the request for arrest and surrender and not a copy of the arrest warrant.[40] A copy of the actual arrest warrant was allegedly only received on 17 March 2006, when Lubanga Dyilo had already been transferred out of the DRC.[41] Because of that, he was no longer in a position "to be apprised of the charges brought against him by the ICC and to exercise all the rights set down, in particular, in article 89 (2) of the Statute and rule 117 *before departure from his national territory* [emphasis in original but bold and underlined emphasis changed into italicised emphasis, ChP]".[42]

Regarding the second rule, the Defence claimed, among other things, that Lubanga Dyilo had "been detained for more than two months without being informed promptly of the cause of the charges against him".[43] As a result, Article 67 of the ICC Statute, via Rule 121 of the ICC RPE, had been violated.[44]

In the penultimate section of the application, the Defence returned to the violations which occurred in the DRC. It explained that the ICC Prosecutor had to be held responsible

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that this made it impossible for him to request provisional release before his country's courts [emphasis in original but bold and underlined emphasis changed into italicised emphasis, ChP]."

[37] See *ibid*., para. 23.

[38] "The Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks."

[39] See n. 201 of Chapter VIII for the contents of this provision. Note that the title of the paragraphs addressing this violation speaks about Rule 11 of the ICC RPE but this is clearly a mistake, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 29. (This is, by the way, not the first error/unclear point in this application.)

[40] See *ibid*., para. 26.

[41] See *ibid*.

[42] *Ibid*.

[43] *Ibid*., para. 29.

[44] See *ibid*. See also n. 201 of Chapter VIII.

> for the extended period the applicant spent in arbitrary detention in the DRC, in compliance with article 55 (1) (d) of the Statute and further to his failure to intercede in the DRC. This holds all the more true since he was aware that he would apply to the Court for the applicant's arrest. Moreover, the ICC clearly has the duty not to endorse or assist in the violation of fundamental rules of international law.[45]

It further explained, with reference to the *Loizidou* case from the ECtHR,[46] that Article 1 of the ECHR "imposes upon member states a general obligation to protect the relevant rights of all persons under their jurisdiction"[47] and that "[t]he Court's case-law may be applied by analogy to the present instance insofar as the ICC takes the view that the matter came under its jurisdiction only as of the date the applicant was transferred to The Hague".[48]

Moreover, the Defence referred to Article 12 ('Aid or assistance in the commission of an internationally wrongful act') of (an older version of) the previously alluded to[49] ILC's draft articles on the responsibility of international organisations,[50] and argued that

> since the ICC's mandate as set down in the statute encompasses the prevention of crime, the Court may not simultaneously punish crimes such as unlawful detention and deprivation as war crimes and crimes against humanity and yet draw advantage from the "fruits" of the applicant's unlawful detention.[51]

This is, again, a view one can adhere to, but one can question to what extent Article 12/13[52] of the draft articles on the responsibility of international organisations can be seen as support for that position. After all, is taking advantage of a certain situation the same as aiding or assisting in its irregularities?[53]

Not very surprisingly, the Defence in this context also referred to the *Barayagwiza* case and its dictum that under the abuse of process doctrine, it is

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[45] *Ibid*., para. 30.
[46] *Cf.* also n. 369 of Chapter III.
[47] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 31.
[48] *Ibid*., para. 33.
[49] See n. 483 of Chapter VI.
[50] This article reads: "An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that organization." (Note that this Art. 12 has become Art. 13 in the 2009 document mentioned in n. 483 of Chapter VI.)
[51] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 32.
[52] See n. 50.
[53] *Cf.* also the discussion with respect to the acknowledgment and adoption test, see Subsection 3.3.3 of Chapter III.

irrelevant which entity is responsible for the violations of the suspect's rights.[54] However, in doing so, it did not explain *how* this doctrine can be incorporated into the system of the ICC/Article 21 of the ICC Statute, see the previous chapter. This important point will be returned to *infra*.

In the final section of the application, the conclusions, the Defence emphasised the importance of the presumption of innocence and again referred to the *Barayagwiza* case. Finally, it requested the release of Lubanga Dyilo. It is not entirely clear whether the release requested here must be seen as a release with prejudice to the Prosecutor; the reference to the *Barayagwiza* case can be seen as support for such a remedy, but in the application, one can also find references to less far-reaching releases.[55]

This lack of clarity with respect to the remedy also became apparent when the Pre-Trial Chamber asked the Defence to which State Lubanga Dyilo had to be released if he were to be granted interim release.[56] Although Lubanga Dyilo's application does not clarify whether the remedy requested is a release or a release with prejudice to the Prosecutor, it is also clear that the remedy requested was in any case *not* an interim release. In that respect, the Pre-Trial Chamber's request shows that Lubanga Dyilo's application was not read/understood correctly. This point was also clarified by the Defence when it, in response to the Pre-Trial Chamber's request, made clear that the remedy requested was not an interim release, but a release based on Rule 185 of the ICC RPE (see on this rule also the text following footnote 86 and accompanying text of the previous chapter).[57] However, also in this response, the exact sort of release requested (with prejudice or not) was not elucidated.

On 13 June 2006, Deputy Prosecutor Bensouda filed her response to Lubanga Dyilo's application for release. She also noted that the application was not a request for interim release. According to her, it rather seemed to be a challenge to the ICC's jurisdiction,[58] "based on the alleged illegality of Thomas LUBANGA DYILO's prior detention in the DRC and of the process of his arrest for and surrender to the

[54] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Application for Release' (Public), ICC-01/04-01/06, 23 May 2006, para. 33.

[55] See *ibid*., para. 20: "The applicant should have been released in the DRC *before being lawfully arrested* in accordance with current DRC legislation for the purposes of the international arrest warrant [emphasis added, ChP]." Note that such a release may encompass a *pro forma* release – in that Lubanga Dyilo is released and immediately re-arrested by the authorities. Such a remedy should, of course, be avoided. (This point was already often made earlier in this book.) Note finally that in the context of the ICC, there does not exist a term like 'international arrest warrant', see n. 127 of Chapter VIII.

[56] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Order on the application for release' (Public Document), ICC-01/04-01/06, 29 May 2006.

[57] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Submission relative to the Order of 29.5.2006' (Public Document), ICC-01/04-01/06, 31 May 2006.

[58] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 6.

Court [original footnote omitted, ChP]"[59] and pursuant to Article 19 of the ICC Statute,[60] an article which has already been predicted will play a role within the *male captus* discussion, see footnote 141 and accompanying text of Chapter VIII. (Bensouda correctly clarified the fact that Rule 185 of the ICC RPE only deals with the procedure after the ICC has decided to release the suspect and that it does not constitute, in itself, a basis for release.)[61]

Turning to the merits of the case, she first looked at the alleged illegality of Lubanga Dyilo's arrest and detention in the DRC.

She opined "that the information on the duration of Thomas LUBANGA DYILO's alleged house arrest and subsequent detention in the DRC is, at the very least, misrepresenting the facts".[62] According to her, the allegation that Lubanga Dyilo had been deprived of his liberty since 13 August 2003 was "both unsubstantiated and factually incorrect",[63] among other things, because "the evidence and information available to the Prosecution shows that he throughout 2003 and 2004 was able to move freely and to communicate, without restrictions, with whomever he wanted, including individuals within the UPC and the FPLC [original footnote omitted, ChP]".[64] It was further argued that he was only placed "under various forms of house arrest for about two weeks immediately prior to 19 March 2005",[65] the date of his arrest.

With respect to the proceedings in the DRC as from 19 March 2005, the Prosecution was "aware of the criticism expressed by international NGOs in relation to the DRC proceedings, including, *inter alia*, in respect of Thomas LUBANGA DYILO".[66] See in that respect, for example, the following words from Human Rights Watch, writing about the "poorly functioning judicial system"[67] of the DRC:

> In some of the few cases where justice has been pursued, authorities have failed to observe international standards of due process. In February and March a number of influential armed group leaders from Ituri were arrested in Kinshasa following the killings of nine U.N. peacekeepers. Several of those arrested, including Thomas Lubanga, Floribert Njabu[[68]] and Germain Katanga,[[69]] were accused by Human Rights Watch and others of war crimes and crimes against humanity. Authorities

[59] *Ibid*.
[60] See *ibid*., para. 7.
[61] See *ibid*.
[62] *Ibid*., para. 8.
[63] *Ibid*., para. 9.
[64] *Ibid*.
[65] *Ibid*., para. 10.
[66] *Ibid*., para. 12, n. 35.
[67] Human Rights Watch, 'Democratic Republic of Congo. Elections in sight: "Don't Rock the Boat"?', 15 December 2005 (available at: http://www.hrw.org/legacy/backgrounder/africa/drc1205/drc1205.pdf), p. 14. See also *ibid*., p. 16, where Human Rights Watch writes about the "absence of a functioning judicial system" and the "absence of an independent and effective judiciary".
[68] One can expect that Njabu, if he is brought before the ICC one day, will raise similar allegations as Lubanga Dyilo.
[69] Not very surprisingly, Katanga also argued that his arrest and detention in the DRC were illegal when he was brought before the ICC, see Section 4 of this chapter.

> arrested several of them without charge and held them for weeks before bringing any charges against them, in clear violation of Congolese legal procedures. By early December, they had been in detention for ten months but there has been no effort to bring them to trial [original footnote omitted, ChP].[70]

However, the Prosecution, which had already referred to these words as supporting material to convince the Pre-Trial Chamber of the urgency of issuing an arrest warrant (because these alleged irregular circumstances could lead to Lubanga Dyilo's release),[71] stated that on the basis of the *official* information,[72] "there was (…) and still is no reason to believe that the arrest and detention of Thomas LUBANGA DYILO in the DRC was illegal".[73] According to this official information, there was a legal basis for the proceedings against Lubanga Dyilo and Lubanga Dyilo was informed of the allegations which led to his arrest.[74] That may, of course, be true, but neither should one forget that this official information is also one-sided, namely information provided by the DRC authorities.[75] One can imagine that these authorities will not readily admit that their own proceedings were conducted in an irregular way. It is therefore a pity that the Prosecution did not try to determine, with help of the information provided by Human Rights Watch, what *really* happened to Lubanga Dyilo in the DRC, especially now that it *did* use this 'unofficial' information from Human Rights Watch for another purpose, namely to convince the Pre-Trial Chamber of the urgency of issuing an arrest warrant against Lubanga Dyilo.

Be that as it may, the Deputy Prosecutor submitted that even if violations of DRC law had occurred, these could not be attributed to the ICC and thus could not

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[70] Human Rights Watch, 'Democratic Republic of Congo. Elections in sight: "Don't Rock the Boat"?', 15 December 2005 (available at: http://www.hrw.org/legacy/backgrounder/africa/drc1205/drc1205.pdf), p. 15.

[71] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Submission of Further Information and Materials' (Under Seal, Ex Parte, Prosecutor Only), ICC-01/04-01/06, 25 January 2006, para. 11.

[72] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 12: "The knowledge of the Prosecution in respect of the reasons for and details of Thomas LUBANGA DYILO's detention in the DRC prior to his arrest for and surrender to the Court was determined by and limited to the information contained in the NOTE SYNOPTIQUE SUR ETAT DE LA PROCEDURE-DOSSIER DE L'ITURI of 10 August 2005 (NOTE SYNOPTIQUE), the copy of the DRC file on Thomas LUBANGA DYILO's detention, and discussions with representatives of the DRC authorities [original footnotes omitted, ChP]."

[73] *Ibid*.

[74] See *ibid*.

[75] This is clear with respect to the *DRC* file on Lubanga Dyilo's detention and the discussions with representatives of the *DRC authorities*, but also with respect to the 'Note Synoptique' of 10 August 2005, which was signed by *DRC* Brigadier General Joseph Ponde Isambwa, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the confirmation of charges' (Public Redacted Version with Annex 1), ICC-01/04-01/06, 29 January 2007, para. 195.

impact on the legality of the ICC arrest, surrender and detention.[76] For example, she rejected the allegation that the ICC had failed to intercede in the DRC, had endorsed and assisted in the violation of fundamental rules of international law and taken advantage of the alleged *male captus*;[77] in this context, she also refused to accept the analogy to, for example, the *Loizidou* case of the ECtHR as support for the idea that the ICC is under a duty to investigate the legality of Lubanga Dyilo's arrest and detention in the DRC.[78] As explained earlier, such a duty would only exist from the moment the ICC was involved in the case. Nevertheless, it is submitted that the ICC should go beyond that reasoning and should supervise any violation which occurs in the context of its case more generally. That is the only way to prevent a suspect from becoming the victim of his proceedings being fragmented over two or more jurisdictions.

The Deputy Prosecutor then went on to reject the Defence's assertion[79] that both the OTP and the Pre-Trial Chamber had considered the illegality of Lubanga Dyilo's arrest and detention in the DRC.[80] She explained that "[b]oth the Prosecution and the Pre-Trial Chamber had indeed reason to believe that Thomas LUBANGA DYILO could be released in the near future",[81] and that "[t]his belief was based on the fact that the local investigations against him turned out to be very difficult",[82] but that this consideration "had no bearing on the legality of Thomas LUBANGA DYILO's arrest and detention in the DRC".[83] That may indeed be true, but one can question whether this is what the Defence had asserted in the first place. After all, the Defence had only argued that "the Chamber took into consideration *the possibility* that the applicant had been arbitrarily arrested and that he might subsequently be released [emphasis added, ChP]".[84]

Subsequently, the Deputy Prosecutor stressed the fact that the arrest and detention of Lubanga Dyilo before 14[85]/15[86]/16[87] March 2006 could not be attributed to the ICC as follows:

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[76] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 11.
[77] See *ibid*., para. 13.
[78] See *ibid*., n. 43.
[79] See *ibid*., para. 14.
[80] See *ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] See n. 28 and accompanying text.
[85] The day the ICC's Registrar transmitted the request for arrest and surrender to the *Procureur Général de la République*, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 7.
[86] The day the *Auditeur Général des FARDC* was notified of the request for arrest and surrender (which was sent to him by the *Procureur Général de la République* on 14 March 2006, see *ibid.*).
[87] The day Lubanga Dyilo was arrested in the context of the ICC proceedings.

> [T]he arrest and detention of Thomas LUBANGA DYILO in March 2005 was not triggered by a request or any other involvement of the OTP, nor had the OTP or any other organ of the Court prior to the notification of the Auditeur Général des FARDC (…) of the DRC pursuant to Article 87 of the Statute on 15 March 2006 made a request to keep Thomas LUBANGA DYILO in custody. Thus, given that (1) Thomas LUBANGA DYILO was not arrested and detained in the DRC "at the behest of"[88] the OTP and, consequently, (2) that he was not in the Court's "constructive custody"[89] prior to his arrest and surrender on 16 March 2006, the alleged violation of the rights of Thomas LUBANGA DYILO cannot be attributed to the OTP or the Court [original footnotes omitted, ChP].[90]

First of all, it is interesting to note that the Deputy Prosecutor apparently recognises a point which was already argued before in this study,[91] namely that if violations occur in the context of constructive custody/during arrest/detention at the behest of the ICC (hence executed by third parties), these violations *can* be attributed to the ICC, even if, strictly speaking, third parties were responsible for them. That is to be welcomed: one can indeed assert that the ICC must take the general responsibility for violations which occur in those contexts. Furthermore, one can also agree with the Deputy Prosecutor that if the ICC were otherwise involved in the irregularities (for example, prior to the official constructive custody), such irregularities can also be attributed to the ICC. Nevertheless, involvement of the ICC is arguably only one situation which can lead to legal attribution. One could also think of conduct of third parties acknowledged and adopted by the ICC as its own, see Subsection 3.3.1 of

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[88] Here, the Prosecution referred to the first decision in the ICTR case of Barayagwiza and explained that the Defence's reliance on this case was misplaced as it had "neglected the fundamental differences in respect of the underlying facts between the case of *The Prosecutor vs. Barayagwiza* and the instant case: Barayagwiza's detention in Cameroon from 4 March 1997 until his transfer to the ICTR's Detention Unit on 19 November 1997 was *triggered* by an *official request of the ICTR Prosecutor* [emphasis in original, ChP]." (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 15, n. 45.) There are, of course, indeed important differences between these two cases, but as earlier explained in Part 3 of this book, the ICTR arguably also took responsibility for violations which occurred even when Barayagwiza was *not* detained at the behest/in the constructive custody of the ICTR, see n. 857 and accompanying text of Chapter VI. (Moreover (and from a more factual point of view), it should neither be forgotten that Barayagwiza was also held at the behest of the ICTR *before* 4 March 1997, namely between 17 April 1996 and 16 May 1996, see ns. 824-825 and accompanying text of Chapter VI.) The Prosecution also referred here to paras. 30 and 33 of the *Rwamakuba* decision of 12 December 2000. This reference is arguably more convincing as the *Rwamakuba* case seems to be less far-going on this issue than a case like *Barayagwiza*, see Subsections 3.1.6 (within the discussion of the *Karadžić* case), 3.2.4 (within the discussion of the *Rwamakuba* case itself) and 5.1 (within the context of the *Duch* case). See also n. 170 of Chapter VII.

[89] Here also, the Prosecution referred to the *Barayagwiza* case. Like this study (see the final words of n. 829 and n. 855 of Chapter VI), the Prosecution apparently views the concepts of 'detention at the behest of' and 'in the constructive custody of' as equal concepts.

[90] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 15.

[91] See the text following n. 830 and accompanying text of Chapter VI.

Chapter III and footnote 484 and accompanying text of Chapter VI. In addition, it can be argued that the fact that a *male captus* cannot be legally attributed to the ICC does not mean that it should not act upon it. The ICC should follow the reasoning of, for example, the *Barayagwiza* case and should supervise any violations which occur in the context of its case more generally, whether or not the violations can be legally attributed to it. An example often discussed is the kidnapping by private individuals, bringing a suspect, of whom it was clear to some that the ICC was interested, into the jurisdiction of the Court. In such a case, the *male captus* cannot be attributed to the ICC, for example, because it did not commit the abduction itself, because it was not otherwise involved in the abduction, because it had not yet officially initiated the investigation, because it did not acknowledge or adopt the abduction of its own, because it cannot be seen as an arrest/detention at the behest/request of the Court, *etc*. However, notwithstanding this, the *male captus can* arguably be seen as falling within the context of the Court's case more generally. Deterrence, the integrity of the proceedings and simple fairness towards the suspect[92] demand that in such a case, the *male captus* is considered and properly remedied by the final prosecuting forum (of course, taking into account that the *male captus* cannot be legally attributed to it).

Finally, the Deputy Prosecutor argued that even if the alleged irregularities at the national level could be attributed to the ICC (*quod non*), the requested remedy, release, was disproportionate to the violations.[93] In this context, she referred to the ICTY Appeals Chamber's decision in *Nikolić*, the second decision of the ICTR Appeals Chamber in *Barayagwiza* and the 31 May 2000 decision of the ICTR Appeals Chamber in *Semanza*, explaining "that the jurisprudence of the *ad hoc* Tribunals requires that the violation of the rights be of *"egregious nature"* for the extraordinary remedy of release to be granted [emphasis in original, ChP]".[94] This shows again (see footnote 58 and accompanying text) that the Prosecution viewed the requested remedy as a bar to the exercise of jurisdiction/as a *male detentus* remedy/as a release with prejudice to the Prosecution remedy.

Now that the alleged illegality of Lubanga Dyilo's arrest and detention in the DRC prior to the ICC arrest had been addressed, the Deputy Prosecutor looked at the allegation that violations had occurred in the context of the proceedings based on Article 59 of the ICC Statute. She maintained that Lubanga Dyilo was arrested and surrendered to the ICC in compliance with all the requirements; in particular, the proceedings were held before the competent judicial authority of the DRC, the

[92] See n. 849 and accompanying text of Chapter VI. See also n. 171 and accompanying text of Chapter VII and n. 286 of the previous chapter.
[93] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *vs*. Thomas Lubanga Dyilo, 'Prosecution's Response to Application for Release' (Public Formatted and Redacted Version), ICC-01/04-01/06, 13 June 2006, para. 16.
[94] *Ibid*., n. 47.

Auditeur Général, and Lubanga Dyilo had been served with, among other things, a copy of the arrest warrant in the DRC on 16 March 2006.[95]

Finally, it was argued that no violation of Article 67, paragraph 1 (a) of the ICC Statute had occurred because Lubanga Dyilo had been comprehensively informed of the charges against him.[96]

The Defence subsequently requested, and was granted, the possibility to react on the Prosecution's observations. In its confidential 'Conclusions en réplique à la réponse du Procureur à la demande de mise en liberté' of 10 July 2006, the Defence argued "that the Application for Release is grounded, on the one hand, on article 55 (1) (d) *juncto* article 85 of the Statute, and, on the other hand, on the inadmissibility of the case against Thomas Lubanga Dyilo".[97]

On 13 July 2006, Pre-Trial Chamber I considered "that in the various documents submitted to the Chamber regarding the Application for Release, the Defence has resorted to a variety of procedural remedies".[98] As a result, it ordered the Defence "to make clear which procedural remedy it is using for the Application for Release of Thomas Lubanga Dyilo".[99]

The response of the Defence was filed on 17 July. In this document, the Defence re-characterised its application as a challenge to the jurisdiction of the ICC[100] (as was already assumed by Deputy Prosecutor Bensouda in her response of 13 June 2006 to Lubanga Dyilo's application for release, see footnote 58 and accompanying text). In doing so, the Defence again referred to the *Barayagwiza* case and repeated (see footnote 54 and accompanying text) the relevance of the abuse of process doctrine, without again, however, clearly explaining how this doctrine fits the system of the ICC:[101]

> The application of the doctrine of "abuse of process" consists of making the Court state that it declines to exercise its jurisdiction in proceedings where continuing to exercise this competence and jurisdiction in relation to violations of the Accused's fundamental rights would cause irreparable damage to the integrity of the judicial process. For the reasons previously set out, the Court, within the context of its supervisory powers, could not endorse a violation of the Accused's fundamental

[95] See *ibid*., para. 17. See for more information with respect to the point that proceedings were held before the competent authority *ibid*., para. 18 and for more information with respect to the point that Lubanga Dyilo had been served with an arrest warrant in the DRC *ibid*., paras. 19-20.
[96] See *ibid*., paras. 21-22.
[97] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 3.
[98] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Order relating to the Application for Release' (Public Document), ICC-01/04-01/06, 13 July 2006, p. 3.
[99] *Ibid*., p. 4.
[100] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Submissions Further to the Order of 13 July 2006' (Public Document), ICC-01/04-01/06, 17 July 2006, para. 8.
[101] See the text following n. 54 and accompanying text.

> rights by continuing to exercise its jurisdiction over him. In this respect, the Court no longer has personal jurisdiction over the applicant. Since the Court must reject the Prosecutor's criminal proceedings in their entirety, release is also essential under this current challenge to jurisdiction [original footnote omitted, ChP].[102]

After this, the DRC and the victims presented their observations on this matter (and, not surprisingly, requested the ICC to reject the application).[103] Although the observations of the DRC are confidential and hence cannot be discussed here,[104] those of the victims are not and are indeed very interesting. The legal representatives of the victims first of all indirectly showed their adherence to a strict *male captus bene detentus* view.[105] For example, they argued that "[a]n irregularity that was committed at the time of the arrest or detention of an accused person should not have *any* consequence on the jurisdiction of the International Criminal Court [emphasis added, ChP]"[106] and that

> [n]o provision of the Statute states that the Court will lose its jurisdiction over such a person, even if that person was arrested or detained illegally, or even arbitrarily, which should cause *any* challenge to jurisdiction based on an irregularity committed at the time of the accused's arrest or detention to be rejected [emphasis added, ChP].[107]

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[102] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Submissions Further to the Order of 13 July 2006' (Public Document), ICC-01/04-01/06, 17 July 2006, paras. 8-9.

[103] Note that in contrast to, for example, the context of the ICTY and ICTR, victims have a much greater role to play in the context of the ICC. See, for example, Fernández de Gurmendi and Friman 2002, pp. 312-324.

[104] Some general information can, however, be found in ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 4, where the judges explain that the DRC requested the ICC "(i) to deny the Defence challenge to the jurisdiction of the Court on the ground that the said challenge has no legal basis; (ii) to reject the Defence assertion based on the alleged illegal detention of Thomas Lubanga Dyilo in the DRC; (iii) to reject the Defence assertion concerning the irregularities surrounding the arrest and surrender to the Court of Thomas Lubanga Dyilo; and (iv) to declare the Defence Application for Release admissible but without merit and thereby dismiss the request". See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 6: "The DRC (…) maintained that Mr. Lubanga Dyilo was brought before the judicial authorities having competence in the matter of enforcement of the warrant of the Court and that the process followed was the one ordained by law."

[105] See also ns. 119 and 121 and accompanying text.

[106] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006' (Public), ICC-01/04-01/06, 24 August 2006, para. 7.

[107] *Ibid*., para. 9.

It is, of course, true that the ICC Statute does not contain any explicit provisions in that respect, see also the previous chapter of this book, but the more interesting question is obviously whether an article such as Article 21 of the ICC Statute may nevertheless provide some direction in that respect.

The legal representatives then turned to the two main aspects of the case, namely 1) the alleged illegal detention of Lubanga Dyilo in the DRC before 16 March 2006 and 2) the alleged irregularities related to the ICC arrest and surrender pursuant to Article 59 of the ICC Statute.

A few interesting observations which are related to the first aspect and which should be mentioned here are the fact that the legal representatives stressed the limited scope of Article 55, paragraph 1 (d) of the ICC Statute[108] – see on this matter also footnote 32 and accompanying text – and that "an *illegal* detention under national law is not necessarily *arbitrary* detention within the meaning of article 55 or article 9 of the International Covenant on Civil and Political Rights [emphasis in original but bold emphasis changed into italicised emphasis, ChP]".[109]

With respect to this last point, it may be instructive to refer back to footnote 216 of Chapter III of this book where "one of the most important interpretations of "arbitrary" [original footnote omitted, ChP]"[110] (from the 1964 UN Committee's 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile') was presented:

> Arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person [original footnotes omitted, ChP].[111]

This means that arbitrariness is broader than illegality and that an arrest which, strictly speaking, is not unlawful may nevertheless be seen as arbitrary (namely if the law on which it is based is in itself incompatible with the right to liberty and security).[112] However, this interpretation also clarifies the fact that an illegal arrest/detention can also be seen as an arbitrary arrest. After all, "[a]rrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law".[113]

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[108] See *ibid*., paras. 13-15.
[109] *Ibid*., para. 16.
[110] Marcoux, Jr. 1982, p. 366.
[111] See n. 216 of Chapter III.
[112] See also Hall 2008 A, p. 1096, commenting on Art. 55, para. 1 (d) of the ICC Statute: "The prohibition in the second part of paragraph 1 (d) is independent of the prohibition in the first part of arbitrary arrest and detention; an arrest or detention made on grounds and in accordance with procedures established by the Statute could still be arbitrary in certain circumstances." Although this statement may *also* be seen as support for the statement of the legal representatives of the victims that an illegal detention is not necessarily arbitrary (see the words "is independent of"), Hall refers to the 1964 UN Committee's 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile' as well (see *ibid*., n. 24), which may mean that he follows the reasoning mentioned in the main text.
[113] See also the final words of n. 216 of Chapter III.

The legal representatives of the victims also referred to the seriousness of Lubanga Dyilo's alleged crimes, arguing that these "are so serious that any violations of the accused's procedural rights could not lead to a straightforward release or stop any proceedings making it possible to determine his responsibility".[114] It can be argued that this view should be resolutely rejected: the fact that Lubanga Dyilo's alleged crimes are very serious does not mean that serious violations of his procedural rights can never lead to the ending of the case. If that were the case, then an abduction of Lubanga Dyilo by the ICC's OTP, accompanied by serious mistreatment – to provide an extreme example – would not lead to the ending of the case either. That would be unacceptable: some *male captus* cases are so serious that jurisdiction must be refused if the Court wants to be taken seriously as a true institution based on law, whether or not one is dealing with suspects of international crimes.

Interestingly, the legal representatives also referred to the state of emergency in the DRC, an argument which the Defence had earlier rejected, see footnote 20 and accompanying text.[115] In this context, they made the statement that "[i]n a situation of armed conflict, the rules governing the detention of a person accused of war crimes are to be judged more on the basis of the law of armed conflicts, and more specifically the 1949 Geneva Conventions and additional protocols, than on the basis of instruments ensuring human rights".[116] However, it must not be forgotten that human rights law is, in principle, applicable at all times, not only in times of peace, but also in times of war. This is only different if the State has validly derogated from its human rights obligations because of the emergency/war situation, see Chapter III. (Note, furthermore, that some rights, and the right to *habeas corpus* appears to be one of them,[117] are of a non-derogable status and can thus never be neglected.)

With respect to the second aspect of the case (the one related to the alleged irregularities in the context of the ICC arrest and surrender pursuant to Article 59 of the ICC Statute), the legal representatives noted, among other things, that

> the Democratic Republic of the Congo was obligated to deliver the accused to the Court, regardless of the legal or illegal nature of his detention and regardless of whether its domestic legislation was adhered to in the period preceding the issuing of the arrest warrant; it would even have been obligated to arrest him and deliver him to the Court if he had been free or if he had been detained arbitrarily by forces outside the State's control.[118]

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[114] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006' (Public), ICC-01/04-01/06, 24 August 2006, para. 22.
[115] See *ibid*., paras. 23-27.
[116] *Ibid*., para. 26.
[117] See n. 426 and accompanying text of Chapter III.
[118] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06

This is another way of saying that notwithstanding any sort of *male captus*, the suspect must always be surrendered to the ICC. As explained in Chapter VIII, how the exact scope of Article 59 of the ICC Statute is to be seen and what has to be done if the competent judicial authority determines that a suspect was not arrested according to the proper process or that his rights were not respected will depend from State to State. Although there may indeed be States which will always surrender the suspect, notwithstanding irregularities in either the official ICC arrest process or the domestic phase preceding the official ICC arrest, it may also be the case that States, after consultation with the ICC (which is in any case mandatory), will refuse the surrender because of serious irregularities. As also clarified in Chapter VIII, the State's position on the *male captus* issue may also play a role here. (It was explained earlier that it is obvious that the legal representatives of the victims adhere to the traditional *male captus bene detentus* position.)[119] Furthermore, States may be of the opinion that certain (less serious) violations demand the release of the suspect. However, as explained earlier, this remedy should be avoided as it can be used as a *pro forma* remedy, to be immediately followed by a new arrest. In that case, the authorities could claim that the wrong has been repaired by the *pro forma* release and that the surrender can continue as if nothing had happened.[120] It would be better if national authorities in that case were to surrender the suspect and report the alleged irregularities to the ICC so that the judges in The Hague can accord appropriate and *real* remedies.

Not surprisingly,[121] the legal representatives also argued that the ICC *itself* could rely on "the principle of *"male captus, bene detentus"* which has been consistently applied before international and national courts [original footnotes omitted, ChP]".[122] As has hopefully become clear from this book, such a statement is, of

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Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006' (Public), ICC-01/04-01/06, 24 August 2006, para. 29.

[119] See n. 105 and accompanying text. See also n. 121 and accompanying text.

[120] *Cf.* also ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006' (Public), ICC-01/04-01/06, 24 August 2006, para. 32 where the legal representatives of the victims state that Lubanga Dyilo was in fact released at the national level before being arrested in the context of the ICC proceedings, but that he was not *actually* released: "While Defence Counsel writes in his application that *"The applicant should have been released in the DRC before being lawfully arrested in accordance with current DRC legislation for the purposes of the international arrest warrant"* it must be noted that this is indeed what happened: if a detainee released by a judicial authority must be arrested for another reason (in the present case, the warrant of the Court), it is not necessary to authorise him to exit the prison in order to arrest him subsequently on the outside, since one order for detention can replace another [emphasis in original and original footnote omitted, ChP]." As explained, it is indeed wise to avoid the *pro forma* release, but it should neither be forgotten that negating the *pro forma* release, and surrendering the suspect, means that it will then be up to the final prosecuting authority, the ICC, to look into the irregularities to avoid the situation that no authority will properly remedy the irregularities. See also n. 55.

[121] See ns. 105 and 119 and accompanying text.

[122] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06

course, far too over-simplified. At the national level, for example, one can also find several *male captus male detentus* cases. However, these were not mentioned by the legal representatives, who were thus too selective in their choice of *male captus* case law.[123] As explained earlier, much will depend on the exact circumstances of the case here. In fact, it was submitted that, with respect to certain serious *male captus* situations, such as an abduction executed by the authorities of the prosecuting forum and followed by a protest and request for the return of the suspect from the injured State or an abduction executed by the authorities of the prosecuting forum and accompanied by serious mistreatment, State practice indicates that courts will refuse jurisdiction. With respect to the first *male captus* situation, it was even argued that this is a rule of customary international law. Furthermore, it is true that at the level of the international courts, all the *male captus* cases ultimately led to a *bene detentus* outcome,[124] but this does not mean that judges follow the traditional *male captus bene detentus* maxim in that "a court may exercise jurisdiction over an accused person *regardless of how* that person has come into the jurisdiction of that court [emphasis added, ChP]".[125] This traditional definition of the maxim has clearly been abandoned. Also in this context, much will depend on the exact circumstances. It is confusing that the legal representatives, on the one hand, refer to the traditional definition of the *male captus bene detentus* maxim, but, on the other, also (correctly) acknowledge that certain serious situations may nevertheless lead to a refusal of jurisdiction.[126]

Finally, the legal representatives of the victims stated that it was not even necessary to refer to the *male captus bene detentus* principle as "unlike the situation in the Barayagwiza case, any violations of the accused's rights in the present case are in no way attributable to the Court, not even for a short time, since the accused was in The Hague barely 24 hours after a request for surrender was served in the DRC".[127] However, counsel forget here that *Barayagwiza*[128] (and the rest of the tribunal *male captus* case law)[129] acknowledges that judges can refuse jurisdiction

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Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006' (Public), ICC-01/04-01/06, 24 August 2006, para. 38.

[123] They only referred to *Ker*, *Frisbie*, *Alvarez-Machain*, *Argoud*, *Barbie* and *Eichmann*, see *ibid.*, n. 21. This is especially remarkable now that they also refer (see *ibid*., para. 38, n. 20) to paras. 70-93 of the ICTY Trial Chamber's decision in *Nikolić*, which contain many *male captus male detentus* cases such as *Toscanino*, *Mackeson*, *Bennett*, *Hartley*, *Levinge*, *Ebrahim*, *Jolis* and *Beahan*. Another odd point is that these paragraphs are referred to as support for the assertion that the principle *male captus bene detentus* has been consistently applied before *international* courts, whereas these paragraphs, for the most part (paras. 79-93), address *national* case law. The only cases before international courts mentioned in these paragraphs are *Dokmanović* and *Barayagwiza*. However, later in the document, the legal representatives of the victims also refer to cases like *Todorović*, *Semanza*, *Kajelijeli* and *Rwamakuba* (but strangely not to arguably the most important one, the ICTY Appeals Chamber's decision in *Nikolić*), see *ibid*., para. 40.

[124] See also *ibid*., paras. 43-45.

[125] *Ibid*., para. 38, n. 19.

[126] See *ibid*., para. 41.

[127] *Ibid*., para. 46.

[128] See n. 841 and accompanying text of Chapter VI.

[129] See ns. 88 and 164 and accompanying text of Chapter VII.

under the abuse of process doctrine, *irrespective of the entity responsible* for the violation. Hence, in very serious cases, the tribunal can refuse jurisdiction, even if the violations could not be attributed to the tribunal. In addition, it was earlier argued that the tribunal should more generally take responsibility for violations which occur in the context of its case, whether or not these violations could be attributed to it and whether or not they were so serious that it would lead to the ending of the case.

The Defence and Prosecution then filed their responses to the observations of the DRC and the victims. Although these responses are confidential, some information on these responses can nevertheless be found in the paragraphs describing this case's background information in the still-to-discuss Appeals Chamber's decision. In those paragraphs, it was explained that

> Mr. Lubanga Dyilo submitted that the Prosecutor was privy to his prior illegal detention by the Congolese authorities with a view to facilitating his unimpeded arrest under the warrant of the Court. There was, in his submission, complicity on the part of the Prosecutor in the action of the Congolese authorities to secure his arrest by devious means; shifting thereby the weight of his submission from responsibility of the Prosecutor for acts of the DRC to responsibility attributed to him on account of underhanded dealings with the authorities of that state.[130]

In response,

> [t]he Prosecutor refuted the allegation that he was party to any surreptitious dealings or arrangements with a view to bypassing the legal process or infringing the rights of the suspect or that he connived in any act of ill-treatment of the suspect. He submitted that the process for the enforcement of the warrant before the Congolese authorities followed the path envisaged by law (…) [original footnote omitted, ChP][.][131]

After all the submissions and responses of the participants had been filed, it was finally time for the ICC judges to address their very first *male captus* case. On 3 October 2006, Pre-Trial Chamber I issued its decision. The judges first of all recapitulated Lubanga Dyilo's two main allegations of this case, namely

> (i) the alleged arbitrary arrest by the DRC authorities on 13 August 2003 and the alleged subsequent illegal detention of Thomas Lubanga Dyilo in the DRC prior to 16 March 2006; and (ii) certain alleged irregularities in the execution of the Court's cooperation request for the arrest and surrender of Thomas Lubanga Dyilo (…) sent to the DRC on 14 March 2006 [original footnote omitted, ChP][.][132]

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[130] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 6.
[131] *Ibid*., para. 7.
[132] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Defence Challenge to the Jurisdiction of the

They then made it clear that Lubanga Dyilo had challenged the ICC's jurisdiction on the basis of Article 21, paragraph 3 of the ICC Statute – an important provision which was discussed at length in Section 4 of the previous chapter but which was not yet explicitly mentioned in the public submissions of the Defence – and the abuse of process doctrine.[133] Furthermore, they explained that Lubanga Dyilo had claimed that, in the context of the execution of the ICC's cooperation request, his rights under Article 59, paragraph 2 of the ICC Statute, again a crucial provision, see Chapters VIII and IX, had been violated.[134]

Starting with this last point, the judges clarified the fact that the phrase "in accordance with the law of the State" (as can be found in Article 59, paragraph 2 of the ICC Statute) "means that it is for national authorities to have primary jurisdiction for interpreting and applying national law [original footnote omitted, ChP]"[135] but

> that this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute [original footnote omitted, ChP][.][136]

This appears to be a good division of responsibilities, one which leaves room for the previously mentioned idea that national authorities are, of course, the experts when interpreting and applying their own law in determining, for example, whether the person has been arrested in accordance with the proper process and whether that person's rights have been respected but that the ICC should also have a supervising role to play here to ensure that the suspect does not become the victim of the fact that his criminal process is fragmented over two or more jurisdictions and that every violation in the context of an ICC case is ultimately properly remedied.

The judges then explained that the DRC authorities were *obliged* to determine the points mentioned in Article 59, paragraph 2 of the ICC Statute in the context of the ICC's request for arrest and surrender, but that there was no obligation for them to look into the lawfulness of the arrest and detention prior to the date this request was sent (14 March 2006) "insofar as that detention was related solely to national proceedings in the DRC".[137] Earlier in this chapter, it was explained that the DRC authorities also looked (albeit only briefly) at Lubanga Dyilo's arrest and detention

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Court pursuant to article 19 (2) (a) of the Statute' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 5.

[133] See *ibid*.

[134] See *ibid*.

[135] *Ibid*., p. 6. Interestingly, the ICC judges referred here to the *Barbie* (*Altmann*) case before the ECtHR, see n. 334 and accompanying text of Chapter III. Unfortunately, however, they did not explain what kind of role such case law plays within the context of the ICC, for example, whether it is only used as an authoritative source or whether it may enter the law of the ICC itself pursuant to Art. 21 of the ICC Statute, see the previous chapter.

[136] *Ibid*., p. 6. The ICC judges referred here to the *Winterwerp* case, see again (see the previous footnote) n. 334 and accompanying text of Chapter III.

[137] *Ibid*.

related to the national DRC proceedings, prior to the official ICC arrest in the context of Article 59, paragraph 2 of the ICC Statute and that that stance is to be welcomed for it may very well be that this part must be seen as falling within the context of an ICC case and it is important that every alleged violation which took place in that context is considered and, if needed, remedied. The ICC judges explained that the DRC authorities could indeed review that arrest/detention, even though they were not obliged to do so. The words of the judges also indicate that if the detention was *not* only related to national proceedings (read: but also to the proceedings of the ICC), the DRC authorities would also have been *obliged*, under Article 59 of the ICC Statute, to look into the lawfulness of that arrest/detention prior to sending of the request for arrest and surrender on 14 March 2006. This can not only be a reference to an arrest/detention based on an ICC's request for *provisional* arrest pending presentation of the actual request for arrest/surrender, but also to an arrest/detention in which the ICC was somehow involved and which can somehow be seen as being related to the ICC proceedings, even before the sending of these official requests.

These provisions having been explained in more detail, the judges turned to the specifics of the case. First of all, they concluded that Lubanga Dyilo had been brought before the competent judicial authority of the DRC, the *Auditeur Général des FARDC* (in this case his representative: the *Premier Avocat Général des FARDC*),[138] "because he was being detained at that time in relation to national proceedings before the Congolese *Military* Courts [emphasis added, ChP]".[139] In addition, they opined, "no material breach of article 59 (2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request".[140] Although it indeed appears that, in the context of the execution of the ICC arrest, the procedures were correctly followed and Lubanga Dyilo's rights were respected (see footnote 140 for more details), it would nevertheless have been even clearer had the judges explicitly addressed the points mentioned in Article 59, paragraph 2 of the ICC Statute, namely that there was no violation of that provision because the competent judicial

[138] See *ibid*., p. 7.
[139] *Ibid*., p. 8. See also *ibid*., p. 7.
[140] *Ibid*., p. 9. In more detail, "the *Premier Avocat Général des forces Armées de la République Démocratique du Congo*: (i) notified Thomas Lubanga Dyilo that as of that moment he was under arrest pursuant to an arrest warrant issued by the Court; (ii) provided to Thomas Lubanga Dyilo all materials attached to the Court's Cooperation Request, including (a) a copy of the arrest warrant for Thomas Lubanga Dyilo issued by this Chamber on 10 February 2006, (b) a copy of the Chamber's Decision of 10 February 2006, (c) a copy of the relevant provisions of the Statute and the Rules in a language that Thomas Lubanga Dyilo understands and speaks, including those relating to his rights under the Statute and the Rules; and (iii) informed Thomas Lubanga Dyilo of his right to oppose his arrest under a Court's arrest warrant and his surrender to the Court [original footnote omitted, ChP]". (*Ibid*., p. 8.) With respect to this last point, the judges also noted "that Thomas Lubanga Dyilo did exercise his right to oppose his arrest under a Court's arrest warrant and his surrender to the Court; and that, prior to confirming Thomas Lubanga Dyilo's arrest and surrender to the Court, the *Auditeur Général des Forces Armées de la République Démocratique du Congo* ruled on the merits of the grounds put forward by Thomas Lubanga Dyilo in support of his claim [original footnotes omitted, ChP]". (*Ibid*.)

authority in the DRC had determined that the warrant applied to Lubanga Dyilo, that he had been arrested in accordance with the proper process and that his rights had been respected (and that there was no reason to assume that the competent judicial authority erred in his rulings).[141] In addition, even though the Pre-Trial Chamber seemingly implied that the competent judicial authority must also look into the lawfulness of the arrest and detention prior to the official ICC arrest if that arrest/detention is somehow related to the ICC proceedings (and that it may do so if the arrest/detention was not related to the ICC proceedings), the ICC judges, as the supervisors which must marginally check the determinations of Article 59, paragraph 2 of the ICC Statute, did not clearly go into that matter themselves. Hence, it is unclear to what extent the ICC judges, under Article 59 of the ICC Statute, would also look into the prior arrest and detention, but one can assume that they would consider that arrest/detention if that arrest/detention could somehow be linked to the proceedings before the ICC. In addition, the Pre-Trial Chamber can be criticised for not discussing provisions which are arguably relevant for the context of Article 59 of the ICC Statute, such as Article 55, paragraph 1 (d) of the ICC Statute[142] and Article 21, paragraph 3 of the ICC Statute.[143] These provisions arguably play a role once the ICC has started an investigation (55) and once the ICC is involved in a case (21). That is certainly the case in the context of Article 59 of the ICC Statute.

The judges then turned to the first allegation of Lubanga Dyilo and explained

> that the Defence is currently challenging the jurisdiction of the Court by stating that "Article 21 (3) […] vests the Court with the obligation to consider whether its exercise of personal jurisdiction over Thomas Lubanga Dyilo is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances" [original footnote omitted, ChP][.][144]

The judges held that, according to Article 21, paragraph 3 of the ICC Statute,

> any violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities [original footnote omitted, ChP][.][145]

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[141] See also n. 272 and accompanying text.
[142] See also n. 156 and accompanying text of Chapter VIII.
[143] *Cf.* also ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Document), ICC-01/04-01/06, 26 October 2006, para. 40, n. 62 and para. 41.
[144] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 9.
[145] *Ibid.*

In making this statement, the Pre-Trial Chamber, again without clearly explaining what kind of role such case law plays within the context of the ICC,[146] referred to the ECtHR's case *Stocké*,[147] the ECmHR's case *Barbie*[148] and the ICTR cases *Semanza* and *Rwamakuba*, these last two as authorities for the idea that the ICTR "has repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the Tribunal".[149] Hence, it appears that the Pre-Trial Chamber followed the view of the Deputy Prosecutor mentioned at footnote 90 and accompanying text, namely that the ICC will take its responsibility, first, for violations which occur *after* the official request has been sent (violations taking place in the constructive custody of the ICC/violations in the arrest/detention at the behest/request of the ICC: *Semanza* and *Rwamakuba*)[150] and secondly, for violations which occurred prior to these official requests if these violations stem from concerted action between the ICC and the external authorities (in the case of Lubanga Dyilo: the DRC authorities): *Stocké* and *Barbie*. This second situation can be compared with the Prosecutor's words "or any other involvement of the OTP", as in: "[T]he arrest and detention of Thomas LUBANGA DYILO in March 2005 was not triggered by a request or any other involvement of the OTP".[151] In those two situations, the violations can be attributed to the ICC.

That which was said in the context of the Deputy Prosecutor's remarks can also be said here: it is good that both the Deputy Prosecutor and the Pre-Trial Chamber are of the opinion that violations which occur in the context of constructive custody/arrest/detention at the behest/request of the ICC can be attributed to the ICC and will thus be considered. Furthermore, one can also agree with the point that, prior to the sending of the official request, irregularities can be attributed to the ICC/can be considered by the Court if they stem from concerted action between the ICC and third parties. This also accords with the previously made assumption in the context of Article 59 of the ICC Statute that the ICC, as the supervisors marginally checking this provision, would also look at an arrest/detention prior to the official ICC arrest if that arrest/detention was somehow related to the ICC proceedings. This is comparable with the idea that the ICC would look at the arrest/detention prior to the official ICC arrest if the ICC was somehow involved in that arrest/detention/if there was concerted action between the ICC and third parties.

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[146] See also n. 135.
[147] See n. 384 and accompanying text of Chapter III.
[148] See n. 334 and accompanying text of Chapter III.
[149] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, pp. 9-10, n. 30.
[150] Although *Semanza* can indeed be seen as a case where the judges stated that they would take responsibility for any violations occurring in the constructive custody/arrest/detention at the behest/request of the Tribunal, *Rwamakuba* appears to be less far-going than the Pre-Trial Chamber states here as in that case, the judges also opined that they would only focus on certain elements of that constructive custody, see n. 1103 and accompanying text of Chapter VI.
[151] See n. 90 and accompanying text.

However, one should not forget that there are also other situations (besides concerted action) which entail that certain conduct can be attributed to the ICC, for example, if the ICC acknowledges and adopts the conduct of third parties as its own. It is regrettable that this point was not mentioned. In addition, it must be repeated that the fact that a *male captus* cannot be legally attributed to the ICC does not mean that it should not be considered. The better solution would be if the judges were to take responsibility for any violation which occurs in the context of their case more generally and then, in deciding the kind of remedy, take into account, for example, whether these violations can be legally attributed to the ICC (using all the possibilities in that respect: constructive custody, involvement, acknowledgment and adoption as its own, *etc*.).

Only this more general view will arguably bring greater flexibility and fairness into a system which is sometimes overly focused on the ultimate remedy: refusal of jurisdiction (*male detentus*). In that respect, it is to be regretted that the ICC judges restrict the scope of Article 21, paragraph 3 of the ICC Statute to violations in the context of constructive custody and in the context of an arrest/detention which resulted from concerted action between the ICC and third parties. Although this seemingly comports with what Article 21, paragraph 3 requires, see Chapter IX[152] where it was explained that the provision covers any situation in which the ICC is involved, including, for example arrest/detentions executed by national authorities at the behest of the ICC, it was argued in the same chapter that it would be even fairer for the ICC to repair any violations which occur in the context of its case more generally. After all, the judges may always be confronted by violations which, strictly speaking, cannot be seen as falling under the above-mentioned situations but which it would be very unfair not to consider/repair.[153] Again, one can mention abduction by private individuals here. If the judges are of the opinion that, in that situation, internationally recognised human rights were violated, they should be able under Article 21, paragraph 3 of the ICC Statute to repair these violations. (*Cf.* also the similar argument made in the context of Article 55 of the ICC Statute.)[154]

This more general reasoning can arguably be found in several tribunal cases, see footnote 170 and accompanying text of Chapter VII. Furthermore, support for this more general reasoning can also be found in the context of the extreme cases; the tribunals have argued that under the abuse of process doctrine, courts may refuse jurisdiction in very serious *male captus* cases, irrespective of the entity responsible. As submitted before, if the tribunals take the ultimate responsibility for violations which occur in the context of their case (refusal of jurisdiction), irrespective of the entity responsible, they should also do so (more clearly) in the case of less serious violations.[155]

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[152] See the text following n. 245 and accompanying text of that chapter.
[153] See the text following n. 247 and accompanying text of Chapter IX.
[154] See n. 32 and accompanying text.
[155] *Cf.* also ns. 1253-1254 and 1280 and accompanying text of Chapter VI (in the context of the *Duch* decision of 15 June 2009).

Although this last idea is not shared by the Pre-Trial Chamber, it *did* look at the context of the extreme cases, holding

> that whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused;[156] and that, to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case,[157] has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal[158] [original footnotes omitted, ChP][.][159]

Before going into the merits of this statement, which were briefly discussed in the *Duch* case, see Chapter VI, it should be said that it should be welcomed that the ICC judges accept the abuse of process doctrine, although it can be maintained that it is unclear *how* the Pre-Trial judges incorporate this doctrine (and the same goes for the international (criminal) tribunal case law)[160] into the system of the ICC/Article 21 of the ICC Statute.[161] In Chapter IX of this book, it was explained that the reasoning behind this doctrine, namely that courts have the power to refuse jurisdiction in certain serious *male captus* cases (one should not focus too much on the common law label 'abuse of process' here) can perhaps be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute[162] or otherwise as general principle of law derived by the Court from national laws of legal systems of the world pursuant to Article 21, paragraph 1 (c) of the ICC Statute.[163] Because so many courts seem to recognise this power, it could be held that it is an inherent power[164] of *any* court of law, a point which was made earlier in this study.[165]

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[156] Here, the judges referred to para. 30 of the ICTY Appeals Chamber's decision in *Nikolić* (see n. 619 and accompanying text of Chapter VI), para. 206 of *Kajelijeli* (see n. 1047 and accompanying text of Chapter VI) and paras. 70-75 of *Dokmanović* (see ns. 221 *et seq*. and accompanying text of Chapter VI).

[157] Here, the judges referred to paras. 74-77 of the first *Barayagwiza* decision (see ns. 845 *et seq*. and accompanying text of Chapter VI) and again (see the previous footnote) to para. 206 of *Kajelijeli*.

[158] Here, the judges referred to the same sources as mentioned in n. 156.

[159] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10.

[160] See also ns. 135 and 146 and accompanying text.

[161] This point was already raised in the context of the arguments of the Defence, see the text following n. 54 and accompanying text and n. 101 and accompanying text.

[162] See the final text of Subsection 2.3.2.2 of the previous chapter.

[163] See n. 210 and accompanying text of the previous chapter.

[164] Lord Diplock described inherent power/jurisdiction of a court as "the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice." (House of Lords, Lord Diplock, *Bremer Vulkan v. South India Shipping*, 22 January 1981, [1981] *A.C.* 909, at p. 977.)

[165] See n. 878 and accompanying text of Chapter VI and n. 19 and accompanying text of Chapter VII.

Hence, it could be argued that the ICC also has this inherent power to refuse jurisdiction in very serious *male captus* cases, irrespective of the entity involved. If the ICC agrees that it has an inherent abuse of process-like power, it should follow the broad abuse of process doctrine of the other international tribunals, which accepts that jurisdiction can be refused, irrespective of the entity responsible. It is submitted that that is the only appropriate abuse of process doctrine for an institution with no police force of its own. However, it is also clear that involvement of the prosecuting forum's own authorities (such as the OTP) is an important element in deciding whether or not a *male detentus* outcome must follow, *cf*. the national level and the abuse of process doctrine in that context.

Thus, while recognising that one must be careful with implied/inherent powers in the context of the ICC,[166] it is submitted that even if the judges do not accept that the reasoning behind the abuse of process doctrine can be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute or otherwise as a general principle of law derived by the Court from national laws of legal systems of the world pursuant to Article 21, paragraph 1 (c) of the ICC Statute, they may nevertheless be of the opinion that it must be seen as an inherent power of the ICC judges. In the words of Currie:

> The ICC must, like any other court, have the ability to control its own process and to address any abuse of its process – up to, and including, the ability to impose dismissal as a remedy. This is a matter of simple credibility for any court, and goes to basic notions of legality; as Professor Morgenstern wrote many decades ago, "[I]t is the duty of courts to administer the law with an eye not only to the merits of each individual case but also to higher considerations of legality." Both the ICTY and ICTR have invoked such inherent/implied powers, including the ability to remedy abuse of process, though it is not spoken to in their respective Statutes or Rules of Evidence and Procedure [original footnotes omitted, ChP].[167]

As explained in Chapter VI, it is indeed true that the abuse of process doctrine shows that tribunals will refuse jurisdiction in the event of very serious *male captus* situations, even if the authorities which can be linked to the tribunal in question were not involved in the *male captus*. However, these situations do not necessarily need to be confined to torture or serious mistreatment. The only real test is that judges can refuse jurisdiction in very serious *male captus* cases and that it is for them to judge whether the *male captus* in question is serious enough to refuse jurisdiction. It is obvious that the *male captus* does not need to be restricted to serious mistreatment/torture-like practices when the tribunal *is* involved – the first *Barayagwiza* decision is, of course, the best example of this[168] – but also when the tribunal is *not* involved in the alleged *male captus*, the situation on which the ICC is focusing here, it might be possible that judges nevertheless find the *male captus*

[166] See n. 131 of Chapter IX.
[167] Currie 2007, p. 375.
[168] The fact that in the end, the *factual* outcome of this case was altered in a second decision, does not in any way jeopardise this reasoning.

serious enough to refuse jurisdiction. One could perhaps think here of an forceful abduction, executed by national special forces, backed up by the peacekeeping force in the area, accompanied by mistreatment inflicted on the suspect (albeit not *serious* mistreatment) and followed by protests and a request for the return of the suspect from the injured State and condemnations of other States.

It may perhaps seem odd, but at this point, it is worth returning to Currie's rugby pitch and his introduction of the term 'lateral' mentioned at the end of Chapter VIII. That chapter clarified that the ICC's cooperation regime has both horizontal and vertical elements and that it is clearly not as vertical as the system of the ICTY and ICTR. Now, in Section 2 of this book's Chapter VII (the principles distilled from the cases between States), it was argued that the *male captus* situation of an abduction executed by the prosecuting forum's authorities and followed by a protest and request for the return of the suspect can be seen as having customary international law status. In Section 3 of that chapter (the principles distilled from the cases between States and international(ised) criminal tribunals), it was consequently explained[169] that such a rule, now that it has customary international law status, should in principle also apply to the context of the tribunals, but that judges in national courts would probably refuse jurisdiction in such cases to, among other things, protect the fragile legal international order based on the equality of sovereign States and that that rationale is less important (albeit not absent) in the vertical context of the ICTY and ICTR. It was then stated that one can thus question whether this rule of customary international law can be applied *mutatis mutandis* to the context of these Tribunals.[170] However, to what extent would this rule be applicable to the not-so-vertical context of the ICC? One should not be too surprised if the ICC judges (correctly) attached more importance to a protest from an injured State and the violation of that State's sovereignty than, for example, the ICTY Appeals Chamber's 'carte blanche decision' of *Nikolić*. Perhaps, the ICC judges would feel bound by the above-mentioned customary international law rule and would thus refuse jurisdiction, not because they believe that they *ought to*, but because they believe that they *must* do so. Likewise, if the above-mentioned scenario of the forceful abduction were to materialise (a situation in which the tribunal itself is not involved), one can expect that the truly vertical (and merely temporal) ICTY and ICTR would not be very impressed by a protest from the injured State and a request for the return of the suspect. But this may be different for the (permanent) ICC, in whose "lateral" context the sovereignty of States plays a much bigger role. In the words of Currie:

> In the lateral system (…) the case for of universally condemned offences as the overarching threats to international peace and order cannot be made with either the

[169] See n. 104 of Chapter VII. See also n. 652 and accompanying text of Chapter VI.

[170] Note, however, that even though this would mean that there would be no obligation for these Tribunals to refuse jurisdiction in such cases, it was already submitted earlier that in the case of an abduction orchestrated by these Tribunals, the latter *should* return (conditionally) the suspect back, whether or not there has been a protest from the injured State.

legal or normative force that it was by the ICTY in *Nikolić*. While the ICC has a large number of state parties, it is by no means a universal treaty; third party states will inevitably be engaged, since international criminals will not necessarily respect borders.[171] The state parties, moreover, exist as sovereign equals in what is essentially a glorified treaty regime. The obligations under the Rome Statute are for parties to cooperate with the Court, even to the point of surrendering jurisdiction in appropriate circumstances, but those obligations are ultimately owed to the state parties themselves. The lack of "verticality" deprives ICC proceedings of some of the moral suasion that attaches to the *ad hoc* tribunals.[172]

[171] Of course, where the sovereignty of non-States Parties, especially those hostile to the ICC, is violated by the *male captus*, the judges of the ICC simply cannot afford not to address that dimension of the *male captus*, see Currie 2007, p. 386, who notes that an abduction of a national from a non-State Party (irrespective of the place of the abduction) may lead to similar serious consequences, see *ibid*.

[172] *Ibid*., p. 385. See also *ibid*., p. 389: "The Appeal Chambers' suggestion in *Nikolić* that a reviewing court should not attribute any significance to international law violations stemming from abduction must be rejected. The legality of this holding is questionable even before that body, but it is entirely inappropriate for the lateral system in which the ICC exists. The ICC must engage with, and must be seen to engage with, the issues of abduction, illegal rendition and illegal arrest, and in a manner which makes the Court's jurisdiction *ratione personae* a live issue; unlike the UN tribunals, it does not have the freedom not to." This point was also already made by Sloan 2006, p. 333 (see n. 642 of Chapter VI): "[T]o simply observe that the violation [of State sovereignty, ChP] may lead to 'consequences for the international responsibility of the State or organization involved', without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice. If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperating member states, the ramifications could be very damaging to international peace and security [original footnotes omitted, ChP]." Currie (2007, pp. 387-388), elaborating more on this issue, notes that "[i]ronically enough, if the *Nikolić* line of reasoning prevails before the ICC there may be certain cases where prosecuting universally condemned offences will *create* threats to international peace and security – different from those underpinning the offence itself but no less destructive for that. The prospect of dousing a smaller fire only to start a larger one is troubling, but very real. Even the more "minor" political conflicts can only hurt the cause, legitimacy and credibility of a Court which already has to operate in a highly-charged political atmosphere; if it is seen to be encouraging or approving of international illegality, then the Court may very well play into the hands of those who view it as a politicized and biased forum. A wholesale application of the *mala captus bene detentus* rule should have no future before the ICC [emphasis in original and original footnote omitted, ChP]." It may finally be interesting to note that Currie also sees a role for the ASP here. He suggests (*ibid*., p. 391): "The Assembly of States Parties should enact some form of formalized mechanism to address abduction or other illegality, perhaps by way of amending the Rome Statute to add some kind of complaints-resolution mechanism or at least a subforum in which these issues could be discussed, and to which non-state parties could bring complaints. While it is difficult to imagine the state parties adopting anything beyond a fairly toothless kind of "talk shop," this forum could nonetheless act as a sort of pressure valve, allowing states to engage each other on the issues without having recourse to other measures, e.g. claims before the ICJ." Although a forum where States can talk about these issues is always useful, one wonders whether it would be necessary to set up a complete new mechanism within the context of the ICC if States have already enough opportunities to discuss such matters in existing international fora such as the UN (or in simple bilateral talks). As concerns a sort of complaints-resolution mechanism: that indeed does not appear to be achievable as States will know beforehand that it can never be truly effective. After all, even if the abducting State were to agree with the ultimate complaint of the injured State that the latter's sovereignty has been violated by the *male captus* and that the suspect must be returned, they both know that the case is now before international and independent judges who will not release a suspect simply because that is the

One can argue that the above-mentioned view, that the abuse of process doctrine, in cases where the tribunal in question is not involved in the *male captus*, should not be limited to serious mistreatment/torture situations and that the ICC may more easily refuse jurisdiction in serious *male captus* situations which are not accompanied by serious mistreatment/torture than the ICTY/ICTR because it will probably attach more importance to a concept such as State sovereignty,[173] does not seem to be rejected by the ICC judges. After all, they state that the application of the abuse of process doctrine, "*to date*, (…) has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [emphasis added and original footnotes omitted ChP][.]"[174] However, the fact that until October 2006, the application of this doctrine has been restricted to a certain situation does not mean that the ICC will also restrict itself to such situations.[175]

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result of a (political) forum. However, what *is* important is, of course, that these judges are aware of all the facts of the case so that they can issue the most just decision (which may indeed be the final release of that suspect). Hence, if a State (whether a State Party or not) is of the opinion that a *male captus* has occurred on its territory and that the ICC judges should know about this violation of its sovereignty (this would be especially important if there are indications that the OTP was involved in this violation) the ICC should, of course, allow that State to file its views with the ICC so that the judges have all the information at their disposal to be able to issue the most just decision.

[173] Related to this point is that the ICC hopefully sees that its model function *vis-à-vis* national courts may even be greater than that of the ICTY and the ICTR (see n. 127 and accompanying text of Chapter VI and n. 106 and accompanying text of Chapter VII). See Lawyers Committee for Human Rights, 'Pre-Trial Rights in the Rules of Procedure and Evidence', International Criminal Court Briefing Series, Vol. 2, No. 3, February 1999, available at: http://www.iccnow.org/documents/LCHRPreTrialRightsFeb99.pdf, where it is written that the ICC "will act as a standard setting mechanism in the interpretation and application of international law and provide a model for national authorities in the administration of criminal justice." See also Stapleton 1999, p. 546: "Ideologically, one of the purposes of an international tribunal like the ICC is to extend "the rule of law and … [to bring] … national courts up to the standards of international law." International human rights and humanitarian conventions are committed to providing an expansive view of rights and to extending the rights of individuals so that national governments will follow their example. Allowing the ICC, an aggressive enforcer of human rights, to deviate from the minimum international standards for a fair trial would undermine the credibility of existing human rights norms. How can a national government be expected to follow "minimum" standards for a fair trial if an international tribunal does not [original footnote omitted, ChP]?"

[174] See also n. 1276 of Chapter VI.

[175] *Cf*., for example, the following decisions from 2009: ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85: "As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or degrading treatment, there is no indication that the Accused suffered such serious mistreatment *or that there was any other* egregious *violation of his rights, including his right to political activity* [emphasis added and emphasis (of the word "egregious") in original, ChP]." See also ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 47: "[T]he Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one, by considering whether the Appellant suffered a serious mistreatment *or if there was any other egregious violation of his rights* [emphasis added, ChP]." See also *ibid*., para. 51: "[T]he

Before returning to that point, another issue must be addressed, an issue which was briefly mentioned in Chapter VI.[176] The Pre-Trial Chamber talks about "instances of torture or serious mistreatment *by national authorities of the custodial State* in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [emphasis added and original footnote omitted, ChP]".

The problem is that under the abuse of process doctrine in the tribunal context, the italicised words are not required: the *male captus* does not need to have been committed by national authorities. Jurisdiction can be refused, *irrespective* of the entity responsible: think, for example, of the actions of the private individuals in the *Nikolić* case. However, whether this is a mistake of the Pre-Trial Chamber is not clear. On the one hand, it does refer to tribunal cases alone (*Nikolić* (Appeals Chamber), *Kajelijeli* and *Dokmanović*) [177] but on the other, the test from the Appeals Chamber's decision in *Nikolić* case was not very clear (see Subsection 3.1.4 of Chapter VI), *Kajelijeli* involved the actions of State authorities working at the behest of the ICTR and the exact paragraphs from the *Dokmanović* case to which the Pre-Trial Chamber refers contain examinations of national cases. (And in the national context, the abuse of process doctrine appears to require the involvement of authorities which can be linked to the prosecuting forum.) The following does not solve this issue either: one could argue that the Pre-Trial Chamber adheres to the normal abuse of process doctrine from the tribunal context (not requiring the involvement of State authorities) but only applies the specifics of the case before it to the theory in question. However, even though a number of quotations from this decision can be seen as such,[178] this particular quotation cannot, for it is too generally formulated. Hence, it is not clear whether the Pre-Trial Chamber would refuse jurisdiction irrespective of the entity responsible or whether it would only do so in the case of a *male captus* committed by the national authorities of the custodial State.

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question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights."

[176] See ns. 1216, 1273-1274 and 1276 and accompanying text of Chapter VI.

[177] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10, n. 33. See also n. 156.

[178] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, pp. 9 ("[A]ny violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities [original footnote omitted, ChP]") and 10: "[N]o issues has arisen to any alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities".

Returning now to the point that the Pre-Trial Chamber had stated that the application of the abuse of process doctrine, *to date*, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal and that this statement does not mean that the ICC will restrict itself to such situations; unfortunately, when the Pre-Trial Chamber moved from the theory to the facts of this specific case, it did not more generally determine for itself whether the *male captus* was so serious that jurisdiction had to be refused: it only focused on the examples of serious mistreatment/torture and concluded

> that in the course of the present proceedings under article 19 of the Statute, no issues has arisen to any alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities[[179]] prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities[.][180]

Now that the abuse of process doctrine could not be relied upon, the judges turned to the question of "whether there was concerted action between the Court and the DRC authorities in connection with the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006 [original footnote omitted, ChP]".[181] Here, the judges concluded

> that there is no evidence indicating that the arrest and detention of Thomas Lubanga Dyilo prior to (…) 14 March 2006 was the result of any concerted action between the Court and the DRC authorities; and that the Court will therefore not examine the lawfulness of the arrest and detention of Thomas Lubanga Dyilo by the DRC authorities prior to 14 March 2006[.][182]

The final conclusion was thus that Lubanga Dyilo's challenge to the ICC's jurisdiction was deemed unfounded and consequently dismissed. As the Pre-Trial Chamber was only prepared to look at the lawfulness of Lubanga Dyilo's arrest/detention prior to 14 December 2006, if that arrest/detention resulted from concerted action between the ICC and the DRC authorities (*quod non*) and as it was only prepared to look beyond that test in the context of the abuse of process doctrine (which is focused on the ultimate remedy, refusal of jurisdiction, only), Lubanga

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[179] In this specific case, in which, for example, no private individuals were involved in the *male captus*, the Pre-Trial Chamber could restrict itself here to the national authorities, see the previous footnote and accompanying text. Nevertheless, it is to be recalled that the *general* abuse of process doctrine from the tribunals is not restricted to actions of the national authorities.

[180] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10.

[181] *Ibid*., pp. 10-11.

[182] *Ibid*., p. 11.

Dyilo was not granted any other, less far-reaching remedies for his alleged irregular arrest/detention in the DRC prior to the official ICC arrest.

Again, it can be argued that a better method would be for the ICC judges to first try to find out *exactly* what happened to Lubanga Dyilo in the DRC before his official ICC arrest and whether the violations, if they did in fact occur, can be seen as falling within the context of the ICC case. It may very well be that the judges would then still be of the opinion that the violations – if they did occur – cannot be seen as falling within the context of the ICC case.[183] If that were so, then the ICC would not have to remedy the violations. (Of course, the context of an ICC case must have *some* boundaries.) However, in that case, the judges would at least have used a test which is arguably fairer than that used now.

Lubanga Dyilo subsequently filed a confidential appeal, which was followed by a confidential response by the Prosecution, observations from the DRC and the victims and a reply from the Defence. After that, the long-awaited decision of the Appeals Chamber was issued. Although the appeal by the Defence and the response by the Prosecution themselves are confidential, the Appeals Chamber summarised their contents. Furthermore, publicly available redacted versions of the Defence's appeal[184] and the Prosecutor's response were filed.[185] As a result, it is possible to examine their (counter)arguments. As many arguments of the Defence and the Prosecution have been reviewed *supra*, this study will, in principle, follow the summary of the Appeals Chamber. However, a few interesting observations from the Defence's appeal and the Prosecutor's response will also be mentioned.

The appeal of the Defence contained five grounds, namely:

> 1st ground: Adoption by the Pre-Trial Chamber "of an incorrect legal test for the determination as to whether to stay the exercise of jurisdiction over Thomas Lubanga Dyilo"[;] 2nd ground: Failure of the Chamber "to consider relevant and significant

[183] In the Appeals Chamber's decision, which will be discussed in a moment in the main text, it was stated that "[p]rior to his arrest on the authority of the warrant of the Court, Mr. Lubanga Dyilo was held in custody by the Congolese authorities for crimes other than those that were found to justify the issue of a warrant for his arrest by the Court." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 5.) See also *ibid*., para. 42: "It is worth reminding that the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority were separate and distinct from those which led to the issuance of the warrant for his arrest." This fact may, of course, play a role in determining whether or not any violations in that detention can be seen as falling within the context of the ICC case, although it is arguably not the only element which should be taken into account. This point will be returned to *infra*.

[184] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Document), ICC-01/04-01/06, 26 October 2006.

[185] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006.

> indicia concerning the relationship between the DRC and the ICC prosecution"[;] 3[rd] ground: Application by the Chamber of "an incorrect legal standard for assessing the relevant law of the DRC in the context of article 59 (2) of the Statute"[;] 4[th] ground: Failure of the Chamber "to consider the cumulative effect of the violations of Thomas Lubanga Dyilo's rights"[;] 5[th] ground: Failure of the Chamber "to consider whether a lesser remedy would be appropriate" [original footnotes omitted, ChP][.][186]

As well as noting that the subject of the fifth ground of appeal was already addressed *supra*, it is interesting to examine a few points mentioned by the Appeals Chamber after it had presented these five grounds. The judges explained that the Defence had argued, among other things, that

> the concept of human rights and the implications of their violations (…) should not be viewed statically but from an ever-evolving perspective of the impact of human rights violations on judicial proceedings. Reference was made to *inter alia* the jurisprudence of the Inter-American Court of Human Rights and the test of "due diligence" adopted as the measure of testing the propriety of action of the prosecuting authorities as well as the conduct of private actors [original footnotes omitted, ChP].[187]

These are certainly interesting thoughts which can be seen as additional support for the already – so often – expressed idea of this study that the tribunal in question, in this case the ICC, should be the ultimate guarantor that violations which take place in the context of an ICC case are, ultimately, properly remedied, irrespective of the entity responsible for these violations (thus including the actions of private individuals).

Another interesting point made by the Defence was that

> [t]orture or serious mistreatment (…) should not be confined to isolated acts but may be configured by the cumulative effect of a series of acts involving violations of the rights of a person. The appellant depicted *inter alia* his stay while in custody and the conditions of his detention as an act of torture [original footnotes omitted, ChP].[188]

The Defence here wanted to convince the Appeals Chamber that (the conditions of) his detention at the national level amounted to torture, for the simple reason that that qualification, torture, is one of the most accepted avenues towards a *male detentus* result. However, and without qualifying Lubanga Dyilo's detention in the DRC as torture, there is no need to prove this. As stated before in this study, serious mistreatment or torture is 'only' an *example* of such a serious *male captus* that jurisdiction must be refused. However, it may very well be that judges are of the

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[186] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 13.
[187] *Ibid*., para. 14.
[188] *Ibid*.

opinion that a certain *male captus* is so serious that *male detentus* must follow, even if the *male captus* was not accompanied by serious mistreatment/torture. And indeed, many not so serious violations can cumulate and lead to such a serious *male captus* that jurisdiction must be refused nevertheless, *cf.* the *Barayagwiza* case, see footnote 875 and accompanying text of Chapter VI. This should, of course, be clear if the *male captus* was executed by staff from the ICC itself, but judges may also refuse jurisdiction if the *male captus* was not executed by authorities which can be linked to the ICC, see also the example mentioned after footnote 168 and accompanying text.

A final interesting point mentioned by the Defence was that "[t]he deference by the Pre-Trial Chamber to national law and the process followed by the Congolese authorities in enforcing the arrest warrant was unjustified".[189] Although it appears that the ICC quite properly checked whether the official ICC arrest was executed correctly – even though it was also noted that it would have been even clearer for it to have explicitly addressed the points mentioned in Article 59, paragraph 2 of the ICC Statute[190] – one can indeed agree with the Defence that the Pre-Trial Chamber can be criticised for not examining provisions which arguably must play a role within the context of Article 59 of the ICC Statute, namely Article 55, paragraph 1 (d) of the ICC Statute and Article 21, paragraph 3 of the ICC Statute.[191]

Conversely, the Prosecution supported the Pre-Trial Chamber's decision in every respect.[192] A few interesting remarks from the redacted version of its response should definitely be mentioned here.

First of all, the Prosecutor stressed that, even though the principle that justice must be done with full respect for the rights of the suspect/accused should be cherished, the ICC is not required to provide a remedy "for violations that occurred outside of its jurisdiction, custody or control, and in respect of separate national investigations or proceedings".[193] In this context, it also referred, among other things, to the scope of Article 55 of the ICC Statute (which only talks about rights in the context of an investigation).[194] As clarified before, one can argue that, strictly speaking, the Prosecutor is right: according to such provisions as Article 21, paragraph 3 and Article 55 of the ICC Statute, the ICC must focus on the rights which occurred when the ICC exercised jurisdiction in the case/was involved in the case (Article 21, paragraph 3 of the ICC Statute) or when it initiated the

[189] *Ibid*.
[190] See n. 141 and accompanying text.
[191] This point was already made earlier, see n. 143 and accompanying text.
[192] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 15.
[193] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 7.
[194] See *ibid*., paras. 13-14 and 32.

investigation (Article 55 of the ICC Statute). However, it is submitted that the final adjudicators, the judges, should determine for themselves whether an irregularity is to be seen as falling within the context of their case more generally and hence whether it should be remedied. One can reassure the Prosecutor that if the suspect was in custody at the national level for other crimes, if the ICC was not yet officially involved in the case and if the ICC had not concerted with the authorities responsible for violations committed in the context of the suspect's national detention, prior to the initiation of the investigation, judges will not quickly determine that these violations can be seen as falling within the context of their case. However, neither is it impossible that if the suspect, quite soon after such violations, is surrendered to the ICC, which profited from the fact that the suspect was in detention at the national level, judges may nevertheless feel that the violations are to be seen as falling within the context of their case and thus need to be repaired.[195] This is so, even if the fact that the judges benefited from the fact that he was already in detention at the national level does not mean that the ICC is thus also, in a strict legal sense, responsible for the violations. (That would, however, be different in the case of, for example, acknowledgement and adoption of the conduct as its own,[196] which, in turn, might be more easily to establish if the ICC were to benefit from

[195] An analogy can be drawn here to the abuse of process doctrine. If judges are willing to take the ultimate responsibility (namely the refusal of jurisdiction) for violations in which the ICC was not involved and which are not directly related to the process of arrest and surrender to the ICC – this point is not only shared by the Defence (see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Document), ICC-01/04-01/06, 26 October 2006, para. 21), but also by the Prosecution (see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 22: "The Prosecution also acknowledges that there is no strict requirement that the violations in question necessarily be directly connected with the arrest and surrender process [original footnote omitted, ChP]") – they should also consider less serious violations which can be seen as falling within the context of the ICC's case. Note that the Defence did not agree with the Pre-Trial Chamber's view "that an applicant must always demonstrate that the breach of his rights occurred in connection with arrest and transfer proceedings to the international judicial forum, or that each concrete breach must amount to torture or other serious mistreatment." (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Document), ICC-01/04-01/06, 26 October 2006, para. 17.) However, one can agree with the Prosecution here (see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 23) that this is not what the Pre-Trial Chamber was asserting, because the latter did not only use the words "to date" but also the more general words "in some way related to". Hence, it appears that both the Defence, Prosecution and Pre-Trial Chamber share the same broad (and welcome) vision in that respect.

[196] *Cf.* also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 17.

these violations *without* reviewing whether they have to be seen as falling within the context of their case and thus are in need of reparation.)[197] If that happened, the judges would have to be able to grant remedies, even if the relevant provisions, strictly speaking, do not go that far. It is submitted that the final adjudicators of the case, the judges, should have the final say in this; they are in the best position to determine whether or not the violation can be seen as falling within the context of the case and hence needing to be repaired. However, in that case, they must, of course, have this test at their disposal, and that is what this study is submitting here. One could respond that this broader task would divert the ICC from its main objective, which is to fight impunity.[198] However, as Chapter IX has already shown, the ICC must not only fight impunity, it must do so in a way which respects, among other things, international law, due process and human rights, including the right to a fair trial. In other words: it must fight impunity fairly. If the judges are of the opinion that it is not fair to disregard irregularities which can more generally be seen as falling within the context of their case, they must be able to remedy them. In addition, it is not to be expected that this broader task will derail the ICC as one can expect that judges would normally view irregularities which occur beyond the involvement of the ICC as not falling within the context of their case. Furthermore, the ICC judges do not stand alone in this task, for they can use the determinations of the competent judicial authority as a first indication of how certain irregularities at the national level must be assessed.

Another interesting remark by the Prosecutor is that "[t]he Appellant never discusses the implications of the relief that he seeks: that the Court would be ruling that the violations of his rights were so severe as to justify granting him impunity for the crimes with which he is charged".[199]

However, as already made clear, even though one can assume that the *male captus* of Lubanga Dyilo would not be seen as being that serious that jurisdiction must be refused, a refusal of jurisdiction (if it were nevertheless granted) 'only' means the ending of the case before this institution. However, that does not mean that the suspect may not be tried before another court. It does not necessarily lead to impunity. While it must be admitted that such an operation may indeed be complicated – as was explained earlier,[200] the ICC Statute does not contain an explicit provision empowering it to transfer suspects to States which can prosecute the case when the ICC refuses jurisdiction – the lack of such an explicit provision does not mean that the ICC judges, with reference to the ICC's overarching objective to fight impunity, should not do everything in their power to ensure that a

[197] See Sluiter 2009, p. 465: "[A] refusal to review the national activities that have benefited the Court can with good reason be seen as acceptance of them, and implicates the integrity of international proceedings."
[198] *Cf.* ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 25.
[199] *Ibid*., para. 8.
[200] See n. 924 of Chapter VI.

case is tried elsewhere if they refuse jurisdiction. In that context, they could perhaps make use of a provision such as Rule 185, paragraph 1 of the ICC RPE, see the text following footnote 86 and accompanying text of the previous chapter.[201]

Inspiration may also be drawn from Rule 215, paragraph 3 of the ICC RPE, even if it applies to another situation (namely one in which the ICC had jurisdiction and in fact had finished the case against the suspect):

> The Presidency may authorize the temporary extradition of the sentenced person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the sentenced person will be kept in custody in the third State and transferred back to the State responsible for enforcement of the sentence pronounced by the Court, after the prosecution.

Moreover, it must also be stressed that a suspect will normally raise his *male captus* claims before the actual trial starts, meaning that the 'new' court's jurisdiction cannot be challenged through a *ne bis in idem* claim.[202]

However, notwithstanding all this, it is, of course, also clear that the inclusion of a more specific provision in the ICC rules, comparable with Rule 11 *bis* of the ICTR/ICTY RPE, may be very welcome.

Another important aspect of the Prosecutor's response – as will become even clearer in the remainder of this book – was the fact that the Prosecution (correctly) agreed that "there is power to stop proceedings for abuse of process [original footnote omitted, ChP]".[203] Moreover, it also addressed the point of the Defence with respect to the deference to the law and procedures of the custodial State (see *supra*) and opined that such deference is implicit from Article 59, paragraph 2 of the ICC Statute and reinforced by Article 99, paragraph 1 of the ICC Statute.[204] As

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[201] *Cf.* also Sluiter 2003 C, p. 644 (writing on the (identical) provision of the Draft ICC RPE): "According to Paragraph 1 of this provision, a released person may only be transferred to a third state for the purpose of prosecution with the consent of the surrendering state [original footnote omitted, ChP]."

[202] See n. 353 of Chapter VI.

[203] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 15. However, here also, it was not clarified how this doctrine enters the system of the ICC. The Prosecution merely stated that "[t]he manner in which the Pre-Trial Chamber exercised its discretion on whether in all the circumstances it would constitute an abuse of process to exercise jurisdiction over the Appellant was entirely reasonable and consistent with established jurisprudence [original footnote omitted, ChP]." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 21.)

[204] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 15. Although the point is clear, one should not forget that Art. 99, para. 1 of the ICC Statute ("Requests

clarified *supra*, it is indeed true that the national authorities are, of course, the ultimate experts in assessing whether or not the arrest and detention was executed in accordance with the proper national laws. Furthermore, it is also true, as submitted by the Prosecutor, that, strictly speaking, "[n]either the Prosecutor nor the Court bear responsibility or can be held accountable for the detention of the appellant by the Congolese authorities or his treatment while in custody".[205] However, this does not mean that the ICC should not keep an eye on alleged violations which occur at this national level for it is the ICC which must be the ultimate guarantor that violations which occur in the context of the ICC case (whether they occur at the national level or not) are ultimately properly remedied.

Finally, the DRC and the victims observed that Lubanga Dyilo's appeal had to be dismissed,[206] a point which was, of course, rejected by the Defence in its final responses.[207]

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for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.") deals with the execution of requests under Artt. 93 and 96 of the ICC Statute (these are requests of cooperation *other than* requests pertaining to arrest and surrender). Perhaps, a reference to Art. 89, para. 1 of the ICC Statute ("States Parties shall, in accordance with the provisions of this Part and the procedures under their national law, comply with requests for arrest and surrender.") would have been more appropriate. However, in the original response, this is better formulated, see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 51: "The Court's limited supervisory role in relation to the manner in which States perform cooperation tasks is further emphasized by Article 99(1)".

[205] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 16.

[206] See *ibid*., para. 17. For more information on the views of the DRC, see [ICC, Appeals Chamber,] Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of the Democratic Republic of the Congo', [ICC-01/04-01/06, 4 December 2006] (this is the English translation of the French document of 21 November 2006). Note that the DRC, like the Prosecution, also agreed with the Pre-Trial Chamber's "sufficient explanation of the scope of (…) the abuse of process doctrine". (*Ibid*., para. 13.) For more information on the views of the victims, see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations of Victims a/0001/06, a/0002/06 and a/0003/06 with respect to the Defence appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute' (Public Document), ICC-01/04-01/06, 22 November 2006. In these observations, one can find the same arguments with respect to the *male captus bene detentus* maxim as were already used in their first, and not uncriticised, observations, see ns. 105 *et seq*. and accompanying text.

[207] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 18. For more information, see ICC, Appeals Chamber, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Reply to the Observations of

It was then up to the Appeals Chamber. In its decision of 14 December 2006, it presented the issues it wished to address as follows:

> A. The parameters of the jurisdiction of the Court
> B. The doctrine or principle of abuse of process, its ambit and applicability in proceedings before the ICC
> C. Article 21 (3) of the Statute, and its relevance to the assumption of jurisdiction by the Court in any given case
> D. The validity of the findings of the Pre-Trial Chamber respecting
> a. the absence of wrongdoing on the part of the Prosecutor in the detention and sequential treatment of the appellant by the Congolese authorities;
> b. the absence of evidence of mistreatment, grave or otherwise, of the appellant; and
> c. the application of article 59 (2) of the Statute.[208]

Starting with issue A, the judges explained that

> the conclusion to which the Appeals Chamber is driven is that the application of Mr. Lubanga Dyilo and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19 (2) of the Statute. What the appellant sought was that the Court should refrain from exercising its jurisdiction in

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the Government of the Democratic Republic of [the] Congo' (Public Document), ICC-01/04-01/06, 27 November 2006 and ICC, Appeals Chamber, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Reply to the Observations of the Victims' Representatives' (Public Document), ICC-01/04-01/06, 28 November 2006. It may be interesting to note that in this last response, the Defence noted "that the Prosecution concurred with the Defence that the arguments submitted by the victims' representatives pertaining to the doctrine of *male captus bene detentus* were misconceived [original footnote omitted, ChP]." (*Ibid.*, para. 7.) As this Prosecution's response is confidential (see (the text preceding) n. 131 and accompanying text), the accuracy of this point of the Defence cannot be assessed. However, if it is indeed true, then it can be seen as support for the criticism which this study vented against the observations of the victims on these matters, see ns. 105 *et seq*. and accompanying text. A final interesting point is that the Defence also referred to the words of Arbour which were already mentioned in ns. 23-24 of Chapter I of this book, see also the final words of n. 878 of Chapter VI. In those footnotes, one can read that Arbour argued that terrorism suspects "are being arrested, detained and interrogated with no apparent intention of bringing them to trial. And I say 'with no apparent intention of bringing them to trial' because the circumstances of their arrest, detention and interrogation – take only the length of their detention – would in any credible jurisdiction amount to such an abuse of process that trial jurisdiction, if it ever existed, could never be exercised." Although one can doubt that Arbour would also agree with the Defence that Lubanga Dyilo had to be released by the ICC because of his alleged irregular detention in the DRC, one must not forget either that in principle, *any* circumstance (such as, indeed, a long irregular pre-trial detention), and not only serious mistreatment/torture, can lead to a refusal of jurisdiction, as long as the judges find this *male captus* so serious that it would undermine the integrity of the Court to continue with the case nonetheless.

[208] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 19.

> the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo.[209]

As already made clear in Chapter VIII (see footnote 141 and accompanying text of that chapter), it is true that, strictly speaking, a suspect who files a challenge to the jurisdiction of the ICC because of his serious *male captus*, is not claiming that the ICC has no jurisdiction but that it should refrain from exercising its jurisdiction. However, one should not focus too strongly on this difference. After all, if the Court indeed decides to follow the suspect's claim and to refuse to exercise its jurisdiction, the Court's jurisdiction *ratione personae* over that person is permanently lost.[210] This means that if the Prosecutor nevertheless wants to restart the trial, the Court would say that it has no jurisdiction *ratione personae* because it cannot try this person, in the same way as the ICC would state that it has no jurisdiction *ratione temporis* if it is confronted by crimes committed before 1 July 2002. Hence, because the result of the suspect's challenge, if it succeeds, would lead to a loss of jurisdiction *ratione personae*, it is perfectly understandable that not only the Defence, but also the Prosecution[211] and the Pre-Trial Chamber[212] were of the opinion that this application of Lubanga Dyilo (seemingly) constituted a challenge to the ICC's jurisdiction under Article 19 of the ICC Statute.

One can assert that if the ICC were to dismiss a challenge purely because it cannot, strictly speaking, be seen as a challenge to the ICC's jurisdiction, this would constitute a violation of the suspect's right to challenge the lawfulness of his arrest/detention, a crucial right[213] which is covered by Article 21, paragraph 3 of the ICC Statute.

Be that as it may, the Appeals Chamber was of the opinion that the challenge could not be seen as a challenge to the ICC's jurisdiction and that the *sui generis* application of Lubanga Dyilo could only survive if the ICC is "vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so".[214] It then explained that the Pre-Trial Chamber had

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[209] *Ibid*., para. 24.

[210] See also n. 102 and accompanying text: "For the reasons previously set out, the Court, within the context of its supervisory powers, could not endorse a violation of the Accused's fundamental rights by continuing to exercise its jurisdiction over him. In this respect, the Court no longer has personal jurisdiction over the applicant."

[211] See ns. 58-60 and accompanying text.

[212] See ns. 144 and 180 and accompanying text.

[213] It is to be recalled – see Subsection 2.2.5 of Chapter III – that this right has customary international law/general international law status and cannot even be derogated from in times of emergency and war.

[214] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 24.

> identified two related grounds, as may be summarized, that might provide justification to refuse to exercise jurisdiction in a case brought before it: a) abuse of process and b) serious violations of the rights of the suspect or the accused, resulting from "concerted action" between the Prosecutor and the DRC, derailing the process to an extent making it antagonistic to the ends of justice to put him/her on trial.[215]

To this one could, of course, also add serious violations which occur in the context of an arrest/detention at the request/behest of the ICC/the ICC's constructive custody, when the ICC has sent its official requests, but perhaps, the Appeals Chamber views this as a form of "concerted action" between the ICC and the executing authorities.

The judges started with the abuse of process doctrine and thus moved to issue B. They first of all noted that abuse of process "is a principle evolved by English case law constituting a feature of the common law adopted in many countries where this system of law finds application".[216] The doctrine/principle[217] was then further explained with help of case law, such as the already discussed cases of *Bennett*, *Hartley*, *Ebrahim*,[218] *Levinge* and – as an exception to *Alvarez-Machain* – *Toscanino*.[219]

However, the Appeals Chamber also opined that "[t]he doctrine of abuse or process as known to English law finds no application in the Romano-Germanic systems of law".[220]

Nevertheless, as previously explained, although the concept of 'abuse of process' *as such* may not be used by courts in the civil law system, it appears that also in this system (as in mixed systems incidentally),[221] judges can refuse jurisdiction if they are confronted by such a serious *male captus* that it would undermine the integrity of the court if they were to nonetheless continue with the case.[222] The Appeals

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[215] *Ibid*., para. 25.
[216] *Ibid*., para. 26.
[217] The judges noted on this point that "[a]buse of process is a principle associated with the administration of justice, referred to as a doctrine because of wide adherence to the principle involved [original footnote omitted, ChP]." (*Ibid*.)
[218] Note that the South African legal system is a mixture of civil law and common law, see n. 650 of Chapter V. Furthermore, the Appeals Chamber also referred to a case from Cyprus, whose legal system is also a mixture of common and civil law, see JuriGlobe's 'Alphabetical Index of the Political Entities and Corresponding Legal Systems', available at: http://www.juriglobe.ca/eng/sys-juri/index-alpha.php.
[219] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, paras. 29 and 32.
[220] *Ibid*., para. 33.
[221] See, for example, the systems of South Africa and Cyprus, to which the Appeals Chamber itself refers, see n. 218. *Cf*. also the Zimbabwean case *Beahan* and the reasoning of Acting Justice of Appeal O'Linn in the Namibian case *Mushwena*.
[222] See n. 878 and accompanying text of Chapter VI and ns. 18-19 and accompanying text of Chapter VII.

Chamber's subsequent explanation as to why the doctrine finds no application in the romano-germanic systems of law is not terribly convincing. It stated:

> The principle encapsulated in the Latin maxim *male captus bene detentus* has received favourable reception in the French case of *re Argoud* but not an enthusiastic one in the old case of *re* [*Jolis*]. The German Constitutional Court too appears to have endorsed like principles to those approved in *re Argoud*. But where serious violations of the fundamental rights of the accused or international law are involved, the rule is mitigated [original footnotes omitted, ChP].[223]

The Appeals Chamber explains here that it appears that the German Constitutional Court also accepts the *male captus bene detentus* rule, except for the situation where serious violations of the fundamental rights of the accused or international law are involved. In that case, the (*male captus bene detentus*) rule is mitigated.

Before commenting on the abuse of process point, it should be noted that the use of the word "mitigated" can be seen as something of an understatement of what the German Federal Constitutional Court really decided in the case to which the Appeals Chamber refers, the previously discussed *Al-Moayad* case. After all, in that case, the German Federal Constitutional Court held:

> In this context, it need not be decided whether a national obstacle precluding criminal proceedings or extradition results from customary international law if the prosecuted person has been taken from his or her state of origin to the state of the forum or to the requested state by use of force. Admittedly, more recent state practice, in particular as a consequence of dealing with the U.S. Supreme Court decision in the *Alvarez-Machain* case (…) indicates that the principle *male captus, bene detentus* is rejected at any rate if the state of the forum got hold of the prosecuted person by committing serious human rights violations, and if the state whose territorial sovereignty was violated protested against such procedure (…).[224]

Hence, the Constitutional Court is arguably of the opinion that more recent State practice indicates that *male captus bene detentus* is *rejected at any rate* in the case of 1) an abduction accompanied by serious human rights violations or 2) an abduction followed by a protest from the injured State. Thus, according to the German judges, in those two situations, more recent State practice indicates that *male captus bene detentus* is rejected and jurisdiction refused.

Returning to the abuse of process point now, even though the German Court does not use this term here, it does hold that judges in general ("more recent state

[223] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 33.

[224] See n. 569 and accompanying text of Chapter V.

practice") refuse jurisdiction in two very serious *male captus* cases.[225] It can be argued that there is no substantive difference between a common law judge refusing jurisdiction under the abuse of process doctrine and a judge from another law system who, without perhaps using the explicit label 'abuse of process', or another label such as 'supervisory powers',[226] refuses jurisdiction in exactly the same manner because he is confronted by such a serious *male captus* that he feels that he cannot proceed with the case without undermining the integrity of the court/his sense of justice. In the words of Oehmichen: "Im Ergebnis folgt das Bundesverfassungsgericht damit in Fällen völkerrechtswidriger gewaltsamer Entführung der „abuse of process-Doktrin,"".[227]

Of course, the test leading to a refusal of jurisdiction may differ from State to State (the *male detentus* test of cases like *Bennett*, *Hartley*, *Ebrahim* and *Levinge* is far lower (and arguably better) than the test mentioned here by the German Court, although it must also be borne in mind that this is a test by which *male captus bene detentus* is rejected *at any rate*, which means that courts can also use a lower threshold), but one can expect that *any* judge will refuse jurisdiction if he is of the opinion that the *male captus* is so serious that he can, in good conscience, no longer proceed with the case.[228]

If even in the State which is so often seen as the champion of *male captus bene detentus*, the US, it appears that judges would refuse jurisdiction in certain serious *male captus* situations,[229] one can expect that judges in France (to also address that point made by the Appeals Chamber) would similarly refuse jurisdiction in certain serious *male captus* situations, even if their *male detentus* test may be stricter than in other States.[230]

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[225] Note, by the way, that the ICC's Appeals Chamber, when arguing that "[t]he German Constitutional Court too appears to have endorsed like principles to those approved in *re Argoud* [original footnote omitted, ChP]", referred to, among other things, the *Stocké* case, hereby not mentioning that this case also contains exceptions to the *male captus bene detentus* rule, see ns. 505, 512, 516-517 and accompanying text of Chapter V.

[226] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 76: "Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation."

[227] Oehmichen 2007, p. 237.

[228] See again n. 222.

[229] See n. 206 and accompanying text of Chapter V and n. 23 and accompanying text of Chapter VII (the *Toscanino* case). This point was also explicitly recognised by the ICC's Appeals Chamber, see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 32: "In the United States of America, the doctrine of abuse of process has had a mixed reception, recognising on the one hand its existence but confining its application within very narrow straits [original footnote omitted, ChP]." (The Appeals Chamber refers here to *Toscanino* and *Alvarez-Machain*.)

[230] In Chapter V (see n. 402 and accompanying text of that chapter), it was explained that *Argoud* appears to support the idea that even if there would be a clear-cut violation of international law (which, it is reminded, was not the case in *Argoud* as it was not clearly established that his abduction was carried out by French agents acting in that capacity and had violated the sovereignty of the Federal Republic of

The judges then asked themselves the question as to whether "the principle or doctrine of abuse of process find application under the Statute as part of the applicable law and in particular under the provisions of article 21 (1) (b) and (c)".[231]

First of all, it must be noted that the fact that the judges of the Appeals Chamber, in contrast to their colleagues at the Pre-Trial Chamber[232] and other participants,[233] examine to what extent the abuse of process doctrine falls within the ICC's system of applicable law (Article 21 of the ICC Statute) should be applauded.

Now, the abuse of process doctrine cannot be found, as such, in the ICC Statute: "Abuse of process is not listed as a ground for relinquishing jurisdiction"[234] under the ICC Statute. However, this does not mean that the ICC does not have the power to refuse jurisdiction in very serious *male captus* situations. It was discussed earlier in the present chapter that, as explained in Chapter IX of this book, the reasoning behind this doctrine, namely that courts have a discretion to refuse jurisdiction in certain serious *male captus* cases (one should not focus too much on the common law label 'abuse of process' here) can perhaps be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute or otherwise as general principle of law derived by the Court from national laws of legal systems of the world pursuant to Article 21, paragraph 1 (c) of the ICC Statute. In addition, because so many (inter)national courts seem to recognise this power, it could be held that it is an inherent power of *any* court. That would mean that the ICC would also have this inherent power.

However, the judges – arguably focusing too much on the specific label 'abuse of process' – did not concur. The Appeals Chamber held that it

> shall not examine the implications of article 4 (1) of the Statute[[235]] for under no circumstances can it be construed as providing power to stay proceedings for abuse of process. The power to stay proceedings for abuse of process, as indicated, is not

Germany), the Court would still be of the opinion that the international law problem had to be solved by the Governments of the two States involved. (In that sense, *Argoud* goes clearly further than other courts which may already refuse jurisdiction in such a situation.) However, one can only guess how a modern French judge (note that the French Court of Cassation issued its decision in *Argoud* on 4 June 1964) would have reacted if it was established that Argoud had indeed been kidnapped by French State agents and, in the course of his abduction, had moreover been seriously mistreated by those agents.

[231] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 34.

[232] See n. 161 and accompanying text.

[233] See the text following n. 54 and accompanying text, n. 101 and accompanying text and n. 203.

[234] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 34.

[235] This provision states: "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

> generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power.[236]

The Appeals Chamber concluded that "the Statute does not provide for stay of proceedings for abuse of process as such"[237] and noted that Article 21, paragraph 1 (b) and (c) of the ICC Statute did not have to be looked to since paragraph (a) of that provision was exhaustive on the matter.[238]

Clearly, this study does not agree with this conclusion. It seems far too easy to conclude that the ICC Statute is exhaustive on the matter simply because the abuse of process doctrine is not explicitly mentioned or implicitly covered (via – the seemingly irrelevant[239] – Article 4, paragraph 1 of the ICC Statute) by the ICC instruments.[240] The judges do not seriously review other relevant provisions which

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[236] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 35.

[237] *Ibid*.

[238] See *ibid*., para. 34. The judges referred here to ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, a decision which was already discussed in the previous chapter.

[239] This provision appears to focus on very different issues, see Rückert 2008, p. 124: "This standard provision clarifies that the Court shall possess at the municipal level the legal capacity essential for it to carry out its functions. This provision makes it incumbent upon the States Parties to ensure that the ICC enjoys such legal status under national law as may be necessary for it to perform its functions. (…) The legal capacity of the ICC, however, extends only as far as the purpose and functioning of the ICC requires. Here, the functional limitation of the legal capacity is explicitly provided for in the Statute. Article 2 of the Draft Agreement on the Privileges and Immunities of the ICC illustrates the extent of the Court's legal capacity. According to this provision on the legal status and juridical personality of the Court, it shall in particular have the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings [original footnotes omitted, ChP]." However, the fact that the abuse of process power cannot be seen as an inherent power under this (seemingly irrelevant) provision does not mean that the ICC does not have such an inherent power nonetheless.

[240] *Cf.* also the comparable criticism of Manning (2007, p. 837) who states: "The decision (…) concludes its dizzying survey by stopping short of determining whether the abuse of process doctrine merits status as a genuine general principle of law, which the Court might rightfully derive from national laws of the legal systems of the world. The decision leaves the question unanswered because the Statute's treatment of jurisdiction is found to be "exhaustive." Thus "no room is left for recourse to the second or third source of law." This conclusion is confusing because it renders the three previous pages of the decision irrelevant. It is surprising because it is made in the absence of any reference to the drafting history to suggest that the omission of authority to decline jurisdiction was deliberate [original footnote omitted, ChP]." Although this study does concur with the last point, it does not agree with Manning's remark that "[t]his conclusion is confusing because it renders the three previous pages of the decision irrelevant." After all, the ICC's examination of the cases was arguably not made in the context of Art. 21, para. 1 (b) or (c) of the ICC Statute, even if the judges asked themselves whether "the principle or doctrine of abuse of process find application under the Statute as part of the applicable law *and in particular under the provisions of article 21 (1) (b) and (c)* [emphasis added, ChP]?" (see n. 231 and accompanying text), but in the context of Art. 21, para. 1 (a) of the ICC Statute: to show that the ICC Statute, which does not explicitly recognise the doctrine, does not implicitly recognise the doctrine either under Art. 4, para. 1 of the ICC Statute.

might shed light on the question of whether the ICC has power to issue a *male detentus* verdict in the case of a serious *male captus*, taking into account the rules of interpretation of the Vienna Convention on the Law of Treaties (as was done in Chapter IX of this book). A more extensive review arguably shows that Article 21, paragraph 1 (a) of the ICC Statute, taking into account Article 21, paragraph 3 of the ICC Statute, is *not* exhaustive on the matter and thus that one can turn to Article 21, paragraph 1 (b) and (c) of the ICC Statute to fill this legal lacuna. And as argued in Chapter IX, the power of a court to refuse jurisdiction in the case of a serious *male captus* might be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute (namely as practice of international courts) or as a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute. In addition, because the power of a court to refuse jurisdiction in very serious *male captus* cases, without looking at the exact label of this power (such as abuse of process/supervisory powers), is used by so many (inter)national courts, it could be seen as an inherent power of *any* court, including of the ICC.

The judges then turned to issue C, Article 21, paragraph 3 of the ICC Statute. They noted that, even though the abuse of process doctrine as such could not be found in the ICC Statute, the doctrine

> had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.[241]

And that aspect of the doctrine, the human rights dimension, *was* obviously covered by the ICC Statute, as can be discerned from provisions such as Articles 55 and 67 of the ICC Statute and, most importantly, Article 21, paragraph 3 of the ICC Statute, which "requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms".[242] Before continuing with the reasoning of the ICC judges, it must be noted that this last point can be seen as support for the interpretation at footnotes 246-247 and accompanying text of Chapter IX, namely that Article 21, paragraph 3 of the ICC Statute covers any situation in which the ICC exercises jurisdiction/any case in which the ICC is involved, including the pre-trial actions from third parties, for example, when arrests/detentions are made at the behest of the ICC. This view arguably also comports with the position of the Pre-Trial Chamber that the scope of Article 21, paragraph 3 of the ICC Statute extends to constructive custody/arrest/detention at the request/behest of the ICC and to "concerted action" between the ICC and third

[241] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 36.
[242] *Ibid*.

parties. This, of course, covers quite a considerable part of the context of the ICC case and that is to be welcomed. However, as there may always occur situations which do not fall within such concepts, but which are nevertheless to be seen as falling within the context of an ICC case, it would be better and fairer for the ICC to go even beyond those concepts and to repair any violations which occur in the context of its case more generally.[243]

Returning to the words of the ICC judges, the following eloquent statement was then made:

> Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute,[244] the right of a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.[245] The Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by article 69 (7) of the Statute.[246] Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped [original footnotes omitted, ChP].[247]

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[243] See also n. 32 and accompanying text (with respect to Art. 55 of the ICC Statute).

[244] Here, the judges referred to, among other things, Art. 64, para. 2 of the ICC Statute ("The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses") and Art. 67, para. 1 of the ICC Statute. See for this latter provision (and the argument that it applies in the pre-trial phase as well) ns. 201 and 261 of Chapter VIII and n. 45 of Chapter IX. See finally ns. 44, 96 and 242 and accompanying text of the present chapter.

[245] It may be interesting to note that the judges referred here to Nowak 1993, p. 244, see also n. 194 and accompanying text of Chapter III.

[246] See n. 265 of Chapter IX.

[247] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 37. Note this refusal of jurisdiction would, of course, be the final ending of the case before the ICC. It was already discussed in Chapter III that a stay of the proceedings may be lifted (as happened in another decision of the *Lubanga Dyilo* case, decided some two years after this one, see n. 623 of Chapter III) but that would only be possible with regard to irregularities which can truly be repaired. However, certain *male captus* situations are so serious that they can no longer be fixed. In such cases, the judges will permanently stay the proceedings/refuse jurisdiction as a remedy. See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"' (Public Document), ICC-01/04-01/06 OA 13, 21 October 2008, paras. 79-80: "The above statements in the Judgment of 14 December 2006 [here, the Appeals Chamber referred to paras. 37 and 39 of the 14 December 2006 decision, ChP] were made in the context of allegations by the appellant in that case that he had been illegally detained and ill-treated by the Congolese authorities and that the Prosecutor had illegally colluded with these authorities, in

First of all, one should welcome the broad (pre-trial) interpretation the ICC gives here to a fair trial. This point was already suggested in Chapter IX (see footnote 248 and accompanying text of that chapter) but it is very good to see that the ICC shares this position. However, one should not be dazzled by these beautiful words.[248] After all, the *male detentus* test states that "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused *by his/her accusers*, it would be a contradiction in terms to put the person on trial [emphasis added, ChP]". The words "by his/her accusers" typically seems to refer to the ICC (Prosecution), which obviously includes concerted action between the ICC and third parties.[249] Given the information provided in the previous pages, one can arguably also include here violations committed by third parties working at the behest of the ICC.

However, what if the President of State A (a State Party to the ICC), who has called upon the international community for months to arrest a certain suspect from State B (a non-State Party to the ICC) who keeps committing serious international crimes in State A, is frustrated by the inaction of the international community and

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contravention of the rights of the appellant. The nature of the allegations was such that, if established, the breaches of the rights of the appellant might have led to an objectively irreparable and incurable situation. Accordingly, the Judgment of 14 December 2006 envisaged that a stay of proceedings imposed on such a basis would be absolute and permanent. The Judgment of 14 December 2006, however, did not rule out the imposition of a conditional stay of proceedings in suitable circumstances. If the unfairness to the accused person is of such nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67 (1) (c) of the Statute). If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute)."

[248] *Cf.* also Sluiter 2009, p. 465.

[249] *Cf.* also the following references under issue C of the decision: "The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct *on the part of the prosecution* and violations of the rights of the accused in the process of bringing him/her to justice [emphasis added, ChP]." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 36.) See also *ibid*., para. 38, the paragraph immediately following the quotation mentioned at n. 247 and accompanying text: "The decision of the European Court of Human Rights in the *Case of Teixeira de Castro v. Portugal*, a case of entrapment *by undercover agents*, provides an example of serious breaches of the rights of the accused *by the investigating authorities*, rendering the holding of a fair trial impossible. The following passage from the judgment puts the matter in perspective as to the implications that such conduct may have on the holding of a fair trial. Improper conduct *by the investigating authorities* and the use of evidence resulting therefrom "in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial." [emphasis added and original footnotes omitted, ChP]"

orders the kidnapping of the suspect (at a moment when that suspect was back in State B) – a kidnapping which was accompanied by mistreatment (albeit not serious mistreatment)[250] and followed by a protest and request for the return of the suspect from State B. State A ignores these protests and subsequently places the suspect in detention. The ICC, which was already making initial inquiries to find out whether a proper investigation could be initiated, now requests the arrest and surrender of the suspect from State A which subsequently surrenders the suspect to The Hague.[251] Such a *male captus* may be deemed by judges to be so serious (note that the ICC judges will probably attach more weight to an abduction (followed by a protest and request for the return of the suspect, see *supra*)) and falling within the context of the ICC case, even if the ICC was not yet formally involved in the case, that jurisdiction must be refused. Under the abuse of process doctrine advocated in this study (which merely demands such a serious *male captus* in the context of an ICC case that judges, in good conscience, can no longer continue with the case), this would not have constituted any problem. However, under the above-mentioned ICC test, this would not be possible. After all, the violations did not occur at a time when the ICC was involved in the case, cannot be seen as being executed "by his/her accusers" (the abduction was not executed by State A on behalf of the ICC). In addition, and this point was already briefly made at the end of the previous chapter, under the abuse of process doctrine, violations of State sovereignty (and of other values such as the rule of law more generally) can easily be taken into account, whereas one can question whether this would also be possible under the ICC test, which only focuses on human rights violations.[252] In another scenario, one could replace the kidnappers of State A with private individuals. Here, an additional problem could arise. Even if the judges, using the above-mentioned test, accept that those private individuals can be seen as "his/her accusers", one or more of them may be of the opinion that private individuals simply *cannot* violate internationally recognised human rights (or the sovereignty of another State).[253] In that case, jurisdiction cannot be refused,

[250] The serious mistreatment/torture issue is complicated and will be separately addressed *infra*.
[251] See also Currie 2007, pp. 383-384. (See also n. 50 of Chapter I.)
[252] See also the problems identified by Currie (*ibid*., p. 393) in that respect: "[I]n rejecting the use of the abuse of process doctrine the Appeals Chamber has taken a distinctly different tack on its powers than that taken by the ICTY and ICTR. On the whole, by way of a strict interpretation of its powers regarding jurisdiction and process, the Court may have painted itself into a corner on the abduction issue. If it has no access to abuse of process powers, then the justiciability of sovereignty violations in the apprehension of an accused (as opposed to human rights violations) is in doubt. Yet, as argued above, a failure by the Court to deal with this issue when presented is likely to wreak havoc. A possible solution is to treat the sovereignty violation as a human rights issue. If an individual is abducted in state A by officials/agents of state B, then the arresting parties are acting illegally under the laws of state A and the apprehension itself amounts to, in human rights terms, an arbitrary detention or illegal deprivation of liberty. This is a workable solution that nonetheless leaves the inter-state conflict outside the Court's purview, and will only cover some situations. Alternatively, perhaps the answer lies in the inherent powers of the Court to which the Appeals Chamber briefly averred, but this is currently far from clear."
[253] See Subsection 3.2 of Chapter III. Currie has a simple solution in that respect, see *ibid*., p. 389: "In a *Nikolić*-type situation where the fugitive was "apprehended" by persons unknown who have no provable connection to state forces, the acts of these persons should be treated as those of state authorities, in

whereas this would, in principle, be unproblematic under the broad abuse of process doctrine, which merely demands that judges have to assess whether the *male captus* is so serious that jurisdiction must be refused.[254]

However, the criticism does not stop here. The test itself is not clear either. After all, two paragraphs later, the judges state: "Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed."[255] First of all, there is a clear difference between the obligation to stop the proceedings in the first formulation of the test ("If no fair trial can be held, the object of the judicial process is frustrated and the process *must* be stopped [emphasis added, ChP]") and the discretion mentioned in the second formulation of the test, where it is explained that if no fair trial can take place, "the proceedings *can* be stayed [emphasis added, ChP]". However, more importantly, although the first formulation (correctly) appears to acknowledge that certain violations of the fundamental rights of the suspect can already entail that one can no longer speak of a fair trial (in the broad sense of the word), the second formulation seemingly demands more, namely that the violations of the accused have to be "such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights". Hence, only if those violations are such as to entail the accused no longer being able to mount his defence, one can say that no fair trial can be held. This reasoning, which was also identified in the ICTY *Karadžić* case,[256] can be criticised as it can be seen as a return to the old-fashioned concept of a fair trial, focusing on the fair trial in the courtroom.[257] Under this formulation, the accused

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order to dispense with any argument as to whether the accused enjoys human rights vis-à-vis private actors [original footnote omitted, ChP]".

[254] See also n. 738 of Chapter VI.

[255] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 39.

[256] See ns. 727 and 733 and accompanying text of Chapter VI. For another more recent case, one could perhaps also refer here to the French case of Carlos the Jackal (Ramirez Sánchez), where the French Supreme Court agreed with the following statement of the Court of Appeal: "Moreover, case-law also provides that the circumstances in which someone, against whom proceedings are lawfully being taken and against whom a valid arrest warrant has been issued, has been apprehended and handed over to the French legal authorities are not in themselves sufficient to render the proceedings void, provided that they have not vitiated the search for and process of establishing the truth, nor made it impossible for the defence to exercise its rights before the investigating authorities and the trial courts." See ns. 535 and 537 and accompanying text of Chapter V. See also, but arguably to a lesser extent, the *Barbie* case, see n. 496 and accompanying text of the same chapter.

[257] This also clearly contradicts the Appeals Chamber's earlier and welcome words on "the right of a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety", see n. 245 and accompanying text. See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 11: "The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of article 55 and 54 (1)

may suffer very serious violations, but if he is still able, in spite of these violations, to make his defence, the ICC could conclude that a fair trial can still take place. However, in such a case, the judges should consider whether the serious violations *as such* are not already so serious that one can no longer speak of a fair trial in general/that it would be unfair to have a trial in the first place/that it would undermine the integrity of the Court to proceed[258] and thus that jurisdiction must be refused, whether or not the accused is still able to make his defence. In that respect, the subsequent words of the ICC judges are to be welcomed – also because they emphasise the importance of a fair trial to anyone, even to persons charged with very serious crimes – but they arguably do not comport with the idea mentioned in the second formulation:

> Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[259]

Another point concerning (what could be seen as) the third formulation of the *male detentus* test should be mentioned. These words (and see also the words mentioned at footnotes 241 and 255 and accompanying text) show that the Appeals Chamber seems mostly concerned with the violations *as such* and not with the question as to whether these violations were, for example, committed intentionally or not.[260] This

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(c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings." *Cf.* finally the words of Sluiter in n. 246 of Chapter IX or in n. 276 of the present chapter.

[258] In the words of Choo 1994 B, p. 629, commenting on the *Bennett* case: "Central to the decision of the House of Lords was the notion that a criminal court should not be concerned solely with accurate fact-finding or, to put it another way, the determination of the 'truth.' A court also has a duty to protect the moral integrity of the criminal process." It appears that Groenhuijsen and Knigge also focus on this broad concept of a fair trial. They state (see Groenhuijsen and Knigge 2004, p. 154 or n. 617 of Chapter III) that the inadmissibility of the Prosecution is especially then the appropriate answer when the non-compliance entails that one can no longer speak of a fair trial and that the question is not whether the *non-compliance* seriously violates the principles of proper procedure but whether *initiating or continuing a prosecution* in spite of such non-compliance would violate fundamental principles of law. In this context, they note the emergence of a suspect's right to a fair trial and the principle of fair balancing as central criteria.

[259] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 39.

[260] See also ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'

may be viewed as a rather broad stance as other courts have often demanded, in their *male detentus* test, an intention on the part of the prosecuting authorities to commit the *male captus*.[261] Nevertheless, even though the ICC does not explicitly demand an intent, it seems clear that it requires serious violations – *cf.* the words "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers" – and that it is very well possible that the ICC may only view those violations which are committed intentionally (note, by the way, that some *male captus* situations, such as an abduction, can arguably not be committed unintentionally)[262] as serious violations which can lead to the ending of the case.[263] In any case, one can assume that the ICC will more readily refuse jurisdiction if the violations are committed intentionally, even if its test does not require the violations to be intentional.

Before turning to issue D, one final, and not unimportant, point must be made. In the previous pages, three formulations of a test which could lead to the ending of an ICC case were presented. As this case's central problem deals with the consequences of an alleged *male captus*, with problems related to the way a person was brought to justice/into the jurisdiction of the Court, the three formulations were also applied to that specific situation. This seems logical. Indeed, as will be shown at footnote 292 and accompanying text, the Appeals Chamber clarified the fact that this decision dealt with "the process of bringing the appellant to justice" (the remainder of the Appeals Chamber's words will be discussed *infra*) and that it had examined whether "in relation to this process (…) breaches of the rights of the suspect or the accused may provide ground for halting the process." In addition, one could also refer here to the already-mentioned (see footnote 247) words of the Appeals Chamber almost two years later that the paragraphs in which one can find these three formulations were made in the context of Lubanga Dyilo's *male captus* allegations.

Nevertheless, it is also possible – and this might explain the differences between the (broader) first and third formulation on the one hand and the (restricted) second

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(Public Document), ICC-01/04-01/06, 13 June 2008, para. 90, where the Trial Chamber, after having referred to paras. 36 and 39 of the 14 December 2006 decision states: "It is not a necessary precondition, therefore, for the exercise of this jurisdiction [this word is a little confusing but arguably refers to the power of the court to stay the proceedings, see *ibid*., ChP] that the prosecution is found to have acted *mala fides*. It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice."

[261] See n. 20 of Chapter VII (for the inter-State context). In the *male captus* decisions of the tribunals, the intent is not explicitly mentioned, but some reasonings could definitely contain this element, see ns. 120-122 of Chapter VII. Note finally that the first *male detentus* possibility proposed by the OTP *itself* in the case of Nikolić also clearly contains this element, see ns. 114 and 116 and accompanying text of Chapter VII and n. 263 of the present chapter.

[262] See n. 20 and accompanying text of Chapter VII.

[263] *Cf.* in that respect also the Prosecution in *Nikolić* which clarified, after having mentioned its first *male detentus* possibility, which contains the element of intent ("[u]nambiguous, *advertent* violations of international law which can be attributed to the Office of the Prosecutor [emphasis added, ChP]"): "(i.e. the Prosecution's *own* conduct would have to be in some way egregious [emphasis in original, ChP])". See ns. 114 and 116 and accompanying text of Chapter VII.

formulation on the other – that the second formulation is *not* dealing with alleged *male captus* situations but with problems relating to the actual trial proceedings. The words would then not be a more strict and demanding version of the Appeals Chamber's test regarding *male captus* problems (see the first and third formulations which could very well be applied to such problems), but simply another, *additional* possibility for the judge to stay the proceedings. A possibility which is not focused on problems related to the way a person was brought into the jurisdiction of the now trying forum, but on problems which occur during the actual trial proceedings. In that case, the second formulation supports the idea that a judge, alongside staying the proceedings because of a *male captus* situation, because of irregularities in the way a person was brought into the jurisdiction of the prosecuting forum (see the first and third formulations), can *also* stay the proceedings when during the trial, serious violations occur which entail that the accused can no longer make his defence. The fact that the Appeals Chamber was also interested in other situations which could lead to a stay of the proceedings, see footnote 241 and accompanying text, may also lead to that conclusion. A final point which could be used as support for the view that the second formulation may be focused on irregularities in the actual trial proceedings is the fact that both the first and third formulation speak of "suspect or the accused", whereas the second formulation only uses the word "accused". However, with respect to this last point, it could also be argued that the use of the word "accused" does not necessarily mean that the second formulation may not be applied to *male captus* problems; even though most *male captus* claims will be made by suspects like Lubanga Dyilo, before the confirmation of the charges, it is not impossible either that an accused makes such a claim. See in that respect also the already-mentioned words of the Appeals Chamber at footnote 241 and accompanying text, where it talked about "violations of the rights of the *accused in the process of bringing him/her to justice* [emphasis added, ChP]."

Having said that, it is now time to see how the Appeals Chamber tackled issue D. It noted the Defence's claim that the Pre-Trial Chamber had "adopted an unduly restrictive approach to the relinquishment of jurisdiction for violations of the fundamental rights of the accused [original footnote omitted, ChP]".[264] The Appeals Chamber did not concur, however. In fact, it held that the Pre-Trial Chamber had adopted an even *broader* standard "than the one warranted in law in that it failed to require the specific consideration of whether a fair trial remained possible in the particular circumstances of the case".[265] According to the Appeals Chamber, the Pre-Trial Chamber's conclusion that no ill-treatment took place in Lubanga Dyilo's arrest and surrender to the ICC "sideline[d] the importance of the precise ambit of the test".[266] What the Pre-Trial Chamber apparently should have considered,

[264] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 40.
[265] *Ibid*.
[266] *Ibid*.

according to the Appeals Chamber, was whether there were violations and if so, whether, in spite of these violations, a fair trial would still be possible. Only if the violations were such that one could no longer speak of a fair trial, could jurisdiction be refused. This can be seen as a repetition of the first and third formulation of the *male detentus* test mentioned above. However, it is arguably different from the second formulation – if that formulation can indeed be applied to *male captus* situations in the first place, see *supra* – which requires that these violations must in fact make it impossible for the accused to make his defence.

Another complaint of the Defence, the Appeals Chamber continued, was

> that the Pre-Trial Chamber applied the wrong standard in reviewing the efficacy of the process leading to the arrest and surrender of the suspect, allegedly ignoring or paying inadequate attention to the supervisory role of the Pre-Trial Chamber under article 59 (2) of the Statute [original footnote omitted, ChP].[267]

According to the Defence, "the Pre-trial Chamber is charged under this article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest".[268] However, the Appeals Chamber did not agree with this either: "[n]o such role is cast on the Court".[269] Nevertheless, in its subsequent explanation, the Appeals Chamber *did* admit – and arguably correctly so – a certain supervisory role with respect to the points which the competent judicial authority in the custodial State must determine pursuant to Article 59, paragraph 2 of the ICC Statute. It explained:

> The Court does not sit in the process (…) 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.[270]

Although it is, of course, true that the ICC is not a court of appeal with respect to the decisions of the competent judicial authority under Article 59, paragraph 2 of the ICC Statute, it would nevertheless be extremely wise for the ICC to check whether the person surrendered to the ICC is indeed the person in which it is interested (if there are reasons to doubt the correct identity of the surrendered person). Otherwise, the wrong person will be tried. With respect to determinations (b) (has the person been arrested in accordance with the proper process) and (c) (have the rights of the person been respected) of Article 59, paragraph 2 of the ICC Statute, the ICC clearly states that it *has* a role to play here. This can not only be deduced from the word "[i]ts", which refers to "[t]he Court", the ICC, but also from the remainder of the paragraph, where it is stated that

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[267] *Ibid*., para. 41.
[268] *Ibid*.
[269] *Ibid*.
[270] *Ibid*.

> the Pre-Trial Chamber determined that the process followed accorded with Congolese law. There is nothing to contradict this statement in light of the fact that the suspect was in custody for crimes coming within the purview of the military authorities. The suspect was afforded an opportunity to voice his views before the judicial authority that examined the request for his surrender. Moreover, there is nothing to indicate that his arrest or appearance before the Congolese authority involved or entailed any violation of his rights.[271]

It is good that the Appeals Chamber, like the Pre-Trial Chamber, (marginally) checks whether Lubanga Dyilo's was arrested in accordance with the proper process and whether his rights were respected. In addition, it is to be welcomed that in doing so, the Appeals Chamber, in contrast to the Pre-Trial Chamber,[272] explicitly and systematically turns to the points mentioned in Article 59, paragraph 2 of the ICC Statute. Unfortunately, however, and again in contrast to the Pre-Trial Chamber, the Appeals Chamber does not delve into whether the competent judicial authority, in determining points (b) and (c) of Article 59, paragraph 2 of the ICC Statute, could also look at the phase prior to the official ICC arrest. Although it stated that "[t]he suspect was afforded an opportunity to voice his views before the judicial authority that examined the request for his surrender" – which views also concerned this phase prior to the official ICC arrest – the Appeals Chamber only mentions this point to explain that Lubanga Dyilo's rights, including the right to voice his concerns before the competent judicial authority, were respected in the context of the execution of the official ICC request for arrest and surrender. Because of that, it is also unclear whether the ICC judges, as the supervisors marginally checking the scope of Article 59, paragraph 2 of the ICC Statute, would also look into the arrest/detention prior to the official ICC arrest under Article 59 of the ICC Statute. Both the Pre-Trial Chamber and the Appeals Chamber can be criticised for not clearly elucidating this point.[273]

In addition, and this point was also mentioned in the context of the Pre-Trial Chamber's decision, the Appeals Chamber does not explain whether the competent judicial authority (or the Appeals Chamber marginally supervising the competent judicial authority), in the context of Article 59 of the ICC Statute, must also look to provisions such as Article 21, paragraph 3 of the ICC Statute and Article 55, paragraph 1 (d) of the ICC Statute. The Appeals Chamber agreed with the Pre-Trial Chamber "that the process followed accorded with Congolese law" and that "there is nothing to indicate that his arrest or appearance before the Congolese authority involved or entailed any violation of his rights". However, this appears to refer to

[271] *Ibid*.
[272] See n. 141 and accompanying text.
[273] Note that in the context of the Pre-Trial Chamber's discussion of the scope of Art. 59 of the ICC Statute, it was assumed that the ICC judges would look at irregularities in the context of an arrest/detention prior to the official ICC arrest if that arrest/detention was somehow related to the ICC proceedings. It can be argued that this assumption found support in the Pre-Trial Chamber's later remark that it will look at irregularities even prior to the official ICC arrest if the ICC was involved in these irregularities, in the case of concerted action between the ICC and third parties.

national law only. It was explained in Chapter VIII that Article 59, paragraph 2 (b) of the ICC Statute implied that the national process cannot violate international (human rights) law[274] and that Article 59, paragraph 2 (c) of the ICC Statute may also refer to consistency with human rights treaties.[275] In addition, Chapter IX clarified the fact that whenever the ICC exercises jurisdiction, whenever the ICC is involved in a case (including actions of third parties working at the behest of the ICC), that involvement must be consistent with Article 21, paragraph 3 of the ICC Statute: internationally recognised human rights. Finally, it must not be forgotten that Article 55, paragraph 1 (d) of the ICC Statute applies as from the initiation of the investigation. This apparently restricted interpretation by the Appeals Chamber of the scope of Article 59 of the ICC Statute can be criticised. In the words of Sluiter:

> This ruling leaves us in the dark as to (i) the applicable law – only Congolese law, or also internationally protected human rights law, and (ii) the level of review – what margin of appreciation is left to national courts? The Appeals Chamber emphasis seems to be, however, on an interpretation of Article 59 (2) as essentially – or merely – offering the protection of national law. This can in my opinion be inferred from the conclusion in this section that 'the process followed accorded with Congolese law'. The logical follow-up question, whether Congolese law – or simply the process as it was applied in practice – was consistent with internationally protected human rights, at least those rights set out in treaties to which Congo is a party, is not addressed. Hereby, Article 59 (2) loses much of its protective force and its interpretation is not in keeping with Article 21 (3) of the Statute.[276]

Then, "[t]he gravamen of the appellant's complaint, where the essence of the appellant's case lies",[277] was addressed, namely "that the Pre-Trial Chamber ignored

[274] See n. 155 and accompanying text of Chapter VIII.
[275] See n. 157 and accompanying text of Chapter VIII.
[276] Sluiter 2009, pp. 473-474. See also *ibid*., p. 465: "Another matter which was not tackled head-on by the Appeals Chamber in *Lubanga* concerns the effect of Article 21 (3) for the pre-trial phase. Clearly, the applicable law of the ICC and the right to a fair trial is not confined to what happens in the courtroom, or at the seat of the Court. The protection of Article 21 (3), like the protection of the right to a fair trial, should extend to the pre-trial phase. Any other approach deprives individuals of essential protection and may make the Court the beneficiary of activities it would not wish to be associated with. A number of provisions in the Statute, like Articles 55 and 59, are illustrative of a deliberate and wise choice for closer supervision of the pre-trial phase. However, (…) the initial case law of the ICC reveals a tendency to retreat within the safe limits of The Hague and a strong desire to keep hands clean by refusing to supervise activities within domestic jurisdictions. By doing so, the adverse effect may be achieved: a refusal to review the national activities that have benefited the Court can with good reason be seen as acceptance of them, and implicates the integrity of international proceedings. And since we are dealing with proceedings that extend over many jurisdiction, with a great variety in the national level of protection, a strong supervisory effect triggered by Article 21 (3) seems to me indispensable, simply to save the credibility of the Court in human rights terms." (See also n. 197 and accompanying text.)
[277] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of

breaches of his human rights prior to his appearance before the Court and the directions for the enforcement of the warrant of arrest [original footnote omitted, ChP]"[278] (these "directions for the enforcement of the warrant of arrest" is probably a reference to the request for arrest and surrender), and that the Prosecution was involved in these breaches.[279] However, the Appeals Chamber concurred with the Pre-Trial Chamber that there was no concerted action between the ICC and the DRC authorities,[280] emphasising that "[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose".[281] This appears to mean that the Appeals Chamber agrees with the Pre-Trial Chamber's test mentioned at footnote 145 and accompanying text that *if* there was concerted action prior to the sending of the request for arrest and surrender, the Appeals Chamber would look into these violations.[282] This also corresponds with what seemingly is the Appeals Chamber's view of the ambit of Article 21, paragraph 3 of the ICC Statute, which extends to situations in which the ICC exercises jurisdiction, to situations in which the ICC is involved ("by his/her accusers"). As stated earlier, this will cover a fair amount of the context of the ICC's case, but it is arguably not enough. The ICC should consider any violations which occur in the context of its case more generally, whether or not the ICC (or third parties working for it) was involved in it.

Finally, the Appeals Chamber also concluded that "the findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way".[283]

It can be argued that it is not very clear how this last point should be assessed. It does mean, of course, that the Appeals Chamber concurs factually with the Pre-Trial Chamber that there was no serious mistreatment/torture in this case, but does it mean more than that?

Of course, one can expect that the serious mistreatment/torture point can be integrated in the Appeals Chamber's own *male detentus* test. Although this test is not entirely clear because of the different formulations used, the first formulation appears to have some additional support in the decision. This formulation reads:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to

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the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 42.

[278] *Ibid*.

[279] See *ibid*.

[280] See *ibid*.

[281] *Ibid*.

[282] See also n. 1215 and accompanying text of Chapter VI.

[283] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 43.

> put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.[284]

Obviously, if the suspect's *male captus*, executed by "his/her accusers" (which should be read to include third parties working at the request of the ICC), is accompanied by serious mistreatment/torture (surely breaches of his fundamental rights), it would be very difficult for the judges to maintain that this would not jeopardise the (fairness of the) trial.

However, the more interesting question is, of course, whether the words of the Appeals Chamber must be understood to mean that it would also refuse jurisdiction in the case of serious mistreatment/torture *irrespective of the entity responsible*, for example, when the *male captus* was perpetrated by private individuals alone,[285] *cf.* the *Nikolić* case?

In the *Duch* case before the ECCC, the co-investigating judges referred to the paragraph which contained the words of the Appeals Chamber that "the findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way"[286] to argue that the Appeals Chamber in *Lubanga Dyilo* followed the Trial Chamber's decision in *Nikolić*, in which it was clearly stated that the ICTY, under the abuse of process doctrine, would refuse jurisdiction in the case of serious violations of the rights of the suspect, such as serious mistreatment/torture, *irrespective* of the entity responsible, for example, if the *male captus* was committed by private individuals.[287] Hence, the co-investigating judges in *Duch* were of the opinion that the ICC Appeals Chamber would also refuse jurisdiction in such a case.[288]

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[284] *Ibid*., para. 37. See also n. 247 and accompanying text.

[285] Who arguably would not fall under such concepts as his/her accusers/constructive custody/arrest and detention at the behest of/concerted action.

[286] See ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 19, n. 19.

[287] See *ibid*., para. 18, where the co-investigating judges quoted the following words of the Trial Chamber in *Nikolić*: "Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract. Accordingly, the level of violence used against the Accused must be assessed. Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals (…) was of such an egregious nature."

[288] See ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21: "The Co-Investigating Judges are (…) compelled to follow the solution adopted in *Nikolic* and *Lubanga* which requires, for the application of the abuse of [process] doctrine, the existence of grave violations of the rights of the Accused. Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused." See also *ibid*., para. 19 where the judges explain that the ICC had "held that the violation of the rights of the defendant at the time of his prior arrest and detention could only be taken into account in two cases: if the court acted in concert with the external authorities, or if the defendant was the victim of torture or serious mistreatment." See (arguably equally incorrect) ECCC, Trial Chamber, 'Decision on Request for

However, whether the ICC's Appeals Chamber would refuse jurisdiction in the case of serious mistreatment/torture, irrespective of the entity responsible, is not clear at all.

First, one must not forget that the remarks made by the Pre-Trial Chamber on serious mistreatment/torture were made in the context of the abuse of process doctrine, a doctrine which the Appeals Chamber has explicitly *rejected*. It could, of course, be argued that it is true that the abuse of process doctrine was rejected, but that the Appeals Chamber nevertheless accepted the human rights dimension of that doctrine and that the serious mistreatment/torture exception could fall under that Article 21, paragraph 3 of the ICC Statute dimension. However, as stated above, within that human rights dimension, the Appeals Chamber already created its own *male detentus* test, one which seemingly requires that the violations (which indeed may include serious mistreatment/torture) must be executed by "his/her accusers", which refers to the ICC/involvement of the ICC/actions of third parties working at the behest of the ICC, *cf.* concepts like concerted action and constructive custody.

Secondly (and this point was also briefly made earlier in this chapter),[289] the Pre-Trial Chamber's view of the abuse of process doctrine itself is not clear. This is because it writes that the application of this doctrine, to date, "has been confined to instances of torture or serious mistreatment *by national authorities of the custodial State* in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [emphasis added and original footnote omitted, ChP]".

This is arguably incorrect, but it is uncertain whether the Pre-Trial Chamber is aware of this mistake. It is unclear whether it is of the opinion that this is the correct test (requiring that the *male captus* be committed by national authorities) or whether it would now be of the opinion that these words were indeed incorrectly formulated and that it would also refuse jurisdiction in the case of serious mistreatment/torture, *irrespective* of the entity responsible, hence also including, for example, the actions of private individuals.

Because of the Appeals Chamber's rejection of the abuse of process doctrine and the lack of clarity with respect to the Pre-Trial Chamber's view of the abuse of process doctrine, it is not clear how the Appeals Chamber would act in the case of serious mistreatment/torture by, for example, private individuals.[290]

In other words, even though others have interpreted the decision to mean that the ICC Appeals Chamber would refuse jurisdiction in the case of serious mistreatment/torture, irrespective of the entity responsible, the fact that the Appeals Chamber explicitly rejected the (abuse of process) doctrine in which context that *male detentus* avenue was created and the lack of clarity with respect to the Pre-

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Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16 (or n. 1254 of Chapter VI). See also n. 1275 and accompanying text of Chapter VI.

[289] See n. 176 and accompanying text.

[290] In addition, one can wonder whether the Appeals Chamber, if it were to follow the Pre-Trial Chamber here, is also aware of the fact that the Pre-Trial Chamber correctly noted that *to date*, the application of that doctrine has been restricted to a certain situation – meaning that other *male detentus* avenues may be accepted in the future.

Trial Chamber's view of the abuse of process doctrine means that it is possible that the serious mistreatment/torture example only applies to the Appeals Chamber's own *male detentus* test, which demands violations by the ICC/violations in which the ICC is involved/violations by third parties working at the behest of the ICC ("by his/her accusers"). Hence, the only thing one can be clear of is that the test is unclear. (A conclusion, unfortunately, often made in this study.)

A final point which must be made about this decision before moving to the next case, the *Bemba Gombo* case, is that one can question to what extent Lubanga Dyilo would be entitled to less far-reaching remedies (than a refusal of jurisdiction) since that the Appeals Chamber has concluded that there was no serious mistreatment/torture in this case. Even if it is true that Lubanga Dyilo had not asked for this earlier in the proceedings,[291] judges should consider the issue. This is valid *a fortiori* for the judges of the Appeals Chamber as Lubanga Dyilo had mentioned this point in his fifth ground of appeal, see footnote 186 and accompanying text. In fact, one could argue that the ICC judges are obliged to look into any violation (and remedy that violation) in the event it can be said that the ICC was involved in the case, see Article 21, paragraph 3 of the ICC Statute, which covers the internationally recognised human right to an effective remedy against a violation. And going beyond that obligation: it would be good if the ICC were to remedy every violation occurring in the context of its cases more generally, whether or not the ICC was involved. However, unfortunately, the Appeals Chamber, in its final words before dismissing the appeal, did not go into that and focused only on the ultimate remedy, refusal of jurisdiction:

> At issue is the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court. The Pre-Trial Chamber determined that it is in relation to this process that breaches of the rights of the suspect or the accused may provide ground for halting the process. And none was shown.[292]

This is truly to be regretted. Given the allegations of irregularities at the national level, irregularities which were partly confirmed by Human Rights Watch, it is a pity that the Appeals Chamber did not make a more serious effort to find out what happened to Lubanga Dyilo, whether the violations – if they did indeed occur – could be seen as falling within the context of the ICC case and if so, what kind of remedies Lubanga Dyilo would be entitled to.[293]

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[291] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor vs. Thomas Lubanga Dyilo, 'Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006' (Public Redacted Document), ICC-01/04-01/06, 17 November 2006, para. 62.

[292] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 44.

[293] See also Sluiter 2009, pp. 471-472.

In that context, it must also be stressed that the above-mentioned point of the Appeals Chamber that it would only look at irregularities which occur in "the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court" does not seem to comport with the earlier statement that it would look at irregularities in the context of concerted action between the ICC and third parties.

This must be clarified further. In the discussion of the Pre-Trial Chamber's remarks on the scope of Article 59 of the ICC Statute, the ICC judges stated that the competent judicial authority was not obliged to look into the lawfulness of the suspect's arrest/detention prior to the sending of the request for arrest and surrender insofar as that detention was related solely to national proceedings. That implies that that authority was obliged to look at irregularities in the context of an arrest/detention prior to the official ICC arrest if that arrest/detention was somehow related to the ICC proceedings. Although the Pre-Trial Chamber did not itself clearly go into the role of the ICC judges, the supervisors of Article 59 of the ICC Statute, it was assumed that these words probably meant that the ICC judges would look into irregularities in the context of an arrest/detention prior to the official ICC arrest if that arrest/detention were somehow related to the ICC proceedings, an assumption which arguably found support in the Pre-Trial Chamber's later, more general, remark that the ICC judges would look into irregularities prior to the official ICC arrest if they were the result of concerted action between the ICC and third parties. Hence, if there is involvement of the ICC in the irregularities, if the national detention is somehow related to the ICC proceedings, if there is concerted action between the ICC and third parties, the irregularities stemming therefrom will be considered.

Now, one could argue that the Appeals Chamber's agreement with the Pre-Trial Chamber on the concerted action point means that the Appeals Chamber would also look into irregularities in the above-mentioned contexts, for example, if the national detention were somehow related to the ICC proceedings.

Nevertheless, the Appeals Chamber now requires an additional point, namely that it would not look into a national detention if the suspect was in detention for crimes other than the ones for which the ICC was now prosecuting this suspect. However, that is arguably a stricter view than the idea that one would look at the national detention if that detention was somehow related to the ICC proceedings, if there was concerted action between the ICC and third parties.

To provide an example, it is not impossible that the Prosecutor informally requests national authorities to keep a suspect, who is in detention for crimes other than those in which the ICC is interested, in custody so that the Prosecutor has more time to prepare a request for arrest and surrender. In such a case, it can be argued that the ICC should definitely be able to consider alleged violations occurring in this arrest/detention, for the simple reason that the ICC was involved in it, because that national detention was somehow related to the ICC proceedings, whether that

suspect was in detention at the national level for the same crimes in which the ICC is now interested or not.[294]

In fact, it could be argued, see also *supra*, that the judges should adopt an even broader stance. It is submitted that the ICC judges should decide for themselves whether the irregularities can be seen as falling within the context of their case more generally. Of course, the fact that somebody is in custody at the national level for crimes other than those in which the ICC is interested and the fact that the ICC is not somehow involved in that arrest/detention may very well constitute good reasons to argue that irregularities occurring in that context *cannot* be seen as falling within the context of the ICC case. However, judges may also take other elements into account here. It is very well possible that judges feel that this detention made the surrender to the ICC in the end possible and thus that it can be seen as falling within the context of the ICC case more generally. If the judges in that case were also to follow the normal abuse of process doctrine, it is by no means unthinkable that, if a person, during this national detention, is seriously mistreated by the national authorities and then, after the ICC becomes involved in the case, is subsequently surrendered to the ICC, the judges may nevertheless refuse jurisdiction, even if the national charges were not exactly the same as those of the ICC and even if the ICC was not yet involved in the case. They could then adopt the following, and more general, task assigned to courts (even if that task stems from a decision addressed by the ICC judges in the context of the (later rejected) abuse of process doctrine), namely that they accept their "inescapable duty to secure fair treatment *for those who come or are brought before them* [emphasis added, ChP]".[295]

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[294] *Cf.* also the discussion of the scope of Art. 60, para. 4 of the ICC Statute in Chapter VIII of this book. As argued in that chapter, involvement of the Prosecutor does not necessarily have to be triggered by an ICC arrest warrant and thus by detention based on the ICC charges. For another opinion, see the references in n. 510 of the present chapter or n. 265 and accompanying text of Chapter VIII.

[295] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 29. This quotation is from Lord Devlin's opinion in the *Connelly* case as discussed in *Bennett* and has already been mentioned earlier in this study, see n. 127 and accompanying text of Chapter V. The example from the main text could also fall under the abuse of process doctrine of the Pre-Trial Chamber, which demands "instances of torture or serious mistreatment by national authorities of the custodial State *in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal* [emphasis added and original footnote omitted, ChP]". (This broad stance was arguably also accepted by the Defence and the Prosecution in that case, see n. 195.) See also the abuse of process doctrine under *Duch*: "Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment by the external authorities and has *most usually been applied in relation to the process of arrest and transfer* [emphasis added and original footnote omitted, ChP]." (ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33.) See further the following formulation from *Bennett* (a formulation which was also used in the ICTY *Milošević* case (see n. 411 of Chapter VI) and the ICTR *Barayagwiza* case (see n. 842 of Chapter VI)): "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the

3 *BEMBA GOMBO*

The second ICC case under discussion here is the case of Jean-Pierre Bemba Gombo,[296] former vice-President and senator of the DRC and alleged President and Commander-in-chief of the *Mouvement de Libération du Congo* (MLC), an armed group which intervened, among other things, in the conflict in the CAR, a neighbouring country of the DRC, between October 2002 and March 2003.

On Friday 23 May 2008, Pre-Trial Chamber III of the ICC issued a sealed warrant of arrest for Bemba Gombo,[297] including a request for provisional arrest.[298] The arrest warrant found that in the context of the MLC intervention in the CAR, there were reasonable grounds to believe that Bemba Gombo was criminally responsible for a number of war crimes and crimes against humanity.[299] The next morning, the Registry of the ICC notified the request for provisional arrest to the authorities of (ICC State Party) Belgium[300] because it had become known that Bemba Gombo was at that moment in Belgian territory.[301] The ICC used a request for provisional arrest pursuant to Article 92 of the ICC Statute instead of the normal request for arrest and surrender pursuant to Article 91 of the ICC Statute, as it was discovered that Bemba Gombo wanted to leave Belgium a few days later, namely on

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accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused *in the circumstances of a particular case* [emphasis added ChP]." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.) See finally the ICTY Trial Chamber's view in *Nikolić*, arguing that "[d]ue process of law also includes questions such as (…) *how an Accused has been brought into the jurisdiction of the Tribunal* [emphasis added, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.) See also *ibid*., para. 114: "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, *before being handed over to the Tribunal*, this may constitute a legal impediment to the exercise of jurisdiction over such an accused [emphasis added, ChP]."

[296] Much of the following has been taken from Paulussen 2010, pp. 195-205.

[297] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, In the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo' (Under seal), ICC-01/05-01/08, 23 May 2008.

[298] See CPI, La Chambre Préliminaire III, Situation en R[é]publique Centrafricaine, Affaire *Le Procureur c. Jean-Pierre Bemba Gombo*, 'Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique' (Sous scellés), ICC-01/05-01/08, 23 mai 2008.

[299] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, In the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo' (Under seal), ICC-01/05-01/08, 23 May 2008, para. 21.

[300] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, In the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision to Unseal the Warrant of Arrest for Mr Jean-Pierre Bemba Gombo' (Public Document), ICC-01/05-01/08, 24 May 2008, para. 5.

[301] See CPI, La Chambre Préliminaire III, Situation en R[é]publique Centrafricaine, Affaire *Le Procureur c. Jean-Pierre Bemba Gombo*, 'Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique' (Sous scellés), ICC-01/05-01/08, 23 mai 2008, para. 3: "Lors de l'audience, le Procureur a soutenu que M. Jean-Pierre Bemba aurait quitté la République portugaise pour se rendre au Royaume de Belgique, dans une demeure à l'extérieur de Bruxelles".

25 May.[302] Only 13 hours later,[303] at around 10 p.m. on Saturday evening,[304] Bemba Gombo was apprehended by Belgian authorities in Sint-Genesius-Rode, a small town near Brussels, where he had acquired a home.[305]

The next day (Sunday 25 May), Bemba Gombo was brought before Hervé Louveaux, *juge d'instruction* (investigating judge)[306] in Brussels.[307] According to the *Loi de 29 mars 2004 concernant la coopération avec la cour pénale internationale et les tribunaux pénaux internationaux*, the Belgian law describing Belgium's cooperation obligations with the ICC and other international criminal tribunals (hereinafter: the Belgian cooperation law),[308] Bemba Gombo needed to appear before this judge within 24 hours after his deprivation of liberty,[309] which was indeed what happened. The Belgian cooperation law also states that this judge must verify whether the person arrested is indeed the person sought and whether the documents as mentioned in Article 92, paragraph 2 of the ICC Statute – which are the documents which must accompany the request for provisional arrest[310] – have been provided by the ICC.[311] In addition, this judge must issue a national arrest warrant, on which basis the ICC's request for provisional arrest can be executed.[312]

It must be noted that the Belgium cooperation law, in contrast to, for example, the Explanatory Memorandum to the Dutch International Criminal Court

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[302] See *ibid*.: "Le Procureur a souligné l'urgence qu'il y avait pour la Chambre de traiter sa requête au regard des risques de fuite de M. Jean-Pierre Bemba. Lors de l'audience, le Procureur a soutenu que M. Jean-Pierre Bemba aurait quitté la République portugaise pour se rendre au Royaume de Belgique, dans une demeure à l'extérieur de Bruxelles qu'il compte apparemment quitter le 25 [m]ai 2008, pour une destination non connue à ce jour."

[303] See 'Jean-Pierre Bemba, former Congo warlord, arrested in Belgium', *International Herald Tribune*, 25 May 2008, available at: http://www.iht.com/articles/ap/2008/05/25/europe/EU-GEN-War-Crimes-Bemba.php.

[304] See the International Federation for Human Rights (FIDH) Legal Action Group's report *FIDH and the situation in the Central African Republic before the International Criminal Court. The case of Jean-Pierre Bemba Gombo*, July 2008, No. 502a (available at: http://www.iccnow.org/documents/CPIaffbemba502ang2008.pdf), p. 20.

[305] See 'Jean-Pierre Bemba, former Congo warlord, arrested in Belgium', *International Herald Tribune*, 25 May 2008, available at: http://www.iht.com/articles/ap/2008/05/25/europe/EU-GEN-War-Crimes-Bemba.php.

[306] The English translations of the names of the different Belgium authorities have been taken from Vandermeersch 2004, pp. 133-157.

[307] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Application for interim release' (Public Document), [ICC-]ICC-01/05-01/-8, 23 July 2008, para. 8.

[308] This law can be consulted through the very practical University of Nottingham, Human Rights Law Centre, International Criminal Justice Unit's 'Database of National Implementing Legislation', available at: http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php.

[309] See Art. 14, para. 2 of the Belgian cooperation law. (The Belgian procedures regarding a request for provisional arrest can be found in the second section ('Demande d'arrestation provisoire') of Chapter 4 ('Arrestation, transfert, transit et remise de personnes à la Cour') of the Belgian cooperation law (Artt. 14-15).)

[310] See n. 124 of Chapter VIII.

[311] See again Art. 14, para. 2 of the Belgian cooperation law.

[312] See *ibid.*

Implementation Act,[313] does not explicitly mention the points of Article 59, paragraph 2 (b) and (c) of the ICC Statute, namely that the judge also has to determine that the person has been arrested in accordance with the proper process and that the person's rights have been respected, see Chapter VIII. Looking at the literal text, one will only find that the investigating judge has to verify that the person before him is indeed the person sought by the ICC, thereby fulfilling the requirement as mentioned in Article 59, paragraph 2 (a) of the ICC Statute. Vandermeersch, in his article on the (then draft) Belgian cooperation law,[314] explains, however, that the requirement under (b) has also been included in the Belgian cooperation law and that the requirement under (c) is not particularly relevant.

To start with the first requirement (under (b), namely that the competent judicial authority has to determine that the person has been arrested in accordance with the proper process), Vandermeersch is of the opinion that this condition is fulfilled by the fact that the Belgian authority has to verify that the information required under Article 92, paragraph 2 of the ICC Statute has been duly received.[315] Although it was earlier clarified in Chapter VIII that the exact meaning of this provision may differ from State to State, it is clear that this is a very restrictive view. In fact, one can assert that checking whether the ICC has provided all the necessary paperwork so that the request for provisional arrest can be executed is merely a small part of the process of verification that the person was arrested according to the proper process.

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[313] See the Explanatory Memorandum to the International Criminal Court Implementation Act (Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 098 (R 1704), Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof), Nr. 3, Memorie van Toelichting), p. 25: "The reference to article 59, paragraph 2 of the [ICC] Statute has been included because the Statute prescribes that the public prosecutor [the *officier*] checks with respect to a(n) (provisionally) arrested person whether there is perhaps a case of mistaken identity, whether the (national) arrest procedure has been correctly applied and whether the rights which the person pursuant to national and international law enjoys in this situation, have been respected [own translation, ChP]." The Dutch International Criminal Court Implementation Act itself (see n. 170 of Chapter VIII) only uses more general references, see Section 14 for provisional arrest ("After the person claimed has been questioned *in accordance with* article 55, paragraph 2, and *article 59, paragraph 2 of the Statute*, the public prosecutor may order that he be detained in police custody for three days from the moment of the provisional arrest [emphasis added, ChP].") and Section 18, para. 2 for arrest ("The person claimed shall be brought before the public prosecutor within 24 hours of his arrest. After questioning the person claimed *in accordance with* article 55, paragraph 2, and *article 59, paragraph 2 of the Statute*, the public prosecutor may order that he be detained in police custody until the date on which the District Court decides on his remand in custody [emphasis added, ChP].").

[314] See Vandermeersch 2004.

[315] Or at least, that is the impression one gets. After all, after each requirement from Art. 59, para. 2 of the ICC Statute, Vandermeersch adds a footnote arguably explaining what these requirements entail. After Art. 59, para. 2 (a) of the ICC Statute for example, he explains in n. 91 of his article: "Verification of the identity of the person." Likewise, one can read in n. 92 of his article (positioned after Art. 59, para. 2 (b) of the ICC Statute): "Verification that the information required under Art. 92.2 of the Statute has been duly received."

The competent judicial authority should also check whether the arrest *itself* was executed procedurally correctly.[316]

With respect to the second requirement (under (c), namely that the competent judicial authority has to determine that the person's rights have been respected), Vandermeersch comments: "This general formula is not of particular relevance within the present context, as the requirement to respect the rights of the accused is satisfied simply by following the relevant procedures prescribed by law."[317] This is, again, a rather restrictive view, see Subsection 3.2 of Chapter VIII. As explained in that subsection, where a – careful – analogy to the human right to liberty and security was drawn,[318] the competent judicial authority could, in fact, make a more substantive review, namely with respect to the prohibition of arbitrariness; although the substantive and procedural legal bases of the deprivation of liberty would not be readily labelled as arbitrary, this may be different with respect to the second element of arbitrariness, which relates to the enforcement of the law in a given case. Hence, even if the arrest were based on the correct grounds (this is up to the ICC to decide), were executed in accordance with a certain procedure (see the requirement under (b)), and even if these substantive and procedural legal bases are generally to be viewed as non-arbitrary, the *factual* execution of a person's specific arrest may still qualify as arbitrary/incorrect. In addition, it must also be stressed that the fact that Article 59, paragraph 2 of the ICC Statute mentions the procedural dimension of the national arrest separately (under (b)) also seems to indicate that the meaning of the words under (c) cannot be restricted to mere procedural issues. If that were the case, then the words under (c) could, of course, also have been left out completely (which they were not).

Be that as it may, three days after his 'Belgian' arrest and detention were authorised by the *juge d'instruction*, on Wednesday 28 May, Bemba Gombo appeared before the *Chambre du Conseil* (the Closed Court) of Brussels.[319] This again was in conformity with the Belgian cooperation law,[320] which clarifies the fact that this Court – like the *juge d'instruction* – must check whether the person standing before it is indeed the person sought and whether the documents as mentioned in Article 92, paragraph 2 of the ICC Statute have been provided by the ICC.[321] Furthermore, this Court must decide, after having heard the *ministère public* (the Public Prosecutor), the suspect and his lawyer, whether or not the provisional arrest must be confirmed.[322] In the *Bemba Gombo* case, the *Chambre du Conseil* decided on the very same day to keep Bemba Gombo under arrest.

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[316] See El Zeidy 2006, pp. 454-455 (see n. 153 and accompanying text of Chapter VIII).
[317] Vandermeersch 2004, p. 149, n. 93.
[318] See n. 159 and accompanying text of Chapter VIII.
[319] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Application for interim release' (Public Document), [ICC-]ICC-01/05-01/-8, 23 July 2008, para. 8.
[320] See Art. 14, para. 4 of the Belgian cooperation law.
[321] See *ibid.*
[322] See *ibid.*

According to the Belgium cooperation law, both the Public Prosecutor and the suspect can appeal the decision of the *Chambre du Conseil* before the *Chambre des Mises en Accusation* (Court of Appeal's Indictments Chamber) within 24 hours of the decision of the *Chambre du Conseil*.[323] After hearing all the parties, this Court of Appeal's Indictments Chamber must promulgate its decision within eight days.[324] On 29 May, Bemba Gombo appealed the decision of the *Chambre du Conseil* and one week later, Bemba Gombo appeared before the *Chambre des Mises en Accusation* in Brussels which shortly afterwards dismissed the appeal of Bemba Gombo as well as his request for provisional release.[325]

Then, on 10 June 2008, the ICC issued a revised arrest warrant[326] and a request for arrest and surrender pursuant to Article 91 of the ICC Statute.[327] On 1 July 2008, the highest court in Belgium,[328] the *Cour de Cassation* (the Court of Cassation)

[323] See Art. 14, para. 5 of the Belgian cooperation law.

[324] See *ibid.*

[325] See the International Federation for Human Rights (FIDH) Legal Action Group's report *FIDH and the situation in the Central African Republic before the International Criminal Court. The case of Jean-Pierre Bemba Gombo*, July 2008, No. 502a (available at: http://www.iccnow.org/documents/CPIaffbemba502ang2008.pdf), p. 20. (It must be noted that this report speaks of 5 June 2008 as the date that the *Chambre des Mises en Accusation* rejected Bemba Gombo's appeal whereas Bemba Gombo's defence lawyers use the date of 6 June 2008, see ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Application for interim release' (Public Document), [ICC-]ICC-01/05-01/-8, 23 July 2008, para. 9.) A request for interim release pending surrender can be made by the arrested person to the *Chambre des Mises en Accusation* pursuant to Art. 16, para. 1 of the Belgian cooperation law (which implements Art. 59, para. 3 of the ICC Statute).

[326] See CPI, La Chambre Préliminaire III, Situation en République Centrafricaine, Affaire *Le Procureur c. Jean-Pierre Bemba Gombo*, 'Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo remplaçant le mandat d'arrêt décerné le 23 mai 2008' (Public), ICC-01/05-01/08, 10 juin 2008.

[327] See CPI, La Chambre Préliminaire III, Situation en R[é]publique Centrafricaine, Affaire *Le Procureur c. Jean-Pierre Bemba Gombo*, 'Demande d'arrestation et de remise de Jean-Pierre Bemba Gombo adressée au Royaume de Belgique' (Public), ICC-01/05-01/08, 10 juin 2008. (The Belgian procedures regarding a request for arrest and surrender can be found in the first section ('Demande d'arrestation et de remise') of Chapter 4 ('Arrestation, transfert, transit et remise de personnes à la Cour') of the Belgian cooperation law (Artt. 11-13).) As also explained in n. 124 of Chapter VIII, Art. 92, para. 3 of the ICC Statute and Rule 188 of the ICC RPE entail that the requested State must have received the request for surrender (including the documents supporting that request) at the latest two months after the provisional arrest. If not, then the person provisionally arrested may be released from custody. The Belgian cooperation law states that the provisionally arrested person must in any case be released from custody if three months have passed, see its Art. 15.

[328] An interesting point which deserves to be mentioned here is that the fact that a Belgian case can be litigated up to the highest court in the State, the *Cour de Cassation*, does not mean that this is the procedure to be followed in each and every country executing an ICC request. As explained in Chapter VIII, the arrest and surrender must be executed on the basis of the Statute *and national law* and national implementations of the ICC's cooperation obligations may, of course, differ from State to State. For example, in the Netherlands, there is no appeal possible against the decision of the District Court in The Hague, see Section 27, para. 4 of the Dutch International Criminal Court Implementation Act (see n. 170 of Chapter VIII). Nevertheless, it is also possible that States may allow a person's case to be litigated up to for example the ECtHR. See Sluiter 2003 C, p. 625. Note finally that according to Bemba Gombo's defence lawyers, the decision of the *Chambre des Mises en Accusation* (of either 5 or 6 June 2008, see n. 325) was only brought to Bemba Gombo's attention on 18 June 2008. Although Bemba Gombo lodged an appeal against this decision to the *Cour de Cassation*, this Court never looked into the merits

finally "rejected the requests of Bemba's lawyers, concerning, in particular, the alleged irregularity of the Belgian proceedings",[329] thereby removing the final obstacles from the path leading to Bemba Gombo's surrender to The Hague. Hence, two days later, on Thursday 3 July, he was surrendered to the ICC[330] where he is now facing justice.

Although this case is interesting in many respects, see, for example, the topic of provisional release,[331] this study will naturally focus on those alleged irregularities in the Belgian surrender proceedings.

In their application of 23 July 2008, Bemba Gombo's counsel argued that Bemba Gombo's rights pursuant to Article 55, paragraph 2 (c) and (d) of the ICC Statute were violated during the surrender proceedings in Belgium.[332] These provisions read:

> 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: (…) (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

More concretely, the Defence claimed:

> During Mr Jean-Pierre Bemba's questioning at the investigating judges in regard to the arrest warrant of the 23rd of May 2008 [this took place on 25 May 2008, ChP] Mr Jean-Pierre Bemba asked to be represented by his lawyer Maître Pierre Legros of the Bar of Brussels (…)[.] Neither the investigating judge nor the registrar respected Mr Jean-Pierre Bemba's wish to be represented by Maître Legros. Therefore Mr (…) Jean-Pierre Bemba was deprived of his fundamental right to be assisted by a counsel of his own choice. In regard to the execution of the arrest warrant of the 10th of June

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of the case because it considered the appeal to have become futile given the fact that the arrest warrant of 23 May 2008 had been replaced by the revised one on 10 June 2008. (See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Application for interim release' (Public Document), [ICC-]ICC-01/05-01/-8, 23 July 2008, para. 9.)

[329] The International Federation for Human Rights (FIDH) Legal Action Group's report *FIDH and the situation in the Central African Republic before the International Criminal Court. The case of Jean-Pierre Bemba Gombo*, July 2008, No. 502a (available at: http://www.iccnow.org/documents/CPIaffbemba502ang2008.pdf), p. 20.

[330] See *ibid*.

[331] See also n. 284 of Chapter VIII.

[332] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Application for interim release' (Public Document), [ICC-]ICC-01/05-01/-8, 23 July 2008, paras. 12-13.

> 2008 it is submitted, that this was not fulfilled in a lawful way because Mr Jean-Pierre Bemba was neither heard nor represented in these proceedings.[333]

As a result, it was submitted "that the arrest warrants of the 23rd of May 2008 and the 10th of June 2008 are null and void and that Mr Jean-Pierre Bemba (…) should be put into liberty".[334]

Judge Kaul of Pre-Trial Chamber III did not agree, however. In its decision of 20 August 2008, the Chamber held, while stressing the relevance of Article 21, paragraph 3 of the ICC Statute[335] and the importance of the right to liberty,[336] that the ICC "is not a court of appeal in relation to the national authorities and that its power to review questions of substance and procedure before national courts is limited [original footnotes omitted, ChP]".[337] Judge Kaul referred here to the two decisions in the *Lubanga Dyilo* case which were already discussed in the previous section. Kaul was of the opinion "that such questions should primarily be raised and pursued before the national authorities as these are better placed than international jurisdictions to deal with such questions and, as the case may be, to provide for an adequate remedy [original footnote omitted, ChP]".[338] As also clarified in the *Lubanga Dyilo* case, one can agree with this stance, but it should also be repeated that this does not mean that the ICC does not have the ultimate responsibility for its own cases, including the pre-trial phase at the national level; the ICC should ensure that all violations are, ultimately, remedied and that it steps in if the national authorities, for whatever reason, do not grant appropriate remedies for violations.[339]

After these general observations, Judge Kaul turned to the specifics of this case and concluded "that the defence has not substantiated sufficiently its allegations of procedural irregularities at the national level so as to allow unequivocally to establish the facts and to verify their compliance with the applicable legal regime".[340]

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[333] *Ibid*., paras. 13-14.

[334] *Ibid*., para. 15. See also ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 27.

[335] See *ibid*., para. 36.

[336] See *ibid*., para. 37: "The Single Judge observes at the outset that the right to liberty is of fundamental importance for everyone and that for any deprivation of liberty to be acceptable, it must be on such grounds and in accordance with such procedure as are established by the applicable legal regime. Furthermore, it must not be arbitrary [original footnote omitted, ChP]." (It may be interesting to note that Judge Kaul refers here not only to, among other things, Artt. 9 of the ICCPR, 5 of the ECHR and 7 of the ACHR, but also to para. 54 of the *Bozano* case, see n. 266 of Chapter III.)

[337] *Ibid*., para. 42.

[338] *Ibid*.

[339] See also the words of Sluiter (2003 C, pp. 644 and 651) at n. 201 of Chapter VIII.

[340] ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in

For example, with respect to the alleged violation during the hearing of 25 May in relation to the arrest warrant of 23 May 2008, Judge Kaul was not sure whether this hearing was real questioning pursuant to Article 55, paragraph 2 (d) of the ICC Statute.[341] According to him, it rather appeared to be a mere interview to establish Bemba Gombo's identity and to inform him of his rights.[342] In that case, "the allegedly unlawful absence of the counsel would only entail a potential exclusion pursuant to article 69(7) of the Statute of evidence obtained in the interview".[343] This remark implies that if the hearing *were* seen as true questioning pursuant to Article 55, paragraph 2 (d) of the ICC Statute, the consequences of the absence of counsel could be greater than mere exclusion of evidence obtained in the interview. Finally, Judge Kaul observed that the absence of counsel during the meeting of 25 May did "not seem to have resulted into any actual prejudice to him [original footnote omitted, ChP]".[344] That may, of course, be true, but one could argue that the level of prejudice should only have an influence on the question of how serious the violation was (and consequently, what kind of remedy must be provided), and not on the question of whether there was a violation in the first place/whether the suspect is entitled to a remedy. It could be argued that *any* violation of the rights of the suspect[345] constitutes some injustice/prejudice to the suspect and that it is not necessary to demand actual/material prejudice before granting remedies, although the level of prejudice can, of course, be taken into account when determining the exact remedies.[346] As explained in Chapter IX, pursuant to Article 21, paragraph 3 of the ICC Statute, a right to an effective remedy against a violation enters the law of the ICC. This means that whenever the ICC is involved in a case, it must grant appropriate remedies for violations which occur in that context.

With respect to the alleged violations in the context of the second/revised arrest warrant, Judge Kaul noted "that Mr Jean-Pierre Bemba had effective legal representation and that he was afforded adequate procedural protection with ample opportunities to raise any objections that he had at the national level at the appropriate time".[347] As a result, he concluded that he had

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the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 44.

[341] See *ibid*., para. 45.

[342] See *ibid*.

[343] *Ibid*.

[344] *Ibid*., para. 46.

[345] It must be borne in mind, however, that not every error in the proceedings amounts to a violation, which, in turn, should lead to a remedy. One could hereby think, for example, of a simple and small technical error in the arrest warrant. *Cf.* n. 603 of Chapter III (with reference to the *Brima* case and the question when an arrest/detention can be qualified as unlawful/illegal). See also ns. 205, 242 and 832 of Chapter VI.

[346] *Cf.* also ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 125 (see also n. 997 and accompanying text of Chapter VI): "[A]ny violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy." See also n. 1164 and accompanying text of Chapter VI (with respect to the *Rwamakuba* case).

[347] ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-

> found no indication of any irregularity or arbitrariness in the procedure followed by the competent Belgian authorities that would constitute a material breach of article 59(2) of the Statute affecting the proceedings before the Court or render the detention of Mr Jean-Pierre Bemba on the authority of the Court otherwise unacceptable [original footnote omitted, ChP].[348]

Two days later, Bemba Gombo filed a notice of appeal[349] and on 16 December 2008, the ICC's Appeals Chamber issued its own decision.[350] Unfortunately, as the alleged irregularities in the way Bemba Gombo was surrendered to the ICC were not (clearly)[351] part of Bemba Gombo's appeal,[352] any views of the Appeals Chamber on this issue are not to be found.

01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 48.

[348] *Ibid*., para. 49.

[349] Three (see ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 7) or four (see ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 1) days later (on 25 or 26 August 2008), the document in support of the appeal was filed. However, as this document (including the response of the Prosecution to the appeal) were filed confidentially, they can unfortunately not be discussed here, see ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 8.

[350] See ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008.

[351] Perhaps, the words "the Appellant states that the Impugned Decision: was not based on reliable evidence" (see the next footnote) could be seen as a general statement, also challenging the views of Pre-Trial Chamber III regarding the alleged irregularities in Belgium.

[352] See ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 10: "In the Document in Support of the Appeal, the Appellant states that the Impugned Decision: was not based on reliable evidence and the Single Judge: a. Erred in failing sufficiently to establish the existence of a risk that Jean-Pierre Bemba would abscond; b. Erred in failing to demonstrate that Jean-Pierre Bemba would obstruct or endanger the investigation or the Court proceedings; c. Erred in failing sufficiently to establish a causal link between the alleged risks of absconding or threats and the interim release of Jean-Pierre Bemba [original footnote omitted, ChP]". See also ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 5.

However, what the Appeals Chamber, like Pre-Trial Chamber III, *did* mention is the relevance of Article 21, paragraph 3 of the ICC Statute and the importance of the right to liberty. In this context, it specifically cited, in the main text of the decision, paragraphs 2-4 of Article 5 of the ECHR,[353] which may be seen as additional support for the view that the ICC considers the remedy of release in paragraph 4, in principle, to be relevant for the Court's functioning, something which was already argued in the previous chapter.[354] The Appeals Chamber also more generally referred to the importance of a suspect being able to challenge the lawfulness of his detention (see also Chapter IX, footnotes 290 and 292 and accompanying text), an avenue which is not explicitly mentioned in the ICC Statute.[355]

In his dissenting opinion to this decision, Judge Pikis does not go into these irregularities either, but he did note that Judge Kaul "summarily dismissed"[356] the contentions of Bemba Gombo regarding the alleged irregularities in Belgium. Furthermore, he also referred to Judge Kaul's conclusion as mentioned at footnote 340 and accompanying text "because it reflects the Single Judge's understanding of the law, that it is not for the prosecutorial authority to establish and justify the prolongation of the arrestee's detention, but for the latter to justify his release from captivity".[357] (Something with which Judge Pikis does not agree.)[358] Furthermore, Judge Pikis also repeats (see footnote 293 and accompanying text of Chapter IX) the

[353] It also referred to paras. 2-4 of Art. 9 of the ICCPR and paras. 4-6 of Art. 7 of the ACHR in ns. 64-65, respectively.

[354] See also ICC, Pre-Trial Chamber II, Situation in the Central African Republic, *In the Case of 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' (Public Document), ICC-01/05-01/08, 14 August 2009, para. 35, writing about the scope of Art. 21, para. 3 of the ICC Statute: "The right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention is enshrined in many international human rights instruments, such as article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples' Rights and article 7 of the American Convention on Human Rights [original footnotes omitted, ChP]."

[355] See ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 32: "Based on the jurisprudence of the ECtHR, the Appeals Chamber considers that, in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case." These considerations are, of course, very interesting for the situation in which the ICC is confronted by a *Todorović*-like situation where the peacekeeping force in question refuses to disclose evidence as to the manner by which the suspect was brought into the jurisdiction of the ICC.

[356] ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 5.

[357] *Ibid*.

[358] See *ibid*., para. 36.

importance of a suspect's right to challenge the lawfulness of his detention, a right which is not explicitly mentioned in the ICC Statute, but which may nevertheless be inferred from a provision such as Article 60, paragraph 2 of the ICC Statute.[359] A final point from Judge Pikis' dissenting opinion should be mentioned and that is that he states that "everything that would enable the person to effectively challenge the lawfulness of his detention must be disclosed".[360] Although Judge Pikis makes this remark in the context of the substantive grounds and reasons of the detention, his words may nevertheless be interesting for the situation – see also footnote 355 – in which the ICC is confronted by a *Todorović*-like situation where the peacekeeping force in question refuses to disclose evidence as to the manner by which the suspect was brought into the jurisdiction of the ICC.

Before turning to the last case, that of Germain Katanga, a final point of the *Bemba Gombo* case should be addressed, namely his allegations with respect to a violation of Article 60, paragraph 4 of the ICC Statute, a provision which was discussed in the previous two chapters.

On 3 November 2008, Bemba Gombo filed an urgent application for interim release, requesting, "as his primary relief, to be released unconditionally and, in the alternative, to be granted interim release with conditions".[361] This was because he was of the opinion "that he has been detained for an extended period prior to the trial due to unjustified delay by the Prosecutor in the conduct of the proceedings".[362] Although the request to be released unconditionally might be seen as a request for final release, comparable with the release with prejudice of the first *Barayagwiza* decision, it appears that in this case, Bemba Gombo views this unconditional release to also constitute an interim release, not jeopardising the trial itself, see the title of his application. As also explained in Chapter VIII, as this provision is surrounded by provisions addressing the concept of interim release, one can imagine that it would normally be used for an interim release.[363] Nevertheless, as also argued in the same

[359] See *ibid*., para. 20: "If there were no provision in the Statute affording the arrested person the opportunity to contest the deprivation of his/her liberty, we would be confronted with a dire denial of his/her human rights. Every person is assured the right to contest the lawfulness of his/her detention. Lawfulness in this context signifies the soundness in law of the factual basis of the decision, as well as the correctness of the legal provisions by reference to which the case is decided. The right of a person to contest the lawfulness of his detention, ordered in his absence and without hearing him, is safeguarded by the provisions of article 60 (2) of the Statute, requiring the Pre-Trial Chamber to evaluate, in proceedings held in the presence and with the participation of the person affected, the lawfulness and sequentially the justification of the deprivation of liberty. The provisions of article 60 (2), like every other provision of the Statute, must (…) be construed and applied in accordance with internationally recognized human rights." See also *ibid*., para. 31: "[A]rticle 21 (3) assures to every individual the right to effectively contest the deprivation of liberty."

[360] *Ibid*., para. 29.

[361] ICC, Pre-Trial Chamber III, Situation in the Central African Republic, In the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Urgent Application for Interim Release' (Confidential, Including 3 Confidential Annexes), ICC-01/05-01/08, 3 November 2008, para. 1.

[362] *Ibid*., para. 8.

[363] See also *ibid*., para. 9, where counsel for Bemba Gombo refers to the following words of Pre-Trial Chamber III in another decision: "The Single Judge would take this opportunity to recall that any inexcusable delay which can be ascribed to the Prosecutor might have consequences in respect of the

chapter, the word "release" itself does not preclude a further-reaching release, a release with prejudice, ending the entire trial, in very serious violations of Article 60, paragraph 4 of the ICC Statute.[364] This interesting provision also played a role in this book's final case, which will now be discussed.

4 *KATANGA*

The final *male captus* case is that of Germain Katanga, the alleged commander of the FRPI, the *Force de Résistance Patriotique en Ituri*. That this case is addressed here will hopefully not come as a real surprise, as in the *Lubanga Dyilo* case, the following passage of a report from Human Rights Watch on the situation in the DRC was presented:

> In some of the few cases where justice has been pursued, authorities have failed to observe international standards of due process. In February and March a number of influential armed group leaders from Ituri were arrested in Kinshasa following the killings of nine U.N. peacekeepers. Several of those arrested, including Thomas Lubanga, Floribert Njabu[[365]] and Germain Katanga, were accused by Human Rights Watch and others of war crimes and crimes against humanity. Authorities arrested several of them without charge and held them for weeks before bringing any charges against them, in clear violation of Congolese legal procedures. By early December, they had been in detention for ten months but there has been no effort to bring them to trial [original footnote omitted, ChP].[366]

On 2 July 2007, a sealed warrant of arrest was issued against Katanga, charging him with a number of war crimes and crimes against humanity related to the attack on the village of Bogoro on 24 February 2003.[367] Four days later, the ICC Registrar

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Chamber's examination of any *request for interim release* by Mr Jean-Pierre Bemba *pursuant to article 60(4) of the Statute* [emphasis added, ChP]."

[364] See n. 269 and accompanying text of Chapter VIII.

[365] As also stated in the context of the *Lubanga Dyilo* case, one can expect that Njabu, if he is brought before the ICC one day, will raise similar allegations as Lubanga Dyilo and Katanga.

[366] Human Rights Watch, 'Democratic Republic of Congo. Elections in sight: "Don't Rock the Boat"?', 15 December 2005 (available at: http://www.hrw.org/legacy/backgrounder/africa/drc1205/drc1205.pdf), p. 15. See also n. 70 and accompanying text.

[367] For more information, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga*, 'Urgent Warrant of Arrest for Germain Katanga' (Under seal), ICC-01/04-01/07, 2 July 2007, p. 6: "[T]here are reasonable grounds to believe that Germain Katanga is criminally responsible under article 25(3)(a) or, in the alternative, under article 25(3)(b) of the Statute, for: i) murder as a crime against humanity, punishable under article 7(1)(a) of the Statute; ii) wilful killing as a war crime, punishable under article 8(2)(a)(i) or article 8(2)(c)(i) of the Statute; iii) inhumane acts as a crime against humanity, punishable under article 7(1)(k) of the Statute; iv) inhuman treatment as a war crime, punishable under article 8(2)(a)(ii) or cruel treatment as a war crime, punishable under article 8(2)(c)(i) of the Statute; v) the war crime of using children under the age of fifteen years to participate actively in hostilities, punishable under article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute; vi) sexual slavery as a crime against humanity, punishable under article 7(1)(g) of the Statute; vii) sexual slavery as a war crime, punishable under article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute; viii) the war crime of intentionally directing attacks against the civilian

filed an urgent and sealed request to the DRC for the arrest and surrender of Katanga,[368] including an urgent and sealed request for the identification, tracing, freezing and seizure of Katanga's property and assets.[369] Although it is not entirely clear when this latter request was actually issued to the DRC (although it is probably the same date as the date of transmission of the request for arrest and surrender), the request for arrest and surrender was transmitted to the DRC on 18 September 2007.[370] In any case, Katanga was already in custody at the time, at the same detention centre where Lubanga Dyilo was imprisoned. On 17 October 2007, Katanga was removed from this *Centre pénitentiaire*[371] *et de rééducation de Kinshasa* so that the DRC authorities could surrender him to the ICC on 18 October 2007.[372] At the initial hearing before the ICC on 22 October 2007, duty counsel for Katanga, Xavier-Jean Keita, made comparable *male captus* allegations as Lubanga Dyilo had done before,[373] but it was only much later, on 30 June 2009, after the

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population as such or against individual civilians not taking direct part in hostilities, punishable under article 8(2)(b)(i) or article 8(2)(e)(i) of the Statute; ix) pillaging a town or place, even when taken by assault as a war crime, punishable under article 8(2)(b)(xvi) or article 8(2)(e)(v) of the Statute".

[368] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga*, 'Urgent Request to the Democratic Republic of the Congo for the Arrest and Surrender of Germain Katanga' (Under seal), ICC-01/04-01/07, 6 July 2007.

[369] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga*, 'Urgent Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of the Property and Assets of Germain Katanga' (Under seal), ICC-01/04-01/07, 6 July 2007.

[370] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, p. 10 or ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 3.

[371] See n. 5.

[372] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 6. It may be interesting to note that pictures from Katanga's surrender can be viewed at http://www.digitalcongo.net/article/47548#.

[373] See ICC, Pre-Trial Chamber I, Situation [in the] Democratic Republic of [the] Congo, First Appearance Hearing – Open Session, Transcript ICC-01-04-01-07-T-5-ENG, 22 October 2007, available at: http://www.icc-cpi.int/iccdocs/doc/doc357321.PDF, pp. 16-21. At these pages, it was claimed, among other things, that Katanga was deprived of his liberty in February 2005 and that he was officially placed in detention on 10 March 2005. (See *ibid*., p. 16.) Furthermore, the Defence contended that according to Congolese law, Katanga had to be brought before a judge within 12 months but that this did only happen after 14 months, on 1 May 2006, when he appeared before a military court. (See *ibid*., pp. 16-17.) (However, note that Katanga's lawyer also explained that before that time, namely on 20 January 2006, Katanga was heard once by a certain Colonel Tsino – this must be Tsinu, see n. 390 and accompanying text – and that in that interview, which was held in the absence of Katanga's lawyer, Katanga was asked about Bogoro, see *ibid*., p. 18.) (Note furthermore that it will be shown *infra* that the Defence later claimed that there were in fact multiple hearings in May 2006, the first one starting on 5

confirmation of the charges (on 26 September 2008), but before the commencement of the actual trial (on 24 November 2009), that the Defence filed an official *male captus* submission.[374]

In this submission, of which the publicly available redacted version was filed on 2 July 2009, the Defence argued that Katanga, who had become an accused in the meantime (see footnote 30 of Chapter I),

> was unlawfully arrested and detained by the authorities of the Democratic Republic of [the] Congo (…) with a consequent flagrant breach of his human rights in international law and under the Statute of the ICC. It is submitted that these violations must be viewed in the light of the actions and omissions of the Office of the Prosecutor and the Registry, and in the context that this detention was in part at the behest and for the purposes of the International Criminal Court. The accused is entitled to an effective remedy for the violation of those rights.[375]

That the Defence tries to convince the judges that the ICC was involved in the *male captus* and that this was in part at the behest of the ICC may not come as a surprise. After all, if the ICC judges were to agree with that, the arrest/detention would fall under concepts such as concerted action/action "by his/her accusers"/constructive custody, see the case of Lubanga Dyilo, concepts which trigger the application of Article 21, paragraph 3 of the ICC Statute. In addition, if the *male captus* were

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May 2006, and that Katanga was not brought before a court until 1 December 2006.) At the meeting(s) in May 2006, Katanga's lawyer challenged the irregularity of Katanga's detention. However, this plea was apparently unsuccessful as Katanga's detention was extended by 60 days. Nevertheless, it was only on 30 November 2006 that Katanga was brought before the military court for the second time (see the point mentioned above that it will be explained *infra* that Katanga appeared before a court for the first time on 1 December 2006), which – again – extended his detention by 60 days. He was allegedly not brought before the Court two months later, however, but some four and a half months later, on 10 April 2007. At this hearing, his detention was again extended for two months. (See *ibid*., p. 17.) It was also claimed, among other things, that during the official ICC arrest and surrender, irregularities occurred, see, for example, *ibid*., p. 19, where it is claimed that Katanga did not receive a copy of his arrest warrant. In that context, it was also argued that "he was not asked to challenge the Warrant of Arrest that was read out to him or to rely on Congolese law, which gives him the right to request his release, even interim release". (*Ibid*., pp. 19-20.)

[374] This delay was explained by the fact that "[t]he Defence was persuaded to file this motion having been appraised of all the documents, views of the DRC on the nature and course of the national proceedings as well as those of the Prosecutor on his knowledge of documents and interactions with the DRC, but especially those observations expressed on the 1st of June 2009 [original footnote omitted, ChP]." (ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 3.) The observations of 1 June 2009 can be found at ICC, Trial Chamber II, Situation [in the] Democratic Republic of [the] Congo, *Case against Germain Katanga and Mathieu Ngudjolo Chui*, Hearing – Open Session, ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, available at: http://www.icc-cpi.int/iccdocs/doc/doc694962.pdf.

[375] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 1.

deemed so serious that one can no longer speak of a fair trial, one can expect that the ICC would issue a *male detentus* verdict/a refusal of jurisdiction/a final stay of the proceedings.[376]

Focusing on the remedy for the alleged violations, the Defence first argued that these "have such an impact on the integrity of the process that the appropriate remedy is a stay or termination of the proceedings".[377] Alternatively, it was submitted that Katanga would be entitled to compensation and, in the case of conviction, a reduction of the sentence.[378]

Specifically, the Defence divided the alleged violations into three phases: 1) "the initial and subsequent detention of the accused while not yet envisaged as an accused before the ICC";[379] 2) "the detention of the accused from the time he became a principal suspect in the case but before the issuance of an international warrant of arrest"[380] and 3) "from the time of the issuance of an international warrant of arrest[[381]] on the 2nd July 2007 until the completion of his transfer to The Hague".[382] Returning to the concerted action/action "by his/her accusers"/constructive custody point mentioned above, the Defence explained that the second and third phases "involved the participation of organs of the ICC, thus giving continuity to the unlawfulness of the detention into the processes of the ICC".[383]

With respect to the first phase, the Defence noted that Katanga was initially arrested at the Grand Hotel in Kinshasa on 26 February 2005, in the aftermath of the killing of nine MONUC peacekeepers one day earlier.[384] He was confined by agents to the hotel premises and given no documents. Likewise, his lawyers were not, in fact never, given access to the case file.[385] Two days later, he was taken to another hotel and then – again – to a third. Around 9 March 2005, he was brought to a small

[376] However, this is not entirely clear because the exact *male detentus* test of the ICC is not plain, see the problems related to the (possibly applicable) second formulation of that test, which speaks of a discretion rather than an obligation to refuse jurisdiction and which, more importantly, requires that jurisdiction does not have to be refused if the accused can still mount his defence.

[377] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 2.

[378] See *ibid*.

[379] *Ibid*., para. 5.

[380] *Ibid*. Note that in the context of the ICC, there does not exist a term like 'international warrant of arrest'/'international arrest warrant', see the final words of n. 55.

[381] See the previous footnote.

[382] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 5.

[383] *Ibid*.

[384] See *ibid*., paras. 8-12. See also n. 70 and accompanying text (the report of Human Rights Watch).

[385] See *ibid*., paras. 12-13.

local prison but only the day after, on 10 March 2005, did the official procedures begin, when a warrant was issued for his arrest according to the legal procedures.[386]

In the second phase, the Defence continued, Katanga became the principal suspect of the ICC case in Ituri, the case dealing with the attack on the village of Bogoro. Although the Defence was not sure when Katanga became a suspect in this case *exactly* – this was up to the Prosecution to clarify[387] – it was argued that this had to be at least by November 2005, when "the Prosecutor announced that he had a new investigation and this turned out to be that of Katanga's involvement in Bogoro".[388] On 18 January 2006, Katanga (and his co-accused) filed a written complaint, "noting that they had not been informed of the reasons for their arrest and requesting provisional release [original footnote omitted, ChP]".[389] Two days later, and 11 months after he was first deprived of his liberty, Katanga was interviewed by Colonel Tsinu Phukuta,[390] officer of the Public Ministry at the Military High Court.[391] The Defence claimed that at this interview, Katanga was unrepresented, was not given the opportunity to make a telephone call and was not informed of the charges – even when he specifically asked to be – nor of his rights.[392]

The Defence then went on to state that on 4 April 2006, 13 months and six days after his initial detention and 12 months and 25 days after his formal arrest, "[t]he illegality of continued detention beyond 12 months without court order was brought to the attention of the Auditor General".[393] As a result of this, court hearings were held on 5, 9 and 12 May 2006, 14 months after Katanga's initial detention.[394] Katanga was not present and his lawyers were deprived access to the case file.[395] In addition, because the bench was inadequately constituted, the hearing was adjourned, for no less than seven months.[396]

On 1 December 2006, Katanga appeared in court for the very first time, 21 months after his initial detention. "This hearing was a result of the request of the Auditor General to seek an extension of the detention of the accused."[397] According to the Defence, the decision of this hearing, also dated 1 December 2006 and allegedly not served on Katanga,[398] stated on the one hand that Katanga's detention

[386] See *ibid*., paras. 14-15.
[387] See *ibid*., para. 16.
[388] *Ibid*., para. 17.
[389] *Ibid*., para. 18.
[390] See also n. 373.
[391] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 19.
[392] See *ibid*.
[393] *Ibid*., para. 20.
[394] See *ibid*.
[395] See *ibid*.
[396] See *ibid*.
[397] *Ibid*., para. 21.
[398] See *ibid*., para. 25.

ran from 9 March 2005 (thus not mentioning the period between 26 February 2005 and 9 March 2005), but asserted on the other that he had been detained for only 12 months.[399] Although Katanga's lawyers were still denied access to the case file, they nevertheless "asked for release on the grounds that the detention was illegal [original footnote omitted, ChP]".[400] The Military High Court, however, opined

> that the question of illegality could not be raised for the period running from the initial seizure of the court on 20th April 2005 to the 1st December 2005 because the Public Minister could not be held responsible and the court's jurisdiction was seized [original footnote omitted, ChP].[401]

The Court also "held that there were 'serious and grave' indications of guilt, being the fundamental condition for provisional detention",[402] a point which, according to the Defence, seemingly contradicted the statement of the DRC on 1 June 2009 (see footnote 374) "that no significant investigative steps were taken [original footnote omitted, ChP]".[403]

It can be argued that the quotation at footnote 401 and accompanying text is rather confusing as the two dates of 20 April 2005 and 1 December 2005 were not mentioned previously in the Defence's submission. This confusion increases in the remainder of the submission where reference is made to 20 April *2006* as the date "when the court was seized by motion",[404] which *may* mean that the Defence is actually referring here to the period between 20 April 2006 and 1 December 2006.

However, even in that case: if one agrees with the Military High Court that the point of illegality cannot be raised for the period between 20 April 2006 and 1 December 2006, one wonders what happened to the alleged violations in the period between 26 February 2005 and 20 April 2006. The fact that the Defence also addresses this period (between 26 February 2005 and 20 April 2006)[405] may indeed mean that the above-mentioned dates of 20 April 2005 and 1 December 2005 are simply erroneous.

Then, on 2 March 2007, the Auditor General again sought an extension of Katanga's detention.[406] A hearing was scheduled for 5 April 2007 but it only took

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[399] See *ibid*., para. 21.
[400] *Ibid*., para. 22.
[401] *Ibid*.
[402] *Ibid*., para. 23.
[403] *Ibid*.
[404] *Ibid*., para. 24.
[405] See *ibid*.: "The period of detention is taken from the 9th March 2005. The period of detention from the 26th February 2005 to the 9th March 2005 was not considered. The discrepancy between the arrest on 9th March 2005 and the arrest warrant only being secured on the 10th March 2005 is not addressed. The court held that the extensions of detention between the 9th March 2005 and the 9th March 2006 were legitimate by law. However, it does not address the violations of the rights of the accused arising out of, for instance, the failure to be brought promptly before a judicial authority. The period from the 9th March 2006 to the 20th April 2006 when the court was seized by motion is not considered and appears to have been ignored [original footnote omitted, ChP]."
[406] See *ibid*., para. 26.

place on 10 April 2007.[407] At this hearing, the Military High Court once more decided to extend Katanga's detention, holding "that the reasons for keeping the accused in detention, given at the prior hearing, remained valid [original footnote omitted, ChP]",[408] one of them being that Katanga "was being pursued for crimes against humanity [original footnote omitted, ChP]".[409] It did not, however, answer the claim of Katanga "that the Public Minister demonstrated negligence in maintaining the detention through not exercising due diligence in bringing the case to trial [original footnote omitted, ChP]".[410] It is, of course, very interesting, the Defence continued, how all this must be see in light of the fact that the DRC had claimed on 1 June 2009, see again footnote 374, "that no investigations were ever conducted with respect to the accused for any crime, including that of the death of the nine blue helmets".[411]

Finally, on 25 June 2007, a second letter asking for provisional release was written by Katanga,[412] who noted "that he had been detained since 26 February 2005 and that the last prorogation [had] expired on 21 June 2007 [original footnote omitted, ChP]".[413]

With respect to the third and last phase, which began with the issuance of the ICC arrest warrant on 2 July 2007, the Defence explained, among other things, that Katanga was taken to the *Auditorat Général* on the morning of 17 October 2007 without his lawyer being informed about this.[414] In the afternoon, he was interviewed by Colonel Mutalizi (this must be: Colonel Muntazini Mukimapa),[415] about which interview the Defence asserts:

> The accused was not informed of the charges against him, nor read his rights. He was not informed of his right to silence, nor of his rights not to incriminate himself. His lawyer was not present and there is no indication in the documents that the accused consented to this situation.[416]

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[407] See *ibid*., para. 27.
[408] *Ibid*., para. 28.
[409] *Ibid*. The Defence notes on this point that "[a]t the admissibility hearing on 1st June 2009 [see n. 374, ChP], it was stated that the accused was only pursued in respect of the murder of the nine MONUC soldiers, but at the same time accepted that the crime of "*atteinte contre la sécurite de l'état*" was transformed into genocide and crimes against humanity [original footnote omitted, ChP]." (*Ibid*.)
[410] *Ibid*., para. 29.
[411] *Ibid*. Note that these words are stronger than the ones mentioned at n. 403 and accompanying text.
[412] The first was written on 18 January 2006, see n. 389 and accompanying text.
[413] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 30.
[414] See *ibid*., para. 34.
[415] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga*, 'Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga' (Confidential, Ex-parte only available to the Prosecution and the Defence), ICC-01/04-01/07, 22 October 2007, p. 3.
[416] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Public Redacted Version of the Defence

However, it was admitted that later that day, his lawyer, who was (merely) contacted by a colleague, arrived to assist him.[417] Although the Defence does not mention this point, it is possible that Katanga was informed of the charges *after* his lawyer had arrived. At least, that may be deduced from (the comments to) one of the photos of Katanga's surrender, see footnote 372, where one can see a person reading a document to Katanga and another person, and where one can read: "Le Colonel [Muntazini Mukimapa] lit les chefs d'accusation devant [G]ermain Katanga et son avocat". In that respect, one can also refer to the words of Katanga's duty counsel during the initial hearing on 22 October 2007, where he stated:

> From 10.00 in the morning till 7.00 in the evening he was detained in a cell. At 7.00 he was visited by his lawyer, Mr. (…) Bertin Boki, with whom he was able to talk for a few minutes. And when he came out of his cell, two cameramen were present and so were photographers, and the senior military officer, the general, read out in French the Warrant of Arrest that the Court has just caused to be read out. Mr. Katanga informs me that a copy of this Warrant of Arrest which was read out to him in French was not handed to him or to his counsel, and he was not asked to sign any report whatsoever.[418]

Be that as it may (this point will be returned to *infra*), the Defence continued to explain that when Muntazini Mukimapa, in his interview, and in the absence of Katanga's counsel, asked Katanga if he accepted being surrendered to the ICC, Katanga stated that he did.[419] The Defence also complained of the fact that "no steps were taken at the Auditorat Général to verify his medical condition or provide medical assistance"[420] when Katanga replied, when asked about his state of health, that "he had finished a course of treatment for malaria two days previously"[421] and that "he was coughing and had a cold".[422] Moreover, no food was provided, even though Katanga had not eaten breakfast (he only received food when his flight to The Hague left on 18 October 2007),[423] and Katanga was not allowed to use the toilet.[424] In addition, the Defence continued, "[t]he documents do not indicate whether the accused was asked if he needed to call anyone or if any arrangements

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motion for a declaration on unlawful detention and stay of proceedings (ICC-01/07-01/04-1258-Conf-Exp)' (Public), ICC-01/04-01/07, 2 July 2009, para. 34.

[417] See *ibid*.

[418] ICC, Pre-Trial Chamber I, Situation [in the] Democratic Republic of [the] Congo, First Appearance Hearing – Open Session, Transcript ICC-01-04-01-07-T-5-ENG, 22 October 2007, available at: http://www.icc-cpi.int/iccdocs/doc/doc357321.PDF, p. 19.

[419] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 35.

[420] *Ibid*., para. 36.

[421] *Ibid*.

[422] *Ibid*.

[423] See *ibid*., para. 38.

[424] See *ibid*., para. 36.

needed to be made for his family".[425] Finally, with respect to his arrival in The Hague, the Defence asserted:

> The accused was brought a doctor then taken through search procedures. It is not indicated that any specific medical attention was given to the accused. There is no indication that the ICC officials informed the accused of his rights or spoke of them, or that he was informed of his right to silence.[[426]] As far as the record shows, no arrangements were made with respect to his family. The lawyer for the accused was not present during these procedures.[427]

Now that the three phases had been discussed factually, the Defence turned to the legal merits of the case, claiming that "serious violations of his rights under international law run through all three phases in a continuing manner".[428]

After having explained international legal standards on arrest and detention (namely the right to personal liberty[429] (of which it correctly noted, by the way, that it is "[w]ithout any doubt (…) part of internationally recognised human rights, in the sense of Article 21 (3) of the ICC Statute"),[430] the right to be brought promptly before the competent judicial authority,[431] the right to be informed of the reasons for arrest/of the charges[432] and the right to have access to and assistance of counsel)[433] and the law of the DRC on these matters,[434] it claimed that the four above-mentioned rights had been violated.

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[425] *Ibid*., para. 37.

[426] Note that at the initial hearing, duty counsel for Katanga stated the following: "He is sorry that both in the Democratic Republic of the Congo and at the time of his surrender he did not -- was not able to exercise any of the rights of which he has been informed by the employees of the court. These are the rights that the Office of Public Counsel for the Defence has explained to him at length because, of course, while he understands French, he is not a master of it, and considering the technical nature of our judicial language, there are things that can escape anyone." (ICC, Pre-Trial Chamber I, Situation [in the] Democratic Republic of [the] Congo, First Appearance Hearing – Open Session, Transcript ICC-01-04-01-07-T-5-ENG, 22 October 2007, available at: http://www.icc-cpi.int/iccdocs/doc/doc357321.PDF, pp. 20-21.) Although this does not prove that he was informed of his rights at his arrival in The Hague *right away*, it *does* show that he was at least informed of his rights by ICC officials between his surrender and the initial appearance, a period which lasted only four days (between 18 October and 22 October 2007).

[427] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 39.

[428] *Ibid*., para. 40.

[429] See *ibid*., paras. 41-42.

[430] *Ibid*., para. 41. See also Section 4 of the previous chapter.

[431] See *ibid*., paras. 43-44.

[432] See *ibid*., paras. 45-47.

[433] See *ibid*., para. 48.

[434] See *ibid*., para. 49-60. In this context, it may be interesting to note that the Defence explained: "A number of rights are absolute and cannot be departed from in any situation even where the State has invoked an emergency situation in accordance with Articles 85 and 86 of the Constitution. These non-violable rights include the prohibition of torture and cruel, inhuman or degrading treatment or punishment (…), the rights of the defence and the right of recourse (…) [original footnote omitted,

Specifically, with respect to the right to personal liberty, it was submitted "that the arrest and detention of the accused was unlawful under national as well as international law and, in the context of the length of unlawful detention, amounted to serious mistreatment".[435] More specifically, it was argued, among other things, "that the initial arrest [made in the aftermath of the killing of the nine MONUC peacekeepers, ChP] was unlawful as it was not supported by reasonable grounds or justification".[436] In addition, it was asserted that Katanga's subsequent provisional detention was irregular and in violation of the Constitution, the Military Legal Code and the Code of Criminal Procedure.[437] Katanga stressed that these were not mere technical irregularities but serious human rights violations:[438]

> It is submitted that his fundamental right to liberty was violated in a very basic way because the authorities which detained him had no reasonable justification for his arrest on the basis of the murder of the MONUC soldiers nor for his continued detention for such offence. The DRC authorities stated to the Chamber that no steps were taken to investigate the matter. Even if the arrest had been on reasonable grounds, his continued detention for more than two and a half years could not be premised on reasonable grounds or constitute a reasonable duration in the absence of investigations.[439]

In that context, the Defence argued that the DRC's claim of 'preventive custody/detention' had to be rejected.[440] According to the Defence, it appeared "that the state authorities in the DRC have been keeping individuals in detention without charge merely for the benefit of the ICC",[441] a point which was allegedly confirmed by Human Rights Watch and the Minister of Human Rights.[442] Although these are, of course, only general allegations, the Defence also asserted that "[t]here is some evidence of this nature directly relating to the accused, in that the State had

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ChP]." (*Ibid*., para. 56.) However, the Defence did not explain if the DRC had invoked the emergency situation and had derogated from its (inter)national human rights obligations because of that.

[435] *Ibid*., para. 61.

[436] *Ibid*., para. 62.

[437] See *ibid*., para. 63.

[438] See *ibid*., para. 64.

[439] *Ibid*.

[440] See *ibid*., para. 66.

[441] *Ibid*., para. 67.

[442] See *ibid*.: "Human Rights Watch in its report *D.R. Congo: ICC Arrest First Step to Justice*, observed that "Congolese authorities state they have been waiting for the ICC to complete its investigations before taking further action", indicating that the DRC *was in fact* subjecting itself and giving priority to the Office of the Prosecutor. The Minister of Human Rights indicated in an informal conversation with members of the Defence team in relation to the remaining Iturian prisoners, arrested at the same time and in the same conditions as Germain Katanga, that the DRC authorities had been waiting to hear from the ICC whether they would seek their transfer. According to the Minister, the ICC had recently indicated that they would not seek the transfer of any of them, and they would now have to decide what to do with those prisoners held without a charge [emphasis in original and original footnotes omitted, ChP]."

indicated that it was awaiting elements from the ICC [original footnote omitted, ChP]".[443]

With respect to the second right, the right to be brought promptly before the competent judicial authority, it was maintained that Katanga was deprived of his liberty for the first time on 26 February 2005 and that he was only brought before a judge 21 months later, on 1 December 2006.[444] The Defence submitted that "this constituted a grossly excessive period of time without the opportunity to challenge the lawfulness of his detention, such that it amounted to a grave violation of the right to be brought promptly before a judicial authority",[445] both under DRC and international law.[446] The Defence also explained that even if the interview of 20 January 2006[447] were to be seen as the moment Katanga was brought before a judicial authority, there was still "a grotesquely unacceptable period of delay of 11 months – or, of over 10 months if detention ran from March 2005".[448]

Concerning the third right, the right to be informed of the reasons for arrest/of the charges, the Defence argued that "[t]here is no official record indicating the accused was informed of any charges against him at any stage before the reading of the international arrest warrant"[449] and hence concluded that this long period (more than two and a half years) "is by any standard a serious violation of this right under national and international law and a flagrant violation of human rights".[450]

With respect to the fourth and final right, the right to have access to and assistance of counsel, the Defence repeated the assertion that Katanga's counsel was not present at the interviews of 20 January 2006 and 17 October 2007 and concluded "that these violations in themselves amounted to serious mistreatment in the light of the significance of these two interviews to his general situation".[451] However, as explained *supra*, and only focusing here on the hearing of 17 October 2007, it must also be noted that there are certain indications that at some point that day, Katanga *was* informed of the charges, in the presence of his counsel. Again, this point will be dealt with *infra*.

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[443] *Ibid*., para. 68.
[444] See *ibid*., paras. 69-70.
[445] *Ibid*., para. 70.
[446] The Defence explained that "under international practice and jurisprudence anything longer than 48 hours is generally considered unacceptable" (*ibid*., para. 70), whereas "[t]he law of the DRC is consistent with international practice in this respect, requiring that the accused be brought before the judicial authorities within 48 hours." (*Ibid*.)
[447] See ns. 391-392 and accompanying text.
[448] ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 71. The Defence in addition noted that all acts of prorogation of Katanga's detention until 20 January 2006 were invalid for they violated the Code of Criminal Procedure and the Constitution, see *ibid*., para. 72.
[449] *Ibid*., para. 73. It must again be remarked – see also the final words of n. 55 – that in the context of the ICC, there does not exist a term like 'international arrest warrant'.
[450] *Ibid*., para. 76.
[451] *Ibid*., para. 77.

The Defence subsequently tried to demonstrate the ICC's involvement with respect to the violations from the last two phases, which allegedly started, it is recalled,[452] at least as from November 2005, when Katanga became a target for the Prosecutor.

Before continuing on this point, it is, however, first worth noting that the Defence argued that it would actually not be *necessary* to establish involvement/responsibility here for under the abuse of process doctrine of *Barayagwiza*, it is irrelevant who was responsible for the serious violations of Katanga.[453] Nevertheless, the Defence continued, "an analysis of the participation of the organs of the Court reinforces a connection to the ICC and the view that prior violations go directly to the integrity of the process before the ICC".[454] Although the Defence does not explain how the abuse of process doctrine falls within the ICC's system – which is, of course, especially relevant now that the ICC Appeals Chamber in *Lubanga Dyilo* had explicitly rejected this doctrine some two and a half years earlier – the Defence's remark on the abuse of process doctrine itself is arguably correct: even though serious violations *as such* can undermine the integrity of the ICC and lead to a refusal of jurisdiction, violations in which it can be proven that the ICC was involved, can, of course, even more strongly undermine the integrity of the Court,[455] *cf.* also the *male detentus* test in *Lubanga Dyilo*, which requires action "by his/her accusers".

Returning now to the exact point in time at which the ICC became involved in the Katanga's case: this could not be clearly established. However, the Defence felt that it was up to the Prosecutor to clarify this point.[456] In any case, the issuance of the arrest warrant would be "an artificial point to measure the beginning of participation by the ICC in the situation of the accused"[457] as already before that point, "there was the formulation of an intention on the part of his Office to treat the accused as a principal suspect in the case concerning Bogoro".[458] The Defence was of the opinion that as from the moment the Prosecutor was involved in the case, he had a duty of care towards Katanga.[459] This is reminiscent of the concept of due

[452] See n. 388 and accompanying text.
[453] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 79.
[454] *Ibid.*
[455] See also the text following n. 734 and accompanying text of Chapter VI, n. 740 and accompanying text of the same chapter and n. 130 and accompanying text of Chapter VII.
[456] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 80.
[457] *Ibid.*
[458] *Ibid.*
[459] See *ibid.*

diligence as was mentioned, for example, in the *Lubanga Dyilo* case,[460] and indeed, Katanga's Defence would *also* later turn to this latter concept, see *infra*.

However, first, it explained the legal foundation of the duty of care towards the accused, by presenting the ICC's unique cooperation regime. In doing so, it correctly pictured a context rather akin to Currie's lateral system/the "rugby pitch".[461] According to the Defence, in this interplay, the organs of the ICC cannot "work on the premise that whatever goes on before an accused is in The Hague is of no relevance".[462] Crucial in that respect was a provision such as Article 21, paragraph 3 of the ICC Statute.[463] The Defence opined that, as a result of this provision and general principles,

> each organ of the Court has an inherent duty to protect the values underlying the protection of human rights in the exercise of their discretion and refrain from knowingly participating in and/or facilitating the continued violations of the rights of an accused. This duty is expressly provided for with respect to the Prosecutor's functions in Article 54(1)(c).[464]

According to the Defence, this was not what the Prosecutor had done in this case, as he "ought to have been in possession of sufficient information (…) to be aware that the accused's detention in the DRC was inconsistent with international human rights standards".[465] What the Prosecutor should have done, the Defence continued, was

> to act with speed and diligence in requesting the transfer of the accused once it was determined that there were reasonable grounds to suspect that the accused had committed crimes within the jurisdiction of the ICC and that his detention was tainted with illegality. This, it is suggested, necessarily flows from his duty of care to the

[460] See n. 187 and accompanying text. However, the concept of due diligence can also be found in cases such as *Barayagwiza* (see, for example, ns. 840, 865, 869, 893, 914, 918 and accompanying text of Chapter VI) and *Kajelijeli* (see ns. 1053 and 1078 and accompanying text of Chapter VI).

[461] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public), ICC-01/04-01/07, 2 July 2009, para. 81: "The principles of *complementarity* and cooperation ensure that the national and international processes are closely intertwined in ensuring that perpetrators are brought to justice. These two levels of the legal process, while separate are heavily inter-dependent in this respect, even more so than in other *ad hoc* tribunals. This is acknowledged by Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence [emphasis in original, ChP]." For Currie's "rugby pitch", see the final pages of Chapter VIII.

[462] *Ibid*., para. 82. (This point was actually formulated in the form of a rhetorical question.)

[463] See *ibid*.

[464] *Ibid*., para. 83. Note that Art. 54, para. 1 (c) of the ICC Statute was explicitly mentioned in Chapter IX, in the examination of a number of provisions from the proper instruments of the ICC which could be seen as being (indirectly) relevant for the *male captus* discussion, see the text preceding n. 44 and accompanying text of Chapter IX.

[465] *Ibid*., para. 84.

> accused and the right of the accused to be tried without undue delay encapsulated in Article 67(1)(c) of the Statute.[466]

Not surprisingly (see footnote 460), the Defence then referred to *Barayagwiza*[467] to show that the ICC Prosecutor had failed in his prosecutorial due diligence.[468] Instead of ending the violations of Katanga's rights once the Prosecutor became involved in the case pursuant to such provisions as Articles 21, paragraph 3, 54, paragraph 1 (c) and 67, paragraph 1 (c) of the ICC Statute,[469] he knowingly countenanced the illegal detention of Katanga in the DRC, "thereby facilitating and taking advantage of a situation of illegality".[470] It must be borne in mind that this situation is somewhat different from a court which exercises jurisdiction over a person who has been the victim of a *male captus* because that *male captus* was not very serious and indeed, not the fault of the prosecuting authorities. In principle, one could argue that in this case, the court also takes advantage of an illegality. However, in the case of Katanga, the Defence claims that the *male captus* is far more serious as the Prosecutor allegedly took advantage of a situation of which he was aware but upon which he nevertheless decided not to act. In fact, the Defence made an even more serious allegation when it stated that

> [t]here is circumstan[t]ial evidence to suggest that the DRC and the Prosecutor acted in tandem in this respect since the DRC was holding accused persons with the specific purpose of their transfer to the ICC before the issuance of warrants of arrest [original footnote omitted, ChP].[471]

What the Defence also reproached the Prosecutor for is that he did not keep the Pre-Trial Chamber properly informed of the (illegal) proceedings in the DRC, information which, according to the Defence, could be relevant for the Pre-Trial to decide on, for example, the issuance of an arrest warrant.[472] After all, pursuant to Article 21, paragraph 3 of the ICC Statute, the Pre-Trial Chamber should "refuse to grant a warrant of arrest if to do so might implicate the ICC in the violation of the rights of a suspect".[473] By not informing the Pre-Trial Chamber, the Prosecutor had made the ICC a participant in the violations.[474] The Defence went even further,

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[466] *Ibid*., para. 86. Note again (see n. 464) that Art. 67, para. 1 (c) of the ICC Statute was also explicitly mentioned in Chapter IX, in the examination of a number of provisions from the proper instruments of the ICC which could be seen as being (indirectly) relevant for the *male captus* discussion, see n. 45 and accompanying text of Chapter IX. See also n. 261 of Chapter VIII.

[467] See *ibid*.: "[O]nce the Pr[o]secutor has set this process [namely the process of bringing a defendant to trial, ChP] in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused [original footnote omitted, ChP]." See also n. 865 and accompanying text of Chapter VI. (See also n. 460 of the present chapter.)

[468] See *ibid*.

[469] See *ibid*., para. 90.

[470] *Ibid*., para. 92.

[471] *Ibid*., para. 93. See also ns. 441-443 and accompanying text.

[472] See *ibid*., para. 95.

[473] *Ibid*.

[474] See *ibid*., para. 100.

arguing that if the Prosecutor *had* informed the Pre-Trial Chamber, the judges *themselves* had to be blamed for being knowing participants in Katanga's violations.[475]

The Defence then turned to the third phase of Katanga's detention and argued that Katanga fell under the ICC's constructive custody between 2 July 2007 (the issuance of the arrest warrant) and 18 October 2007 (when Katanga was surrendered to the ICC). As from that moment, the Defence submitted, "it is no longer necessary (…) to inquire into issues of knowledge and duty of care. At this point any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC".[476] Although this last reasoning is definitely correct, one can imagine that some discussion is possible with respect to the actual moment Katanga falls under the constructive custody of the ICC. The Defence focuses on the arrest warrant and the idea behind this document,[477] but one could also view this point in a more practical way and argue that one should not look at the issuance of the arrest warrant (which, despite its title, focuses more on the accusations than on the arrest of the suspect), but at the moment the DRC authorities started to *actually* detain the suspect on behalf of the ICC, which can only be after 18 September 2007, the moment the more concrete request for arrest and surrender was sent to the DRC authorities.[478]

However, it can be argued that one should not focus too much on the definition and actual starting moments of concepts which can fragment a process which should not be fragmented in the first place. What the judges should do is ensure that all violations which occur more generally in the context of their case are ultimately remedied and that, in determining what kind of remedy be provided, attention is being paid, among other things, to the degree of involvement of the ICC in the violations. Such involvement is, of course, greater in the context of a provision such as Article 59 of the ICC Statute, which starts to apply as from the moment the national authorities have received a request for provisional arrest or for arrest and surrender, but already before these proceedings, which execute the official ICC arrest, the ICC can be said to be involved in the case and to have responsibilities in that respect. One could think here of a provision such as Article 55, paragraph 1 (d) of the ICC Statute which states that "[i]n respect of an investigation under this Statute, a person: (…) Shall not be subjected to arbitrary arrest or detention, and

[475] See *ibid*., para. 99.
[476] *Ibid*., para. 101. See also *ibid*., para. 106.
[477] See *ibid*., para. 102: "[C]ustody may be said to be constructive once it serves the interests of, enables, and is in fact being taken advantage of by the ICC for the purpose of his eventual transfer to the ICC. Having issued a warrant of arrest against the accused, the ICC had taken a definite and official step with a view to his prosecution before the ICC. His continued detention served the direct interests of the ICC and the ICC was aware of that detention."
[478] It is possible (but, because of the omitted information, not clear) that this is the alternative argument of the Defence, see *ibid*., para. 108: "Alternatively, the accused must have come within the constructive custody of the Court between [REDACTED], and the 17th October when constructive custody became the actual custody of the ICC. During that period the rights of the accused continued to be violated and he was not even informed promptly of the new charges against him under the Statute, let alone those that formed the original basis of his detention in the DRC [original footnote omitted, ChP]."

shall not be deprived of his liberty except on such grounds and in accordance with such procedures as are established in this Statute."[479] However, as previously clarified, the ICC should not restrict itself to such concepts as investigation, arrest/detention at the behest of/constructive custody and the like: irregularities may also occur in which the ICC (or a third party working at the behest of the ICC) is not involved, but which may nevertheless be seen as falling within the context of an ICC case and in need of a remedy (think of the abduction by private individuals just before the ICC has initiated its official investigation).

The Defence also complained about the Registry, namely in the context of allegations that Article 59 of the ICC Statute was violated by the DRC because Katanga was not brought promptly before the competent judicial authority who, in addition, had not inquired whether Katanga had been arrested in accordance with the proper process and whether his rights had been respected.[480] According to the Defence, "[t]he DRC failed to comply with the requirements of Article 59, nor is there any indication that the Prosecutor or Registry requested that they do so".[481] In this context, the Defence made the general allegation that the fact that the arrest warrant was not executed until three and a half months later showed "an intent not to put into effect the warrant of arrest".[482] Furthermore, it was also asserted that "[o]n the day of his transfer there was continued mistreatment, with the participation of the Registry".[483]

Now, what was to be done about all these alleged violations? The Defence argued, returning to the point mentioned above, that it is unclear how the Defence viewed the abuse of process doctrine to fit within the ICC's system, that "[w]hatever may be the precise status at the ICC of the common law doctrine of 'abuse of process' there is no doubt that the principles the doctrine is aimed at upholding and give effect to are principles equally valued by the ICC".[484] That is, of course, true, although neither must it be forgotten that the abuse of process doctrine/the doctrine which in the common law context is called abuse of process is broader and more suitable to tackle other pre-trial irregularities which are not necessarily related to the human rights dimension (the dimension on which the ICC focuses) but which may nevertheless be deemed to be so serious that it would undermine the integrity of the Court to continue with the case. One could hereby think of violations of State sovereignty and the rule of law. In addition, it is to be remembered that the ICC's *male detentus* test only concerns action by the "accusers" of the suspect/accused and that it possibly – see the discussions on the second formulation *supra* – requires an old-fashioned and outdated element, namely that the accused can no longer make his defence because of the *male captus*.

[479] See for the Defence's view on the interaction between those two provisions *ibid*., para. 104.
[480] See *ibid*., paras. 112-113.
[481] *Ibid*., para. 112.
[482] *Ibid*., para. 110.
[483] *Ibid*., para. 113.
[484] *Ibid*., para. 114.

The Defence, however, was not concerned with this. The fact that an abduction did not take place and that private individuals were not involved in the *male captus* of Katanga may also have helped to persuade the Defence that the ICC Appeals Chamber's reasoning in *Lubanga Dyilo* sufficed here.

The Defence noted that under this reasoning, the ICC, like the other international criminal tribunals "may review the actions of such separate entities [the Defence referred here to "state authorities and potentially other international organisations",[485] ChP] prior to the transfer of an accused to the tribunal".[486] In fact, it was alleged that it does not only have the power, but also the responsibility to do so.[487] In that context, Katanga also asked the Chamber, and this will remind one of the *Todorović* case, "to consider whether it would be appropriate to order an evidentiary hearing in the determination of this matter".[488]

Then, finally, the Defence turned to the last point of its submission, the appropriate remedy for these violations. It argued that first, the ICC had to make a declaration of illegality, as a result of which it could decide, pursuant to Katanga's right to a remedy, "on the appropriate remedy which may be awarded or left to a later decision following the appropriate procedure".[489] With respect to this appropriate remedy, the Defence argued, referring to *Barayagwiza*, *Nikolić* and *Lubanga Dyilo*, "that given the length and extent of the unlawful detention the accused has been subjected to serious mistreatment and the appropriate remedy is a stay or termination of the proceedings against him".[490] In this context, it also – interestingly – turned to the earlier discussed (*male detentus*?) formulation in *Lubanga Dyilo* that the violations must be "such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights".[491] However, the Defence does not go clearly into the arguably most interesting words of this statement, namely what it means for the violations to be "such as to make it impossible for him/her *to make his/her defence* within the framework of his[/her] rights [emphasis added, ChP]". It rather focused on the meaning of the idea of the violations being "such as to make it impossible for him/her to make his/her defence *within the framework of his*[*/her*] *rights* [emphasis added, ChP]". According to the Defence, it was clear that all the violations suffered by Katanga brought "these legal proceedings in such disrepute, that a fair trial within the framework of the rights of the accused is no longer possible".[492] Of course, one might be of the opinion that

[485] *Ibid*., para. 116.
[486] *Ibid*.
[487] See *ibid*., para. 119: "[I]t is submitted that the Trial Chamber has power and responsibility to review and supervise the persisting situation of unlawfulness of the detention of the accused. It has the inherent power, in the Defence submission, to ensure that its process is not undermined by serious human rights violations of a continuing nature which pierce to the heart the Court's integrity and standing in the international community as an instrument of justice."
[488] *Ibid*., para. 120.
[489] *Ibid*., para. 121.
[490] *Ibid*., para. 122.
[491] See *ibid*., para. 125.
[492] *Ibid*., para. 127. See also *ibid*., paras. 130-131: "In this case, there has been no clean break from the initial and continuing illegality of the detention. It will continue throughout the trial under conditions

Katanga's violations were such that one can no longer speak of a fair trial, even if the trial at the ICC (in the ICC courtroom) itself is fair, but *that* idea represents the other (namely the first and third) formulations of the *male detentus* test of the ICC Appeals Chamber in the *Lubanga Dyilo* case. However, the Defence does not clarify to what extent the violations of Katanga would also lead to a refusal of jurisdiction under a (possible) *male detentus* formulation which, in addition, demands that the violations must be "such as to make it impossible for him/her *to make his/her defence* [emphasis added, ChP]".[493]

Be that as it may, the Defence also argued that Katanga was entitled to compensation pursuant to Article 85, paragraph 1 of the ICC Statute.

Finally, it was requested "that the matter of the accused['s] unlawful arrest and detention be taken into account at the relevant time, in the event that he is convicted of any offence within the jurisdiction of the court".[494] The Defence stated in that context that "Rule 146 [this must be Rule 145 of the ICC RPE ('Determination of sentence'), ChP] sets out a variety of factors to be tak[en] into account in the determination of sentence, but these are not exhaustive".[495]

On 23 July 2009, the legal representatives of the victims presented their (brief) observations. They argued that Katanga had been in detention in the DRC for his alleged involvement in the killing of the nine MONUC peacekeepers – not for the situation in Bogoro[496] – and that his "détention préventive"[497] was extended several times for the purpose of the investigation.[498] Moreover, they opined that the procedure by which Katanga was brought before the competent judicial authority was in accordance with Congolese law.[499] With respect to the allegations of

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where the total disregard for the basic rights of the accused in arresting and detaining him and the use of this to enable his transfer to the Court cloud the legitimacy of his presence in the courtroom every additional day the accused is kept in detention. It is therefore submitted that the trial will remain unfair as long as the continued detention formerly based on a total disregard for the rights of the accused persists, and the justice administered by the court has been brought into such serious disrepute that a fair trial has in fact become an impossibility, regardless of the impartiality of the judges in the assessment of the evidence."

[493] In the following paragraph, the Defence *does* mention the words "make his defence", but again does not explain to what extent the accused can no longer make his defence when brought to court after these violations, see *ibid*., para. 128: "It is important to note that when the Appeals Chamber speaks of a fair trial not being possible it takes the view that this occurs when an accused cannot make his defence within the framework of his rights. If an unlawful detention in flagrant violation of human rights not only continues but effectively enables his attendance at the trial, then the trial cannot take place within the framework of his rights and the whole trial is vitiated."

[494] *Ibid*., para. 138.

[495] *Ibid*., para. 137.

[496] See CPI, La Chambre de Première Instance I[I], Situation en République Démocratique du Congo, Affaire *Le Procureur c. Germain Katanga et Mathieu* [*Ngudjolo*] *Chui*, 'Observations des représentants légaux des victimes représentées par Me Jean-Louis GILLISEN et Me Joseph KETA sur « The Defence motion for a declaration on unlawful d[e]tention and stay of proceedings (ICC-01/04-01/07-125-conf-Exp) »' (Public), ICC-01/04-01/07, 23 juillet 2009, para. 8.

[497] *Ibid*., para. 2. See also *ibid*., para. 8. See for the issue of "preventive detention" n. 440 and accompanying text.

[498] See *ibid*., para. 2. See also *ibid*., para. 8.

[499] See *ibid*., para. 4.

violations of Congolese law and international human rights law in the context of Katanga's detention in the DRC, in which the ICC organs allegedly participated, the legal representatives made a reservation as they were not in the possession of all the documents from the case file.[500] However, they submitted that if by any chance, the judges had to consider involvement of the Court in the violations committed in the DRC, the remedy could not be the refusal of jurisdiction in view of the seriousness of the alleged crimes of Katanga.[501] Such a remedy would violate the rights of the victims to the truth and to justice.[502]

This study does not agree with the legal representatives of the victims that refusal of jurisdiction cannot follow merely because of the seriousness of Katanga's alleged crimes. Obviously, if the violations are so serious that it would undermine the integrity of the ICC to continue, a *male detentus* should follow, whether one is dealing with suspects of international crimes or not.[503] The victims should not focus on their right to have the (alleged) perpetrators of their crimes tried.[504] They should focus on their right to have the (alleged) perpetrators of their crimes tried *fairly*. However, as concerns this specific case, one can indeed concur that a refusal of jurisdiction would be a disproportionate remedy, taking into account, *among other things*, the seriousness of the alleged crimes. Indeed, the fact that some of Katanga's charges were already confirmed may constitute an additional drive for the judges not to relinquish jurisdiction unless absolutely necessary.[505] However, in that case, perhaps other remedies would be justified, a point which the legal representatives of the victims, unfortunately, do not address.

Next, it was up to the Prosecution. In the introduction to its response, the Prosecution did not adopt the Defence's division of the case into three phases, but divided the relevant time frame in two periods, namely 1) 26 February 2005 (arrest of Katanga by the DRC authorities) – 18 September 2007 (transmission by the Registry to the DRC authorities of the ICC's request for arrest and surrender) and 2)

[500] See *ibid*., para. 9.
[501] See *ibid*., para. 12.
[502] See *ibid*., para. 13. See also *ibid*., where it is stated that this entitlement leads to three consequences: 1) that perpetrators of crimes are prosecuted; 2) that perpetrators of crimes are judged and found guilty and 3) that victims have the right to reparation.
[503] One can argue that the ICC judges would (correctly) agree with that idea, see ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 39: "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."
[504] See n. 502.
[505] *Cf*. in that respect the argument at n. 163 and accompanying text of Chapter VII that the reasoning that one can take into account the element 'seriousness of the alleged crimes' is valid *a fortiori* with respect to persons who have already been convicted, taking into account, of course, that a confirmation of the charges is absolutely not the same as a conviction.

18 September 2007 – 18 October 2007 (surrender of Katanga).[506] The date of 18 September 2007 is an interesting one and has already been alluded to in the discussion of the Defence's submission, namely that some time after that date could mark the beginning of the ICC's constructive custody of Katanga, see footnote 478 and accompanying text.[507]

The Prosecution was of the opinion that Katanga's detention in the first period "could not be attributed to the Court and cannot affect the jurisdiction of this Court".[508] It hereby referred to the *Lubanga Dyilo* case and the previously mentioned (and criticised) reasoning of the Appeals Chamber in that case "that issues regarding his prior detention were relevant only where they were part of"[509] "the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court".[510] And that was not the case here, as "[t]he DRC authorities expressly confirmed that the Accused had not been kept in detention for facts related to Bogoro [original footnote omitted, ChP]".[511] As argued earlier, the fact that a person may be in detention at the national level for other crimes during a time in which the ICC is not involved may very well not be considered to fall within the context of the ICC's case. However, if, during this period, a suspect is, for example, seriously mistreated and consequently surrendered to the ICC, judges may still be of the opinion that this *male captus* falls within the context of their case and that the violation must hence be remedied. If that *male captus* is so serious that they feel that it would undermine the integrity of the ICC to proceed, they will refuse jurisdiction, even – to come back to the assertion of the Prosecution mentioned at footnote 508 and accompanying text – if that *male captus* cannot be legally attributed to the ICC. With respect to this first period, the

[506] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 3.

[507] See also n. 370 and accompanying text.

[508] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 4.

[509] *Ibid*.

[510] See n. 292 and accompanying text. The Prosecution also referred here to para. 121 of the ICC Appeals Chamber's decision in *Lubanga Dyilo* of 13 February 2007. This paragraph was already mentioned (and criticised), see n. 265 and accompanying text of Chapter VIII. Remarkably, the Prosecutor did not refer to a decision from the *Katanga* case *itself* in which the reasoning from the 13 February 2007 decision was confirmed, see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 11. Nevertheless, he did refer to this case later in his response, see ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 24, n. 38. See also n. 528.

[511] *Ibid*., para. 5.

Prosecutor moreover maintained that there was no concerted action between the Prosecutor and the authorities in the DRC to detain Katanga "in order to ensure that he would be in custody and available for surrender to the Court [original footnote omitted, ChP]".[512]

With respect to the second period, the Prosecutor admitted that the detention based on the ICC's request for arrest and surrender, which lasted about a month, was attributable to the ICC.[513] One could argue that, in making this statement, the Prosecutor follows the apparent view of the Deputy Prosecutor in *Lubanga Dyilo* (see n. 90 and accompanying text) that if a suspect is arrested/detained at the behest/request of the ICC, violations in that context can be attributed to the ICC. This broad responsibility for violations occurring in the suspect's constructive custody is surely to be welcomed. However, the Prosecutor continued, both Katanga's detention and the surrender "were legally and factually unblemished".[514]

A little earlier, it was explained that the Prosecutor argued that the detention in the first period "could not be attributed to the Court and cannot affect the jurisdiction of this Court". However, perhaps the Prosecutor retreats from this assertion when he made his final point, stating that

> the Defence does not substantiate that the Accused suffered torture or any other serious form of mistreatment which could have the consequence that this Court cannot properly proceed against him. A stay of proceedings is the most exceptional of remedies, to be applied only in cases where it is impossible to secure a fair trial of the Accused [original footnote omitted, ChP].[515]

The word "perhaps" has been used here as the words of the Prosecutor are very generally formulated and could easily apply to situations in which the suspect is seriously mistreated *as such*, irrespective of the entity responsible. However, doubt is created by his reference to paragraph 39 of the Appeals Chamber's decision in the *Lubanga Dyilo* case, a paragraph used in the Appeals Chamber's discussion of its own *male detentus* test, a test which demands action "by his/her accusers". A test, moreover, created by an Appeals Chamber which rejected the abuse of process doctrine.

Now that the introduction of his response was presented, the Prosecutor turned to the relevant factual background. Here, he argued, among other things, that when Katanga was brought before the competent judicial authorities on 17 October 2007,

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[512] *Ibid.* Although the Prosecutor refers here to the *Lubanga Dyilo* case, he nevertheless appears to have forgotten to replace the name of Lubanga Dyilo with the one of Katanga: "In addition, there is no evidence to support allegations of "concerted action" between the Prosecutor and the DRC authorities to detain Lubanga in order to ensure that he would be in custody and available for surrender to the Court [original footnote omitted, ChP]."

[513] See *ibid*., para. 6: "The Second Period of detention of the Accused by the DRC authorities dates from the time the Court transmitted to the DRC authorities a formal request for the Accused's arrest and surrender. The detention based on the ICC's request for surrender lasted approximately one month. It is attributable to the Court."

[514] *Ibid.*

[515] *Ibid*., para. 7.

these authorities "determined that he was the person named in the warrant, notified the Accused of the warrant of arrest, and read out the charges against him [original footnotes omitted, ChP]".[516] In addition, when this happened, Katanga was assisted by his counsel.[517] Although the Prosecutor does not go into the other two points of Article 59, paragraph 2 of the ICC Statute here (namely that the competent judicial authority must determine whether Katanga has been arrested in accordance with the proper process and whether his rights have been respected), the assertion that his lawyer was present when the charges were read to Katanga strengthens the already expressed doubt (see footnote 418 and accompanying text) with respect to Katanga's allegations on this point. The Prosecutor also contested other claims of Katanga concerning his surrender and arrival at the ICC, maintaining that on 17 October 2007, Katanga "was medically examined by a doctor designated by the Court, who certified that the Accused was fit to travel [original footnote omitted, ChP]"[518] and that, when Katanga arrived in The Hague, "he was subjected to a medical examination [original footnote omitted, ChP]"[519] and "visited by staff of the Court, who gave him a file containing the Court's basic legal documents, including a certified copy of the warrant of arrest, and read him his rights [original footnote omitted, ChP]".[520]

After these factual issues had been addressed, the Prosecutor turned to the legal arguments of the case, where he looked at 1) the relevant legal framework; 2) the point that Katanga's detention by the DRC authorities does not require a stay of the proceedings or in fact any other remedy and 3) the point that the Defence did not substantiate any allegation of torture or serious mistreatment.

In his discussion of first point, the relevant legal framework, the Prosecutor addressed three issues, namely a) the doctrine of abuse of process and stay of the proceedings; b) the relevance of detention by national authorities to the proceedings before the ICC and c) the point that the jurisprudence adduced by the Defence does not support the Defence motion.

With respect to the point under a), the Prosecutor first (correctly) explained that the abuse of process as such had been rejected by the Appeals Chamber in *Lubanga Dyilo* but that the judges had nevertheless formulated a test of their own in the context of Article 21, paragraph 3 of the ICC Statute.[521] According to the Prosecutor, the remedy of a stay of the proceedings only applied:

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[516] *Ibid*., para. 14.
[517] See *ibid*. Very strangely, the Prosecutor also referred to the "submissions of Mr. Keita during the initial appearance of the Accused that confirm that the Accused was able to consult with his lawyer already during the morning of 17 September 2007 (ICC-01-04-01-07-T-5-ENG, 22 October 2007, p. 19, lines 13-15)." (*Ibid*., para. 14, n. 19. See also *ibid*., para. 60, n. 121.) However, besides the fact that this date must, of course, be 17 *October* 2007 and not 17 September 2007, one can clearly read at these lines that Mr Keita maintained that Katanga did *not* see his lawyer in the morning: "From 10.00 in the morning till 7.00 in the evening he was detained in a cell. At 7.00 he was visited by his lawyer, Mr. (…) Bertin Boki, with whom he was able to talk for a few minutes." (See n. 418 and accompanying text.)
[518] *Ibid*., para. 14.
[519] *Ibid*., para. 15.
[520] *Ibid*. See also the remarks made at n. 426.
[521] See *ibid*., paras. 21-22.

> a) where "either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course;" b) "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed"; or c) "[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process" [original footnotes omitted, ChP].[522]

The last possibility does not stem from the decision of 14 December 2006, but from a very famous decision issued almost two years later in which the Appeals Chamber confirmed the Trial Chamber's stay of the proceedings because of other, evidence-related, problems, namely because the Prosecution had improperly/too extensively used Article 54, paragraph 3 (e) of the ICC Statute[523] when obtaining information from the UN and NGOs.[524] This had led to the non-disclosure of a considerable amount of exculpatory evidence and thus to the inability of Lubanga Dyilo to defend himself. Although this is indeed a stay of the proceedings possibility, it is, of course, better to focus here on the formulations used by the ICC in actual *male captus* decisions. After all, the case from 2008 did not involve a *male captus* issue, as it did not concern a problem related to the way the suspect was brought into the jurisdiction of the ICC. With respect to the evidence problems suffered by Lubanga Dyilo, one can indeed concur with the Appeals Chamber/Trial Chamber[525] in that case that the unfairness of the trial may be resolved during the proceedings in court, namely when the exculpatory evidence is nonetheless disclosed to the Defence.[526] However, this is different with respect to very serious *male captus* cases. If such serious situations occur, it is irrelevant whether the suspect can still enjoy a fair trial in court because it would be unfair to try the suspect in the first place; some

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[522] *Ibid*., para. 23.

[523] This provision states that "[t]he Prosecutor may (…) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents".

[524] See (the already briefly mentioned, see n. 623 of Chapter III and n. 247 of this chapter) ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"' (Public Document), ICC-01/04-01/06 OA 13, 21 October 2008. The words to which the Prosecutor in *Katanga* refers can be found at para. 76 of this decision. In fact, they stem not from the Appeals Chamber itself, but from the Trial Chamber (whose decision was confirmed by the Appeals Chamber), see ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008' (Public Document), ICC-01/04-01/06, 13 June 2008, para. 91.

[525] See the previous footnote.

[526] See also n. 623 of Chapter III and accompanying text, explaining the difference between a conditional and a permanent stay of the proceedings.

situations are simply not reparable. In that respect, it is a pity that the Prosecutor only mentions the second formulation of the Appeals Chamber's (*male detentus*?, see *supra* and *infra*) test and not, for example, the first, where it was stated that "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial". Although such a broader avenue can be found in the first possibility presented by the Prosecutor, one must not forget that these words stem from a case discussed in the context of the abuse of process doctrine, a doctrine which was explicitly rejected by the Appeals Chamber.[527]

A final interesting point to be made here is that the Prosecutor, in contrast to the Appeals Chamber in its decision of 14 December 2006, clearly presents *different* possibilities which can lead to the ending of the case. That may constitute additional evidence for the earlier mentioned idea that the second (*male detentus*?) formulation as used by the Appeals Chamber in its decision of 14 December 2006 may not be a more strict version of the first and third formulations in that decision, but may constitute an *additional* possibility to lead to the ending of the case, namely in case certain serious violations entail that the accused can no longer make his defence. If that were so, than a *male captus* victim does not need to turn to this seemingly stricter formulation as he can already rely on the broader formulations which better suit *male captus* problems, namely the first and third formulations. (Or the first formulation presented here by the Prosecutor.)

After having presented these three possibilities, the Prosecutor turned to the point under b), the relevance of detention by national authorities to the ICC's proceedings, repeating the (criticised) point mentioned in his introduction that the Appeals Chamber in *Lubanga Dyilo* had stated that it would only look at irregularities in the detention if these were part of "the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court".[528] The Prosecutor then explained, and this point has to do with

[527] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 31.

[528] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 24. In this context (see *ibid*., para. 24, n. 38), the Prosecutor also asserted that "[a]ccording to the established practice before this Court, detention by national authorities prior to the transfer of an Accused to the Court is also not relevant for the purposes of Article 60(4)", referring to ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 11 (see also n. 510) and ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Conditions of the Pre-Trial Detention of Germain Katanga' (Public Document), ICC-01/04-01/07, 21 April 2008. However, in this last decision, Art. 60, para. 4 of the ICC Statute was not discussed. In

the word "perhaps" (see the text following footnote 515 and accompanying text), that besides the Appeals Chamber's *male detentus* test in which involvement of the ICC is required,[529] "torture or serious mistreatment of the suspect that is "in some way related to the process of arrest and transfer of the person"[530] to the Court might – if sufficiently outrageous – justify the non-assumption of the jurisdiction in any given case".[531] One can, of course, agree with this view, which would arguably also lead to a refusal of jurisdiction, irrespective of the entity responsible (the words "in any given case" reinforce that idea) and irrespective of the question for which crimes the person was in detention at the national level, *cf*. the very general words "in some way related to the process of arrest and transfer of the person" to the ICC.[532] However, as the Prosecutor concurred earlier with the Appeals Chamber's view in *Lubanga Dyilo*, demanding that the irregularities must be connected to "the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court",[533] it is unclear whether the above-mentioned broader formulation does in fact represent the Prosecutor's stance. With respect to the words "in any given case", this test is surely better presented than that of the Pre-Trial Chamber in *Lubanga Dyilo* which spoke of "instances of torture or serious mistreatment *by national authorities of the custodial State* [emphasis added ChP]". However, where the Pre-Trial Chamber in *Lubanga Dyilo* surpassed the Prosecutor in *Katanga* is that the former stated that the application of this reasoning, *to date*, has been restricted to these instances (which does not exclude other serious *male captus* situations which do not involve serious mistreatment/torture), whereas the Prosecutor in *Katanga* was only interested in serious mistreatment/torture if

addition, besides the fact that the first decision, which referred to the 13 February 2007 decision in *Lubanga Dyilo*, was already criticised earlier, see n. 510 of the present chapter and n. 265 and accompanying text of Chapter VIII, it arguably *did* take detention prior to surrender into account, namely the detention at the behest of the ICC between the issuance of the arrest warrant/request for arrest and surrender and the actual surrender.

[529] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 25. The Prosecutor referred here (see *ibid*., para. 25, n. 41), among other things, to the decision of 21 October 2008 (see n. 524 and accompanying text), the decision which did not concern a *male captus* issue, but in which the Appeals Chamber nevertheless discussed the reasoning of its *male captus* decision of 14 December 2006 (including the "by his/her accusers" paragraph).

[530] This is very much reminiscent not only of the abuse of process formulation of the Pre-Trial Chamber in *Lubanga Dyilo* (see n. 159 and accompanying text), but also of the abuse of process formulation in the *Duch* case (see n. 1276 and accompanying text of Chapter VI), see also n. 295 of the present chapter.

[531] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 25.

[532] This would also comport with the Prosecutor's stance in *Lubanga Dyilo*, see ns. 195 and 295.

[533] See ns. 510 and 528 and accompanying text.

sufficiently outrageous. In fact, the Prosecutor confined this test even further when referring to the (criticised)[534] words of the ICTY Trial Chamber in *Karadžić* that

> it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed. Where an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party [original footnote omitted, ChP].[535]

However, as already argued in Chapter VI and in this chapter, wondering whether a person can still enjoy a fair trial in the courtroom after being seriously mistreated/tortured is the wrong question, one which focuses on the restricted view of a fair trial, a fair trial in the courtroom. The judges confronted by such a case should not consider whether in such a case, the suspect/accused can still enjoy a fair trial in court. They should consider whether the serious mistreatment/torture *as such* is not already so serious that one can no longer speak of a fair trial/that it would be unfair to have a trial in the first place and thus that jurisdiction must be refused, whether or not the suspect/accused can still enjoy a fair trial in court.

Finally, it must be borne in mind that even though one may agree with (some aspects of) the above-mentioned view of the Prosecutor, it is not at all clear whether the Appeals Chamber also shares the serious mistreatment/torture *male detentus* avenue as the remarks related to that avenue were made in the context of the abuse of process doctrine,[536] a doctrine which the Appeals Chamber explicitly rejected. The fact that the Appeals Chamber in *Lubanga Dyilo factually* agreed with the Pre-Trial Chamber that no serious mistreatment/torture occurred in the case[537] does not necessarily mean that it also shares the legal (and unclear) view of the Pre-Trial Chamber with respect to the serious mistreatment/torture *male detentus* avenue, see the text following footnote 283 and accompanying text.

The third legal point the Prosecutor wished to make, the point under c), had to do with the jurisprudence used by the Defence. According to the Prosecutor, this case law did not support the Defence motion.[538] In his view,

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[534] See ns. 727 and 733 and accompanying text of Chapter VI and n. 256 and accompanying text of the present chapter.

[535] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 25 or n. 733 and accompanying text of Chapter VI.

[536] See also *ibid*., para. 25, n. 42, referring, among other things, to the Pre-Trial Chamber's serious mistreatment/torture remarks in *Lubanga Dyilo*.

[537] See *ibid*., referring, among other things, to para. 43 of the Appeals Chamber's *male captus* decision in *Lubanga Dyilo* where the judges of the Appeals Chamber stated that "the findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way."

[538] See *ibid*., para. 26.

> an analysis of the factual basis of the cases relied upon in the Defence Motion and the conclusions drawn by the respective courts in those cases corroborates that a stay of proceedings based on abuse of process is the most exceptional of remedies. It also shows that any abuse must be related to the process of bringing a person to justice for crimes that form the subject-matter of the proceedings for which a stay is sought.[539]

Although one can agree with the Prosecutor that it is unlikely that the *male captus* of Katanga is so serious that one must turn to the "most exceptional of remedies", namely the refusal of jurisdiction, the second part of the quotation repeats the earlier criticised requirement of the Appeals Chamber in *Lubanga Dyilo* that the irregularities must be connected to "the process of bringing a person to justice for crimes that form the subject-matter of the proceedings" of the ICC. It also provides additional support for the view mentioned above, namely that it is unclear whether the broader formulation mentioned at footnote 531 and accompanying text does in fact constitute the Prosecutor's stance.

In Chapter VII of this book, the principle was distilled that at both the national level and the international level, courts use their discretion not to exercise jurisdiction if the *male captus* is so serious that to continue exercising jurisdiction would constitute an abuse of the court's process. However, what constitutes such a serious *male captus* is up to the judges to determine. At the national level, there is an additional condition, namely that the authorities of the now prosecuting forum must be involved in the *male captus*, but this requirement is absent (and rightly so) in the context of the tribunals which do not have an enforcement arm of their own. Otherwise, judges at both levels have the same task, namely to find out whether the alleged *male captus* exists and is so serious that they cannot, in good conscience, continue with the case. If the irregularities are connected to a national detention of a suspect who was held for the same charges in which the now prosecuting forum is interested, one can easily assert that this *male captus* takes place within the context of the prosecuting forum's case and should therefore be looked into. However, other irregularities may occur which do not have the above-mentioned feature but which are nevertheless to be seen as falling within the context of the prosecuting forum's case. For example, if a suspect was held at the national level for certain crimes but during his detention was seriously mistreated by the national authorities before being surrendered to the ICC for other crimes, judges may still believe that this *male captus* falls within the context of their case and that the violation must hence be remedied. In short, judges must look at the context of their case more generally.[540]

In the remainder of his response, the Prosecutor (correctly) explained that the case law of the tribunals – *Nikolić*,[541] *Barayagwiza*[542] and *Duch*[543] – shows that

[539] *Ibid*.
[540] See n. 295 for several cases arguably supporting that broader view.
[541] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 28.
[542] See *ibid*., para. 29.

refusal of jurisdiction under the abuse of process doctrine is an exceptional remedy, but not one of these cases can arguably be seen as support for that other idea, namely that the *male captus* must be connected to the process of bringing a person to justice for crimes that form the subject-matter of the now prosecuting forum.[544]

Having addressed the relevant legal framework, the Prosecutor turned to the second issue related to the legal arguments of his case, namely the point that Katanga's detention by the DRC authorities does not require a stay of the proceedings or, in fact, any other remedy.

In the discussion of this issue, the Prosecutor repeated the previously mentioned and criticised point that Katanga's first period of detention in the DRC was "unrelated to the process of bringing the Accused to justice for crimes that form the subject-matter of the proceedings before the Court".[545] In this context, he noted that the Defence had admitted that the killing of the nine MONUC peacekeepers had constituted the reason for Katanga's initial arrest[546] and that the DRC authorities had stated that the Bogoro case had not been the subject of proceedings in the DRC.[547] That may indeed be true, but one becomes very curious then to know for which crimes (if any at all) Katanga was actually being held at the DRC. See in that respect the allegations by the Defence that, during the interview of 20 January 2006, Katanga was asked about Bogoro by Colonel Tsinu,[548] that the Military High Court had held that Katanga was pursued for crimes against humanity[549] and finally that the DRC authorities had stated "that no investigations were ever conducted with respect to the accused for any crime, including that of the death of the nine blue helmets".[550]

The Prosecutor subsequently reiterated his argument that, until the ICC request for arrest and surrender was served on the DRC authorities, the starting moment of the second period of detention, there was no involvement/concerted action/collusion of the ICC in the DRC detention.[551] Involvement which could, of course, entail that violations be imputed to the ICC. With respect to another issue related to the starting point of the second period of detention, namely the Defence's point that the ICC

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[543] See *ibid*., para. 30.
[544] In fact, in *Nikolić*, *Duch* and *Barayagwiza*, one will find broader formulations, see n. 295.
[545] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 31.
[546] See also n. 384 and accompanying text.
[547] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 34.
[548] See n. 373.
[549] See n. 409 and accompanying text.
[550] See n. 411 and accompanying text.
[551] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 35.

was obliged to speedily transmit the request for arrest and surrender,[552] the Prosecutor replied, and arguably correctly so, that the Court was under no duty to transmit this request without delay.[553] The Prosecutor also turned to Article 59 of the ICC Statute, again rightly noting that the obligations of this provision only start to run as from the request for arrest and surrender/request for provisional arrest.[554] Moreover, he stated that paragraph 2 of this provision "does not impose a further obligation on national authorities, or on the ICC, to review the legality of any previous detention of the person for national criminal proceedings that are unrelated to the process before the Court [original footnote omitted, ChP]".[555] This point was also made by the Pre-Trial Chamber in *Lubanga Dyilo*. In the discussion of that case, it was argued that this provision indeed does not contain a clear obligation in that respect, but that this does not mean that the competent judicial authority of the custodial State – or the ICC, as the ultimate supervisor – should not take into account irregularities which occurred prior to the official ICC arrest if these can be seen as taking place within the context of the ICC case. Furthermore, it can be argued that if the national detention *was* somehow related to the ICC proceedings, if the Prosecutor was involved in that detention, even if it concerned other crimes for which the ICC is in the end prosecuting the suspect, both the competent judicial authority in the custodial State and the ICC – marginally supervising that authority – *must* review that detention. A provision such as Article 21, paragraph 3 of the ICC Statute would arguably demand this as well.

The Prosecutor then went on to reject the Defence's submission that it had a duty of care towards Katanga prior to the transmission of the request for arrest and surrender.[556] According to the Prosecutor, the Defence had misconstrued the Prosecutor's duty under Article 54, paragraph 1 (c) of the ICC Statute, in particular with respect to Article 67, paragraph 1 (c) of the ICC Statute (the right to be tried

[552] See n. 466 and accompanying text.
[553] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 41. The Prosecutor in this context correctly noted that "the Statute envisages a process of consultation with the requested State to facilitate successful implementation of a request for cooperation under Part IX. Article 87(4) provides that "[i]n relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families". In this sense, it may be legitimate for the Court to time the transmission of a request for arrest and surrender by taking into consideration the concerns of the DRC authority that transmission of the request could adversely affect safety and the success of the D[RC] operation." (*Ibid*.) *Cf*. also *ibid*., para. 48: "Contrary to the contention of the Defence, the Prosecution was not obliged to seek a warrant of arrest at the very earliest moment that the Accused became a princip[al] suspect. The Prosecution has multiple statutory duties [original footnote omitted, ChP]."
[554] See *ibid*., para. 44.
[555] *Ibid*.
[556] See *ibid*., para. 47.

without undue delay).[557] The Prosecutor held that the rights under Article 67 of the ICC Statute

> apply to a person against whom charges have been confirmed, as well as to a "person subject to a warrant of arrest or a summons to appear". However, these rights do not extend to a person who is not subject to an enforceable warrant of arrest or a summons to appear (i.e. a warrant or a summons that has been issued by a Chamber and transmitted to national authorities and/or served on the person) [original footnote omitted, ChP].[558]

However, one can question whether the scope of this provision is not broader. One does not even need to refer to the comments of Schabas in that respect:[559] one can already refer to the Appeals Chamber's views in *Lubanga Dyilo*, which stated that whenever the ICC is involved in a case, whenever it exercises jurisdiction (this may, of course, be prior to the constructive custody, namely in the case of concerted action between the ICC and third parties) it must follow internationally recognised human rights, such as those stemming from Articles 55, 67 and 21, paragraph 3 of the ICC Statute.[560]

The Prosecutor also rejected the allegation that he had not acted with due diligence:[561] he "did not "sit back until he was ready", as suggested by the Defence, but he also did not act prematurely [original footnote omitted, ChP]".[562] Finally, he argued that he did not have a duty to inform the judges "of issues pertaining to the fact and the conditions of detention by national authorities. Such information would be irrelevant for the Chamber's exercise of its functions [original footnotes omitted, ChP]."[563] However, if one is of the opinion – as is this study – that the judges have a supervisory role in ensuring that all violations occurring in the context of their case is, ultimately, remedied, information on alleged irregularities in the pre-trial phase would not be irrelevant, it would in fact be indispensable.

Next, the Prosecutor turned to the second phase of the DRC detention, after 18 September 2007 (the transmission of the request for arrest and surrender to the DRC authorities). Although he conceded that during this phase of constructive custody, possible violations could be attributed to the ICC, nothing irregular had happened during that phase.[564]

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[557] See *ibid*.
[558] *Ibid*.
[559] See ns. 201 and 261 of Chapter VIII.
[560] See ns. 242 and 244.
[561] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 50. See also n. 468 and accompanying text.
[562] *Ibid*.
[563] *Ibid*., para. 52.
[564] See *ibid*., para. 53.

Specifically, he maintained that this second phase could not be seen as a continuation of the first phase because "the former detention was tied to a national investigation and ordered by national authorities, without participation or influence by this Court".[565] However, even if, theoretically, both phases could be linked, the Prosecutor continued, the facts nevertheless showed that the two phases constituted separate events.[566]

The Prosecutor was also of the opinion that the argument of the Defence "that the prior detention of the accused can or should be attributed to the Court because the Court benefitted from it [original footnote omitted, ChP]",[567] hence the idea "that but for the prior detention, the Accused would not have been surrendered",[568] was "factually incorrect and legally irrelevant".[569] Of course, one could agree with the Prosecutor that one can never assert that Katanga would not have been surrendered were it not for the fact that he was already in detention; it may very well have been possible, if Katanga were at liberty, for him to have been arrested, detained and surrendered to the ICC in a normal way.[570] However, because Katanga was *not* at liberty, because he was already in custody before being surrendered to the ICC, one can, of course, argue that the ICC profited from the fact that he was already in detention. However, that does not mean that this detention can be legally attributed to the ICC, although the ICC judges may, of course, be of the opinion that, notwithstanding this, the detention is nonetheless to be seen as falling within the context of their case.

According to the Prosecutor, nothing irregular occurred in the process of the execution of the request for arrest and surrender. In this context, he maintained that "[b]ecause the period of delay [of one month, ChP] is reasonable, there is no need to consider whether excessive delay could deprive the Court of jurisdiction over the Accused".[571] He also submitted, and this touches upon the point made in Chapter VIII (in the context of uncooperative States), "that a failure by a national authority to act promptly cannot deprive this Court of the ability to prosecute. Such an interpretation would enable a State to effectively shield a person from justice, by delaying their surrender [original footnote omitted, ChP]."[572] This is indeed an important point, one which justifies that judges take their role as supervisors over the entire proceedings seriously.[573] However, it appears that the abuse of process doctrine, incorrectly rejected by the *Lubanga Dyilo* Appeals Chamber, because it is so broad, and because the judges can take every element of the case into account, would be perfectly able to deal with such situations. If it becomes clear that State

[565] *Ibid*., para. 54.
[566] See *ibid*., para. 54.
[567] *Ibid*., para. 55.
[568] *Ibid*.
[569] *Ibid*.
[570] See *ibid*.
[571] *Ibid*., para. 59.
[572] *Ibid*.
[573] Note that this – justified – concern was also expressed by the Prosecutor in the *Todorović* and *Nikolić* cases, see ns. 344 and 476 of Chapter VI.

authorities have intentionally violated procedures and human rights – only to shield the ICC – the judges will not readily conclude that the *male captus* is so serious as to undermine the integrity of the ICC if it were to continue with the case. That might even be the case in the event of a *prima facie* case of serious mistreatment/torture. Experienced judges should be able in such cases to determine whether such mistreatment/torture was set up or whether it was genuine and to balance all the different elements at stake to reach a just verdict. Although judges should, of course, be very careful not to become the adjudicators of victims of authentic torture practices, much will depend on the circumstances. In any case, one cannot state beforehand that *any* case of serious mistreatment/torture *must* lead to the ending of the case for that would constitute the trigger for States which do not want to surrender their own nationals to inflict severe (physical or mental) pain or suffering upon them[574] before surrendering them to the ICC (if they had not refused to surrender those suspects already beforehand, in the context of the Article 59 of the ICC Statute proceedings). It would, of course, be a ridiculous situation if a State would sooner torture its own nationals (probably even persons high up the hierarchy of the State) than to surrender them to a court which, even though it is not perfect, is definitely fair in general. However, as there are – unfortunately – ridiculous regimes in the world, it is not impossible that judges may nevertheless be confronted by such a situation.

The Prosecutor then went on to reject a number of factual assertions on the part of the Defence, assertions (and rejections) which were mentioned earlier and which do not need to be repeated here.[575]

The third and final point of the Prosecutor's legal arguments of the case (after having discussed the relevant legal framework and the point that Katanga's detention by the DRC authorities does not require a stay of the proceedings or in fact any other remedy), was that the Defence had not substantiated any allegation of torture or serious mistreatment.

In the discussion of this point, the Prosecutor again repeated (a slightly different version of) the broader formulation mentioned at footnote 531 and accompanying text, namely that besides the Appeals Chamber's *male detentus* test in which involvement of the ICC is required, "torture or serious mistreatment of the suspect that is "in some way related to the process of arrest and transfer of the person" to the Court may justify the non-assumption of the jurisdiction".[576] The differences between this formulation (at paragraph 62 of the Prosecutor's response) and the one mentioned at footnote 531 and accompanying text (at paragraph 25 of the

[574] *Cf.* Art. 7, para. 2 (e) of the ICC Statute: "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

[575] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 60.

[576] *Ibid*., para. 62.

Prosecutor's response) is that the former speaks of "may" and the latter of "might – if sufficiently outrageous –" and in addition, that the latter does not contain the words "in any given case". Although the words "in any given case" reinforce the idea that the ICC would refuse jurisdiction under this test, irrespective of the entity responsibility, without these words, the test can still be interpreted as such. The fact that the words "might – if sufficiently outrageous –" have been deleted is to be welcomed as one could argue that serious mistreatment/torture is already sufficiently outrageous to possibly lead to a refusal of jurisdiction (note that there is still a discretion here). The more important point is that the problem remains as to whether the Prosecutor is of the opinion that serious mistreatment/torture *as such* can lead to the ending of the case, or whether it must be related to a detention which can be seen as being part of a process of bringing a suspect to justice for the crimes that form the subject-matter of the proceedings before the ICC. Although there are a number of indications that the Prosecutor follows this last idea, the fact that this broader formulation is repeated here (even if a slightly different version has been used) again engenders doubt. This doubt is augmented by the remainder of the Prosecutor's response, where he examines whether the detention by the DRC authorities (which he had stated concerned crimes other than those in which the ICC is interested) can be seen as serious mistreatment/torture.

Be that as it may, it is in any case clear that the Prosecutor did not factually agree with the Defence:

> Not every violation of a right amounts to mistreatment, and not every serious violation of a right amounts to serious mistreatment. The Prosecution submits that serious mistreatment requires proof of acts causing grave physical or mental suffering or injury or constituting a serious attack on human dignity. The claims made by the Defence are inadequate to establish that the Accused has been subject to serious mistreatment [original footnote omitted, ChP].[577]

Again, one can assert that it may very well be that Katanga's *male captus* is not so serious as to refuse jurisdiction, but that neither must one forget that serious mistreatment/torture are only the more 'physically' coloured examples which could lead to a refusal of jurisdiction. Hence, it may indeed be the case that "not every serious violation of a right amounts to serious mistreatment", but that is not particularly important, because a serious violation of a right *as such* may already be deemed to constitute such a serious *male captus* that a *male detentus* must follow.

After having repeated the previously criticised additional requirement that "a stay of the proceedings may be ordered only if the breaches of the rights of the accused are such as to make it impossible to conduct a fair trial"[578] (in the strict

[577] *Ibid*., para. 64.
[578] *Ibid*., para. 65.

sense of the word),[579] the Prosecutor turned to the fourth and final issue of his response, the remedy.

Importantly, he submitted

> that the Chamber should refrain from entering a finding on the legality of the detention of the Accused by the DRC authorities and on whether the Accused's rights have been violated during that period. To do so at all, and in particular based on incomplete facts, would overstep this Court's mandate and the statutory limits to its jurisdiction.[580]

He hereby asserted that the ICC's supervisory role under Article 59, paragraph 2 of the ICC Statute is restricted "to the process of arrest and surrender by national authorities subsequent to the notification of a request for arrest and surrender by the Court".[581] According to him, this provision "does not impose an obligation on national authorities, or a power to the Court, to review the legality of any previous detention of the Appellant for national criminal proceedings unrelated to Court proceedings [original footnote omitted, ChP]".[582]

As argued before, this point is reminiscent of the words of the Pre-Trial Chamber in *Lubanga Dyilo*, where it was stated that the competent judicial authority was not obliged to look into irregularities in the context of an arrest/detention prior to the official ICC arrest insofar as that arrest/detention was related solely to national proceedings. Although the Pre-Trial Chamber did not clearly explain the role of the ICC judges themselves on this particular matter, it was assumed that these words meant that if the arrest/detention *were* somehow related to the ICC proceedings, there was an obligation, both for the national competent judicial authority and the ICC judges themselves to examine irregularities stemming therefrom, an assumption which was arguably confirmed when the Pre-Trial Chamber later explained that it would look at irregularities prior to the official ICC arrest if those irregularities were the result of concerted action between the ICC and third parties. (Note that the Appeals Chamber adopted a stricter approach here, demanding that the suspect had to be in detention for the same crimes as those for which the ICC was now prosecuting that person, an approach which is hard to reconcile with the Appeals Chamber's confirmation of the concerted action point of the Pre-Trial Chamber.)

It can be asserted that a provision such as Article 21, paragraph 3 of the ICC Statute (applicable as from the moment the ICC gets involved in the case, in the case of concerted action) also demands such a supervisory role.

This also means that if the detention *were not* somehow related to the ICC, if the ICC *were not* involved in that detention, there is no strict obligation to look into irregularities arising therefrom. However, as also argued in the context of the

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[579] See *ibid*.: "The Prosecution submits that the Defence has failed to establish that the treatment of the Accused was of such a nature so as to preclude a fair trial which could be secured in various other ways, for example, by excluding any evidence obtained by such mistreatment."
[580] *Ibid*., para. 70.
[581] *Ibid*., para. 71.
[582] *Ibid*.

Lubanga Dyilo case, the judges should nevertheless go one step further and should supervise any irregularity which can be seen as falling within the context of an ICC case more generally.

Returning to the Prosecutor's response, his argument that the ICC, for the same reasons, "may also not review the detention of the Accused by national authorities for the purposes of any claim for compensation pursuant to Article 85 and Rules 173-175 [original footnote omitted, ChP]"[583] is not very convincing.[584] Article 85, paragraph 1 of the ICC Statute is formulated very generally ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation") and if judges are of the opinion that irregularities mentioned in the above-mentioned scenario lead to an unlawful arrest or detention in the context of their case, suspects are entitled to compensation.[585]

The Prosecutor also submitted that the judges should dismiss the Defence's request to impose a stay or termination of the proceedings. At this juncture, he repeated the fact that the abuse must be connected to "the process of bringing the Accused to justice for the crimes charged before the Court",[586] again adding confusion to the point as to whether or not he is of the opinion that the ICC can also refuse jurisdiction if the abuse can more generally be seen to be "in some way related to the process of arrest and transfer of the person" to the ICC. In addition, the more general formulation presented by the Prosecutor at footnote 531 and accompanying text, arguably mentioned separately from the normal *male detentus* test of the ICC (requiring involvement of the ICC), could also cover abuse irrespective of the entity responsible. The fact that the formulation talks about the "non-assumption of the jurisdiction *in any given case* [emphasis added, ChP]" reinforces that idea, an idea which can also find support in the Prosecutor's efforts

[583] *Ibid*., para. 73.

[584] However, the Prosecutor had a point in arguing that *this specific* Chamber could not rule on the matter of compensation because of Rules 173-175 of the ICC RPE. See *ibid*., para. 75: "The Chamber has not been properly seized with any requests in relation to compensation. Rule 173(1) provides that "[a]nyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the requests". Contrary to the contention of the Defence, this Chamber thus does not have the authority to grant the remedy. Rule 173 expressly states that the judges who decide on any request for compensation "shall not have participated in any earlier judgement of the Court regarding the person making the request". This implies that the Chamber shall refrain from making any finding or declaration in relation to compensation of the Accused [original footnote omitted, ChP]."

[585] *Cf*. the discussion at n. 216 and accompanying text of Chapter VIII. Note that the second, and broader formulated, requirement under the Prosecutor's test ("in connection with proceedings before the Court", see *infra*) can in fact be seen as support for this view, but the remainder of his words again refer to the more strict requirement that this means that the suspect must be in detention at the national level for the same crimes as those for which the ICC is now prosecuting him: "A right to compensation under Article 85 is limited to instances where a person has been unlawfully arrested or detained (1) in violation of specific provisions of the Statute, the Rules or international law, but only (2) *in connection with proceedings before the Court*. The Court has no duty, or authority, to pay compensation to a person who has been detained by national authorities *for conduct that is unrelated to the process of bringing the person to justice for the crimes charged before the Court* [emphasis added and original footnotes omitted, ChP]." (*Ibid*., para. 73.)

[586] *Ibid*., para. 74.

to show that the actions of the national authorities in the first phase of detention did not amount to serious mistreatment/torture.[587] However, at this point in his response, the Prosecutor confusingly requires the attribution of the abuse to the ICC.[588]

Finally, the Prosecutor also rejected Katanga's request for a reduction of the sentence (as being "premature")[589] and his request for an evidentiary hearing[590] (as being unnecessary).[591]

After that, it was time for the judges to pronounce on the case. In their decision of 3 December 2009, the judges of Trial Chamber II first of all noted that they had invited the Registry and the authorities in the DRC to file their observations on the matter.[592] The Registry reacted, but its observations are confidential and cannot – directly (but see *infra*) – be discussed here.[593] The authorities of the DRC, on the other hand, did not find it necessary to respond.[594] The judges also remarked that the Prosecutor has requested to add a case law reference, a request which was

[587] See n. 577 and accompanying text.

[588] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 74: "Without abuse attributable to the Court, there is no reason to consider staying or discontinuing the proceedings."

[589] See *ibid*., para. 76. In this context, the Prosecutor rejected the analogy to *Duch* and *Barayagwiza*, holding that "a) they were decided against a different procedural framework; b) the detention in both cases was based on the same conduct for which the persons were then tried before the international forum; and c) in the Barayagwiza case, the accused was held in detention by national authorities subject to a request by the ICTR for provisional arrest pursuant to Rule 40 of the Rules of Procedure and Evidence of the ICTR." (*Ibid*., para. 75, n. 149.) However, the Prosecutor seemingly forgets here that the judges in *Duch* stated: "Should the Accused be convicted, the Chamber finds him to be entitled to a remedy, to be decided by the Chamber at the sentencing stage, for the time spent unlawfully in detention before the Cambodian Military Court between 10 May 1999 and 30 July 2007." (See n. 1282 and accompanying text of Chapter VI.) Now, during that period, Duch was also in detention for crimes other than those for which he is now being prosecuted at the ECCC, see n. 1182 and accompanying text of Chapter VI. In addition, it must be noted that in the *Barayagwiza* case, the ICTR took responsibility for violations even occurring *beyond* the constructive custody of the ICTR. Finally, it must be stated that a reduction of the sentence could be granted, also pursuant to the ICC's own procedural framework, see Rule 145 of the ICC RPE.

[590] See n. 488 and accompanying text.

[591] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 77.

[592] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 13.

[593] See *ibid*.

[594] See *ibid*.

granted.[595] In (the annex to) this submission, the Prosecutor filed a copy of the 31 August 2009 decision in *Karadžić*,[596] discussed earlier in this study.[597]

The judges first summarised the visions of the Defence, the legal representatives of the victims and the Prosecutor, all of which have been discussed at length in the previous pages (and which therefore do not need to be repeated here). The only issue which should be mentioned here is the view of the Registry, whose observations were, after all, filed confidentially. The judges noted that the Registry had submitted that "from the time it took Germain Katanga into custody, it ensured that all necessary procedures were followed and that his rights were not prejudiced".[598] According to the Registry, "all required procedures were carried out and hence Germain Katanga's rights were respected [original footnote omitted, ChP]".[599]

The judges then turned to their own analysis. Not very surprisingly, they noted that the Defence had relied on the abuse of process doctrine, a doctrine which was rejected by the Appeals Chamber in *Lubanga Dyilo*.[600] Nevertheless, they also explained that the Appeals Chamber, in the context of Article 21, paragraph 3 of the ICC Statute, had stated that "[u]nfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial".[601] (This was the third formulation of the Appeals Chamber's *male detentus* test.)

However, before they turned to the real merits of this case, the judges first wanted to determine whether Katanga's submission was in fact admissible; whether the ICC law authorised a participant in the proceedings to file a *male captus* submission after the confirmation of the charges and at this stage of the proceedings (read: so late).[602]

In fact, the judges opined that a *male captus* challenge, especially when it is accompanied by an application to stay or terminate the proceedings "must be submitted in the initial phase of the proceedings".[603] This was in the interest of all parties, especially the victim of the alleged *male captus*.[604]

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[595] See *ibid*., para. 14.
[596] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution's submission of additional authority regarding "Defence motion for a declaration of unlawful detention and stay of proceedings"' (Public with public Annex A), ICC-01/04-01/07, 6 October 2009.
[597] See ns. 795 *et seq*. and accompanying text of Chapter VI.
[598] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 32.
[599] *Ibid*.
[600] See *ibid*., para. 36.
[601] See *ibid*., para. 39. See also n. 259 and accompanying text.
[602] See *ibid*., para. 38.
[603] *Ibid*., para. 39.
[604] See *ibid*., para. 40.

For example, the judges noted that pursuant to Article 19 of the ICC Statute, "challenges to admissibility or jurisdiction must be made at the earliest opportunity, so as to avoid obstructing or delaying the proceedings [original footnote omitted, ChP]".[605] They also pointed to Rule 122, paragraph 2 of the ICC RPE,[606] which specifies that if the Pre-Trial Chamber is requested to rule on such a challenge in the course of the confirmation of the charges hearing, "it must ensure compliance with the provisions on expeditiousness expressly prescribed by rule 58 of the Rules".[607] In addition, they continued, the same Rule 122, in paragraphs 3 and 4,[608] provides "that any objection or observation concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be raised at the start of the hearing, failing which it will no longer be possible to do so subsequently [emphasis in original, ChP]."[609] The judges also stressed that pursuant to Article 64, paragraph 2 of the ICC Statute, the Trial Chamber must ensure that a trial is fair and expeditious and that it is conducted with full respect for the rights of the accused, which, in this case, involves the right of Katanga's co-accused, Mathieu Ngudjolo Chui, to be tried without undue delay as well.[610]

That Katanga had raised his *male captus* from the very start of the trial is clear: on 22 October 2007, during the initial hearing, the alleged illegal arrest and

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[605] *Ibid*., para. 41.

[606] This provision reads: "If a question or challenge concerning jurisdiction or admissibility arises, rule 58 applies." See for the contents of this latter rule the next footnote.

[607] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 41. Rule 58 of the ICC RPE reads: "1. A request or application made under article 19 shall be in writing and contain the basis for it. 2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first. 3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber. 4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility."

[608] These paragraphs read: "3. Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing. 4. At no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings."

[609] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 41.

[610] See *ibid*., para. 42.

detention of Katanga in the DRC (between February 2005 until his surrender) was emphasised by his duty counsel, as a result of which the Pre-Trial Chamber had invited the Defence to submit this issue in writing.[611] In this context, the Defence had submitted, on 7 April 2008, an application to the Pre-Trial Chamber based on Article 57, paragraph 3 of the ICC Statute[612] to obtain the cooperation of the DRC on these matters.[613] In this application, the Defence specified "that the requested documents were necessary in order to substantiate certain of its submissions concerning the lawfulness of prior proceedings"[614] and stressed the urgency of this cooperation in view of the time limits imposed by Rule 122, paragraphs 3 and 4 of the ICC RPE.[615]

During an *ex parte* hearing ten days later, the Defence repeated its request, "expressing the concern that it risked finding "the door closed" before the Trial Chamber if it did not raise such matters"[616] within the time limits of Rule 122, paragraphs 3 and 4 of the ICC RPE.[617] However, during the same hearing, the judges continued, the Defence was informed that even if the DRC authorities were not to respond to the request for cooperation before the confirmation of the charges hearing (which indeed occurred as the information was only provided on 28 August 2008, after the confirmation of the charges hearing, which took place from 27 June 2008 to 18 July 2008),[618] "no prejudice would be caused to the right of the Accused to make such challenges (to the lawfulness of prior proceedings or the admissibility of the case) under article 19 of the Statute [original footnote omitted, ChP]".[619] This is, of course, an interesting remark, for it shows that the Pre-Trial Chamber in *Katanga*, about a year and a half after the decisions in *Lubanga Dyilo*, concurred with the Pre-Trial Chamber (but not with the Appeals Chamber) in that case that the *male captus* claims could be seen as a challenge pursuant to Article 19 of the ICC Statute, something which was previously submitted by this study in the discussion of the *Lubanga Dyilo* decisions.

This reasoning was confirmed in a decision of the Pre-Trial Chamber issued *ex parte* on 25 April 2008, in which the judges had stated that Article 59, paragraph 2 of the ICC Statute only applies to the proceedings following the transmission, by the

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[611] See *ibid*., para. 43.
[612] Part (b) of this provision states: "[T]he Pre-Trial Chamber may: (…) (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence".
[613] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 43.
[614] *Ibid*.
[615] See *ibid*.
[616] *Ibid*.
[617] See *ibid*.
[618] See *ibid*., para. 61.
[619] *Ibid*., para. 43.

Registry, of the request for arrest and surrender and that as a result, any alleged prior international human rights violations of the suspect, which, according to the Defence, could prevent the ICC from exercising jurisdiction over him, were to be raised in the context of a challenge to the ICC's jurisdiction pursuant to Article 19 of the ICC Statute – a challenge which is not subjected to the time limits of Rule 122, paragraphs 3 and 4 of the ICC RPE.[620]

Although it is true that Article 59 of the ICC Statute only applies as from the request for provisional arrest/for arrest and surrender, the competent judicial authority (and the ICC should perform a supervisory role here as well), when determining the points of paragraph 2 of that article, can also look into alleged irregularities prior to the ICC requests. It appears that the Pre-Trial Chamber in *Lubanga Dyilo* held that the competent judicial authority and the ICC as its supervisor could look into irregularities prior to the official ICC arrest if those irregularities stemmed from a detention which was somehow related to the ICC proceedings.

The judges of the Trial Chamber in *Katanga* consequently noted that the decision of the Pre-Trial Chamber of 25 April 2008 was also confirmed by the Pre-Trial Chamber during a hearing on 14 May 2008:[621] when the Defence again expressed its concerns and doubts whether this was indeed the correct procedure to follow to raise this question, the Pre-Trial Chamber likewise indicated that a similar motion had been filed in *Lubanga Dyilo*.[622] This is, of course, true, but has the Pre-Trial Chamber in *Katanga* forgotten that the *Appeals Chamber* in *Lubanga Dyilo* had stated that Article 19 of the ICC Statute could not be used? Even if the Defence is of the opinion, as is this study, that Article 19 of the ICC Statute can be used for these kinds of claims, it is quite understandable that the Defence in *Katanga* was concerned about using it here, the Appeals Chamber in *Lubanga Dyilo* having rejected it.

The judges of the Trial Chamber in *Katanga* then went on to note that the issue of the arrest and detention of Katanga was raised neither in the course of the confirmation of the charges hearing nor in the Defence's written observations preceding that hearing.[623] In a decision of 29 April 2008, the Pre-Trial Chamber had given the parties until 23 June 2008 – this is four days before the start of the confirmation of the charges hearing – "to file a list concisely setting out those issues pertaining to jurisdiction and admissibility and any other issue concerning the proper conduct of the prior proceedings that they intended to raise under rule 122(2) and (3) [original footnote omitted, ChP]".[624] In addition, a decision issued on 13 June 2008 "gave the parties the possibility of presenting observations on jurisdiction, admissibility, and any other procedural issue [original footnote omitted,

[620] See *ibid*., para. 44.
[621] See *ibid*., para. 45.
[622] See *ibid*., para. 45.
[623] See *ibid*., para. 46.
[624] *Ibid*.

ChP]".[625] On 24 June 2008, the judges explained, the Defence filed its written observations (which were presented orally before the Pre-Trial Chamber on 2 July 2008) and on 28 July 2008, the Defence presented its written observations on the issues addressed during the confirmation of the charges hearing.[626] The issues regarding jurisdiction, admissibility and other procedural matters were addressed both on 2 July 2008 and in the written observations, although it appears, the judges noted, "that the Defence was then seeking primarily to challenge the admissibility of certain evidentiary material tendered for the purpose of the confirmation hearing [original footnote omitted, ChP]".[627] In that context, it contested, among other things, "the admissibility of a record of an interview before the military court dated 20 January 2006".[628] It was only in that context, the judges remarked, that the Defence had stressed that at that time, Katanga did not yet have a legal counsel and had not yet been informed of the charges and reasons justifying his detention.[629]

In fact, the judges held, it was not until a hearing held *ex parte* on 11 July 2008 that Katanga's Defence again raised the necessity of obtaining the requested information and documents from the DRC authorities in order to be able to formulate and submit the challenges to jurisdiction and admissibility of the case.[630] However, in its final observations on 28 July 2008, the Defence did not return to the alleged *male captus*.[631]

As a result, the Trial Chamber concluded that, even though the Defence had raised the issue of the *male captus* several times during the pre-trial phase of the proceedings (including during Katanga's initial appearance),[632] it had not submitted, finally, "a motion in that regard to the Pre-Trial Chamber, whether by claiming that the proceedings were unlawful or by raising a challenge to jurisdiction".[633] However, according to the Chamber, "such a motion should have been introduced during the pre-trial phase and addressed at that stage".[634]

Nevertheless, the Chamber recognised that this may also have been caused by the position adopted by the Pre-Trial Chamber.[635] Hence, what had to be determined now was whether the Trial Chamber *itself* had been timely and officially seized of such a motion.[636]

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[625] *Ibid*.
[626] See *ibid*.
[627] *Ibid*.
[628] *Ibid*. See also ns. 391-392 and accompanying text.
[629] See *ibid*.
[630] See *ibid*., para. 47.
[631] See *ibid*.
[632] See *ibid*., para. 48.
[633] *Ibid*.
[634] *Ibid*.
[635] See *ibid*.: "The Chamber is nevertheless mindful that the position adopted by the Pre-Trial Chamber may have led the Defence for the Accused to believe that it was authorised to defer the filing of its motion and postpone it until after the decision on the confirmation of the charges."
[636] See *ibid*., para. 50.

The Chamber stated that between its constitution, on 24 October 2008, and the hearing of 1 June 2009,[637] the Defence had never raised the question of Katanga's illegal detention with the Chamber, even though it had the opportunity to do so several times: it had not done so during the status conferences[638] held on 27-28 November 2008 and 3 February 2009, in its written submissions and during the hearings on Katanga's continued detention.[639]

Although it may be true, especially given that the Defence had received the required information from the DRC authorities on 28 August 2008,[640] that the Defence did not timely mention the allegations concerning Katanga's *male captus*,[641] it is not that strange that it did not do so during the hearings on Katanga's continued detention, the hearing reviewing his pre-trial detention. These reviews are based on Article 60, paragraph 3 of the ICC Statute[642] and Rule 118, paragraph 2 of the ICC RPE[643] and although they are rather generally formulated, they are preceded by provisions dealing with interim releases.[644] If the Defence is of the opinion that it

[637] See n. 374.

[638] See for this concept Rule 132 of the ICC RPE: "1. Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public. 2. In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary."

[639] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 51.

[640] See *ibid*., para. 61.

[641] A good example can be found in the context of the first status conference. In preparation of that conference, the Trial Chamber sent a list of questions to the participants "inviting them (…) to inform it of "issues and observations which they would deem relevant and on which they would like the Chamber to rule" [original footnote omitted, ChP]". (*Ibid*., para. 52.) One can indeed argue that such an open invitation should make the Defence raise the *male captus* issue, even if it would only have stated that it will soon submit its official motion on these matters.

[642] "The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require."

[643] "The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor."

[644] See Art. 60, paras. 1-2 of the ICC Statute: "1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial. 2. 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 forth 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." See also Rule 118, para. 1 of the ICC RPE: "If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in

can only use such hearings to obtain a remedy in which it is not interested, namely a 'mere' *interim* release – and it appears that the Defence was indeed of this opinion[645] – it is not so odd for it not to use them to submit *male captus* claims, which, after all, have nothing to do with interim releases but with actual, final releases. Nevertheless, as already explained, in those hearings, judges must also pay attention to the distinct Article 60, paragraph 4 of the ICC Statute. This provision is, of course, also surrounded by provisions dealing with interim releases, but it was nevertheless argued earlier in this study that this provision could perhaps be used for *male captus* allegations.[646] However, if so, the suspect needs to argue that his rights have been so seriously violated by the unreasonable pre-trial detention[647] due to inexcusable delay by the Prosecutor that his right to a fair trial can no longer be guaranteed/that it would undermine the integrity of the Court to proceed[648] and thus that the Prosecutor has forfeited his right to prosecute. Because Katanga alleged that the Prosecutor was involved in his illegal DRC detention, he could perhaps have persuaded the Trial Chamber to take that provision into account here. However, according to the Trial Chamber, he did not do so.[649]

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accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor." *Cf*. also n. 259 of Chapter VIII.

[645] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 54: "The Chamber is bound to observe once again that, in its written submissions, *the Defence did not request the Accused's interim release* and that it confined itself to stating that, at that stage, it had no particular observations to make and that it was reiterating its previous observations [emphasis added and original footnote omitted, ChP]." See also *ibid*., para. 55: "At that hearing [a public hearing on 23 March 2009, in the context of the third review of Katanga's pre-trial detention, ChP], the Defence for Germain Katanga stated, as it had in its written submissions, that it was taking a realistic and pragmatic position. In this respect, the Defence essentially stressed that, in the absence of any facility enabling release under judicial supervision in the Netherlands or a neighbouring State, *it* "[*saw*] *no practical purpose served in applying for the provisional release of Mr. Katanga at th*[*at*] *time*". Moreover, *it made it clear that it was not making an application for interim release*, that it had "come relatively empty-handed before the Court", and that it was confining itself to seeking a pragmatic solution to a problem which went beyond Germain Katanga's case alone [emphasis added and original footnotes omitted, ChP]."

[646] See n. 269 and accompanying text of Chapter VIII.

[647] Which arguably includes *any* pre-trial detention, whether or not the suspect was in detention for the same crimes which the ICC is now prosecuting, see the text following n. 265 and accompanying text of Chapter VIII.

[648] See House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161: "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

[649] See ICC, Trial Chamber II, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Fifth review of the Pre-Trial Chamber's Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to rule 118(2) of the Rules of Procedure and Evidence' (Public), ICC-01/04-01/07, 19 November 2009, para. 30: "The Defence for Germain Katanga has not specifically addressed the issue of an unreasonable delay attributable to the

In any case, this decision now under discussion indicates that even though the hearings on the review of the pre-trial detention seem to be confined to the arrest/detention in The Hague/interim releases only (with the possible exception of Article 60, paragraph 4 of the ICC Statute), a suspect/accused can apparently use them for *any* question related to his detention.[650] This would be especially relevant for a person such as Katanga who claims that the involvement of the ICC in his *male captus* contributed to the illegality of his detention, which continued in the context of the ICC procedures:

> The Defence for Germain Katanga doubtless considered that the detention then under review covered only the period starting with his arrival at the Court's Detention Centre on 18 October 2007. It remains the case that the Defence contends that the participation of the organs of the Court during the period of detention prior to the accused's transfer contributed to "*giving continuity to the unlawfulness of the detention into the processes of the ICC*". In view of such a contention, it follows that the failure to act on the part of the Defence for Germain Katanga cannot be justified [emphasis added and original footnote omitted, ChP].[651]

The judges then turned to the final part of their decision, the conclusions. They stated that it was only during the meeting of 1 June 2009[652] that the Defence had stated that it was intending to file its *male captus* motion, which, in turn, only occurred 30 days later, seven months after the first status conference.[653] The judges noted that the Defence had maintained, among other things, that it "was persuaded to file this motion having been appraised of all the documents, views of the DRC on the nature and course of the national proceedings as well as those of the Prosecutor on his knowledge of documents and interactions with the DRC, but especially those observations expressed on the 1st of June 2009 [original footnote omitted, ChP]".[654]

Prosecution within the meaning of article 60(4) of the Statute in either its current or previous observations on the accused's detention review." However, note that in the context of the proceedings before the Pre-Trial Chamber, reference *was* made to this provision, see n. 264 of Chapter VIII.

[650] See in that respect the following words of the Trial Chamber, made in the context of the third review of Katanga's pre-trial detention: "On that occasion, once again, the Defence made no reference whatever to the unlawfulness of its client's prior detention, despite the fact that *the hearing had been convened with the specific aim of raising and addressing any issue concerning the Accused's detention* [emphasis added, ChP]." (ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 55.)

[651] *Ibid*., para. 58. See also n. 383 and accompanying text.

[652] See n. 374.

[653] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 59.

[654] See n. 374.

However, the judges were not convinced: according to them, the Defence "ha[d] not advanced any convincing reasons to justify the filing of the Motion at such an advanced stage of the proceedings".[655] Although the Defence had argued that "the information provided by the DRC representatives at the meeting of 1 June 2009 was decisive in the filing of the Motion",[656] the judges were of the opinion that it appeared that the arguments in the motion relied, "for the most part on information which was already available to the Defence at the pre-trial phase".[657] In that context, they also noted that the requested information from the DRC authorities[658] had already been provided on 28 August 2008.[659] The judges felt that if the filing of the motion depended on obtaining certain information, the Defence should have notified the judges of this need.[660]

However, the misery for the Defence did not stop there. The judges also referred to Article 24, paragraph 5 of the Code of Professional Conduct for counsel, which states: "Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings".[661] This provision, the judges continued, had to be seen as "a reminder to the Defence of the Chamber's general and ongoing obligation under article 64(2) of the Statute[662] to ensure that the trial is expeditious."[663] According to the judges, the Defence, by filing its motion only seven months after the Chamber had invited the Defence "to submit to the Chamber the relevant issues on which it wished the latter to rule",[664] had not followed the above-mentioned provision.[665]

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[655] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 61.
[656] *Ibid*.
[657] *Ibid*.
[658] See n. 613 and accompanying text.
[659] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 61.
[660] See *ibid*., para. 62.
[661] See *ibid*., para. 63.
[662] "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."
[663] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, para. 63.
[664] *Ibid*., para. 65. See also n. 641.
[665] See *ibid*.

Consequently, the judges concluded that the motion was filed too late and hence inadmissible,[666] as a result of which the substantive arguments of the parties and participants were not to be examined in this decision.[667]

What can be said about this utter anticlimax? One can agree with the judges that the seven-month period between the first status conference (27 November 2008) and the submission of the request (30 June 2009) is rather long. Indeed, one could argue that the delay is not seven but ten months, between 28 August 2008 (when the Defence received the requested DRC information) and 30 June 2009. In that context, it must also be borne in mind that in this decision one can read that the "requested documents were necessary in order to substantiate certain of its submissions concerning the lawfulness of prior proceedings".[668] That seems to imply that the Defence had already drafted a concept submission (which would not be unusual given the fact that the Defence had already briefly mentioned a number of *male captus* allegations during the initial appearance on 22 October 2007), of which parts had to be checked/confirmed with help of the DRC information. That would, of course, need some time, but ten months is indeed quite long. However, suppose that the Defence had handed in the request just before the winter recess, some three and a half months after 28 August 2008. Although one can only guess how the judges would have reacted in that case, it is likely that such a period of time would be deemed reasonable. However, that would mean that the judges, invoking Article 64, paragraph 2 of the ICC Statute, would be prepared to attach the most extreme consequence, namely that the issue would not be addressed substantively *at all*, to a delay of a little more than six months. Again, it appears that the Defence can indeed be reproached for the delay but is the sanction not far too severe? The ICC judges should not forget that these matters go to the foundations of their case, namely to the question of how the suspect was brought into their jurisdiction. It is submitted that they should *want* to know what happened to the suspects they are now trying prior to their arrival in The Hague. This is especially so since an NGO report has partly confirmed the *male captus* allegations of Katanga and when it can be argued that the ICC profited from the fact that he was already in detention in the DRC. One can question how any judge can continue a case without being able to state that he is sure that the alleged pre-trial irregularities are absent, or are present but not so serious that jurisdiction must be refused. The ICC judges in the *Katanga* case run the risk of continuing a case which has an unstable foundation and whose unstableness is not repaired, hence jeopardising the fairness/integrity of the ICC proceedings.[669] As previously argued in the context of the *Lubanga Dyilo* case, the

[666] See *ibid*., para. 66.
[667] See *ibid*., para. 67.
[668] See n. 614 and accompanying text.
[669] *Cf*. also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 11: "The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of article 55 and 54 (1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may

ICC should be careful not to return to the old-fashioned concept of a fair trial, namely a fair trial in the courtroom. This decision can easily be interpreted as a confirmation of Sluiter's words (written at a time when this decision was not yet issued) that "the initial case law of the ICC reveals a tendency to retreat within the safe limits of The Hague and a strong desire to keep hands clean by refusing to supervise activities within domestic jurisdictions".[670] It may even be seen as a violation of a suspect's right to effectively challenge the lawfulness of his arrest and detention, a crucial right covered by Article 21, paragraph 3 of the ICC Statute.[671] This is especially unfortunate since in an earlier decision from the *Katanga* case, it was held – and rightly so – that

> according to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the Defence, including the right "not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute"[.][672]

According to Sluiter, who refers to comparable words from another decision (also from the *Katanga* case),[673] such words reinforce the idea that because of the fact that "the ICC system is more inquisitorial in nature than the ad hoc tribunals",[674] judges must "explore issues *ultra petitum* and address violations *proprio motu*".[675]

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have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings."

[670] See n. 276.

[671] *Cf.* also ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 31: "[A]rticle 21 (3) assures to every individual the right to effectively contest the deprivation of liberty."

[672] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 8. See also n. 201 of Chapter VIII.

[673] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of [the] Congo, *In the Case of The Prosecutor v. Germain Katanga*, 'Decision Concerning Pre-Trial Detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 21 February 2008, p. 6, where the judge is referred to "as the ultimate guarantor of the rights of the Defence".

[674] Sluiter 2009, p. 471. This point was already earlier clarified in n. 9 of Chapter IV, see Swart 2002 B, p. 1601: "A comparison of the Rome Statute with the Statutes of the *ad hoc* Tribunals reveals that in the Statute, too, there is a mixture of adversarial and inquisitorial elements. Again, the adversarial elements largely prevail, although there is stronger contribution of the inquisitorial tradition, especially where the structure of pre-trial investigations is concerned."

[675] Sluiter 2009, pp. 471-472.

Indeed, it can be argued that the judges of the Trial Chamber should have been more concerned with what actually happened to Katanga than to – rather too readily – dismiss the entire motion for being submitted too late.[676]

[676] Note that in the *Kajelijeli* case before the ICTR, the Appeals Chamber decided in 2005 that Kajelijeli could not re-litigate the issue of the ICTR's personal jurisdiction as "[t]he Appeals Chamber squarely held, in its 16 November 2001 decision, that the Appellant procedurally lost his entitlement to raise his personal jurisdiction objection by failing to file a sufficiently specific notice of appeal, even after the Appeals Chamber had allowed him extra time to do so after his initial failure. This holding disposed of the personal jurisdiction objection. The Appellant has not demonstrated any cause to reconsider this determination on a discretionary basis: there is no clear error in the Appeals Chamber's reasoning, nor is reconsideration necessary to prevent an injustice." (ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 205.) However, in that case, the issue was already examined by the Trial Chamber. (*Cf.* also the ICTY case of *Tolimir* or the ICTR case of *Rwamakuba* where the Trial Chamber examined the *male captus* allegations and the Appeals Chamber dismissed the appeal for procedural reasons.) In addition, in 2005, the judges in *Kajelijeli* did (marginally) review the issue themselves, when they stated (see *ibid*., para. 206): "[E]ven if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction. The Appeals Chamber is mindful that it must maintain the correct balance between "the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law." While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment." However, those cases are exceptional and, in most circumstances, the "remedy of setting aside jurisdiction, will . . . be disproportionate." The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above [original footnotes omitted, ChP]." Finally, the judges in 2005 also examined whether the violations, even if they did not lead to the ending of the case, should nevertheless lead to other, less far-reaching, remedies.

PART 5

CONCLUSION

CHAPTER XI
ANSWERING THE CENTRAL QUESTION, RECOMMENDATIONS AND EPILOGUE

1 INTRODUCTION

This study must now come to an end. The only thing that remains is to answer the central question with which this book began (Section 2), to provide recommendations which may hopefully be helpful to anyone interested in this topic, in particular the ICC judge confronted by a *male captus* situation (Section 3), and to conclude this book with a brief epilogue (Section 4).

2 ANSWERING THE CENTRAL QUESTION

In the very first pages of this book, the following central question was presented:

How does the ICC currently cope with the dilemmas that a male captus *case can give rise to and how should this approach be assessed?*

This question encompasses two elements, namely 1) the ICC's current position on the *male captus* issue and 2) an assessment of that position. With respect to the second element, it was explained that this study would create two evaluative frameworks with which the ICC position on the *male captus* issue would be assessed, namely an external one (*vis-à-vis* the position of other courts that have dealt with this problem before, namely to find out how similar or different the ICC position is in comparison with the position of these other courts) and an internal one (*vis-à-vis* the law of the ICC itself, namely to find out how the ICC position is to be seen in view of what the law of the ICC – to be found in Article 21 of the ICC Statute – itself prescribes the judges to do).

In short, three elements have to be sorted out here before turning to the recommendations in Section 3, namely: 1) the ICC's current position on the *male captus* issue (Subsection 2.1), 2) the ICC's current position on the *male captus* issue assessed in the context of this book's external evaluative framework (Subsection 2.2) and 3) the ICC's current position on the *male captus* issue assessed in the context of this book's internal evaluative framework (Subsection 2.3).

2.1 The ICC's current position on the *male captus* issue

Before being able to assess a certain position, the position itself must, of course, be identified. And here, the first problem arises; it does not seem to be very clear what the ICC's current position on the *male captus* issue is.

In the Appeals Chamber's decision in *Lubanga Dyilo*, arguably the most authoritative decision on this matter, the Appeals Chamber presented the following *male detentus* test:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped [original footnotes omitted, ChP].[1]

However, this formulation of the Appeals Chamber's test was followed by another, one which arguably differs from the above-mentioned words in a number of important aspects: "Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed."[2]

Besides the fact that the second formulation has a discretionary ("the proceedings can be stayed") and the first one an automatic sanction ("the process must be stopped") when it is determined that no fair trial can be held, the second formulation is arguably much more restrictive than the first one when it demands that the violations must be "such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights". Hence, whereas the first formulation states that certain violations *as such* can already ensure that no fair trial is possible, thus accepting a broad concept of fair trial,[3] the second formulation

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[1] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 37.

[2] *Ibid*., para. 39.

[3] See also *ibid*., para. 37: "Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right of a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety [original footnotes omitted, ChP]." See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 11: "The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of article 55 and 54 (1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings."

appears to be in favour of the old-fashioned concept of a fair trial, namely a fair trial in the courtroom, when it argues that the violations must be such that the person can no longer make his defence.

After this second formulation, a third one was presented. This formulation, which also stressed the concept of a fair trial, even for persons charged with very serious crimes, seemingly supports the first formulation, which could constitute evidence for the argument that the ICC's position on the *male captus* issue can be found in the first formulation and not in the second, which demands that the accused must prove that the *male captus* was so serious that as a result, he could no longer make his defence before the ICC.

> Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[4]

It was also this formulation to which the ICC Trial Chamber in *Katanga* referred, although it did not express its own views on the *male detentus* test.[5]

Additional evidence for the argument that one should focus on the first formulation can be found in the following words of the Appeals Chamber, when it censured the Pre-Trial Chamber for using the wrong test:

> As may be discerned from the principles identified in the decision of the Pre-Trial Chamber as relevant to stay of proceedings, a broader standard was adopted than the one warranted in law in that it failed to require the specific consideration of whether a fair trial remained possible in the particular circumstances of the case. The findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal.[6]

These words mean that it would not be necessary for the person to show that he can no longer make his defence because of the violations (a strict version of the concept of fair trial), but he *would* have to show that because of these violations, one can no

[4] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 39.

[5] See n. 601 and accompanying text of Chapter X.

[6] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 40.

longer speak of a fair trial (in the broad sense of the word). This can be seen as a repetition of the first and third formulation of the *male detentus* test mentioned above.

A final indication that one may rely on the first (and third) formulation is that it could be argued that the second formulation, even if it was presented in a case dealing with an alleged *male captus* situation, is not to be used as a *male detentus* test, a test which deals with problems related to the way a person was brought into the jurisdiction of the Court (and hence can neither be seen as a stricter and more demanding version of the first or the third formulation, which could very well be applied to *male captus* situations). It could be asserted that this formulation must be seen as an *additional* avenue leading to the ending of the case, namely when the *accused* (note also that in contrast to the first and third formulations, the second one only refers to an accused), during the *trial* proceedings themselves, is confronted by such serious violations that he can no longer make his defence. It appears that this position would also be shared by the Prosecution in the *Katanga* case, see the text following footnote 527 and accompanying text of Chapter X. Nevertheless, even though this would explain the difference between the strict second formulation and the broader first and third formulations, doubts remains. For example, the fact that the word "accused" is used in the second formulation does not necessarily mean that the test cannot be applied to *male captus* situations, as an accused can also make *male captus* claims. In that case, the problem remains whether a victim of a *male captus* situation may refer to the broader first (and third) formulation or whether he *also* needs to show that the violations were such that he can no longer make his defence.

Hence, even though it appears that the first formulation of the ICC Appeals Chamber should be used here, the second formulation still casts some doubt as to the identification of the definitive ICC *male detentus* test.

Moreover, another problem with respect to the ICC's *male captus* position can be identified. In the *Duch* case before the ECCC, it was held that the ICC Appeals Chamber in *Lubanga Dyilo* would also refuse jurisdiction, under the abuse of process doctrine, in the case of grave violations of the suspect's rights (thereby focusing on the more 'physical' words serious mistreatment/torture) *as such*, hence irrespective of the entity responsible:[7]

> The Co-Investigating Judges are (…) compelled to follow the solution adopted in *Nikolic* and *Lubanga* which requires, for the application of the abuse of [process] doctrine, the existence of grave violations of the rights of the Accused. Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the

[7] See also n. 1213 of Chapter VI where the co-investigating judges of the ECCC referred to the following statement of the Trial Chamber in *Nikolić*: "Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals (…) was of such an egregious nature."" (ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 18.)

> prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused.[8]

However, whether the ICC Appeals Chamber, besides its above-mentioned *male detentus* test – which requires the involvement of the ICC (or third parties working at the behest/request of the ICC), see the words "by his/her accusers"[9] – would also refuse jurisdiction in the case of grave violations/serious mistreatment/torture *as such*, irrespective of the entity responsible (such as private individuals), is not at all clear.

The co-investigating judges in *Duch* referred in this context to the following words of the Appeals Chamber: "[T]he findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way".[10] What is clear about these words is that the Appeals Chamber factually agrees with the Pre-Trial Chamber that there was no serious mistreatment/torture in this case. However, that does not mean that it would go beyond its own *male detentus* test (requiring the involvement of the ICC: "by his/her accusers") and would refuse jurisdiction in cases of serious mistreatment/torture, irrespective of the entity responsible, for example if the *male captus* was committed by private individuals.

This lack of clarity can be explained in two ways. First, one must not forget that the remarks made by the Pre-Trial Chamber on serious mistreatment/torture were made in the context of the abuse of process doctrine, a doctrine which the Appeals Chamber has explicitly *rejected*. Secondly, the position of the Pre-Trial Chamber *itself* on the abuse of process doctrine is not clear, since it writes that its application, to date, "has been confined to instances of torture or serious mistreatment *by national authorities of the custodial State* in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal

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[8] *Ibid*., para. 21. See also *ibid*., para. 19 where the judges explain that the ICC had "held that the violation of the rights of the defendant at the time of his prior arrest and detention could only be taken into account in two cases: if the court acted in concert with the external authorities, or if the defendant was the victim of torture or serious mistreatment." See (arguably equally incorrect) ECCC, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16 (or n. 1254 of Chapter VI). See also n. 1275 and accompanying text of Chapter VI.

[9] Note that the involvement of the ICC (or third parties working at the behest/request of the ICC) can arguably be seen as a requirement for all three formulations mentioned *supra*. Although it is best illustrated by the words "by his/her accusers" in the first formulation, one can find other references to this requirement in the section of the Appeals Chamber's decision in which the three formulations can be found. See n. 249 of Chapter X.

[10] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 43. See also ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 19, n. 19.

[emphasis added and original footnotes omitted, ChP]".[11] This is incorrect, but it is uncertain whether the Pre-Trial Chamber would nevertheless follow its words (requiring that the *male captus* be committed by national authorities) or whether it is of the opinion that these words are indeed erroneous, entailing that it would also refuse jurisdiction in the case of serious mistreatment/torture, *irrespective* of the entity responsible, hence also including, for example, the actions of private individuals.

In short, even though others have read the decision to mean that the ICC Appeals Chamber would refuse jurisdiction in the case of serious mistreatment/torture, irrespective of the entity responsible, the fact that the Appeals Chamber explicitly rejected the (abuse of process) doctrine in which context that *male detentus* avenue was created and the lack of clarity with respect to the Pre-Trial Chamber's view of the abuse of process doctrine means that it is possible that the serious mistreatment/torture example only applies to the Appeals Chamber's own *male detentus* test, which demands that there are violations by the ICC/violations in which the ICC is involved/violations by third parties working at the behest of the ICC ("by his/her accusers").

Another unclear issue is related to the fact that the Appeals Chamber seemingly agreed with the Pre-Trial Chamber's view that it would look into irregularities when these were committed in the context of concerted action between the ICC and third parties, even before the sending of the ICC request for arrest and surrender (hence before the constructive custody). This term, "concerted action", is very general and could encompass any involvement of the ICC in irregularities. It was also this term which arguably confirmed the assumption made in the context of the *Lubanga Dyilo* Pre-Trial Chamber's views on Article 59 of the ICC Statute that the judges of the Pre-Trial Chamber were probably of the opinion that they would have to examine irregularities in the context of a national arrest/detention prior to the official ICC arrest if that arrest/detention were somehow related to the ICC proceedings.

However, even though the Appeals Chamber thus accepted the concerted action term, a term which could encompass a national arrest/detention if that arrest/detention were somehow related to the ICC proceedings, the Appeals Chamber also presented an additional requirement, namely that only violations of the suspect's rights which are related to the "process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court (…) may provide ground for halting the process".[12] However, that is a stricter

[11] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10.

[12] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 44. See also *ibid*., para. 42: "It is worth reminding that the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority were separate and distinct from those which led to the issuance of

condition as one can imagine that there are situations in which the ICC was involved in a national arrest/detention, in which there was concerted action between the ICC and third parties, in which the national arrest/detention was somehow related to the ICC proceedings, even if the suspect was not in detention for the same crimes as those for which the ICC is now prosecuting him. For example, it is not impossible for the Prosecutor to informally request national authorities to keep a suspect, who is in detention for crimes other than those in which the ICC is interested, in custody so that the Prosecutor has more time to prepare a request for arrest and surrender. In such a case, it can be argued that the ICC is involved in the case, that there is concerted action between the ICC and third parties, that the national arrest/detention is somehow related to the ICC proceedings (which would entail the examination of irregularities stemming therefrom), whether that suspect was in detention at the national level for the same crimes as those for which the ICC is now prosecuting him or not.

A final unclear issue is that the ICC Appeals Chamber does not view a motion of a suspect who has allegedly been the victim of a *male captus* and who argues that the ICC should refuse jurisdiction because of that *male captus* as a challenge to its jurisdiction under Article 19 of the ICC Statute. It considers such a challenge to be a *sui generis*/atypical motion, seeking the stay of the proceedings.[13] This view, with which the Appeals Chamber corrected the Pre-Trial Chamber's decision in this case, was, however, seemingly rejected by Pre-Trial Chamber in *Katanga*, decided *after* the Appeals Chamber's decision in *Lubanga Dyilo*.[14] Although the Trial Chamber in *Katanga* referred to the Appeals Chamber's view in *Lubanga Dyilo*, it did not further comment on it.[15]

Now that these obscurities with respect to the ICC position on the *male captus* issue have been addressed, a few less ambiguous features which can be identified in

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the warrant for his arrest." The same argument was used in the context of Art. 60, para. 4 of the ICC Statute, where the ICC judges referred to this decision of 14 December 2006, *cf.* ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, para. 121 and ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 11.

[13] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 24.

[14] See ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, paras. 43-45.

[15] See n. 619 and accompanying text of Chapter X.

the ICC's handling of an alleged *male captus* case should be mentioned. It must be clarified that the following points may also reveal inconsistencies between, for example, the decisions of the Pre-Trial Chamber and the Appeals Chamber in *Lubanga Dyilo*. However, as the Appeals Chamber specifically reviewed the Pre-Trial Chamber's decision in that case, this study does not view a correction of the Appeals Chamber in that respect as a lack of clarity but as a more authoritative view of the ICC. The obscurities discussed above were different: they either included unclear issues with respect to the Appeals Chamber's decision itself or lack of clarity engendered by a Chamber taking another view *after* the Appeals Chamber had issued its decision.

First, the ICC does not accept the doctrine which is so often contrasted with the *male captus bene detentus* rule, the abuse of process doctrine, because it is not covered by Article 21 of the ICC Statute. However, what *is* covered by this provision, namely by its paragraph 3, is the human rights dimension of the abuse of process doctrine. It is that human rights dimension which the ICC uses to solve *male captus* claims. It is clear that the ICC theoretically attaches great importance to human rights – and the human rights to a fair trial[16] and to liberty and security (including the right to challenge the lawfulness of one's detention, a right which is not explicitly mentioned in the ICC's proper instruments) in particular.[17] In this

[16] See, for example, ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 37: "Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right of a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety [original footnotes omitted, ChP]." See also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Public Document), ICC-01/04-01/06, 12 September 2006, Separate opinion of Judge Georghios M. Pikis, para. 3: "Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions. The right to a fair trial belongs to this class of rights."

[17] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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"' (Public Document), [ICC-]01/04-01/06 (OA 7), 13 February 2007, Separate Opinion of Judge Georghios M. Pikis, para. 16 ("Article 21 (3) of the Statute ordains the application and interpretation of every provision of the Statute in a manner consistent with internationally recognized human rights. Internationally recognized human rights in this area, as may be distilled from the Universal Declaration of Human Rights and international and regional treaties and conventions on human rights, acknowledge a right to an arrested person to have access to a court of law vested with jurisdiction to adjudicate upon the lawfulness and justification of his/her detention. Such a right is afforded to the arrestee from the outset [original footnotes omitted, ChP]."), ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, 'Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007 (…)' (Public Document), ICC-01/04-01/06 OA8, 13 June 2007, para. 13 ("The human right [and then the ICC

context, it was also remarked that "the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case".[18] The

judges refer to Artt. 21, para. 3 of the ICC Statute, 9, para. 4 of the ICCPR, 5, para. 4 of the ECHR and 7, para. 6 of the ACHR, ChP] of a person to have recourse to judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute [original footnote omitted, ChP]."), ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 8 ("[A]ccording to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the Defence, including the right "not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute"".), ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 37 ("The Single Judge observes at the outset that the right to liberty is of fundamental importance for everyone and that for any deprivation of liberty to be acceptable, it must be on such grounds and in accordance with such procedure as are established by the applicable legal regime. Furthermore, it must not be arbitrary [original footnote omitted, ChP].") and ICC, Pre-Trial Chamber II, Situation in the Central African Republic, *In the Case of 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' (Public Document), ICC-01/05-01/08, 14 August 2009, para. 35, writing about the scope of Art. 21, para. 3 of the ICC Statute: "The right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention is enshrined in many international human rights instruments, such as article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples' Rights and article 7 of the American Convention on Human Rights [original footnotes omitted, ChP]." *Cf.* also ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 20: "If there were no provision in the Statute affording the arrested person the opportunity to contest the deprivation of his/her liberty, we would be confronted with a dire denial of his/her human rights. Every person is assured the right to contest the lawfulness of his/her detention. Lawfulness in this context signifies the soundness in law of the factual basis of the decision, as well as the correctness of the legal provisions by reference to which the case is decided. The right of a person to contest the lawfulness of his detention, ordered in his absence and without hearing him, is safeguarded by the provisions of article 60 (2) of the Statute, requiring the Pre-Trial Chamber to evaluate, in proceedings held in the presence and with the participation of the person affected, the lawfulness and sequentially the justification of the deprivation of liberty. The provisions of article 60 (2), like every other provision of the Statute, must (…) be construed and applied in accordance with internationally recognized human rights." See finally also *ibid*., para. 31: "[A]rticle 21 (3) assures to every individual the right to effectively contest the deprivation of liberty."

[18] ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 32. See also ICC, Appeals Chamber, Situation in the Central

Katanga case has shown that even provisions which do not seem relevant for the *male captus* topic (such as provisions on interim releases) can apparently be used in that respect if the suspect is of the opinion that his *male captus* has tainted the lawfulness of his detention in The Hague.[19]

The ICC furthermore appears to concentrate on the violations themselves and not so much on the question of whether the ICC (or third parties working at the behest of the ICC) – see again the words "by his/her accusers" – intentionally violated certain norms.[20] However, what *seems* to be required, see the *Bemba Gombo* case, is that violations must result into actual prejudice to the suspect.[21]

Another important aspect of the *male captus* issue is the role of the competent judicial authority of the custodial State in the whole procedure, a point which was already briefly mentioned *supra*. In contrast to the Pre-Trial Chamber, the Appeals Chamber in *Lubanga Dyilo* did not explain to what extent that authority, under Article 59 of the ICC Statute, can look into irregularities prior to the official arrest/detention. In addition, and this time just like the Pre-Trial Chamber, the Appeals Chamber did not clarify the role of the ICC judges, who marginally supervise the points of Article 59, paragraph 2 (b) and (c) of the ICC Statute,[22] in this context of the prior arrest/detention. Finally, again following the Pre-Trial Chamber, the Appeals Chamber does not elucidate to what extent provisions such as Article 21, paragraph 3 of the ICC Statute and Article 55, paragraph 1 (d) of the ICC Statute should be considered here. The focus appears to be on national law only.

Finally, the Appeals Chamber seems only interested in the ultimate remedy, the refusal of jurisdiction/a halt of the procedures.

African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 29.

[19] See ns. 650-651 and accompanying text of Chapter X.

[20] See also ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, 'Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008' (Public Document), ICC-01/04-01/06, 13 June 2008, para. 90.

[21] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 46.

[22] This marginal role was also confirmed in the *Bemba Gombo* case, see n. 337 and accompanying text of Chapter X.

2.2 The ICC's current position on the *male captus* issue assessed in the context of this book's external evaluative framework

Now, how can the above-mentioned position – taking into account that some of its aspects are not very clear – be viewed *vis-à-vis* the *male captus* position of other courts? How similar or different is the ICC's handling of the *male captus* issue in comparison with that of these other courts?

First of all, it appears that the ICC, like almost every modern court or tribunal, does not accept the old-fashioned version of *male captus bene detentus* that jurisdiction will be exercised, *regardless of the way* that person came into the power of the Court.

Human rights are considered to be of paramount importance and extend to the entire proceedings, including the pre-trial phase. This includes the (for this study) so important human right to liberty and security, including its sub-right to challenge the lawfulness of one's detention, even if that sub-right is not explicitly mentioned in the proper instruments of the ICC.[23] This resembles the position of other tribunals.[24] It will also be very interesting to see how the ICC will interpret its remark that "the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case"[25] when it is confronted by a *Todorović*-like *male captus* situation in which peacekeeping forces do not wish to share the exact information on the way a person was brought into their hands with third parties.

As a result, the pre-trial phase will be examined to see what kind of effect violations of these rights may have on the jurisdiction of the Court. The Trial Chamber in *Katanga* did not do so on procedural grounds – and can be criticised for that – but it is uncertain, and in fact improbable, for this decision to be viewed as support for the old-fashioned version of *male captus bene detentus* mentioned above. It is simply unimaginable that the Trial Chamber would also refuse to look at a *male captus* claim because the motion was submitted too late if there were reasonable grounds to believe that the *male captus* was extremely serious, for example, because it involved an abduction operation orchestrated by the ICC OTP itself.

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[23] See n. 17 and accompanying text.

[24] See n. 148 of Chapter VII.

[25] ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, para. 32. See also ICC, Appeals Chamber, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"' (Public document), ICC-01/05-01/08 OA, 16 December 2008, Dissenting opinion of Judge Georghios M. Pikis, para. 29, where Judge Pikis states that "everything that would enable the person to effectively challenge the lawfulness of his detention must be disclosed." As explained in Chapter X: although Judge Pikis makes this remark in the context of the substantive grounds and reasons of the detention, his words may nevertheless be interesting for a possible *Todorović*-like situation.

If one is of the opinion that the ICC Appeals Chamber's one and only *male detentus* test can be found in the words at footnote 1 and accompanying text (and this is most probably the case), then the ICC shares the view of, for example, the Trial Chamber in *Nikolić* and the *Ebrahim* case in that the Prosecution (including third parties working at its behest) must come to court with clean hands.[26] If that is not the case, for example, if the fundamental rights of the suspect have been violated in the process of bringing that suspect before the ICC, judges can conclude that one can no longer speak of a fair trial in the broad sense of the word, a conclusion which must lead to the ending of the case. Because the words "breaches of the fundamental rights of the suspect" are very generally formulated, these could include all kinds of *male captus* situations, such as abductions, luring situations and other techniques which could (possibly) be seen as violations of the person's right to liberty and security.[27]

Before continuing on this topic, it is interesting to note that the ICC seems to concentrate here on the violations themselves and not so much on the question of whether the ICC (or third parties working at the behest of the ICC) intentionally violated certain norms. This can be considered a rather liberal stance as other courts have often demanded, in their *male detentus* tests, an intention on the part of the prosecuting authorities to commit the *male captus*.[28] Nevertheless, as also explained in the previous chapter, even though the ICC does not explicitly demand an intent, it seems clear that it requires serious violations – *cf.* the words "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or

[26] See ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111: "Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal."

[27] See the authorities mentioned in n. 17 and Hall 2008 A, p. 1093, writing on "the fundamental rights recognized in article 55, para. 1" (of which the section under (d) contains the ICC's right to liberty and security). In fact, Hall notes that the absence of this section under (d) "has led to inconclusive and unsatisfactory jurisprudence concerning challenges to the lawfulness of arrests by UN peace-keeping forces in the former Yugoslavia in the *Dokmanovic*, *Todorovic*, *Nikolic* and *Krajisnik* [see for this latter case n. 659 of Chapter VI, ChP] cases (…) [with reference to Lamb 2001, ChP] and to the lawfulness of prolonged pre-trial detention by national authorities pursuant to ICTR arrest warrants (…) [with (probably) reference to the two decisions of *Barayagwiza* and the one of *Semanza* of 31 May 2000, ChP]." (*Ibid*., n. 26.) Hall refers to "see decisions cited in *supra* note 44 below", but it is in n. 53 of his contribution that one will find, among other things, the three above-mentioned ICTR decisions. See finally Knoops 2002, p. 260, writing that the ICC "cannot act arbitrarily, such as by assuming *eo ipso* the prevalence of its surrender provisions over treaty provisions which indirectly prohibit forcible abduction and luring such as Article 9 (1) of the ICCPR." At the same page, Knoops even writes that "[t]he protection against forcible abduction and luring may figure as *jus cogens* arising from these international fundamental human rights norms." (See also n. 433 of Chapter III.)

[28] See n. 20 of Chapter VII (for the inter-State context). In the *male captus* decisions of the tribunals, the intent is not explicitly mentioned, but some reasonings could definitely contain this element, see ns. 120-122 of Chapter VII. Note finally that the first *male detentus* possibility proposed by the OTP *itself* in the *Nikolić* case also contains this element, see ns. 114 and 116 and accompanying text of Chapter VII and n. 263 and accompanying text of the previous chapter.

the accused by his/her accusers" – and that it is very well possible that the ICC may only view those violations which are committed intentionally (note, by the way, that some *male captus* situations, such as an abduction, can arguably not be committed unintentionally)[29] as serious violations which can lead to the ending of the case.[30] In any case, one can assume that the ICC will more readily refuse jurisdiction if the violations are committed intentionally, even if its test does not require the violations to be intentional.

However, what *appears* to be required, see the *Bemba Gombo* case, is that violations must result into actual prejudice to the suspect.[31] Nevertheless, other tribunal cases can be seen as supporting the view that the level of prejudice is only relevant for determining how serious the violations were (and, consequently, what kind of remedy must be provided) and not for determining whether there were violations in the first place/whether the suspect would be entitled to a remedy. In that view, every violation causes some level of injustice/prejudice to the suspect, whether or not the suspect suffered actual/material prejudice.[32]

Returning to the ICC's words "breaches of the fundamental rights of the suspect" being so generally formulated that these could include all kinds of *male captus* situations, including abductions and luring situations: if the ICC were to refuse jurisdiction if the suspect's accusers were responsible for an abduction *as such*, the ICC would side with the decisions in *Levinge*,[33] *Bennett*,[34] *Ebrahim*[35] and *Beahan*.[36]

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[29] See n. 20 and accompanying text of Chapter VII.

[30] *Cf.* in that respect also the Prosecution in *Nikolić* which clarified, after having mentioned its first *male detentus* possibility, which contains the element of intent ("[u]nambiguous, *advertent* violations of international law which can be attributed to the Office of the Prosecutor [emphasis added, ChP]"): "(i.e. the Prosecution's *own* conduct would have to be in some way egregious [emphasis in original, ChP])". See ns. 114 and 116 and accompanying text of Chapter VII.

[31] See ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on application for interim release' (Confidential), ICC-01/05-01/08, 20 August 2008 (available as the annex to the decision ICC, Pre-Trial Chamber III, Situation in the Central African Republic, *In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision concerning the public version of the "Decision on application for interim release" of 20 August 2008' (Public Document), ICC-01/05-01/08, 26 August 2008), para. 46.

[32] See, for example, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, para. 125 (see also n. 997 and accompanying text of Chapter VI): "[A]ny violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy." See also n. 1164 and accompanying text of Chapter VI (with respect to the *Rwamakuba* case).

[33] See, for example, the following general reasoning in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. Such an abuse may arise by reason of delay on the part of prosecuting authorities. But delay is only one variety of unfair or wrongful conduct on the part of those authorities. Other such conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another." (*Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 FLR 142.)

[34] See, for example, the following general reasonings in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international

(Taking into account that *Levinge*, *Bennett* and *Beahan* explicitly, and *Ebrahim* implicitly, made these remarks in the context of the abuse of process doctrine, a doctrine rejected by the ICC Appeals Chamber, which, in turn, focuses on the human rights dimension.) These are reasonings which fall short of the test about which, according to the German Federal Constitutional Court in *Al-Moayad*, more recent State practice agrees that it must, *in any event*, lead to rejection of the *male captus bene detentus* rule, namely in the case of an abduction 1) accompanied by serious human rights violations/serious mistreatment or 2) followed by a protest and request for the return of the suspect from the injured State.[37] With respect to the context of the tribunals, if the ICC were to refuse jurisdiction because the suspect's accusers were responsible for an abduction *as such*, the ICC would probably also side with the tribunal cases. Although none of these cases involved abductions perpetrated by the tribunal itself, one could refer here to general statements which

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law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed. It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 163.) See also House of Lords, Lord Griffiths, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 151: "In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

[35] See Supreme Court (Appellate Division), *Opinion in State v. Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992), p. 896: "When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean."

[36] See, for example, the following general reasoning in that case (not focusing now on the specifics of the case, which did not involve a traditional kidnapping): "In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting state. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual." (Supreme Court, *Beahan* v. *State*, 4 September 1991, *International Law Reports*, Vol. 103 (1996), p. 214.)

[37] Although this point is not very clear, it is possible that the German Federal Constitutional Court in *Al-Moayad* would follow the 1986 case from Germany, meaning that it would not refuse jurisdiction if the abduction was not accompanied by serious human rights violations/serious mistreatment and followed by a protest and request for the return of the suspect from the injured State, see the text between ns. 587-588 and accompanying text of Chapter V. See also n. 47 of Chapter VII.

can be found in *Nikolić*[38] and *Barayagwiza*.[39] (Taking – again – into account the fact that the remark in the *Barayagwiza* case was made in the context of the abuse of process doctrine.) One could also refer to the *Dokmanović* case, about which Scharf noted that "the Trial Chamber focused on the distinction between "luring" (the means used to arrest Dokmanović) and "forcible abduction", reckoning that the former was acceptable while the latter might constitute grounds for dismissal in future cases [original footnote omitted, ChP]".[40]

Turning to this concept of luring, the ICC's phrase "breaches of the fundamental rights of the suspect" is so generally formulated that it could also cover a situation of luring, as long as the judges are of the opinion that that would constitute a violation of a suspect's fundamental rights (namely his right to liberty and security).[41]

In that case, the ICC would follow – taking into account for the third time the fact that the ICC uses the human rights dimension here and not the more general tool of the abuse of process doctrine – the more progressive inter-State cases of *Levinge*[42] and *Bennett*,[43] cases which (are considered to) contain very general *male*

[38] See n. 26. As explained earlier in this book, there is some lack of clarity here with respect to the vision of the ICTY Appeals Chamber in *Nikolić*, which stated that "certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined." Although these words are very broad, it could be argued, because it was assumed that Nikolić was the victim of an abduction, because the Appeals Chamber was apparently not very impressed by the value of State sovereignty and because the Appeals Chamber, in justifying its approach, refers to passages from cases which particularly focus on serious mistreatment when writing about their *male detentus* threshold, that the Appeals Chamber's *male detentus* test appears to be mainly interested in the seriousness of the mistreatment inflicted on the suspect. This could mean that the Appeals Chamber would not be concerned about an abduction, as long as that abduction was not accompanied by serious mistreatment. It is not very clear from the decision, however, whether this is the general *male detentus* test or whether it is only the test applicable to the case at hand, which involved the actions of private individuals.

[39] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74: "Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. (…) It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."

[40] Scharf 1998, p. 371.

[41] See Subsections 2.2.1 and 2.2.4 of Chapter III.

[42] Where the Court formulated the following, rather general, *male captus male detentus* test: "Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. Such an abuse may arise by reason of delay on the part of prosecuting authorities. But delay is only one variety of unfair or wrongful conduct on the part of those authorities. Other such conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another."

[43] Where (as summarised by the Court in *Westfallen*) it had to be sorted out "whether it appears that the police or the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign States or abused their powers in a way that should lead this court to stay the proceedings against the applicants [original footnote omitted, ChP]."

detentus reasonings and which could cover luring operations (even though these cases did not concern such operations), but would distance itself from the inter-State luring cases such as *Yunis*[44] and *Stocké*[45] where the judges would probably only refuse jurisdiction if the luring were accompanied by serious mistreatment.[46]

The tribunal context is less straightforward. Although it is clear that if the ICC were to refuse jurisdiction in a case of luring as such, it would take a more liberal stance than the ICTY judges in *Dokmanović* had done (who had condoned this legal technique,[47] except where accompanied by serious mistreatment, *cf*. the cases of *Yunis* and *Stocké*),[48] such a position could perhaps also fall under the more general words of the ICTR as mentioned in footnote 39. In addition, neither must it be forgotten that the general words of *Nikolić* as mentioned in footnote 26 could also cover a luring operation and that the decision in which these words can be found was issued *after* the *Dokmanović* case.

Returning to 'the' position of the ICC: if one is, however, of the opinion that the Appeals Chamber's requirement that one can no longer speak of a fair trial must be seen in the strict sense of the word, namely a fair trial in the courtroom (see the words at footnote 2 and accompanying text but recall the discussion related to the second formulation whether it must be seen as a (more strict) *male detentus* test at all), the ICC's position is arguably different from most of the more recent national and international courts. Most of these courts seemingly also refuse jurisdiction, not only if one can no longer speak of a fair trial (in the strict sense of the word), but

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[44] See US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920: "In cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction."

[45] In *Stocké*, the Court held that the prosecuting State's authorities were not involved in the luring operation (or, if they were, were not acting on the State's authority), but that, even if they were, the *male captus* was not serious enough to divest jurisdiction.

[46] See US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 920: "In this action, there is no dispute that United States law enforcement officers were fully involved in the planning and execution of defendant's arrest. However, defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction. The record in this proceeding has been reviewed with care and the Court fails to find the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*." In *Stocké*, the German Federal Constitutional Court stated that jurisdiction could be refused on the basis of national law if a certain *male captus* situation could be seen as an "extremely exceptional case". Although it is not clear what the exact meaning is of this concept (although the more serious *male captus* situation of an abduction (as such) will not fall under the term, see the abduction case which was decided by the Constitutional Court one year later), it may be that the Court was thinking of *Toscanino*-like circumstances, see Wilske 2000, p. 334, n. 413 (commenting on this concept): "[D]as Gericht hatte hier möglicherweise die schweren Folterungen im *Toscanino*-Fall im Auge." See also Grams 1994, pp. 70-71. It is also possible that the German Federal Constitutional Court in *Al-Moayad* would follow the *Stocké* case, namely that it would not refuse jurisdiction in the case of a normal luring operation, but only if that luring was accompanied by serious violations/mistreatment, see the text between ns. 587-588 and accompanying text of Chapter V.

[47] See n. 197 and accompanying text of Chapter VI.

[48] See n. 255 and accompanying text of Chapter VI.

also in the broad sense of the word, namely if it were to be unfair in general/if it were to undermine the integrity of the court to have a trial in the first place (hereby often using the abuse of process doctrine). To provide two examples, in *Bennett*, it was held that

> a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[49]

And in *Nikolić*, the Trial Chamber explained:

> There exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. Ensuring that the Accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal.[50]

An exception to this, however, can be found in the ICTY case of Karadžić, a case to which the Prosecutor in *Katanga* also referred.[51] In that case, the Trial Chamber

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[49] House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161. Note that these words were also referred to in the ICTY *Milošević* case (see n. 411 of Chapter VI) and the ICTR *Barayagwiza* case (see n. 842 of Chapter VI). This point is also very clearly described by Lord Steyn in *Latif* (see n. 346 and accompanying text of Chapter V): "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place." (House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996].)

[50] ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111. For a focus on the broad concept of a fair trial, see also SCSL, Appeals Chamber, *Prosecutor Against Morris Kallon* (Case No. SCSL-2004-15-AR72(E)) and *Brima Bazzy Kamara* (Case No. SCSL-2004-16-AR72(E)), 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', 13 March 2004, para. 79. (See n. 1289 and accompanying text of Chapter VI.)

[51] See n. 535 and accompanying text of Chapter X. For another more recent case, one could perhaps also refer here to the French case of Carlos the Jackal (Ramirez Sánchez), where the French Supreme Court agreed with the following statement of the Court of Appeal: "Moreover, case-law also provides that the circumstances in which someone, against whom proceedings are lawfully being taken and against whom a valid arrest warrant has been issued, has been apprehended and handed over to the French legal authorities are not in themselves sufficient to render the proceedings void, provided that they have not vitiated the search for and process of establishing the truth, nor made it impossible for the defence to exercise its rights before the investigating authorities and the trial courts." See ns. 535 and 537 and

judges held that proceeding with the case, even if the so-called Holbrooke Agreement existed, "would not affect any of the Accused's fair trial rights"[52] and that

> it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed. Where an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party.[53]

This quotation also provides a nice stepping-stone to the next point which should be discussed here.

It must be stressed that the above-mentioned position of the ICC, whether one follows that supporting the broad concept of a fair trial or that advocating the restricted concept, assumes the involvement of the ICC in the violations. This can not only be inferred from the words "by his/her accusers" (which arguably includes concerted action between the ICC and third parties[54] and action of third parties working at the behest of the ICC),[55] but also from other references in the section in which the different *male detentus* formulations are presented, to the prosecuting forum's own authorities.[56]

As explained *supra*, it is not clear whether the Appeals Chamber only follows this *male detentus* test, demanding involvement of the ICC, or whether it would also refuse jurisdiction in the case of, for example, serious mistreatment/torture, irrespective of the entity responsible, for instance, if that mistreatment/torture were committed by private individuals.

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accompanying text of Chapter V. See also, but arguably to a lesser extent, the *Barbie* case, see n. 496 and accompanying text of the same chapter.

[52] See n. 727 and accompanying text of Chapter VI.

[53] ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85. Note, however, that the Appeals Chamber judges did not agree with this restricted test, see ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 51: "The Appeals Chamber observes at the outset that none of the Appellant's allegations qualify as a situation making a fair trial impossible, pursuant to the first prong of the test set out in the *Barayagwiza* Decision. The Appellant's allegations point instead to the second prong of the test set out in the *Barayagwiza* Decision. In other words, the question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights [original footnotes omitted, ChP]."

[54] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, pp. 9-10 and its references to *Semanza* and *Rwamakuba*.

[55] See *ibid*., p. 9 and its references to *Stocké* en *Altmann* (*Barbie*).

[56] See n. 9.

If one assumes that the ICC only follows its *male detentus* test demanding ICC involvement, the ICC would follow most of the national cases (but see the 1982 Swiss (*male captus male deditus*) case of X) which require the involvement of one's own people.[57] However, in that case, it would also clearly deviate from the tribunal cases which recognise that, under the abuse of process doctrine, a doctrine which the ICC Appeals Chamber rejects, very serious *male captus* cases can lead to the ending of the case, irrespective of the entity responsible.[58]

If the ICC (Appeals Chamber) were nevertheless to refuse jurisdiction in very serious *male captus* cases, irrespective of the entity responsible – this is how the co-investigating judges in *Duch* read the Appeals Chamber's decision – and if it were to follow the Pre-Trial Chamber's statement in that case (assuming that the reference to "torture or serious mistreatment *by national authorities of the custodial State* [emphasis added, ChP]" is erroneous), the Appeals Chamber would also recognise that this *male detentus* avenue is not restricted to torture or serious mistreatment. After all, the Pre-Trial Chamber stated that

> *to date*, the application of this doctrine [of abuse of process, ChP], which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person

[57] See n. 51 and accompanying text of Chapter VII.

[58] See, for example, the Trial Chamber's decision in *Nikolić* (with reference to the 1999 *Barayagwiza* decision): "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated*. This, the Chamber observes, is in keeping with the approach of the Appeals Chamber in the *Barayagwiza* case, according to which in cases of egregious violations of the rights of the Accused, it is "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights" [emphasis added and original footnote omitted, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 114.) See further ICTY, Trial Chamber III, *Prosecutor v. Slobodan Milošević*, 'Decision on Preliminary Motions', Case No. IT-99-37-PT, 8 November 2001, para. 51, ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 30, SCSL, Trial Chamber, *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 'Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts', Case No. SCSL-04-16-PT, 31 March 2004, para. 26, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206, ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21, ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33, ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85 and ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 47.

> to the relevant international criminal tribunal [emphasis added and original footnotes omitted, ChP][.][59]

This means that the ICC may also refuse jurisdiction in serious *male captus* cases other than serious mistreatment/torture. This appears to be similar to the position of the tribunals. Although several cases, perhaps inspired by the Trial Chamber's words in *Dokmanović*,[60] a case issued prior to (the abuse of process test from) the *Barayagwiza* case,[61] have focused on the more 'physically' coloured words "serious mistreatment" and "torture" (which is not without problems as this can gradually turn the abuse of process test into a 'torture test'),[62] the more recent *Karadžić* case has clarified that serious mistreatment/torture are only to be seen as *examples* of such serious cases that a court may refuse jurisdiction.[63]

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[59] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 10.

[60] See ICTY, Trial Chamber II, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijvančanin and Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavko Dokmanović', Case No. IT-95-13a-PT, 22 October 1997, para. 75: "[T]here was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" in the arrest of Mr. Dokmanović. The accused was not *mistreated* in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience [emphasis added and original footnote omitted, ChP]." It is reminded that Toscanino was tortured for almost three weeks.

[61] See ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 77: "[T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay [or other circumstances, see the test from *Bennett* (see n. 49 and accompanying text) to which the judges in the *Barayagwiza* case referred, see *ibid*., para. 75, ChP] has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."

[62] See, for example, ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33: "Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment by the external authorities and has most usually been applied in relation to the process of arrest and transfer [original footnote omitted, ChP]." See also ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 21: "It is obvious that in a case of crimes against humanity, the proceedings should be stayed only where the rights of the accused have been seriously affected, at least, for example, to the degree in *Toscanino*." (It is again to be recalled that Toscanino was tortured for nearly three weeks.) The co-investigating judges of the ECCC also used more generally words when they stated that they "are (...) compelled to follow the solution adopted in *Nikolic* and *Lubanga* which requires, for the application of the abuse of [process] doctrine, the existence of grave violations of the rights of the Accused" (*ibid*.), but the words following that quotation again show that the co-investigating judges apparently require serious mistreatment/torture-like circumstances: "Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused." (*Ibid*.)

[63] See ICTY, Trial Chamber III, *Prosecutor v. Radovan Karadžić*, 'Decision on the Accused's Holbrooke Agreement Motion' (*Public*), Case No. IT-95-5/18-PT, 8 July 2009, para. 85: "As for the example of "serious mistreatment" of the accused by a third party, such as torture or cruel and/or

Another point which should be discussed here is the scope of review. As explained *supra*, there is lack of clarity as to whether the Appeals Chamber, prior to the constructive custody of the ICC, would examine irregularities during a national detention which result from concerted action between the ICC and third parties more generally or whether it would only consider irregularities if the suspect were in detention for the same crimes as he is now being prosecuted at the ICC.

However, first looking at the context of constructive custody itself, it appears that the ICC accepts that it will review and in fact take responsibility for *any* violations which occur in this context, in the context of an arrest/detention executed at the behest of the ICC.[64] Several tribunal cases can be interpreted as support for

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degrading treatment, there is no indication that the Accused suffered such serious mistreatment *or that there was any other* egregious *violation of his rights, including his right to political activity* [emphasis added and emphasis (of the word "egregious") in original, ChP]." See also ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement' (*Public*), Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 47: "[T]he Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one, by considering whether the Appellant suffered a serious mistreatment *or if there was any other egregious violation of his rights* [emphasis added, ChP]." See also *ibid*., para. 51: "[T]he question before the Appeals Chamber is whether, assuming that the Appellant's factual submission are accepted, proceeding with the trial of the Appellant would contravene to the Tribunal's sense of justice or would be detrimental to the Tribunal's integrity, due to pre-trial impropriety or misconduct amounting to serious and egregious violations of the Appellant's rights."

[64] For example, when the Pre-Trial Chamber in *Lubanga Dyilo* explained that "any violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 [when the request for arrest and surrender was transmitted to the DRC, ChP] will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities [original footnote omitted, ChP]" (ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of 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' (Public Document), ICC-01/04-01/06, 3 October 2006, p. 9), it referred to the ECtHR's cases of *Stocké* and *Barbie* (with respect to the concerted action point) and the ICTR cases of *Semanza* and *Rwamakuba*, these last two as authorities for the idea that the ICTR "has repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the Tribunal." (*Ibid*., pp. 9-10, n. 30.) Hence, it appears that the Pre-Trial Chamber followed the vision of the Deputy Prosecutor in *Lubanga Dyilo* (see n. 90 and accompanying text of Chapter X), namely that the ICC will take its responsibility, first, for violations which occur *after* the official request has been sent (violations taking place in the constructive custody of the ICC/violations in the arrest/detention at the behest/request of the ICC: *Semanza* and *Rwamakuba*) and secondly, for violations which occurred prior to these official requests if these violations stem from concerted action between the ICC and the external authorities (in the case of Lubanga Dyilo: the DRC authorities): *Stocké* and *Barbie*. See also the following view of the Prosecutor in *Katanga*: "The Second Period of detention of the Accused by the DRC authorities dates from the time the Court transmitted to the DRC authorities a formal request for the Accused's arrest and surrender. The detention based on the ICC's request for surrender lasted approximately one month. It is attributable to the Court." (ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings' (Public, Public Redacted Version of ICC-01/04-01/07-1335-Conf-Exp), ICC-01/04-01/07, 17 August 2009, para. 6.) The Appeals Chamber in *Lubanga Dyilo* did not really delve into this issue, as it was especially focusing on the main allegation of Lubanga Dyilo: "The gravamen of the appellant's complaint, where the essence of the

that view,[65] although there are also cases in which the judges refused to review the legality of the national arrest/detention proceedings.[66]

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appellant's case lies, is that the Pre-Trial Chamber ignored breaches of his human rights prior to his appearance before the Court and the directions for the enforcement of the warrant of arrest [original footnote omitted, ChP]." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 42.) One can assume that the Appeals Chamber does not reject the Pre-Trial Chamber's stance on taking responsibility for violations which occur after the requests have been sent. Additional evidence for this assertion may be found in the fact that the Appeals Chamber connects the ICC's exercise of jurisdiction in general, whenever the ICC is involved in a case (which arguably also includes making an arrest/detention via third parties), to Art. 21, para. 3 of the ICC Statute, see the concept of "by his/her accusers".

[65] See, for example, ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 85, ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza* v *the Prosecutor*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-AR72, 31 March 2000, para. 74, ICTR, Appeals Chamber, *Laurent Semanza vs. The Prosecutor*, 'Decision', Case No. ICTR-97-20-A, 31 May 2000, paras. 78, 87 and 125, ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, paras. 226-227, 232, 255 and 322, ICTR, Trial Chamber II, *The Prosecutor v. André Rwamakuba* et alia, 'Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused', Case No. ICTR-98-44-T, 12 December 2000, para. 23, ICTR, Trial Chamber III, *The Prosecutor v. André Rwamakuba*, 'Judgement', Case No. ICTR-98-44C-T, 20 September 2006, para. 218 and ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, 'Decision on Appeal against Decision on Appropriate Remedy', Case No. ICTR-98-44C-A, 13 September 2007, para. 24 (although it must also be admitted that the *Rwamakuba* case is arguably less far-going than the other above-mentioned cases). See finally also ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 16 (see n. 165 of Chapter VII). Note that the Pre-Trial Chamber in *Lubanga Dyilo* referred to both *Semanza* and *Rwamakuba* as support for the idea that the ICTR "has repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the Tribunal." (See n. 64.) However, even though *Semanza* can indeed be seen as support for the idea that it will look at any violation in the context of an arrest/detention at the behest of the ICTR, *Rwamakuba* is arguably less far-going as in that case, the judges also stated that they would only review some aspects of an arrest/detention at the behest of the ICTR. Note finally that the above-mentioned cases can in fact be interpreted as support for the reasoning that any violation occurring *in the context of the tribunal case more generally*, a context which is often triggered by the tribunal request, but not necessarily limited to the constructive custody, see the cases of *Barayagwiza* and *Duch*, must be remedied.

[66] See, for example, ICTY, Trial Chamber I, *Motion on Behalf of General Djorde Djukić*, 'Decision', Case No. IT-96-19-Misc. 1, 28 February 1996, D211, ICTR, Trial Chamber II, *The Prosecutor versus Edouard Karemera*, 'Decision on the Defence Motion for the Release of the Accused', Case No. ICTR-98-44-I, 10 December 1999, para. 4.3, ICTR, Trial Chamber II, *The Prosecutor v. Matthieu Ngirumpatse*, 'Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items', Case No. ICTR-97-44-I, 10 December 1999, para. 56, ICTR, Trial Chamber II, *The Prosecutor versus J[u]v[é]nal Kajelijeli*, 'Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing', Case No. ICTR-98-44-I, 8 May 2000, paras. 34-35, ICTR, Trial Chamber I, *The Prosecutor v. Siméon Nshamihigo*, 'Decision on the Defence Motion Seeking Release of the Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor', Case No. ICTR-2001-63-DP, 8 May 2002, n. 2, ICTR, Trial Chamber II, *The Prosecutor v. Joseph Nzirorera*, 'Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return

With respect to examining irregularities beyond the constructive custody: if the ICC were more generally to review irregularities which resulted from concerted action between the ICC and third parties, it would follow several (inter)national courts in which it is recognised that responsibility must be taken for action in which the prosecuting forum's own authorities participated, in which those authorities were involved. Two inter-State cases (discussed by the ECtHR and ECmHR) were already mentioned in the Pre-Trial Chamber's decision in *Lubanga Dyilo*: *Stocké*[67] and *Altmann* (*Barbie*).[68] As regards the tribunal context, one could refer to the views of the co-investigating judges, the judges of the Pre-Trial Chamber and the judges of the Trial Chamber in the *Duch* case before the ECCC (who, in turn, relied on the *Lubanga Dyilo* case).[69] However, there are also judges who look more broadly at the issue of responsibility and do not confine themselves to concerted action. One may here refer to the *Nikolić* case, where the judges of the Trial Chamber considered whether the *male captus* of the private individuals could be attributed to SFOR and whether, in turn, the conduct of SFOR could be attributed to the OTP. Here, the

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of Personal Items Seized', Case No. ICTR-98-44-T, 7 September 2000, para. 27 and ICTR, Trial Chamber II, *The Prosecutor v. Pauline Nyiramasuhuko*, 'Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized', Case No. ICTR-97-21-T, 12 October 2000, para. 28.

[67] In the *Stocké* case, the ECtHR held that "[n]either the facts found by the Commission nor the circumstances of the case as a whole established that the cooperation that there had unquestionably been between the German prosecuting authorities and Mr Köster had extended to "unlawful activities abroad such as [returning] the applicant against his will from France to the Federal Republic of Germany"." (ECtHR (Chamber), *Case of Stocké v. Germany*, Application No. 11755/85, 'Judgment', 19 March 1991, para. 51.) See also *ibid*., para. 54: "Like the Commission, the Court considers that it has not been established that the cooperation between the German authorities and Mr Köster extended to unlawful activities abroad." (See also n. 384 and accompanying text of Chapter III.)

[68] In the *Altmann* (*Barbie*) case, the ECmHR stated: "The question nevertheless arises of whether any concerted action between the two Governments, or the fact that he was expelled rather than extradited, would constitute grounds for considering the applicant's imprisonment after he was handed over to the French authorities as illegal." (ECmHR (Plenary), *Klaus Altmann (Barbie) v/France*, Application No. 10689/83, 'Decision of 4 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 37, p. 234.) (See also n. 334 and accompanying text of Chapter III.)

[69] See ECCC, Office of the Co-Investigating Judges, 'Order of Provisional Detention', Criminal Case File 002/14-08-2006, Investigation No. 001/18-07-2007, 31 July 2007, para. 20 where the co-investigating judges explained that "[t]he fact that the Extraordinary Chambers is part of the judicial system of the Kingdom of Cambodia does not lead to the conclusion that this special internationalised Tribunal acted in concert with the military court: the Extraordinary Chambers only became operational on June 22, 2007 (...). Prior to the initiation of this judicial investigation, the Co-Investigating Judges (who together form the sole authority empowered to decide upon matters of provisional detention) had no means of intervening. Once they were in a position to do so, they dealt with the issue." See also ECCC, Pre-Trial Chamber, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 15, where the judges stated that they could only take into account a violation of Art. 9 of the ICCPR "when the organ responsible for the violation was connected to an organ of the ECCC, or had been acting on behalf of any organ of the ECCC or in concert with organs of the ECCC." (See also *ibid*., para. 21.) See finally ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33: "The abuse of process doctrine constitutes an additional guarantee of the rights of the accused and may apply even in circumstances where there is no concerted action between the international criminal tribunal and the external authorities [original footnote omitted, ChP]."

judges, cautiously making use of the ILC's DARS, also examined whether SFOR acknowledged and adopted the conduct of the private individuals as its own (Article 11 of the DARS).[70]

Finally, if the ICC('s Appeals Chamber) were not to look at concerted action more generally but only at irregularities, prior to the constructive custody of the ICC, if the suspect were in detention for the same crimes as those for which he was now being prosecuted at the ICC, that stance would constitute a deviation from other (inter)national courts which simply appear to be interested in the seriousness of the pre-trial irregularities in general, whether or not a suspect was in detention for the same crimes as those for which the court is now prosecuting him.[71] It is very well possible that the prosecuting forum is somehow involved in a national detention, even if the suspect was detained for other crimes. In that case, judges may be of the opinion that there was concerted action, entailing legal responsibility. Note in that respect that Duch, in whose case the judges made the above-mentioned remarks on concerted action, was also initially detained for crimes other than those for which the ECCC was now prosecuting him. In addition, it must also be repeated[72] that the cases mentioned in footnote 65 can be interpreted as supporting the idea that the

[70] See n. 488 and accompanying text of Chapter VI.

[71] For example, Lord Devlin stated in the *Connelly* case that courts must accept their "inescapable duty to secure fair treatment *for those who come or are brought before them* [emphasis added, ChP]." (ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 29). One could also refer here to the vision of the ICC Pre-Trial Chamber in *Lubanga Dyilo*, which merely demands "instances of torture or serious mistreatment by national authorities of the custodial State *in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal* [emphasis added and original footnote omitted, ChP]". (This broad stance was arguably also accepted by the Defence and the Prosecution in that case, see n. 195 of Chapter X.) See also the abuse of process doctrine under *Duch*: "Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment by the external authorities and has *most usually been applied in relation to the process of arrest and transfer* [emphasis added and original footnote omitted, ChP]." (ECCC, Trial Chamber, 'Decision on Request for Release' (Public), Case File 001/18-07-2007/ECCC/TC, 15 June 2009, para. 33.) See further the following formulation from *Bennett* (a formulation which was also used in the ICTY *Milošević* case and the ICTR *Barayagwiza* case (see n. 49)): "[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused *in the circumstances of a particular case* [emphasis added ChP]." (House of Lords, Lord Lowry, *Bennett v Horseferry Road Magistrates' Court and another*, 24 June 1993, [1993] 3 *All England Law Reports* 161.) See finally the ICTY Trial Chamber's view in *Nikolić*, arguing that "[d]ue process of law also includes questions such as (…) *how an Accused has been brought into the jurisdiction of the Tribunal* [emphasis added, ChP]." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.) See also *ibid*., para. 114: "[I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, *before being handed over to the Tribunal*, this may constitute a legal impediment to the exercise of jurisdiction over such an accused [emphasis added, ChP]."

[72] See the final words of n. 65.

tribunal will take responsibility for any violations which occur in the context of its case more generally, whether that concept of "in the context of its case" is triggered by an arrest/detention at the behest of the tribunal (which was often the case) or not (see *Barayagwiza* and *Duch*). In that case, it would not matter if the suspect were in detention for crimes other than those for which the prosecuting forum was now trying him.

A few remaining elements can be briefly addressed here.

First, it is clear that the competent judicial authority in the custodial State, because of Article 59 of the ICC Statute, has become a much more serious and powerful link in the surrender proceedings than the national authorities in the context of the UN *ad hoc* Tribunals.

Secondly, the (possible)[73] idea of the ICC that a *male captus* motion cannot be seen as a challenge to the ICC's jurisdiction (*ratione personae*) does not seem to be shared by other (inter)national courts, even if, strictly speaking, the motion challenges the *exercise* of personal jurisdiction and not the personal jurisdiction itself.[74]

Thirdly, with respect to the ICC's sole focus on the ultimate remedy (*male detentus*): the cases examined at the inter-State level did not clearly identify the reasoning that the suspect, if his claim for a *male detentus* was rejected, might be entitled to other remedies from the prosecuting forum such as a reduction of the sentence or financial compensation, although it was, of course, possible for the *male captus* victim to sue the kidnappers in a civil case, see that of Alvarez-Machain, discussed after his criminal case. In addition, it is possible that the prosecuting forum was of the opinion that during the *male captus*, other legal rules were violated; violations for which it could grant remedies, such as the exclusion of

[73] But see ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, In the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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)' (Public document), ICC-01/04-01/07, 3 December 2009, paras. 43-45.

[74] See, for example, US Court of Appeals, Ninth Circuit, *United States v. Verdugo-Urquidez*, 22 July 1991, No. 88-5462 (939 F.2d 1341), p. 1343: [I]f the Mexican government formally objects to the treaty breach and a defendant timely raises that breach in a pending criminal proceeding the courts of the United States may not exercise personal jurisdiction over that defendant, provided the Mexican government is willing to accept repatriation." (See n. 104 of Chapter V.) See also ICTY, Appeals Chamber, *Prosecutor v. Dragan Nikolić*, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', Case No. IT-94-2-AR73, 5 June 2003, para. 19: "[T]he Appeals Chamber wishes to clarify that what is at issue here, is not jurisdiction *ratione materiae* but jurisdiction *ratione personae*. Jurisdiction *ratione materiae* depends on the nature of the crimes charges. The Accused is charged with war crimes and crimes against humanity. As such, there is no question that under the Statute, the International Tribunal does have jurisdiction *ratione materiae*. In this case, jurisdiction *ratione personae* depends instead on whether the Appeals Chamber determines that there are any circumstances relating to the Accused which would warrant setting aside jurisdiction and releasing the Accused. It is to this determination that the Chamber now turns." (See also n. 591 and accompanying text of Chapter VI.) *Cf.* finally ICTR, Appeals Chamber, *Juvénal Kajelijeli v. The Prosecutor*, 'Judgement', Case No. ICTR-98-44A-A, 23 May 2005, para. 206: "[T]he Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction." (See also n. 1047 and accompanying text of Chapter VI.)

unlawfully obtained evidence.[75] As regards the context of the tribunals, the focus on the ultimate remedy alone, refusal of jurisdiction, can certainly be found here.[76] Nevertheless, there are also cases where the judges, after having rejected the *male detentus* claim, have examined whether the suspect would be entitled to other, less far-reaching, remedies instead.[77]

Fourthly, the ICC has not yet explicitly mentioned the element 'seriousness of the crimes' when considering *male captus* claims, an element which can be found in the context of both inter-State and tribunal cases.[78] However, this is not that strange as the ICC has rejected the abuse of process doctrine, a doctrine in which this element played a major role. Nevertheless, if the ICC were to follow the Pre-Trial Chamber and consider refusing jurisdiction in the case of serious violations, irrespective of the entity responsible (assuming for now that that is the position of the Pre-Trial Chamber), one can expect that the ICC would not refuse jurisdiction too readily and in doing so, would refer to both the absence of responsibility on the part of the suspect's accusers and the importance of prosecution (read: the seriousness of the suspect's alleged crimes).

A last point which should be mentioned here before turning to the assessment of the ICC position in the context of this book's internal evaluative framework is that the ICC does not explicitly support the *male captus bene/male detentus* maxim. This is similar to other courts and tribunals. Although the Appeals Chamber does contrast the *male captus bene detentus* rule with the abuse of process doctrine and although that latter doctrine is rejected by the Appeals Chamber (which could be interpreted as meaning that the Appeals Chamber follows the *male captus bene detentus* rule), this is certainly not the case, as the Appeals Chamber clearly supports a large part, namely the human rights dimension, of the abuse of process doctrine. Looking now at the first (and third) formulation of the ICC's *male detentus* test: if the ICC is of the opinion that no fair trial (in the broad sense of the word) can be held because of a serious *male captus* committed by the suspect's accusers, a *male detentus* verdict must follow. That is even the case – to return to the above-mentioned point of the

[75] For example, it was explained in Chapter V, in the context of the *Yunis* luring case, that Yunis' *male detentus* claim was rejected, but that his confession made after his arrest had to be suppressed because "the FBI failed to comply fully with constitutional restraints and precedential Supreme Court decisions." (US District Court, District of Columbia, *United States v. Yunis*, 23 February 1988, Crim. No. 87-0377 (681 F.Supp. 909), p. 929.) See also ns. 179-180 and accompanying text of Chapter V.

[76] See, for example, the Trial and Appeals Chamber's decisions in *Nikolić* and the Trial Chamber's decision in *Tolimir*, see n. 155 of Chapter VII.

[77] See, for example, the second decision in *Barayagwiza*, *Semanza*, *Kajelijeli*, *Rwamakuba* (although that case concerned compensation after an acquittal) and *Duch*. (See also n. 152 of Chapter VII.)

[78] *Cf.* also the more general importance the European institutions attach to prosecution (of serious crimes), see, for example, ECmHR (Plenary), *Illich Sánchez Ramirez v/France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports,* No. 86-B, p. 162 (see n. 316 of Chapter III) and ECtHR (Grand Chamber), *Case of Öcalan v. Turkey,* Application No. 46221/99, 'Judgment', 12 May 2005, para. 88 (see n. 341 of Chapter III).

seriousness of the alleged crimes – if a suspect is charged with very serious crimes.[79]

2.3 The ICC's current position on the *male captus* issue assessed in the context of this book's internal evaluative framework

Before turning to the merits of this subsection, it is interesting to note that, in the course of writing this study, it became clear that the two evaluative frameworks can merge: even though the external evaluative framework was created 'merely' to see how similar or different the ICC's position on the *male captus* issue is to the point of view of other courts which have dealt with the problem before, the examination of Article 21 of the ICC Statute in Chapter IX elucidated that *within* this provision, within this book's internal evaluative framework, there might be room for the results of the external evaluative framework. This was made possible by a number of concepts – such as "principles and rules of international law" and "general principles of law of law derived by the Court from national laws of legal systems of the world" – whose exact scope is not clear, but of which it can be argued that they can house the practice of (inter)national courts. In other words, all the critically reviewed practices of national courts and international(ised) criminal tribunals may not only be used to see how similar or different the ICC position on the *male captus* issue is in comparison with other courts; they may also be used, in a less non-committal way: to assess the ICC position *vis-à-vis* its own law.

Having said that, how is the ICC's current position on the *male captus* issue to be assessed *vis-à-vis* its own law?

First of all, one can question whether a number of aspects of what *could* be the ICC position on the *male captus* issue (as explained: this is not entirely clear) are in conformity with Article 21, paragraph 3 of the ICC Statute. This provision, among other things, demands that the application and interpretation of the ICC law must be consistent with internationally recognised human rights.

For example, one can question whether the (*male detentus*?) requirement that certain violations must be such that a person can no longer make his defence before one can speak of the impossibility of a fair trial is in fact in accordance with Article 21, paragraph 3 of the ICC Statute. This latter provision definitely contains the human right to a fair trial and arguably a human right to a fair trial which is not limited to the fair trial in court but which extends to the entire proceedings. It may

[79] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 39: "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."

be worth in that respect recalling the words of Nowak, commenting on Article 14 of the ICCPR:

> The claim to a fair trial in court on a criminal "*charge*" ("accusation") does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned. This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as arrest [original footnotes omitted, ChP].[80]

However, if the ICC were to adhere to its words which focus on a broad concept of fair trial (and this is probably more likely),[81] there would be no violation of the ICC's law. In this context, it must also be remarked that the ICC's view that a broad concept of a fair trial must be cherished, even for persons charged with very serious crimes, is definitely in conformity with internationally recognised human rights, which are, of course, applicable to anyone, whether that anyone is charged with fraud or genocide.

Article 21, paragraph 3 of the ICC Statute also contains the human right to liberty and security, including a person's right to challenge the lawfulness of his detention, even if that right is not explicitly mentioned by the ICC Statute. This has also been confirmed by the ICC itself.[82] However, the refusal of the judges in the *Katanga* case to look into the motion of the suspect challenging the lawfulness of his pre-trial arrest and detention, for the only reason that the motion was filed too late, might perhaps be interpreted as a violation of this right and thus of the ICC law. In this context, it must be noted that this right is so crucial – it is to be recalled[83] that it has customary international law/general international law status and cannot even be derogated from in times of emergency and war – that the ICC, according to Article 21, paragraph 3 of the ICC Statute, must always accept and review such a challenge, especially if the motion argues that the unlawfulness of the arrest/detention is so serious that it should lead to the ending of the case. This is so, whether the challenge, strictly speaking, can be seen as a challenge to the ICC's jurisdiction or not.[84]

That the ICC concentrates on the violations themselves (and not so much on the question of whether they were violated intentionally) can be seen as being in accordance with the right to an effective remedy in the case of violations, a right of which Section 3 of Chapter IX concluded that it can also be qualified as an internationally recognised human right. Conversely, the additional requirement as

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[80] Nowak 1993, p. 244. Another interesting quotation can be found in ECtHR (Chamber), *Case of Miailhe v. France (No. 2)*, Application No. 18978/91, 'Judgment', 26 September 1996, where the ECtHR stated in para. 43 that it must "satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any". (Note, however, that this case dealt with the admissibility of evidence.) See also n. 194 and accompanying text of Chapter III.

[81] See n. 16.

[82] See n. 17.

[83] See Subsection 2.2.5 of Chapter III.

[84] See ns. 13-15 and accompanying text.

can be found in the *Bemba Gombo* case that the violation must have caused actual prejudice to the suspect before remedies can be granted would not be in accordance with this right.

The ICC has acknowledged that whenever it exercises jurisdiction, whenever the ICC is involved in a case, that involvement must be in accordance with internationally recognised human rights.[85] This appears to be a correct interpretation of Article 21, paragraph 3 of the ICC Statute. If the ICC('s) Appeals Chamber were to agree with the Pre-Trial Chamber that it would look, beyond the constructive custody of the suspect, to irregularities which result from concerted action between the ICC and third parties, that stance would be in accordance with the scope of Article 21, paragraph 3 of the ICC Statute. However, if the Appeals Chamber followed its additional requirement that it would only look at irregularities suffered by the suspect if that suspect was in detention for the same crimes as those for which he is now being prosecuted at the ICC, this can be seen as a violation of Article 21, paragraph 3 of the ICC Statute. After all, that provision applies to any situation in which the ICC is involved. It is very well possible that the Prosecution would informally request national authorities to keep a suspect in national detention (for other crimes) until it has finished preparing its case. If irregularities occur during that national detention, it can certainly be said that they take place in a context in which the ICC was involved, whether or not the suspect was in detention for the same crimes as those for which he is now being prosecuted at the ICC.

One of the most interesting points to be discussed here is, of course, that the ICC's *male detentus* test assumes the involvement of the ICC (or third parties working at its behest). It appears – although this is not entirely clear – that the ICC would not refuse jurisdiction, for example, if private individuals were responsible for a very serious *male captus*. This would be unproblematic if the ICC had accepted the abuse of process doctrine, which is very general and which merely demands that judges must refuse jurisdiction if they feel that the *male captus* is so serious that it would undermine the integrity of the court/their sense of justice/the idea of a fair trial in general to continue the case. However, the ICC rejected this doctrine. How is this rejection of the abuse of process doctrine to be assessed *vis-à-vis* the ICC's law?

The ICC judges are right when they argue that this doctrine cannot be found in the ICC's proper instruments pursuant to Article 21, paragraph 1 (a) of the ICC Statute. However, after having clarified that a certain provision of the ICC Statute – Article 4, paragraph 1 of the ICC Statute – "cannot be construed as providing power to stay proceedings for abuse of process",[86] they concluded that Article 21,

[85] See n. 16.

[86] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 35.

paragraph 1 (a) of the ICC Statute was exhaustive on the matter and hence that one did not have to look to Article 21, paragraph 1 (b) and (c) of the ICC Statute.

One can have serious doubts whether this conclusion is in accordance with the ICC's law, however. As explained in Chapter X, it seems far too easy to conclude that the ICC Statute is exhaustive on the matter simply because the abuse of process doctrine is not explicitly mentioned or implicitly covered (via – the seemingly irrelevant[87] – Article 4, paragraph 1 of the ICC Statute) by the ICC instruments.[88] The judges, who arguably focus too much on the common law label 'abuse of process' here, do not seriously review other relevant provisions which might shed light on the question of whether the ICC has power to issue a *male detentus* verdict in the case of a serious *male captus*, taking into account the rules of interpretation of the Vienna Convention on the Law of Treaties (as was done in Chapter IX of this book). The much more extensive review in Chapter IX has arguably shown that Article 21, paragraph 1 (a) of the ICC Statute, taking into account Article 21, paragraph 3 of the ICC Statute, is *not* exhaustive on the matter and thus that one can turn to Article 21, paragraph 1 (b) and (c) of the ICC Statute to fill this legal lacuna. And, as argued in that chapter, the power of a court to refuse jurisdiction in the case of a serious *male captus* might be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute (namely as practice of international courts) or as a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute. In addition, because the power of a court to refuse jurisdiction in very serious *male captus* cases, without looking at the exact label of this power (such as abuse of process/supervisory powers) now, is used by so many (inter)national courts, it could be seen as an inherent power of *any* court,[89] including of the ICC (even if it cannot be construed via Article 4, paragraph 1 of the ICC Statute).

Another important aspect which should be mentioned here concerns the ICC's views on Article 59 of the ICC Statute. Although the Appeals Chamber in *Lubanga Dyilo* did not go into this matter, the Pre-Trial Chamber in that case clarified the fact that the competent judicial authority in the custodial State was not obliged to look into the pre-trial phase if that phase concerned national proceedings only. However, that appears to mean that the competent judicial authority is, nevertheless, allowed to do so and in fact, must do so if those national proceedings were somehow related to the ICC, for example, because the ICC was involved in them. That would constitute a role in accordance with Article 21, paragraph 3 of the ICC Statute, which demands compliance with internationally recognised human rights as from the moment the ICC is involved in a case, which may, of course, be the case before the official requests were sent to the national authorities. However, regarding the

[87] This provision appears to focus on very different issues, see Rückert 2008, p. 124. (See n. 239 of Chapter X for more information.) However, the fact that the abuse of process power cannot be seen as an inherent power under this (seemingly irrelevant) provision does not mean that the ICC does not have such an inherent power nonetheless.

[88] *Cf*. also the comparable criticism of Manning 2007, p. 837 (see n. 240 of Chapter X for more information).

[89] See n. 878 and accompanying text of Chapter VI and n. 19 and accompanying text of Chapter VII.

role of the ICC judges, as the supervisors marginally reviewing this provision, both the Pre-Trial Chamber and the Appeals Chamber do not discuss to what extent these judges could look into the phase before the official ICC requests were sent. In addition, both Chambers, and the same goes for the judges in *Bemba Gombo*, do not clearly review the execution of the ICC's official arrest in terms of provisions such as Articles 21, paragraph 3 and 55, paragraph 1 (d) of the ICC Statute. (They merely stress the importance of such rights in their decisions more generally.) They seem interested in national law alone. This restrictive interpretation is arguably in violation of the ICC's own law, since both provisions certainly apply to the Article 59 of the ICC Statute proceedings. (Article 21, paragraph 3 of the ICC Statute applies already as from the moment the ICC becomes involved in the case and Article 55, paragraph 1 (d) of the ICC Statute applies already as from the moment the ICC initiates an investigation.)

The final point which should be addressed here, before turning to the recommendations, is that the Appeals Chamber is only interested in the ultimate remedy, the refusal of jurisdiction/a halt of the procedures, even though Lubanga Dyilo raised the point of other, less far-reaching, remedies in his appeal. However, Article 21, paragraph 3 of the ICC Statute contains the internationally recognised human right to an effective remedy in the case of a violation. This means that every violation as from the moment the ICC becomes involved in the case must be repaired, whether this leads to the ending of the case or not. Although it is possible that no violations occurred in this case as from the moment the ICC became involved in it (and hence that no violation of the ICC's law occurred here), the ICC must not forget in general that suspects would, however, be entitled, pursuant to Article 21, paragraph 3 of the ICC Statute, to appropriate remedies in the case of violations as from the moment the ICC becomes involved in the case.

3 RECOMMENDATIONS

This study has tried to examine case law, literature and regulatory documents as objectively (but certainly not uncritically!) as possible because it was – and still is – held that only such an approach can lead to useful internal and external evaluative frameworks. However, it has also become clear that the material could sometimes be interpreted in several ways and that in such instances, this study has not hesitated to take a position. One could hereby think of the role and scope of Article 21, paragraph 3 of the ICC Statute.[90]

[90] See also Sluiter 2009 p. 475: "Initial case law, especially Pre-Trial Chamber and Appeals Chamber decisions in the *Lubanga* case, reveals flawed interpretation and application of two vital provisions for the protection of individual rights in the pre-trial phase, Article 21 (3) and Article 59. Article 21 (3) has not yet occupied its prominent place as a systematic and obligatory human rights review standard for each and every activity of the Court and activity that is of benefit to the proceedings before the Court. Furthermore, many questions in respect of the precise scope and content of Article 21 (3) remain – yet – unaddressed. The same applies to Article 59, where the Appeals Chamber has in the *Lubanga* case wrongly reduced the ICC's supervisory role."

This has also to do with the third goal of this study – besides more generally combining two fascinating subjects which have not previously been put together in a book and more specifically answering the book's central question – namely to make a contribution to the *male captus* discussion itself, to the discussion as to how ICC judges and judges in general can best deal with alleged irregularities in the pre-trial phase of their case, to the discussion as to how proceedings can be achieved which are considered both effective and fair. The most important recommendations will now be presented.

First of all, this study is obviously of the opinion that the ICC should *at least* follow its own law. This means that it should reject all the above-mentioned reasonings which could be seen as being in violation of Article 21 of the ICC Statute, and in particular its paragraph 3.[91]

Hence, it ought to abandon the old-fashioned and restrictive concept of a fair trial that certain violations must be such that a person can no longer make his defence before one can speak of the impossibility of a fair trial (if that concept is indeed supported by the ICC in the *male captus* discussion). Some violations are simply so serious that it would undermine the judges' sense of justice/the integrity of the Court/the concept of a fair trial broadly perceived to proceed with the case, whether or not that suspect can still make his defence in court.[92]

Furthermore, it is to be welcomed that in theory, the ICC so often stresses the importance of human rights, even for suspects of the most serious crimes[93] and even regarding rights which are not explicitly mentioned in the ICC Statute (such as the right to challenge the lawfulness of one's detention), but that also means that suspects should be able to exercise those rights in practice. However, it can be argued that the *Katanga* case, for example, did not crystallise that thought. It is submitted that judges should always *want* to find out what happened to their suspects, what the foundation of their case is. Consequently, they should not focus too much on the exact title of the *male captus* motion or dismiss too readily the entire motion for being submitted too late. The judges can also censure the Defence for its tardiness and still *proprio motu* review the allegations. Although it is recognised that the ICC's system is in many respects unique and should be

[91] In doing so, it could rely on Art. 21, para. 2 of the ICC Statute, which clarifies that the ICC is not obliged to "apply principles and rules of law as interpreted in its previous decisions."

[92] In the words of Choo 1994 B, p. 629, commenting on the *Bennett* case: "Central to the decision of the House of Lords was the notion that a criminal court should not be concerned solely with accurate fact-finding or, to put it another way, the determination of the 'truth.' A court also has a duty to protect the moral integrity of the criminal process." (See also n. 258 of Chapter X.) *Cf.* also the formulation used by the ICC in the case of illegally obtained evidence, see Art. 69, para. 7 of the ICC Statute: "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." (See also n. 265 of Chapter IX and n. 246 and accompanying text of Chapter X.) See also Knoops 2002, pp. 252-253 and 263 and Currie 2007, p. 390.

[93] *Cf.* Swart 2001, p. 201.

preserved as much as possible,[94] the judges cannot hide behind this uniqueness to disregard what is arguably their main task, namely to try suspects of international crimes *in a fair way*.[95] With that comes a serious examination of the way in which those suspects were brought into the jurisdiction of the ICC, of the foundation of their case.

The feeling one gets from the *Katanga* case, that the judges do not seem to be *really* interested in a full examination of the legality of the pre-trial phase, can also be found in the *Lubanga Dyilo* and *Bemba Gombo* cases, where the judges did not seriously examine the relevance of provisions such as Articles 21, paragraph 3 and 55, paragraph 1 (d) of the ICC Statute in the context of Article 59 of the ICC Statute. In addition, one can also refer to the focus on the ultimate remedy in *Lubanga Dyilo* here.[96] The ICC must be very careful not to, in the words of Sluiter, "retreat within the safe limits of The Hague".[97] Put another way, "the ICC must strengthen its grip on national activities which are an indispensable and inextricable part of ICC proceedings, whether we like it or not".[98]

The ICC has stated that whenever it exercises jurisdiction, whenever it is involved in a case, that exercise of jurisdiction, that involvement (which includes the actions of third parties working at the behest of the ICC) must be in accordance with Article 21, paragraph 3 of the ICC Statute. This is a correct statement of the law, meaning, in turn, that the ICC Appeals Chamber's additional requirement that it will only look into irregularities if the suspect was in detention at the national level for the same crimes as those for which he is now being prosecuted at the ICC should be

[94] See, for example, ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor *v.* Thomas Lubanga Dyilo, 'Decision on the Final System of Disclosure and the Establishment of a Timetable' (Public Document), ICC-01/04-01/06, 15 May 2006, Annex I ('Discussion of the Decision on the Final System of Disclosure'), para. 4: "[T]he single judge considers that the need to safeguard the uniqueness of the criminal procedure of the International Criminal Court (…) is one of the primary considerations in contextual interpretation of the relevant provisions."

[95] See n. 53 of Chapter IX. See in that respect also the *Tadić* case where the 'uniqueness' was also used to grant the suspect less than a fair trial (in that case even a fair trial in the strict sense of the word: in the courtroom). See also ns. 132-133 and accompanying text of Chapter VI. *Cf.* also Stapleton 1999, p. 570: "The *Tadić* case, and, in particular, the judgment allowing testimony by anonymous witnesses, is relevant insofar as it relates to the issue of procedural rights of the accused and impacts interpretation of the Rome Statute. It is important to note that the reasoning behind the decision rested on the characterization of the ICTY as a "unique" body – a characterization that enabled the majority to interpret the right to a fair trial within the limited context of the ICTY rather than the broader context of human rights."

[96] *Cf.* Sluiter 2009, pp. 465 and 471-474. In this context, one can also share Sluiter's concern (see *ibid*., p. 475) that the fact that the ICC judges do not sufficiently supervise the proceedings of Art. 59 of the ICC Statute may also backfire, may lead to serious problems in the context of uncooperative States, in which case that provision can become a Trojan horse. It is submitted that the ICC should indeed consider to what extent this provision can still be used for these kinds of States. See also ns. 198-199 and accompanying text of Chapter VIII. In any case, it can be seen as yet another justification for the judges to closely supervise the pre-trial phase of their case. See n. 573 and accompanying text of Chapter X.

[97] *Ibid*., p. 465.

[98] *Ibid*., p. 475.

abandoned.[99] However, even though the first statement is in accordance with the ICC's law, it is submitted that the judges should go one step further: they should examine *any* violation which occurs in the context of their case more generally, whether or not there is involvement on the part of the ICC.[100] Normally, violations which occur during a period before the ICC was involved in a case will not readily be viewed as falling within the context of the ICC's case. Hence, this broader test should not be feared too much from a practical point of view.[101] Conversely, it should be cherished from a legal point of view, because it is the only test which can enable judges to remedy violations which they deem to fall within the context of their case, even if the ICC was not yet involved in it.

Another important aspect is that if the ICC is confronted by a new *male captus* case, it should more extensively examine whether or not the ICC has the power to refuse (the exercise of) jurisdiction in serious *male captus* cases, comparable with the abuse of process doctrine. The examination in Chapter IX of this study has arguably shown that Article 21, paragraph 1 (a) of the ICC Statute is not exhaustive on the matter and hence that the judges can turn to Article 21, paragraph 1 (b) and (c) of the ICC Statute. If they agree with this study that these provisions, via concepts such as "principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems of the world" can cover established practices of (inter)national courts, they can use these practices to solve their *male captus* problem.

As concerns "principles and rules of international law", one could think of the acceptance of a broad concept of abuse of process (in that jurisdiction may be refused in very serious *male captus* cases, irrespective of the entity responsible) and the fact that the seriousness of the crimes with which the suspect is charged can be taken into account when applying the abuse of process doctrine.

If these principles bring no relief, the ICC may turn to the "general principles of law derived by the Court from national laws of legal systems of the world". These stipulate that most courts confronted by a *male captus* will use their discretion, for instance (in the common law system) under the abuse of process doctrine, to balance all the different elements of the case to decide whether or not the *male captus* is so serious that jurisdiction must be refused. In addition, most courts seem to refuse jurisdiction only if their own authorities were involved in the *male captus*. Finally, it appears that quite a number of courts – although it is unclear whether "quite a number" would be enough to lead to a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute – would also take into account the seriousness of the crimes with which the victim of the *male captus* is charged in deciding whether or not jurisdiction must be refused.

Finally, because both the "principles and rules of international law" and the "general principles of law derived by the Court from national laws of legal systems

[99] Hence, the ICC should follow the general formulas as can be found in n. 295 of Chapter X (or in n. 71 of the present chapter).
[100] See n. 72 and accompanying text.
[101] See also n. 176 and accompanying text of Chapter VII.

of the world" seem to accept an abuse of process-like power, one could argue that *any* court, including the ICC, is invested with such an inherent power.[102]

Hence, even if the judges do not accept that the reasoning behind the abuse of process doctrine can be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute or otherwise as general principle of law derived by the Court from national laws of legal systems of the world pursuant to Article 21, paragraph 1 (c) of the ICC Statute, they should embrace the abuse of process-like power they arguably already possess ("inherent")[103] – in the same way as they seem to embrace the right of a suspect to challenge the lawfulness of his detention (probably including, in principle, the remedy to be released in the case of an unlawful arrest/detention), even if that right is not explicitly mentioned in the ICC instruments.[104] In exercising that power, they should balance all the different elements of the case in finding the most appropriate remedies for the violations, such as the seriousness of the alleged crimes/the importance of having the case continued and the seriousness of the *male captus*, which increases when the involvement of the ICC[105] is greater (thereby looking at all the different possibilities of attributing conduct to the ICC, including, for example, acknowledgment and adoption of the conduct as its own), when the violations have been committed intentionally,[106] when the *male captus* has caused great prejudice to the suspect, when the *male captus* was accompanied by serious mistreatment, *etc*.[107]

If the ICC is not convinced that such a broad balancing exercise can be found in the ICC's law or cannot be seen as an inherent power of the Court, it may, perhaps, be more susceptible to practical arguments. It is to be recalled that the *male detentus* test of the ICC 'only' takes into account the human rights dimension of the abuse of process doctrine. In addition, it assumes the involvement of the ICC (or third parties working at its behest).

However, what happens – to repeat the example given in Chapter X – if the President of State A (a State Party to the ICC), who has called upon the international

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[102] See Currie 2007, p. 375 (see n. 167 and accompanying text of Chapter X).

[103] Although they do not explain how the doctrine enters the ICC's framework, it should neither be forgotten that, in contrast to the Appeals Chamber in *Lubanga Dyilo*, the Defence (see ns. 54 and 102 and accompanying text of Chapter X), the Prosecution (see n. 203 and accompanying text of Chapter X), the DRC (see n. 206 of Chapter X) and the Pre-Trial Chamber (see n. 159 and accompanying text of Chapter X) in that case *did* all embrace the abuse of process doctrine. (*Cf.* Manning 2007, pp. 837-838.) This may mean that these actors are also of the opinion that the doctrine is an inherent power of the ICC.

[104] See n. 17 and accompanying text of this chapter and n. 140 and accompanying text of Chapter IX.

[105] One can argue that the ICC, like the other tribunals, should follow the broad abuse of process doctrine here, which accepts that jurisdiction can be refused, irrespective of the entity responsible. However, it is, of course, clear that involvement of the prosecuting forum's own authorities is an important element in deciding whether or not a *male detentus* outcome must follow, *cf.* the national level.

[106] As explained *supra*, although the ICC seemingly presents a test which does not contain the element of intent, one can assume that also the ICC will view violations which are committed intentionally as more serious and more susceptible to a *male detentus* verdict. In addition, it must again be noted that some *male captus* situations, such as an abduction, can arguably not be committed unintentionally.

[107] *Cf.* the factors as noted by Baaijens-van Geloven/Groenhuijsen and Knigge as presented in n. 617 of Chapter III.

community for months to arrest a certain suspect from State B (a non-State Party to the ICC) who keeps committing serious international crimes in State A, is frustrated by the inaction of the international community and orders the kidnapping of the suspect (at a moment when that suspect was back in State B) – a kidnapping which was accompanied by mistreatment and followed by a protest and request for the return of the suspect from State B. State A ignores these protests and subsequently places the suspect in detention. The ICC, which was already making initial inquiries to find out whether a proper investigation could be initiated, now requests the arrest and surrender of the suspect from State A, which subsequently surrenders the suspect to The Hague.

Under the abuse of process doctrine, which merely demands a *male captus* in the context of an ICC case that is so serious that judges, in good conscience, can no longer continue with the case, judges could refuse jurisdiction in this case if they are of the opinion that such a serious situation is present here. (It is to be noted that it is probable, or at least to be hoped, that the ICC judges would not follow the 'carte blanche' decision of the ICTY Appeals Chamber's decision in *Nikolić* and would attach more importance to the value of State sovereignty, a concept which the judges of the "lateral" ICC cannot ignore in the same way as the judges of the truly "vertical" ICTY did.)[108]

However, under the ICC test, this would not be possible. After all, the violations did not occur at a time when the ICC was involved in the case, cannot be seen as being executed "by his/her accusers" (the abduction was not executed by State A on behalf of the ICC). In addition, under the abuse of process doctrine, violations of State sovereignty (and of other values such as the rule of law more generally) can easily be taken into account, whereas one can question whether this would also be possible under the ICC test, which only focuses on human rights violations.[109]

In another scenario, one could replace the kidnappers of State A with private individuals. Here, an additional problem could arise. Even if the judges, using the above-mentioned test, were to accept that those private individuals can be seen as "his/her accusers", one or more of them may be of the opinion that private individuals simply *cannot* violate internationally recognised human rights (or the sovereignty of another State), see the discussions in Chapter III on this topic. In that case, jurisdiction cannot be refused, whereas this would, in principle, be unproblematic under the broad abuse of process doctrine, which merely demands that judges have to assess whether the *male captus* is so serious that jurisdiction must be refused. This may include the acts of private individuals, even if their acts cannot be seen as proper human rights violations/violations of a State's sovereignty.[110]

This study does not argue that in the above-mentioned scenarios, judges should refuse jurisdiction; this will depend on the exact circumstances, including, of course, the level of involvement on the part of the ICC. However, this study asserts that the

[108] See the remarks made by, for example, Currie, at ns. 171-173 and accompanying text of Chapter X.
[109] See the words of Currie at n. 252 and accompanying text of Chapter X.
[110] See also n. 254 of the previous chapter.

judges should in any case have the tools, the possibility, to refuse jurisdiction in such scenarios. That does not seem to be possible under the present *male detentus* test.

Another important suggestion is connected to the previously mentioned right of a suspect to challenge the lawfulness of his arrest/detention. If the judge is of the opinion that his arrest/detention is indeed unlawful (but not so serious that jurisdiction must be refused), he may wonder what the consequences of that determination must be, now that the ICC Statute does not mention the remedy of release in the case of an unlawful arrest/detention and now that this right, including its remedy of release, can be seen as having customary international law status and thus, in principle, is applicable to the ICC as well. Here, the judges may turn to the examination of this remedy in Chapter IX, where it was concluded that pursuant to Article 21, paragraph 3 of the ICC Statute, this remedy is in principle to be accorded. However, it was also explained in that context (and also elsewhere in this book) that the remedy is problematic because it is over-simplified, because it can be used as a *pro forma* remedy and finally because there is a risk that a suspect of international crimes will escape prosecution because he is released for a minor violation, for example, because he was not promptly informed of the reasons for his arrest. This study argues that not only in the context of the abuse of process doctrine (or a comparable doctrine which can be used in determining whether the *male captus* is so serious that jurisdiction must be refused) but also in the context of this problematic remedy of release, a judge should be able to consider all the relevant elements of the case, including the seriousness of the alleged crimes.[111] That means that a suspect of international crimes should not be released because of the determination 'unlawful arrest/detention' but should remain in custody and should be granted other appropriate remedies, such as a reduction of the sentence (on the basis of Rule 145 of the ICC RPE), compensation (which in any case appears to be mandatory pursuant to Article 85 of the ICC Statute) or perhaps merely a statement that a violation has occurred and that this is to be regretted, taking into account the seriousness of the *male captus*. However, if the unlawful arrest/detention is very serious, for example, because the ICC orchestrated an abduction, jurisdiction should be refused and the person permanently released. That is a far-reaching consequence, but some *male captus* situations are so serious that the ICC, in good conscience, can

[111] It must be stressed that this study is of the opinion that in these two specific situations, the abuse of process doctrine and the problematic remedy of release in the case of an unlawful arrest/detention, such a balancing exercise can be used. However, one should be very careful not to extend the balancing exercise much further. For example, the ICTY Appeals Chamber's statement in *Nikolić* that there is a legitimate expectation that persons accused of 'Universally Condemned Offences' are quickly brought to justice and that this expectation "needs to be weighed against the principle of State sovereignty and the fundamental rights of the accused" (see n. 600 and accompanying text of Chapter VI) can easily be abused, namely as an argument that fundamental human rights of suspects of international crimes can be given less weight than fundamental human rights of suspects of ordinary crimes. That, of course, cannot be the case. Fundamental human rights are applicable to anyone. However, in the event of a discretionary remedy (the abuse of process doctrine) or a fundamental human right which is arguably problematic in many aspects, such as the release in the case of an unlawful arrest/detention determination, such a balancing exercise should be possible.

no longer proceed with the case without undermining its integrity as an institution based on law. Furthermore, it must also be stressed that the fact that the ICC can no longer try this suspect does not mean that it should not do everything in its power to ensure that the suspect is tried before another court.[112] It still has a general duty to fight impunity, whether that fight takes place before the ICC or not.

However, the most important thing is that tribunal judges – and this goes especially for the ICC judges[113] – as the final adjudicators, as the ultimate guarantors of the suspect's rights,[114] remedy *every* violation occurring in the context of their case, whether or not that leads to a refusal of jurisdiction and irrespective of the entity responsible.[115] Such an approach, in which context the ICC judges may use the determinations of the competent judicial authority in the custodial State as a first indication of how certain irregularities at the national level must be assessed,[116] will deter parties in the arrest and surrender proceedings from committing irregularities, will best protect the integrity of the ICC and will provide fairness to the suspect, who will not become the victim of a legal vacuum due to the fact that his case has been fragmented over two or more jurisdictions.[117] In addition, because

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[112] As a suspect will normally raise his *male captus* claims before the actual trial starts, the 'new' court's jurisdiction cannot be challenged through a *ne bis in idem* claim, see n. 202 and accompanying text of Chapter X.

[113] This is not only because of a provision such as Art. 85 of the ICC Statute (see the words of Zappalà in n. 86 and accompanying text of Chapter IX), but also because "the ICC system is more inquisitorial in nature than the ad hoc tribunals, requiring Judges to explore issues *ultra petitum* and address violations *proprio motu*". (Sluiter 2009, pp. 471-472. See also ns. 674-675 and accompanying text of Chapter X.) Note that Sluiter also recognises the relevance of Art. 85 of the ICC Statute here, see *ibid*., p. 472.

[114] See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga' (Urgent, Public Document), ICC-01/04-01/07, 18 March 2008, p. 8. See also n. 201 and accompanying text of Chapter VIII and n. 672 and accompanying text of Chapter X.

[115] See also n. 100 and accompanying text. Note in that respect the remark of Sluiter that not reviewing may in fact be seen as acceptance of the *male captus*, thus triggering the concept of strict legal responsibility through attribution (acknowledgement and acceptance of the conduct as its own), see Sluiter 2009, p. 465: "[A] refusal to review the national activities that have benefited the Court can with good reason be seen as acceptance of them, and implicates the integrity of international proceedings."

[116] Those national authorities should then broadly review, on the basis of Art. 59 of the ICC Statute, how the suspect was brought before them, *cf*. the words of El Zeidy at n. 153 and accompanying text of Chapter VIII.

[117] See n. 849 and accompanying text of Chapter VI, n. 171 and accompanying text of Chapter VII, n. 286 of Chapter IX and n. 92 and accompanying text of the previous chapter. *Cf*. also ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal' (Public Document), ICC-01/04, 13 July 2006, para. 11: "The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of article 55 and 54 (1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings." Note that if the ICC properly remedies violations committed in the context of its case, criticism towards the ICC's non-supervision by external authorities may also be reduced, see ns. 235-236 and accompanying text of Chapter VIII. See also M. Federova, S. Verhoeven and J. Wouters, 'Safeguarding the Rights of

not many *male captus* cases are so serious that jurisdiction must be refused, neither will it easily jeopardise the victims' idea of fairness (in that a trial must be held). Moreover, it will lead to greater differentiation in a context which is sometimes overly focused on the ultimate remedy (refusal of jurisdiction).[118] This will also 'soften' the old-fashioned *male captus bene detentus* image that international courts have. Even though it appears that the ICC follows the *male captus male detentus* reasoning as concerns serious irregularities by the suspect's "accusers" (which includes the actions of third parties working at the ICC's behest),[119] something which is to be welcomed, the *male captus* cases by which the ICC will be confronted will very often not concern such irregularities. This means that *in practice*, the ICC will probably almost always continue a *male captus* case, which could, in a way, be seen as acceptance of the *male captus bene detentus* rule. (Note in that respect that it is to be applauded that the ICC explicitly supports neither the *male captus bene detentus* nor the *male captus male detentus* rule, as these maxims are the height of simplicity, leaving no room for differentiation at all.)[120]

Regarding the above-mentioned point that it appears that the ICC follows the *male captus male detentus* reasoning as concerns serious irregularities by the suspects "accusers"; this study is very much in favour of granting discretion, in the context of the abuse of process doctrine (or a comparable doctrine) and in the context of determining the consequences of an unlawful arrest/detention, to judges so that they balance all the relevant elements of the case. However, it is also aware of the fact that too much discretion can lead to problems, for example, in terms of equality, transparency and predictability.[121] Hence, there must be *some* beacons to guide this discretion.[122]

Suspects and Accused Persons in International Criminal Proceedings', Working Paper No. 27 – June 2009, Leuven Centre for Global Governance Studies (available at: http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp27.pdf), p. 20. *Cf.* finally Sloan (2003 B, pp. 546-547) for comparable values at the inter-State level: "By one approach, which may be summarized by the maxim *male captus, male detentus*, the national court would refuse jurisdiction where the circumstances of the accused's capture were sufficiently irregular. Among the reasons given by these national courts for refusing jurisdiction in such circumstances have been the following: (i) the rule of law; (ii) the integrity of the executive branch (it must not be rewarded for illegal behaviour); (iii) the integrity of the judicial branch; (iv) the fairness of the legal process; and (v) respect for state sovereignty [original footnotes omitted, ChP]." (See also n. 17 of Chapter VII.)

[118] See n. 76 and accompanying text.

[119] See n. 1 and accompanying text.

[120] See again (see also n. 76 and accompanying text of Chapter VII) Garner 2004, p. 1703, citing James Fitzjames Stephen in his 1883 *History of the Criminal Law of England* (Vol. 2, p. 94, n. 1): "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and disqualifications to them are more important than the so-called rules."

[121] See also the following concerns expressed by the Defence of Nikolić: "If the matter is simply left to a court's discretion then that may be an invitation to the continued exercise of that discretion in favour of continuing a trial; the individual's safeguard then rests solely upon the integrity of any given court and not upon the fundamental principle. If that were deemed sufficient by the international community there would be no need for the rights to be enshrined as they are in international law as well as certain regional and national jurisprudence". (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9

First of all, it is submitted that in some cases, it must be understood that there is normally only one possible outcome. For example, if it becomes clear that the OTP was involved in an abduction operation flouting all the relevant legal rules, the judges cannot but refuse jurisdiction if they want to be taken seriously as custodians of the law, whether or not that suspect was charged with serious crimes.[123] This

October 2002, para. 6. See for this motion: ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikoli*[*ć*], 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', Case No. IT-94-2-PT, 17 May 2001, para. 13.) See further the final words of Zappalà's book (see Zappalà 2003, p. 258): "One of the distinctive traits of international criminal trials, at least so far, has been the flexibility of procedural rules. This feature may be explained by the relatively short life of this branch of law, and by a tradition of procedural flexibility in international courts. Today, however, with the establishment of the ICC, international criminal justice aims to become an 'ordinary' system of judicial accountability for very serious criminal offences. Therefore, increasingly flexibility in international criminal trials should be reduced: procedural rules should be drafted in more rigorous terms, and strict compliance with these rules should be ensured. Borrowing Montesquieu's words one should recall that '*les formalités de la justice sont nécessaires à la liberté*'. Only by strengthening respect for procedural rules will international criminal justice be truly just and fair. It will also be perceived as such by defendants, victims, and public opinion, both in the States concerned and in the rest of the world [original footnote omitted, ChP]."

[122] *Cf.* Groenhuijsen and Knigge 2004, p. 154 (see n. 617 of Chapter III). See also Choo 1994 A, p. 177, writing on the inter-State context: "In my view, a mandatory stay should not be ordered in every case where a prosecution has been commenced in consequence of an illegally executed extradition. What is required, rather, is a discretionary approach based upon a weighing up of all relevant considerations. Inherent in judicial discretion is, of course, the danger of uncertainty, but this danger is likely to be minimized by the courts' gradual development of a coherent set of guidelines for particular cases. As noted earlier, considerations that a court might take into account in deciding whether to order a stay include whether physical violence was involved; whether the police were acting in circumstances of urgency, emergency, or necessity; and whether the offense charged was serious." See also *ibid*., p. 179: "[A] discretionary approach, based upon a weighing of all relevant considerations, is preferable because it safeguards important constitutional rights while at the same time preserving flexibility."

[123] See also (the on the inter-State context writing) Rayfuse 1993, p. 895, with the comment that Rayfuse, even though it seems that she is focusing on abductions here, sometimes uses rather broad formulations ("violation of his human rights") and the comment that human rights, which are, of course, applicable to anyone, *as such* do not contain a *male detentus* sanction, although serious violations of human rights can, of course, constitute a reason for the judge to refuse jurisdiction: "[W]here the defendant (…) is not admissible, because his presence has been secured by a violation of his human rights, the better position must be that the court lacks all jurisdiction to try him. To give the court a discretion in this matter is to invite the continued exercise of that discretion in favour of the abducting authority and to invite the court to participate in and compound the pre-existing violation of the defendant's human rights. While the UK practice may now be different as a result of the decision in *Bennett*, as we have seen in the US context, the courts have not exercised their discretion in favour of the abducted individual. This is perhaps not surprising given the sometimes manifestly hideous nature of the crimes with which these individuals stand charged or the policy decisions which have been made with respect to stemming certain criminal activities. However, no matter how hideous the crime, these individuals are entitled to equal protection of the law, and that includes their customary international legal rights. It is not up to the courts to decide to whom they will accord these rights. They belong to everyone. The existence and uncertainty of exercise of a discretion in this matter cannot help but bring the administration of justice into disrepute. The separation of executive and judicial powers, the requirements of an independent and impartial judiciary and of a fair trial, including the presumption of innocence, and the need to preserve the integrity of the judicial process and the rule of law all militate in

view, which falls short of the test about which, according to the German Federal Constitutional Court in *Al-Moayad*, more recent State practice agrees that it must, *in any event*, lead to rejection of the *male captus bene detentus* rule, probably also constitutes the view of the ICC[124] and that is to be welcomed.[125] In other less obvious cases, all the above-mentioned elements, see footnote 107 and accompanying text, should play a guiding role in determining whether or not jurisdiction should be refused. For instance, if the violation was committed intentionally or was accompanied by mistreatment, the chances increase that jurisdiction is refused. In that respect, (the information provided in Chapter III on) human rights law, even if it does not contain a right to a *male detentus* outcome as

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favour of the position that there can be no jurisdiction over an individual who has been brought before the court by virtue of a State-sponsored violation of his human rights." See also Knoops 2002, pp. 263-264, referring to Rayfuse. See further International Law Association 1994, p. 163: "The objection to such a discretionary power is that abduction does not constitute an absolute bar to the exercise of jurisdiction. The most desirable approach is for a municipal court in the abducting state to be absolutely barred from exercising jurisdiction on the ground that the presence of the abductee has been secured in violation of basic human rights. The abductee should then be released and allowed to return to the state from which he has been abducted [original footnote omitted, ChP]." *Cf.* finally also ns. 225, 411, 414 and accompanying text of Chapter III, n. 523 and accompanying text of Chapter V, ns. 258 and 656 and accompanying text of Chapter VI and ns. 46 and 64 of Chapter VII.

[124] See n. 119 and accompanying text. Note that under the very broad words of the ICC judges (see n. 41 and accompanying text), a luring operation executed by the suspect's accusers could possibly also lead to the ending of the case, although much will depend here on the circumstances of the case. One can assume that many will argue that the ICC can legally approve a luring operation executed by the ICC OTP, with reference to the ICTY *Dokmanović* case. *Cf.* also Scharf 2000, p. 971: "This precedent will be useful to a permanent international criminal court, which may directly or through third parties resort to luring as a method of obtaining custody over offenders present in non-cooperating states." (See also Knoops 2002, p. 260, referring to Scharf.) However, the ICC judges must not forget either that this decision was not without criticism, see Chapter VI of this book, and furthermore (see also the text following n. 48 and accompanying text), that *after* the *Dokmanović* case was decided, the ICTY also held, in the *Nikolić* case: "Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal." (ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para. 111.) Even if a luring operation cannot be compared with an abduction operation (as the one in *Ebrahim*), the words "come to court with clean hands" are, of course, very general and may also encompass a luring operation, although much will depend here on the exact circumstances of the case: was there a circumvention of regular procedures, was there a violation of State sovereignty, was there a violation of human rights, *etc*. *Cf.* also the following general words of the *Barayagwiza* case, issued *after* the *Dokmanović* case as well: "Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued *if improper or illegal procedures are employed in pursuing an otherwise lawful process* [emphasis added, ChP]." (ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 74.) See also ns. 50, 121 and 122 of Chapter VII and ns. 26 and 39 of the present chapter. *Cf.* finally the suggestion of this study, made in the *Nikolić* case, that the tribunal should refuse jurisdiction if employees of the tribunal itself intentionally committed serious (procedural) irregularities in the process of bringing a suspect to trial, *such as* an abduction. (See n. 633 and accompanying text of Chapter VI.)

[125] *Cf.* n. 46 and accompanying text of Chapter VII.

such, can certainly be used to channel the discretion in the balancing exercise,[126] although it must also be borne in mind, see this study's criticism regarding the over-simplified remedy of release in the case of an unlawful arrest/detention, that certain human rights provisions, because of their rigid language and their potential for abuse, may also be problematic.[127] Thus, even though certain indicators should be followed in the balancing exercise to ensure that the discretion is not unlimited, the ultimate responsibility should still lie with the judges because it was shown that too harsh rules may also lead to abuse[128] and because judges may always be confronted by situations not envisaged.[129]

Another observation which should be made is that this book was premised on two features of the ICC's system, namely that the ICC cannot try suspects *in absentia*[130] and does not have its own police force.[131] However, one can obviously imagine that if the ICC were to be endowed with such features, this could decrease the chances of the ICC judges being confronted by a *male captus* case in the first place. After all, in the first case, suspects could be tried even without them being present in the courtroom (meaning that there would not be a need to resort to a (*male*) *captus*). In the second case, the ICC would still have to capture the suspect, but would then be less dependant on third parties which may have an idea of what constitutes a regular arrest and detention which differs from that of the ICC.

Although this study has shown that the idea of an own international *arrest* team is not yet politically feasible,[132] the ICC might consider following the example of the ICTY in creating *tracking* teams,[133] a term which has already been presented in

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[126] See n. 121.

[127] *Cf.* also Warbrick 2000, p. 495, writing on the inter-State context: "On the face of it, there are advantages to considering the treatment of the fugitive/defendant in terms of his human rights – there is here the potential capacity to bring objective standards to bear and thus, to some degree, structure the exercise of the discretionary power of the court to order a stay. (…) There are, however, obstacles to realising this potential. First, what human rights are at stake and what the consequences are of their violation in situations of this kind is far from resolved – to the extent it is, a wide power is left to national States. Second, if violations of human rights are involved, the discretionary power which characterises the abuse of process determination may be overridden by a mandatory obligation to give relief to a defendant."

[128] See n. 573 and accompanying text of Chapter X where it was explained that one cannot state beforehand that *any* case of serious mistreatment/torture *must* lead to the ending of the case for that would constitute the trigger for States which do not want to surrender their own nationals to inflict severe (physical or mental) pain or suffering upon them before surrendering them to the ICC.

[129] See also House of Lords, Lord Steyn, *Regina v. Latif; Regina v. Shazad*, 18 January 1996, 1 *W.L.R.* 112-113 [1996]: "The speeches in *Ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful." (See n. 346 and accompanying text of Chapter V and n. 49 of the present chapter.)

[130] See n. 32 and accompanying text of Chapter I.

[131] See ns. 35-36 and accompanying text of Chapter I.

[132] See n. 107 of Chapter VI and n. 36 of Chapter VIII.

[133] See n. 106 and accompanying text of Chapter VI.

the context of the ICC.[134] By this term, this study does not mean a team of investigators on the ICC premises assembling and analysing information from third parties about the whereabouts of the suspect. Such teams, of course, already exist.[135]

[134] See the presentation of David Tolbert of the ICTY during the 'Second public hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts', The Hague, 26 September 2006 (available at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+2), commenting on the ICC OTP's *Report on Prosecutorial Strategy*, The Hague, 14 September 2006 (available at: http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf): "Our experience in obtaining arrests is directly relevant to the 3 rd Objective of the strategic plan. [Which is "to gain the forms of cooperation necessary to mobilize and facilitate successful arrest operations", see the *Report on Prosecutorial Strategy* at p. 8, ChP.] In this regard, paragraph 5(a) of this Objective, which provides that while the Court itself does not have the power to effect arrests, it "should deploy substantial efforts to gathering information on the whereabouts of suspects", is particularly important. Moreover, it is important to note that this point is then linked or should be linked to "galvanizing support and cooperation for arrests and surrender" and this in turn is linked to a 3 rd point of the objective, that is to promoting cooperation among "national and international parties"[.] If we analyze these elements in the context of our experiences at the ICTY, we see that there are two elements in which (…) the Tribunal or the Court must develop expertise. We are all familiar with one aspect, which might be referred to as political or diplomatic efforts to obtain arrests. These include using diplomatic means to persuade States to fulfil their legal obligations. In this regard, various diplomatic carrots and sticks, such as in the ICTY's case conditionality concerning potential membership in the European Union (EU), have been particularly effective. Others include conditionality of foreign aid and other diplomatic and political measures. A second element is the gathering [of] information itself regarding the fugitives and their networks. This element is often overlooked in discussions related to effecting arrests, but the diplomatic and political efforts are made much more effective by having in-house expertise. At the ICTY, we call this unit the "Tracking Team", and it deploys in the region as needed and analyses information to determine where fugitives might be as well as the networks supporting them. It is very important technical expertise to have in the Office and complements diplomatic efforts. I would liken it to two hands working together, one without the other is a bit like one hand clapping." (…) [T]he Office needs "eyes and ears" of its own. (…) The principal lesson from the ICTY is that there must be carrots and sticks plus internal information-gathering by the OTP itself for diplomatic and political strategies to work. It is indeed the Prosecutor's own intelligence gathering that shows whether a State is, in fact, cooperating, thus making these carrots and sticks much more effective." Note that in the new strategic plan, the item of the tracking team will not be found, see ICC OTP's 'Prosecutorial Strategy 2009 - 2012', The Hague, 1 February 2010 (available at: http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf).

[135] See CPI, La Chambre Préliminaire III, Situation en R[é]publique Centrafricaine, Affaire *Le Procureur c. Jean-Pierre Bemba Gombo*, 'Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique' (Sous scellés), ICC-01/05-01/08, 23 mai 2008, para. 3: "Le Procureur a souligné l'urgence qu'il y avait pour la Chambre de traiter sa requête au regard des risques de fuite de M. Jean-Pierre Bemba. Lors de l'audience, le Procureur a soutenu que M. Jean-Pierre Bemba aurait quitté la République portugaise pour se rendre au Royaume de Belgique, dans une demeure à l'extérieur de Bruxelles qu'il compte apparemment quitter le 25 [m]ai 2008, pour une destination non connue à ce jour." (See also n. 302 of Chapter X.) See further 'Bemba in Hands of International Justice', *Hirondelle News Agency*, 7 July 2008 (available at: http://www.hirondellenews.com/content/view/6242/517/): "For the first time, the prosecutor set up a "tracking team", a team charged with following the actions of the leader of the Congolese opposition." See finally C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 35.

It would be a team that can *also* operate in the State where the suspect is thought to be residing. However, because the work of such teams consists of traditional police work (such as shadowing and observing the suspect), they must have the consent of that State, which will obviously be very difficult, if not impossible, to obtain from uncooperative States.

Allowing – under certain circumstances – trials *in absentia* would solve that problem.[136] This topic was already "[o]ne of the most controversial legal issues during the negotiation process"[137] of the ICC Statute, but one can expect that the debate will return with a vengeance if arrest warrants are not executed for long periods of time. The introduction of an *in absentia* provision into the system of the STL[138] may also constitute a catalyst in that respect.

However, the ICC is simply not (yet)[139] equipped with these features. This means that it must make (perhaps more)[140] use of the tools it already has.

In this context, it is submitted that the ICC must stay far away from dubious methods of bringing a suspect into its jurisdiction. Of course, resorting to such methods may sometimes be tempting, for instance, when arrest warrants are not executed for a long time and public criticism grows against an "ineffective ICC". However, individual ICC staff members – who do not have a "permanent" life and would like to be successful during their stay at the ICC – must always be aware of the fact that the Court they (temporarily) work for *is* permanent. And resorting to dubious methods to reach a short-term goal, besides the fact that it undermines, at that particular moment, the values for which the ICC stands,[141] and that it may not

[136] Although it will also raise new problems, one of them being "that trials in absentia may deflate public pressure to ensure the arrest of the accused war criminal [original footnote, ChP]." (Sharp, Sr. 1997, p. 459, commenting on a recommendation from the Carnegie International Commission on the Balkans to have trials *in absentia* in the context of the ICTY.) *Cf.* also the remarks of Quintal (1998, p. 723) in n. 89 of Chapter VI (in the context of the Rule 61 proceedings).

[137] Friman 1999, p. 255.

[138] See n. 1169 and accompanying text of Chapter VI.

[139] The ICC Review Conference, which will take place in Kampala, Uganda, between 31 May and 11 June 2010, does not have these items on the agenda either.

[140] One could hereby think, for example, of the freezing of assets, see ICC, ASP, Sixth session, New York, 30 November to 14 December 2007, *Report of the Bureau on cooperation*, ICC-ASP/6/21, 19 October 2007, paras. 41, 68 and 71. See n. 300 of Chapter VIII with respect to the ICC's possibilities as concerns this tool.

[141] See ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, In the Case of 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 pursuant to article 19 (2) (a) of the Statute of 3 October 2006' (Public Document), ICC-01/04-01/06 (OA4), 14 December 2006, para. 37: "A fair trial is the only means to do justice." Or in the more dramatic words of Chief Prosecutor Jackson during his opening statement before the IMT of Nuremberg on 21 November 1945: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." See Nuremberg Trial Proceedings, Vol. 2, Second Day, Wednesday, 21 November 1945, Morning Session, available at: http://avalon.law.yale.edu/imt/11-21-45.asp. *Cf.* finally the following words of Judge Mansfield from the inter-State context: "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." (US Court of Appeals, Second

be that 'successful' at all given that such tactics can lead to the ending of the case (see *supra*),[142] can seriously damage the ICC's mission in the long run.

This is because the ICC needs the practical support of the international community, especially because it does not have its own enforcement arm.[143] Hence, to ensure that it has the *constant* goodwill of States, the ICC's enforcers, it must *always* prosecute a suspect in a fair, law-abiding way.[144] Consequently, ICC officials should not focus too strongly on the specific suspects with whom they are dealing at the time: they should focus on the fairness of the system in general, on the system which will apply to *any* suspect who will appear before the ICC. If sceptical, but mighty States (such as the US) see that the ICC is a fair court, they may more readily become a party to the ICC Statute, which will in turn lead to greater support and a more powerful enforcement arm of the ICC.[145]

Circuit, *United States v. Toscanino*, 15 May 1974, No. 746, Docket 73-2732 (500 F 2d 267), p. 274. See also n. 58 and accompanying text of Chapter V.)

[142] See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 59.

[143] This is, by the way, also valid for the inter-State context, where States are sometimes also dependent on other States, for example, in extradition cases, see Schultz 1984, pp. 110-111 (commenting on the 1982 decision of the Swiss Federal Court in the case of X): "Vorkommnisse, wie sie sich in dem hier geschilderten Auslieferungsfall abspielten, sind nicht nur eines Staates, der sich als Rechtsstaat ausgibt, unwürdig. Sie sind außerdem überaus bedauerlich, weil sie allen denen Auftrieb geben, die der zwischenstaatlichen Rechtshilfe jeder Art mit Mißtrauen begegnen und überall Mißbrauch wittern. Der kurzfristige Vorteil, einmal einen ins Ausland entwischten Angeschuldigten, der schwerer Delikte bezichtigt wird, auf eine solche Weise zur Strecke zu bringen, wiegt die dadurch hervorgerufene, lange nachwirkende Erschütterung des Vertrauens in dieses wichtige Mittel zwischenstaatlicher Zusammenarbeit nie auf [original footnote omitted, ChP]." (See n. 428 of Chapter V.)

[144] See also Stapleton 1999, p. 536: "For the ICC to succeed as a viable permanent tribunal, it must guarantee the accused a fair trial. (…) [U]nfair trials could seriously undermine the legitimacy of the ICC and limit its chances for success." This is so, even if this means that sometimes, the ICC may have to issue decisions which a particular State or organisation will *not* like, *cf.* the *Barayagwiza* and *Todorović* cases. However, with respect to the *Barayagwiza* case, it must be repeated that the criticism in that decision was perhaps not so much directed towards the fact that the ICTR *can* issue a *male captus male detentus* decision, but more that it did so in *this* specific case (where the violations were probably indeed not so serious as to refuse jurisdiction) and that it did not properly take care of the aftermath of its decision, forgetting that it has a more general responsibility to fight impunity, whether before the ICTR or not.

[145] See also *ibid*., p. 546: "A fair trial is important at both the national and international level, but at the international level the importance is heightened for both practical and ideological reasons. Practically, the ICC depends on the acceptance as well as financial and administrative support of the international community. Additionally, the ICC depends on this community to turn over individuals for prosecution." (The ideological reason will come back in a moment.) See also *ibid*., pp. 577-578, where Stapleton makes a comparison between the *ad hoc* ICTY and the *permanent* ICC: "Thus, the ICC cannot make rules to fit a specific situation and cannot justify deviating from international standards of fairness; doing so would endanger the Tribunal's existence as it would deter states from cooperating and would invalidate the justification for removing trials from national forums." See finally *ibid*., p. 609: "If the ICC is to be successful it needs respect, it needs state cooperation, and it needs to be created by a statute that is structurally sound and presided over by a judiciary willing to interpret this statute in such a way that the court is able to fulfill its mandate – to provide effective and fair trials in situations where national courts are unable."

Furthermore, and in the more distant future, showing respect for fairness and human rights may also lead to fewer human rights violations at the national level, which, in turn, will ensure that the ICC's goal to put an end to impunity and to contribute to the prevention of international crimes[146] can be realised and thus that the ICC can be seen as an effective court.[147]

As a result, this study argues that if judges are confronted by the dilemma presented in the very first chapter of this book, namely effectiveness (in the sense of achieving prosecutions and convictions) versus fairness, they should always opt for

[146] See the ICC's Preamble.

[147] See the following words of Edwards (2001, p. 334), reminding of the already-mentioned (see n. 173 of Chapter X) model function of the ICC towards the national level: "[A]ffording suspects and accused persons full rights is consistent with eradicating impunity and with full human rights for all, and will ultimately impact society positively. Respecting rights of suspects and the accused will educate officials and the public about the sanctity of human rights, and will encourage human rights compliance. Human rights education at the international level will likely trickle down to the grassroots. As governments and citizens become more aware of the need to enforce these rights, fewer human rights violations will occur." See also the remainder of the words of Stapleton from n. 145 (words which were also mentioned earlier in n. 173 of Chapter X): "Ideologically, one of the purposes of an international tribunal like the ICC is to extend "the rule of law and … [to bring] … national courts up to the standards of international law." International human rights and humanitarian conventions are committed to providing an expansive view of rights and to extending the rights of individuals so that national governments will follow their example. Allowing the ICC, an aggressive enforcer of human rights, to deviate from the minimum international standards for a fair trial would undermine the credibility of existing human rights norms. How can a national government be expected to follow "minimum" standards for a fair trial if an international tribunal does not [original footnote omitted, ChP]?" One could also refer here to international law violations more generally (such as violations of another State's sovereignty). If the ICC judges do not refuse jurisdiction in case ICC staff have orchestrated an abduction violating a State's sovereignty, this can have an effect on the inter-State context, where respect for another State's sovereignty is even more crucial. See also ns. 638-640 and accompanying text of Chapter VI (in the context of the *Nikolić* case and the ICTY). Hence, the effect of an ICC decision, even if decided in a *sui generis* context, may not be limited to that own context. That is arguably also the case for a decision like the one of 14 December 2006, even if it focused heavily on its own provisions. Manning (2007, p. 839), however, does not agree, writing that "the Jurisdictional Appeal Decision will have no impact on the international law debate between the old *male captus, bene detentus* principle and the increasingly-recognized abuse of process doctrine. Because the decision is grounded entirely in the ICC provisions, its relevance beyond the Court is curtailed." However, it is very well possible that a national court focusing on a restricted fair trial notion refers to the ICC's second (*male detentus*?) formulation – "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed" – to support its own stance on the *male captus* issue. Conversely, more progressive courts may refer to the Court's first formulation – "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial" – to back their own vision that jurisdiction must be refused in any *male captus* situation (including, for example, luring) which can be seen as a breach of a fundamental right (the right to liberty and security) if that breach would undermine the notion of a fair trial broadly perceived, whether or not one is dealing with a suspect of international crimes: "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice." (The third formulation.)

the latter concept. Only fairness can engender *real* effectiveness, meaning effectiveness in the long term. If the ICC conducts unfair trials to attain short-term effectiveness, it will never be *truly* effective.[148]

In this respect, the words of Judge Woodhouse from the New Zealand *Hartley* case that "this must never become an area where it will be sufficient to consider that the end has justified the means"[149] are also definitely applicable to the ICC context. The fight against impunity must be fought, but must be fought fairly. It must never become a true '*war* on impunity', a term which hints at diminished respect for the law,[150] *cf.* also the abductions of Alvarez-Machain (in the context of the 'war on drugs')[151] and Abu Omar (in the context of the 'war on terror').[152]

Another point which cannot be made strongly enough in this discussion is that introducing new tools *for the ICC* to increase its capabilities to start a trial, such as a provision on allowing trials *in absentia* (if that possibility were to be introduced in the future), runs the risk of masking the real problem, namely why the enforcement arm of the ICC, formed by *States* party to the ICC Statute (and States ordered by the UNSC to cooperate with the ICC), is not functioning as it should. It must be borne in mind that States have the prime obligation to arrest and surrender suspects and that this obligation must be taken very seriously.

This means, for example, that if suspects cannot be apprehended by the custodial State, other States (or States working together in an international peacekeeping force) should assist that State in its efforts. Not only logistically or financially,[153] but perhaps also with an actual arrest team. As long as the custodial State provides its consent to such an operation on its territory, the arrest itself is executed lawfully[154]

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[148] See again Stapleton 1999, p. 544: "[I]f the ICC is unable to guarantee minimum procedural rights necessary to fair trial or uphold international standards of behavior, it is ineffective; (…) [I]neffective prosecutions undermine the purpose and jurisdiction of the ICC, thus undermining the Court's chance for success."

[149] See n. 129 and accompanying text of Chapter V.

[150] See the famous phrase of Cicero from *Pro Milone*: *silent [enim] leges inter arma*, "[l]aws are silent amid arms" (Garner 2004, p. 1758). See also n. 18 of Chapter I.

[151] See Baker 2004, p. 1376.

[152] See ns. 18-22 and accompanying text of Chapter I.

[153] In this context, one could also think of financial rewards for citizens of that State for information or assistance which will lead, in the end, to the arrest of suspects of international crimes, comparable with the 'US Rewards for Justice Program', discussed in n. 115 of Chapter VI (which is, of course, not (yet) focusing on the ICC). See also Scharf 2000, p. 951 who notes, after having discussed the ICTY context (where this program offered a reward of $ 5 million for such information and assistance): "The ICC could similarly benefit from the institution of a rewards program. The amount required for reward offers is a relatively small price compared to the costs of running the ICC". A comparable tool could indeed be used by the ICC, with the comment that it should be clearly understood by all that awards will only be granted for information and assistance in the arrest efforts of the competent authorities and not for actually turning in the suspect in question, which may lead to chaotic wild-west scenarios executed by private bounty hunters. Scenarios which, in serious cases, may even lead to the dismissal of the case, *cf.* the case of Nikolić and ns. 115, 281 and 444 of Chapter VI.

[154] In the case of an international peacekeeping force, this would, among other things, require a clear legal mandate to arrest suspects for the ICC. See also n. 40 and accompanying text of Chapter VIII.

and non-arbitrarily and all the (human) rights of the suspect are respected during the operation, there would be nothing wrong with such support.[155]

As regards uncooperative States, third States should turn to the carrot-and-stick method which has worked so well for the ICTY, meaning that they must stress that cooperation with the ICC will lead to financial/political support and that non-cooperation will lead to embargoes/sanctions/political isolation.[156] Such a method would have more legitimacy if it were executed within the context of a collectivity of States, such as international organisations. In this context, reference should also be made to the role of the UNSC. While acknowledging that this organ's relationship with the ICC is a difficult one (it should be remembered that three of its

[155] *Cf.* the concept of "assisted arrest", introduced by Gillett (see also n. 56 of Chapter VIII), who suggests agreements "between peacekeeping forces and the territorial State in which they were located, granting the former the authority to carry out arrests in the host state's territory. Ideally, such agreements would contain "assisted arrest" clauses allowing peace-keepers to execute arrest warrants and to hand the accused directly to the ICC in cases of substantial or total collapse of the State's judicial or governmental infrastructure." (Gillett 2008, p. 21.) Gillett even proposes in this context the creation, by the ICC's ASP, of a multilateral reciprocal treaty, see *ibid*., p. 27: "The acceptance of *ad hoc* assisted arrest operations, while a positive development in the struggle to try those accused of the most serious crimes known to mankind, would not be an ideal long-term solution to the problem of impunity. To provide an ongoing, regulated basis for assisted arrests to be conducted in States unable to execute warrants through their own agents, the Assembly of State Parties of the ICC would need to conclude an assisted arrest agreement as a subsidiary instrument to the Rome Statute. Within this agreement, State Parties would provide a prior and continuing consent to assistance in executing ICC arrest warrants in situations where they are unable to do so through their own agents, and also would reciprocally agree to aide in the execution of ICC arrest warrants within other State Parties' territories, when those States are unable to do so [original footnote omitted, ChP]." *Cf.* also Rastan 2008, p. 454: "The 'unable' state could invite capable states or an international peacekeeping presence on its territory to assist it in fulfilling its duties towards the Court. Moreover, although the Court's non-compliance procedure is normally discussed with reference to a state's 'unwillingness' to co-operate, the Court could possibly treat 'inability' also as a failure to comply with a co-operation request. Rather than indicating the international wrongfulness of non-co-operation, the purpose of such a finding would be to invite the ASP or the Security Council, as appropriate, to consider the matter with a view to promoting co-operation. Such considerations may, for example, take the form of the Security Council modifying the mandate of relevant peacekeeping operations to enable regional co-operation and co-ordination with a territorial state that is willing but otherwise unable to perform arrest and surrender operations, or may lead to the exertion of political pressure through issue-linkage to secure co-operation from a hitherto 'unwilling' state [original footnote omitted, ChP]." See finally the more general words of Hall at ns. 54-55 and accompanying text of Chapter VIII.

[156] See also Ciampi 2006, p. 736: "[T]he main incentive available to the international community to compel a State to cooperate with the ICC (and, more generally, with international criminal tribunals) is through political pressure, eventually accompanied by the imposition (or threat) of sanctions or other enforcement measures against the non-cooperating State." Roper and Barria (2008, pp. 466-467) see especially a role for economic pressure here: "We regard political pressure by third parties, whether by states or non-state actors, as generally having a limited ability to enhance the bargaining effectiveness of the ICC with regard to the capture of indictees. Instead, military or peacekeeping pressure and especially economic pressure are more successful tools available to third parties to enhance the leverage of the ICC. (…) [W]e argue more generally that significant economic pressure may be one of the most effective tools available to third parties in order to support the activity of the ICC. (…) Especially for states which are highly export-dependent, third-party economic pressure may be one of the most important means by which the international community can assist the ICC in securing the apprehension of suspects." See also n. 116 of Chapter VI and 21 of Chapter VIII.

five permanent members (China, the US and Russia) are not States Parties to the ICC): *if* that organ decides that certain States must cooperate with the ICC and those States refuse to do so, the UNSC should act, much more than it has done until now. The Council should understand that its soft responses to non-cooperation from States such as Sudan – and one could also refer here to the Council's role in the context of the ICTY – seriously undermines not only the fight against impunity but also – and this may be considered to be more relevant for the Council itself – its own credibility. It is, of course, recognised that demanding cooperation is very difficult if the ultimate leader of that State is *himself* charged with international crimes (as in the case of Sudan) as one can assume that such a leader would never turn himself in to the ICC.[157] However, in such a case, the UNSC must, to borrow the words of the former Chief Prosecutor of the ICTY and ICTR Carla Del Ponte,

[157] In the case of Sudan, there is the additional problem that the leader is also involved in important peace talks, which brings in the ever-returning question of peace versus justice (see also the situation in Uganda). However, and without wanting or being able to properly address this interesting question here, a question about which entire books can be written, it can be briefly argued that the two terms are not mutually exclusive; there cannot be any peace without justice. One does always wonder why those arguing in favour of the peace process and against arrest warrants of the main negotiator(s) do not see this either. (In the context of Sudan, one could refer here to the role of the AU Member States which, with a reservation of Chad, decided not to cooperate with the ICC in the arrest and surrender of Al Bashir, see AU, Assembly of the African Union, Thirteenth Ordinary Session, 1 – 3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya (Assembly/AU/Dec. 243-267 (XIII) Rev. 1, Assembly/AU/Decl.1-6(XIII), Decisions and Declarations, adopted on 3 July 2009 (available at: http://www.africa-union.org/root/AU/Conferences/2009/july/summit/docs/DECISIONS/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.pdf), 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev. 1, para. 10.) It is difficult to understand why a peace process would be so much dependable on one or a few persons. If those arguing in favour of peace are *really* committed to the peace process – note, however, that some persons asserting that justice should yield to peace are arguably not genuinely interested in peace but only use this argument in an effort to save their own skin and that serious peace talks may only *begin* because of the political pressure caused by the arrest warrants – they will ensure that peace is achieved, whatever it takes and whoever is main responsible for the talks. In fact, a peace agreement may even be more easily reached *without* the persons most loudly claiming that arrest warrants are obstructing the peace talks. See in that respect Goldstone, who notes that "specific evidence suggests that without the work of the ICTY – without the indictment of Radovan Karadzic and Radko Mladic by the ICTY and their consequent isolation by the world community – there would have been no Dayton Peace Agreement." (Goldstone 1998, p. 205.) While taking into account that Karadžić and Mladić did not have the same position as Al Bashir has know, even a President's position is not sacred and can be effectively undermined. See again Goldstone: "I hear the refrain, "But if these are the leaders of an important constituency, how can we avoid negotiating with *them*?" As you cannot choose your family, so you cannot choose the leaders you have to negotiate with. But history teaches us that leaders come and leaders go. There is nothing immutable about the political process. Indeed, we all know that the political process is a fickle one. Political support is based on (assumed) legitimacy and capacity. Few people would, if they knew the truth of the ambitions and associated misconduct of leaders responsible for genocide and crimes against humanity, long continue to support such a leader. If this is crediting humanity too much, then I rely on the alternative that few would long continue to support a leader who, because of his or her international political condemnation and isolation, is unable to represent her or his constituency meaningfully in the international community or who, even worse, has brought on his or her constituency military, diplomatic, economic, and cultural sanctions and embargos." (*Ibid*., p. 206.)

"be creative in finding ways to bring to bear the sort of pressures that will produce results".[158] It should connect such political and economic sanctions to the non-cooperation that the leader's role domestically is challenged, in addition to publicly demand from States to arrest that person if he enters their territory. Hopefully, such measures would not only lead to the suspect being branded as an international pariah[159] (an effect which would also be reached after a trial *in absentia*) but one day also to that suspect's surrender. In the ultimate case, after years of non-compliance – and possibly after the extension of the mandate of the peacekeeping force already on the ground has brought no relief[160] – the Council may even allow, as an *ultimum remedium*, an arrest operation by foreign States on the territory of the uncooperative State,[161] even though one can assume that it is very unlikely that such a politically risky undertaking – not only for the States in the Council approving such an operation but also for the States executing the actual operation – will occur very soon.[162]

In short, the international community must (better) understand that it has major responsibilities in the functioning, effectiveness[163] and thus success and credibility of the ICC.[164] In the same vein, critics should recognise that if arrest warrants are not executed, they should criticise not the ICC for being ineffective, but the States

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[158] UNSC, Fifty-fourth year, 4063rd meeting, 10 November 1999, S/PV.4063, p. 4 (see also n. 120 of Chapter VI). *Cf.* also n. 121 of the same chapter and its reference to the *Taylor* and *Lockerbie* cases.

[159] See again (see n. 157) Goldstone, but now ten years later: "The arrest warrants for President Bashir reveal to the world what type of regime holds power in Khartoum. They should also push the Security Council to apply real pressure on the Sudanese government. The council and its member states should make President Bashir's government an international pariah, imposing sanctions against its leaders and, most important, Sudan's oil exports, which have so effectively insulated the regime." (R. Goldstone, 'Catching a War Criminal in the Act', *The New York Times*, 15 July 2008.) See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 25, n. 78.

[160] See n. 56 of Chapter VIII and the ideas of Ryngaert as concerns arrests of peacekeeping forces in unwilling States. See also the more general words of Hall at ns. 54-55 and accompanying text of the same chapter.

[161] See n. 157 of Chapter III.

[162] In fact, in the context of the *Harun* case (and before he filed his application requesting the issuance of a warrant for the arrest of Al Bashir on 14 July 2008), even ICC Chief Prosecutor Moreno Ocampo himself stated that he would not be in favour of such an operation, see P. Eichstaedt, 'ICC Chief Prosecutor Talks Tough', *Institute for war & peace reporting*, 28 April 2008 (available at: http://www.iwpr.net/?p=acr&s=f&o=344364&apc_state=henh): "Moreno-Ocampo said the international community also had to get tougher with Sudan, and push for the arrest of two individuals wanted by the court for crimes in connection with the ongoing war in the western region of Darfur. (…) "Arresting Haroun today will break the criminal system in Darfur," Moreno-Ocampo said. However, he would not support military intervention to accomplish this. "Arresting a minister is not a military operation," he said, "but a political one."" See also C. Ryngaert, 'The International Prosecutor: Arrest and Detention', Working Paper No. 24 – April 2009, Leuven Centre for Global Governance Studies (available at: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp133e.pdf), p. 22, n. 62.

[163] See also Kaul and Kreß 2000, p. 157: "[T]he issue of cooperation goes to the heart of an effective Court". See also Fernández de Gurmendi and Friman 2002, p. 328.

[164] See also Scharf 2000, p. 979: "In the end, the ICC will succeed only where international justice and power can be brought together."

which refuse to cooperate.[165] If the international community does not adequately react in the event of non-compliance, States undermine the system of the ICC – of which they constitute the enforcement pillar[166] – and hence the fight against impunity *themselves*.[167] The international community has, in the words of Rastan, a responsibility to enforce here:

> The successful enforcement of the Court's decisions will (…) require the assumption of responsibilities by the international community should an individual State fail in its duties to cooperate with the Court. Much like the preventative principle expressed under the responsibility to protect to which it was a precursor,[[168]] or the threat of united reprisal action under collective security arrangements, the system is predicated on the successful operation of a covenant of undertakings between the individual State and the collective. In the context of the ICC, such a covenant is formed between the States that are party to the Rome Statute, and may, in the case of a Security Council referral, be extended to embrace all UN Member States as a result of their duties under the Organisation's Charter. (…) [S]uch enforcement will only be effective, however, if the ICC can rely on unity of thought and action from the collective community of States. If the non-compliance procedure is to genuinely influence State behaviour, therefore, the support for justice must be matched by concerted, consistent and unified action by the international community under a notional responsibility to enforce [original footnotes omitted ChP].[169]

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[165] See also the following words of ICC Chief Prosecutor Moreno Ocampo: "[N]ations around the world need to understand that without their co-operation, investigations cannot take place, arrests cannot be made, and indicted criminals cannot be prosecuted. If none of this happens, it will not be a failure of the courts but instead of the global community that has not understood its own obligation to act inter-dependently." (*Colloquium of Prosecutors of International Criminal Tribunals on "the Challenges of International Criminal Justice", held in Arusha, Tanzania, from 25 November to 27 November 2004, Report of Proceedings* (available at: http://www.ictr.org/ENGLISH/colloquium04/reports/final_report.pdf), p. 6.) See also n. 219 of Chapter VI.

[166] See also the opening remarks of ICC President Kirsch at the fifth session of the ASP in The Hague on 23 November 2006 (available at: http://www.icc-cpi.int/NR/rdonlyres/A0F5C933-65AC-4621-B607-C3F25D0C22B7/278555/PK_20061123_en.pdf): "In establishing the ICC, States set up a system designed on two pillars. The Court itself is the judicial pillar. The enforcement pillar belongs to States." See also ICC, ASP, Sixth session, New York, 30 November to 14 December 2007, *Report of the Bureau on cooperation*, ICC-ASP/6/21, 19 October 2007, para. 39 and Rastan 2009, pp. 164-165.

[167] To again quote ICC Chief Prosecutor Moreno Ocampo: "[M]ore State cooperation in terms of securing arrests is needed. For the ultimate efficiency and credibility of the Court you created, arrests are required. The Court can contribute to galvanize international efforts, and support coalitions of those willing to proceed with such arrest. But ultimately, the decision to uphold the law will be the decision of States Parties. If States Parties do not actively support the Court, in this area as in others, then they are actively undermining it." (Moreno Ocampo 2009, p. 12.) See also Rastan 2008, p. 454, referring to Moreno Ocampo. (Note that the 2009 contribution of Moreno Ocampo stems from a speech from 25 June 2007.) See finally *ibid.*, p. 456: "Unless the duty of states to co-operate in the fight against impunity is matched by the necessary degree of unity and support from the international community, the enforcement pillar simply will not hold. For, ultimately, the treaty signed in Rome should be viewed not merely as the creation of a court, but rather as the establishment of a system, a global system comprising a network of powers and duties between the ICC and nation-states."

[168] See for this concept Subsection 2.1.1.3 of Chapter III.

[169] Rastan 2009, p. 182. See also Rastan 2008, pp. 453-454.

4 EPILOGUE

It must be stressed that this study has focused on the ICC's *current* position on the *male captus* issue. That necessarily means that Section 2 of this chapter 'merely' constitutes a picture of a situation at a given moment in time. In addition, it must be admitted that this picture is somewhat blurred since the definitive current position of the ICC is not very clear – something to which the ICC judges should pay more attention in the future. As a result, the answer to the central question of this study is, necessarily, restricted as well. However, it is to be hoped that the reader will recognise that the real value of his study will be found not so much in its, unavoidably, limited conclusions but rather in its elaborate and more timeless *corpus*, in its effort to position the complex *male captus* topic into the equally intricate ICC context.

The ICC is a permanent institution and will undoubtedly be confronted by new *male captus* situations in the future, situations which may include those which have not yet occurred in the ICC context, such as luring situations and abductions. Hopefully, this study (including its critical observations as can be found in Subsection 2.3 and Section 3 of this chapter), or the discussions which it may engender, will inspire and help the ICC when it is confronted by a new *male captus* situation to issue a decision which does (more) justice to its difficult but commendable objective, namely to fight impunity in a fair way. A fight, as was argued in Section 3 of this chapter, that can only be won if the international community takes its responsibility as the ICC's enforcer seriously.

SUMMARY

In Part 1 (and Chapter I) of this book, the reader was introduced to the subject of this study. The infamous abduction of Adolf Eichmann in Argentina on 11 May 1960 and the recent kidnapping of suspected terrorist Abu Omar in Italy on 17 June 2003 showed that the use of irregular means was and is still considered an option in apprehending suspects, especially when the interests are (considered to be) strong.

Since the International Criminal Court (ICC) also has to deal with suspects of serious crimes, it was considered what the position of this Court, arguably the most important institution in the field of international criminal justice, is towards suspects who claim that the way they were brought into the Court's jurisdiction was irregular (*male captus*). Basically, would it opt – taking into account, of course, that much would depend on the exact circumstances of the case – for effectiveness (in the sense of achieving prosecutions and convictions) and would it continue to exercise its jurisdiction notwithstanding the *male captus* (*male captus bene detentus*) or would it be of the opinion that values such as fairness, human rights and the integrity of its proceedings demand that in the case of a *male captus*, the exercise of jurisdiction must be refused (*male captus male detentus/ex iniuria ius non oritur*)?

This led to the following central question:

How does the ICC currently cope with the dilemmas that a male captus *case can give rise to and how should this approach be assessed?*

For this purpose, it was explained that two evaluative frameworks would be created; an external one (to find out how similar or different the ICC *male captus* position was to the position of other courts that have dealt with this problem before) and an internal one (to find out how the ICC position is to be assessed in relation to its own law pursuant to Article 21 of the ICC Statute).

Besides answering this specific central question, it was made clear that this study also had two other objectives, namely 1) to more generally combine two fascinating subjects which have not previously been put together in one book (the ICC and the *male captus bene detentus* maxim) and 2) to make a contribution to the *male captus* discussion itself, to the discussion as to how ICC judges and judges in general can best deal with alleged irregularities in the pre-trial phase of their case, to the

discussion on how proceedings can be achieved which are considered both effective and fair.

In Part 2 of this study, the *male captus bene detentus* maxim itself was scrutinised.

Chapter II looked at the origin of the maxim and noted, among other things, that even though *male captus bene detentus* has often been labelled in literature as a(n "ancient" or "old") *Roman* maxim, a modest inquiry into Roman criminal law showed that the maxim did not seem to have its roots in antiquity at all and that the four-word Latin phrase may in fact be relatively modern.

In any case, the oldest text in which this study could find the maxim is M.H. Cardozo's article 'When Extradition Fails, Is Abduction the Solution?', which was published in the *American Journal of International Law* of January 1961.

Chapter II also looked into the origin of the reasoning behind the maxim and concluded that the legal reasoning of the English *Ex Parte Susannah Scott* case, decided by Lord Chief Justice Tenterden of the Court of King's Bench on Tuesday, 19 May 1829, is probably the oldest *male captus bene detentus* reasoning with a truly multi-jurisdictional, international dimension – the 'target dimension' of this study.

In Chapter III, the different elements of the maxim were thoroughly analysed with help of four main questions: 1) "Which *male captus* situations exist?", 2) "What is violated by these *male captus* situations?", 3) "Who violates?" and 4) "What are the consequences of such violations?"

In the discussion of the first main question, it was first of all explained that even though *male captus* situations can encompass every pre-trial irregularity which can be seen to have occurred within the context of a certain case (including, for example, an irregular pre-trial detention), Chapter III would focus on three basic *male captus* situations which looked at the irregularity of the apprehension: disguised extradition, luring and kidnapping/abduction. As these situations originated from the horizontal, inter-State context, it was made clear that that context would be the principal background against which Chapter III would be discussed.

After a discussion of these three basic *male captus* situations, it was explained which values those situations could violate (State sovereignty, human rights – the two most important being the right to liberty and security/the right not to be arrested or detained arbitrarily, rights which arguably have customary international law/general international law status – and the more general rule of law concept) and which kinds of exceptions could apply so that a violation does not occur: consent, self-defence and humanitarian grounds (as concerns a violation of State sovereignty) and war or other public emergency (as regards a violation of human rights).

As regards the human rights context, two important provisions were discussed, namely Article 9, paragraph 1 of the ICCPR and Article 5, paragraph 1 of the ECHR. Alongside a more theoretical examination of both provisions, it was examined how the human rights bodies supervising the ICCPR (namely the HRC)

and the ECHR (namely the (now defunct) ECmHR and the ECtHR) had interpreted these provisions in the context of alleged *male captus* cases.

An interesting observation stemming from this context was that there is a difference discernible between, on the one hand, the ECtHR and ECmHR, which still find the attitude of the 'injured' State important in determining whether a kidnapping/abduction violates human rights, and, on the other, the HRC, which only appears to focus on the interests of the individual and thus may conclude that a human rights violation has occurred, even when the 'injured' State has colluded in the operation and thus even when there is no problem from a classical (inter-State) international law point of view.

More generally, it appeared that whereas the HRC only looks at the interests of the individual, the European institutions also take the other side of the coin into account, namely the importance of cooperation between States in prosecuting alleged criminals – a reasoning which was very well articulated in the famous *Öcalan* case. A reasoning which can also be abused in order to condone rather questionable pre-trial proceedings. In that respect, it is not strange that literature has criticised several cases decided by the European institutions, including the *Öcalan* case, for (implicitly) supporting the *male captus bene detentus* maxim.

The discussion of the third main question of Chapter III – "Who violates?" – made clear that not only States/State officials, but also private individuals may be involved in the different *male captus* situations. It addressed the controversial issue of whether private individuals *as such* can violate values like State sovereignty and human rights and concluded that there is no clear-cut answer to this question. As a result, it was suggested, using the example of a kidnapping of a person by private individuals in the context of the tribunals, that one could argue more generally that even if one is of the opinion that private individuals, in principle, cannot have violated that person's right to liberty and security or the injured State's sovereignty, it seems hard to view that abduction as a purely private violation of domestic law either. Because the abduction is the reason why the suspect is now standing before his judges, it has gained a certain public dimension. Thus, and without maintaining that the tribunal in such a case has violated the person's right to liberty and security or the injured State's sovereignty, one could argue that a (wrong akin to a) violation of that person's right to liberty and security or the injured State's sovereignty *has* nonetheless occurred in the context of the tribunal case and that the tribunal ought to repair this violation. Obviously, the fact that such a violation/wrong has been perpetrated by private individuals may/should then also be taken into account when determining its consequences.

After this discussion, the less controversial point of how conduct of private individuals can be attributed to a State was explored with help of the ILC's Draft articles on responsibility of States for internationally wrongful acts (such as Article 11 on conduct acknowledged and adopted by a State as its own), the *Eichmann* case and the concept of due diligence.

The fourth and final main question of this chapter dealt with the consequences of the different violations. In this context, topics such as reparation (such as a return of

the suspect in the case of a violation of State sovereignty), remedies (such as a release of the suspect in the case of a violation of the right to liberty and security) and abuse of process (such as a stay of the proceedings in the case of a violation of the rule of law) were addressed. In addition, it was examined how those different consequences were to be viewed when compared with the *male detentus* outcome, that is, the refusal to exercise jurisdiction.

An important point made in the final pages of this chapter was that the remedy of release in the case of an unlawful (arrest and) detention (see Article 9, paragraph 4 of the ICCPR and Article 5, paragraph 4 of the ECHR) is arguably problematic; if a person has been the victim of an unlawful arrest/detention (but not one which is so serious that it leads to the ending of the case), he must, strictly speaking, be released. However, a release does not preclude a new arrest on the spot and a new exercise of jurisdiction by the court. This is because the above-mentioned provisions simply speak of a release (as such) and not of, for example, a release/dismissal of the case with prejudice to the Prosecutor, meaning that the Prosecutor is barred from starting a new trial against the suspect after the latter's release. Hence, a new arrest is not precluded, especially if the suspect is charged with serious crimes and prosecution is considered to be of utmost importance. In such a case, the prosecuting authorities could assert that this 'remedy' (the 'release') has repaired the initial *iniuria* of the irregularity and that the trial can continue as normal. However, in that case, the suspect would only be granted a *pro forma* remedy which does not comport with the idea that a remedy must be real and effective, see Article 2, paragraph 3 (a) of the ICCPR and Article 13 of the ECHR. In addition, the *pro forma* release does not take account of the exact seriousness of the irregularity. In other words: it is not only a *pro forma* remedy but also an over-simplified remedy.

As a result, it was suggested that it would be better if a judge were to avoid this problematic remedy of release and would, if he determines that a person's arrest/detention is unlawful, simply grant the most appropriate remedy which takes into account all the specifics of the case, not only the seriousness of the *male captus*, but also the seriousness of the suspect's alleged crimes and the importance of having the case continued. If one follows that route, then one can still satisfy the common sense idea behind the immediate re-arrest mentioned above, namely that suspects of serious crimes must be prosecuted if possible – although a *male detentus* outcome must, of course, also not be excluded for these suspects – but one will also avoid the strange *pro forma* release and immediate re-arrest and replace it with *real* remedies, such as a reduction of the sentence and/or compensation. The judge can then take the exact seriousness of the irregularity into account in determining how much the sentence should be reduced or how much compensation one should accord the suspect. Such a solution would arguably be fairer to the suspect and more capable of putting flexibility into the system. Furthermore, this solution also avoids the (justified) criticism one may expect from various actors if a suspect of serious crimes is released for an irregularity which is not so serious as to lead to the ending of the case (in such serious cases, the public must understand that the court has no option but to refuse jurisdiction and to release (but now in a 'real' way) the suspect),

but which nevertheless ensures that the detention must be qualified as unlawful and that, strictly speaking, the suspect must be released. Even if that suspect, given his alleged serious crimes, would probably be re-arrested on the spot, one can assume that the public/the international community/the victims will not grasp how, for example, a suspect of genocide can be released because he has not been promptly informed of the reasons for his arrest, especially if that person is *not* re-arrested and subsequently flees.

After these rather theoretical chapters on the *male captus bene detentus* maxim, Part 3 of this study delved into practice, with the purpose of creating the external evaluative framework with which the current ICC *male captus* position could be compared.

Chapter IV contained a brief introduction, explaining how the biggest part of this book was going to be tackled methodologically.

In Chapter V, *male captus* case law stemming from the context between States was critically described and analysed. The chapter was divided in three categories, addressing dozens of inter-State cases stemming from arguably the two most important legal systems (common and civil law) and a third category of interesting cases which did not (clearly) fall under either category. All three categories looked at both older cases and more recent cases (the more recent cases starting with the 1974 case of Toscanino) in the hope of seeing more clearly whether the maxim was developing in a certain direction or not.

Before turning to the main conclusions of this chapter, which were summarised in Chapter VII, the general features of the intervening Chapter VI should be discussed here.

In Chapter VI, *male captus* case law stemming from the context between States and international(ised) criminal tribunals was – again critically – described and analysed. The focus was on arguably the two most important international criminal tribunals, the ICTY and ICTR. As a result, not were only ten *male captus* cases decided by these UN *ad hoc* Tribunals extensively discussed (*Dokmanović*, *Todorović*, *Milošević*, *Nikolić*, *Tolimir* and *Karadžić* (ICTY) and *Barayagwiza*, *Semanza*, *Kajelijeli* and *Rwamakuba* (ICTR)), but the main characteristics of the vertical cooperation and transfer regime of these Tribunals were also reviewed. It was explained that this regime was seemingly primarily focused on efficiency, on the obligation of States to transfer suspects, and, to a lesser extent, on the rights of those (to be) transferred. Nevertheless, it was also noted that case law had repaired some of the deficiencies on paper, such as the absence of a right to *habeas corpus*, a right to challenge the lawfulness of one's detention and to be released in the case of an unlawful (arrest or) detention. Finally, a number of interesting strategies to obtain custody of the suspect were addressed, such as the use of sealed indictments, peacekeeping forces, tracking teams and political pressure from third States and organisations (think of the carrot-and-stick method with respect to finances and membership of organisations).

In contrast, only a few general remarks were devoted to the system of legal assistance in the context of the internationalised criminal tribunals – tribunals which

are half international, half national – as it was unnecessary for the purpose of this study to explain in detail all the different cooperation regimes of these tribunals, which are very much akin to the horizontal inter-State cooperation regimes. The fact that it was discovered afterwards that the context of the internationalised criminal tribunals only seemed to contain one case in which the *male captus* problem played an important part in the proceedings (the *Duch* case before the ECCC, involving an alleged irregular pre-trial detention) could now, with hindsight, be seen as another justification for a less far-reaching discussion of the system of legal assistance in the context of the internationalised criminal tribunals. Finally, Chapter VI ended with a few interesting observations from cases stemming from internationalised criminal tribunals which could not be seen as real *male captus* cases but which nevertheless touched upon topics which, more generally, could be connected to this book's central topic and which were mentioned earlier in Chapter VI, such as *habeas corpus* and abuse of process.

The final chapter of this part of the book was Chapter VII, which summarised the principles distilled from Chapters V and VI and so created the external evaluative framework of this study.

As regards the inter-State context (Chapter V), it was observed in Chapter VII that most judges in the older *male captus* cases continued exercising jurisdiction, stating that they could not or did not want to (because it would make no difference anyway) look at the way a person was brought into the jurisdiction of the State of the now prosecuting court, even if irregularities might have been committed (by authorities from that State) in the pre-trial phase abroad (*male captus bene detentus*). As such, they adhered to the non-inquiry rule and a restricted notion of a fair trial, excluding that phase which had in fact ensured that the person was brought to the courtroom in the first place.

With the arrival of human rights treaties such as the ICCPR and the rising status of the individual in the international context, judges appeared to pay more attention to concepts such as fair trial and were more willing to look at the pre-trial phase abroad, independently of the question of whether or not there had been a protest from the injured State.

Nevertheless, this did not mean that the era of *male captus bene detentus* was over and that *male captus male detentus* or *ex iniuria ius non oritur* was now the new preferred guideline for judges.

Even though the old(-fashioned) version of the *male captus bene detentus* rule (in that judges cannot or will not look at how the suspect came into the jurisdiction of the State of the now prosecuting court) indeed seemed to have been (rightly) abandoned, it was also concluded that many judges still issue decisions which could be qualified as *male captus bene detentus* decisions; not because they state that they cannot or will not look at alleged pre-trial irregularities abroad (and hence that they are going to exercise jurisdiction, regardless of the circumstances in which the suspect came into the jurisdiction of the State of the now prosecuting court), but because they are of the opinion that, having investigated the pre-trial phase abroad, the alleged *male captus* in question is not serious enough to divest jurisdiction: (a

not so serious) *male captus bene detentus*. It was observed that much depended here on the exact circumstances and the question of how those circumstances were to be weighed in the balancing exercise which judges clearly prefer.

In some instances, the *male captus* was deemed to be so serious that judges were of the opinion that refusing jurisdiction was the only way to protect such values as respect for another State's sovereignty, due process of law/human rights of the suspect and the rule of law/the integrity of the (executive/judicial) proceedings. Much used in that respect was the abuse of process doctrine, which stems from the common law context but whose rationale can arguably also be found in the reasonings of judges from other legal contexts: courts in principle have jurisdiction (*bene detentus*) but will use their discretion not to exercise that jurisdiction (*male detentus*) if the *male captus* is so serious that to continue exercising jurisdiction would constitute an abuse of the court's process.

Applying these general remarks to the different basic *male captus* situations presented in Chapter III of this book (disguised extradition, luring and abduction – *male captus* situations whose definitions imply, incidentally, that they are executed intentionally), and starting with abduction, Chapter VII concluded that it appeared that the more recent cases showed that courts would refuse jurisdiction in the case of an abduction (performed by the prosecuting State's own agents on another State's territory without the latter's consent) which 1) was accompanied by serious human rights violations/serious mistreatment *or* 2) was followed by a protest and request for the return of the suspect from the injured State. In fact, it seemed that State practice more generally indicated that in those two circumstances (the two so-called *Toscanino* possibilities/exceptions), jurisdiction had to be refused. As concerns the second situation, an even more far-reaching conclusion was reached, namely that customary international law seemingly indicated that a *male detentus* had to follow. It was also stressed that the above-mentioned situations were situations in which *male captus bene detentus* was rejected *at any rate*. However, that did not mean that courts have not utilised lower *male captus male detentus* thresholds in the case of abductions. There were also *male captus* cases where courts have suggested a *male detentus* test which does not require a protest from the injured State or serious mistreatment. Nevertheless, it appeared that these lower thresholds, even if they can be applauded, and even if these cases may be seen as evidence of a certain trend in State practice, did not have the same degree of support in the rest of the world as the two *Toscanino* possibilities. Hence, it was arguably difficult to maintain that in *any* case involving an abduction (even one without serious mistreatment or without a protest and request for the return of the suspect), State practice (let alone customary international law) indicated that a court will issue a *male detentus* decision.

As regards the two other *male captus* techniques, luring and disguised extradition (and other less serious irregular methods not clearly falling within these three basic *male captus* situations, such as an informal transfer between two States without any procedural guarantees), quite a few of the more recent cases showed that such techniques, even if they can be considered less serious than abduction, can still lead to a refusal to continue the case – a point which can again be applauded –

on the condition that the now prosecuting State's own authorities were involved in the *male captus*. That also meant that courts would generally continue with the case if the prosecuting State's own authorities were *not* involved in the *male captus*. Nevertheless, there were also quite a few recent cases in which such techniques had been used and where it was established that the prosecuting State's own authorities had been involved in the *male captus* but where the court nevertheless did *not* refuse jurisdiction. Those cases showed that a luring operation or a disguised extradition as such are not seen as such a serious *male captus* as to lead to the ending of the case.

An important observation from Chapter VII was that the element of 'seriousness of the alleged crimes with which a suspect is charged' sometimes seemed to play a role in the judge's balancing exercise; perhaps a *male captus* had indeed occurred, but given the fact that the suspect's alleged crimes were more serious and the continuation of the proceedings was hence of more importance, such a *male captus* did not lead to the ending of the case.

In short, a lot depended on the exact circumstances, on questions such as: what kind of *male captus* was involved, was the *male captus* committed intentionally, who committed the *male captus*, did the *male captus* lead to a violation of another State's sovereignty (including a protest and request for the return of the suspect), was the person seriously mistreated during the *male captus* and was the victim of the *male captus* charged with serious crimes? Finally, it was noted that judges sometimes also avoided the entire *male captus* discussion by simply arguing that no *male captus* occurred in the first place, even if there were indications that something irregular had happened.

As regards the principles distilled from the cases between States and international(ised) criminal tribunals (Chapter VI), it was concluded that Chapter VI had arguably shown that tribunals nowadays reject the old-fashioned version of the *male captus bene detentus* maxim in that they do not support the idea that the tribunals have jurisdiction, *regardless* of the circumstances in which the suspect was brought before them. This was explained by the fact that these tribunals, after a perhaps somewhat dubious start, have often stressed the importance of human rights, due process and fair proceedings and have generally not limited these concepts to the proceedings in the courtroom. This (welcome) position could be explained by the fact that when the tribunals discussed in Chapter VI came into being – as from the 1990s – concepts such as human rights and fair proceedings were already firmly established in the mindset of judges. The much older idea that a trial had to continue, *irrespective* of what happened in the course of bringing a suspect to justice had simply become out of step with these ideas.

However, also in this context of the international(ised) criminal tribunals, it was shown that this did not mean that this could be qualified as a *male captus male detentus* context. In fact, although in the inter-State context, several *male captus* cases still resulted in a *male detentus* outcome, there was only one case in the context of the international(ised) criminal tribunals where a *male captus* led to a *male detentus* outcome: the *Barayagwiza* case before the ICTR. However, even that outcome was altered (into a *bene detentus* outcome, 'softened' with a reduction of

the sentence) after the Government of Rwanda, which would not allow such a 'big fish' as Barayagwiza to escape justice, had suspended its cooperation with the Tribunal and after the Appeals Chamber had reviewed its decision. In that respect, it was maintained that the tribunals, even if they do not support the old-fashioned version of the maxim and even if they do not explicitly champion the *male captus bene detentus* maxim, were more easily affiliated with the latter maxim than with its counterpart *male captus male detentus*. How could this be explained?

Chapter VII made clear that the tribunals argue, as do most national courts, that they have, in principle, jurisdiction (*bene detentus*), but that a serious *male captus* situation can lead, under the discretionary abuse of process doctrine, to a *male detentus* outcome. In doing so, the tribunals have adopted a broad version of the abuse of process doctrine in that, in determining whether a *male captus* is so serious that jurisdiction should be refused, it may not matter if the entity committing the *male captus* cannot be linked to the tribunal. This stance, Chapter VII explained, clearly goes further than the national abuse of process doctrine where the involvement of the authorities of the prosecuting forum appears to be required.

However, even if the tribunals had adopted a broader version of the abuse of process doctrine than the one at the national level, and even if the tribunals appeared to accept – this was not clear due to the imprecise decision of the ICTY Appeals Chamber in *Nikolić*, arguably the most important *male captus* decision from the context of the tribunals – that they would refuse jurisdiction in the case of a 'normal' abduction performed by their own people – hence falling below the *male detentus* test at the inter-State level – they were still more readily affiliated with the *male captus bene detentus* rule because no *male captus* situation had, ultimately, led to a *male detentus* result. This, Chapter VII continued, might be explained by the following two factors. (Note that the following two factors assume the existence of a *male captus*. However, like courts at the inter-State level, tribunals may also be of the opinion that no *male captus* occurred in the first place, even if one can doubt whether that is accurate.)

First, as the tribunals do not have their own police force, the *male captus* will often be performed by third parties. This, of course, diminishes the seriousness of the *male captus*.

The second factor which may explain why the tribunals are still more readily affiliated with the *male captus bene detentus* rule is that the judges, even if they establish that a serious *male captus* has occurred, also look at the other side of the coin, namely the fact that the suspect is charged with serious crimes and that the international community demands that such a suspect should, if possible, be prosecuted. Hence, the judges basically have to determine, taking every aspect of their case into account, what is more serious: the *male captus* or that the suspect is prosecuted.

In other words, although a serious *male captus* may lead to a *male detentus* outcome, even with respect to suspects of serious crimes (think of the above-mentioned point that tribunals will probably refuse jurisdiction when their own people are involved in an abduction), the *male captus* is often not that serious. Not

only with respect to the *male captus* technique used, but also with respect to the actors responsible for the *male captus*.

Hence, it was explained that an abduction orchestrated by the OTP may lead to the ending of the case, whereas an abduction performed by third parties may not (see also the decision of the ICTY Appeals Chamber in *Nikolić*). However, this will probably be different when that abduction is accompanied by other serious violations/irregularities, such as serious mistreatment. (Note that even though tribunals have often focused on serious mistreatment here, the test 'only' requires such serious violations/irregularities that the judge cannot proceed with the case, not necessarily serious mistreatment/torture-like circumstances.) In such a case, the *male captus* may also lead to a *male detentus* outcome, even if the OTP is not responsible for the *male captus*.

As regards less serious *male captus* situations such as luring, Chapter VII explained that a luring operation executed by the OTP was condoned by the ICTY Trial Chamber in *Dokmanović*, but that *bene detentus* outcome could have been different if that luring was accompanied by, for example, serious mistreatment. In addition, it was also noted that the general reasonings of, for example, the *Nikolić* and *Barayagwiza* cases, cases which were decided *after* the *Dokmanović* case, may entail that tribunal judges confronted by luring-like situations are of the opinion that the OTP has not come to court with clean hands, has resorted to illegal procedures, and thus that jurisdiction must be refused.

This study has accepted the above-mentioned element of 'seriousness of the alleged crimes' in the context of the discretionary abuse of process doctrine, but has also warned that it must not become a carte blanche with respect to transferring suspects of serious crimes to the tribunals (and the same goes for the inter-State context); the view that one may take the seriousness of the crimes into account to a certain extent in deciding the consequences of a certain *male captus* cannot in any way be seen as a green light for using *male captus* techniques in the context of international crimes. Some *male captus* situations are so serious – for example, because the OTP intentionally committed serious (procedural) irregularities in the process of bringing a suspect to trial, such as an abduction – that jurisdiction should be refused if the tribunal wants to be taken seriously as a court of law, whether it is dealing with a suspect of serious crimes or not. One could also mention practical considerations here; proceeding with the case under such circumstances would arguably also be damaging for the entire mission of the tribunal. In addition, neither should one forget that the negative consequences of proceeding with a case involving an abduction might not be limited to the context of the tribunals. For national States/courts, these international institutions may be seen as examples to follow. If employees of a tribunal are involved in an abduction and in a way get away with it (because the judges do not decline jurisdiction), then national States/courts can refer to the tribunal's approach to defend their own (potentially) dubious methods of bringing suspects to trial or to defend the 'approval' of such methods by proceeding with the case. That in turn would harm the integrity of these States/courts, the human rights of their suspects and – what is far more important for

the horizontal context than for the context of the tribunals – the very foundation of the inter-State level itself, namely respect for another State's sovereignty.

Chapter VII clarified the fact that the element of 'seriousness of the alleged crimes' was also accepted in the more controversial context of the consequences of the determination that a person's arrest or detention was deemed unlawful. Noting the problems of the remedy of release as already identified in Chapter III of this book and emphasising that a release, in the context of the tribunals, may even more easily lead to a suspect of international crimes evading justice because of relatively minor irregularities, it was stated that although the law should obviously be obeyed, one must also be careful not to apply the law in such a strict way that it leads to great injustice: *summum ius, summa iniuria*.

In other words, Chapter VII maintained, the human rights of *all* suspects must be respected. The fact that one is dealing with suspects of international crimes cannot in any way be used as an excuse to violate human rights or to argue that no violation occurred in the first place where such a violation was clearly present. Furthermore, when violations occur, appropriate remedies must be granted. However, in granting these remedies, one must be careful that one does not potentially pave the way for absurd consequences which are counter to the concept of justice, for example, through a strict application of the remedy of release in the case of an unlawful arrest/detention. In such a case, it would arguably be better to keep a suspect of international crimes in custody and to grant appropriate and real remedies instead, taking into account the seriousness of the *male captus*.

A final important issue from Chapter VII which should be mentioned in this summary is that it was suggested that *all* violations which occur in the context of a tribunal case must be remedied and not only if those violations can be attributed to the tribunal (although it is clear that the involvement of the tribunal may lead to more far-reaching remedies).

This suggestion was uncontroversial in the context of the abuse of process doctrine; in the context of the question of whether the *male captus* is so serious that the judges, in good conscience, can no longer proceed with the case, the tribunals have confirmed that they will look at the violations, irrespective of the entity responsible for those violations.

However, this was far less certain regarding less serious violations which do not come within the domain of the abuse of process doctrine. Nevertheless, it was argued that it would be quite odd for the tribunals to only look at the actions of third parties if those actions reach a certain seriousness. If the tribunal is willing, under the abuse of process, to take the *ultimate* responsibility for actions of third parties (namely by refusing jurisdiction), it should also be perfectly able to take responsibility for less serious violations. To ensure that the suspect does not become the victim of the fact that his proceedings have been fragmented over two or more systems, it is fair that the final adjudicator, the tribunal, in the context of whose case these violations occurred, takes responsibility for *every* violation. This in turn also implies, of course, that a judge must be able to examine how the arrest/detention/transfer was made 'on the ground', for example, whether the entities

making the arrest at the behest/request of the tribunal respected all the (national) arrest procedures. After all, if an arrest was clearly made in contravention of such procedures, it is difficult to maintain that a person's right to liberty and security was not violated, even if all the rules of the tribunal (such as the issuance of a valid indictment and an arrest warrant) have been adhered to.

It was explained that in this specific context, tribunal decisions have been issued which follow a rather non-inquiry/*male captus bene detentus*-like view and which support the idea that the legality of the national arrest/detention proceedings cannot be examined. However, there were also cases which could be interpreted as meaning that the tribunal would look into what happened at the national level and would in fact repair any violation which occurred in that context, even if the tribunal were, strictly speaking, not responsible for it.

Nevertheless, if it were indeed true that the case law contained both interpretations, it was submitted that the judge should opt for the second interpretation, the one which does investigate any pre-trial irregularities and which does not demand the attribution of the violations to the tribunal/the tribunal's strict legal responsibility for the violations. Deterrence, the integrity of the proceedings and simple fairness towards the suspect (in that a suspect does not end up in a legal vacuum) demand that the now prosecuting forum remedies all the violations which have been committed in the context of its case. This position could also 'soften' the (unpopular) *male captus bene detentus* image that the tribunals have; providing remedies for all violations which occurred in the context of their cases shows that the tribunals are not only concerned with prosecuting suspects of international crimes but also with ensuring fair proceedings for these suspects. In that context, one could also reassure those who object to this position that granting remedies may not have drastic consequences. One can assume that very often, a judge will only be confronted by minor violations. For those kinds of violations, small remedies will be appropriate, for example, a (minor) reduction of the sentence in the case of conviction. This ensures that both the sense of justice of the person in question (in that his violations are remedied) and of the victims/the international community as a whole (in that a suspect of international crimes, if found guilty, receives an appropriate (which very often means stern) penalty for his deeds) are met.

After this important chapter, to which – accordingly – considerable attention has been paid in this summary, it was time to look at Part 4 of this book, which addressed the context of the ICC. In the first chapter of this part, Chapter VIII, the ICC's more general cooperation regime, including the specific arrest and surrender provisions, were examined. In this context, the role of international forces in surrendering suspects to the ICC was addressed as well. A crucial subject, among other things because States which wish to cooperate with the ICC are often unable to do so because the war which may have triggered the attention of the ICC may also have ruined the legal systems of these States.

In Chapter VIII, special attention was paid to Article 59, paragraph 2 of the ICC Statute, a *habeas corpus*-like provision which can be seen as one of the most important in the ICC's arrest and surrender system, where the national and

international levels meet. It was observed that quite a few questions remain with respect to this provision, the main one being what the consequences are when the competent judicial authority in the custodial State determines that a person has not been arrested in accordance with the proper process and that the person's rights have not been respected. It was concluded that the answer to this question may depend from State to State but that because of several reasons, including the important fact that uncooperative States could abuse this provision, one could agree with most authors that national authorities should be very reluctant to refuse the surrender of a suspect if it is determined at the national level that a person has not been arrested in accordance with the proper process or that the person's rights have not been respected. Nevertheless, a State may very well be justified in arguing that a release may constitute the correct legal remedy in the case of violations. However, in that case, the national authorities were reminded of the previously identified problems of this remedy. In fact, in the ICC context, a release of a suspect could even more easily lead to an escape as the released suspect could flee to many non-State Parties which are, in principle, not obliged to cooperate with the ICC, a feature missing in the ICTY/ICTR context.

Furthermore, it was also remembered that Article 59 of the ICC Statute – which generally accords much more importance to national law (interpreted in light of human rights law) and national authorities than the vertical regime of the ICTY/ICTR does – 'only' regulates the arrest proceedings for *States* and that the arrest procedures for, for example, peacekeeping forces – if these forces have a mandate to make arrests for the ICC – remain unclear. Nevertheless, several suggestions from legal scholars were addressed which could solve these problems, such as a direct surrender by peacekeeping forces of the suspect to the ICC, provided that certain safeguards are respected.

An important point observed in Chapter VIII was that many aspects of the human rights *habeas corpus* provisions, thanks to Articles 55, 59 and 60 of the ICC Statute, were present in the arrest and surrender regime of the ICC, and that this constituted an improvement when compared to the legal context of the ICTY/ICTR, but that an unequivocal and explicit right for a suspect to challenge the lawfulness of his arrest and detention and to be released in the case of an unlawful arrest and detention was missing. This rather strange point would be returned to in Chapter IX.

Finally, it was concluded that Chapter VIII had revealed that the ICC's regime contains both vertical and horizontal elements and that the term "lateral", introduced by Currie, may be a fitting (and in any case original) term for this regime.

In the next chapter, Chapter IX, the internal evaluative framework of this study was created through an examination of Article 21 of the ICC Statute. Not only the content of the three different paragraphs of this article, but also the correlation between the three parts of the first paragraph were addressed with help of both doctrine and case law.

As part (a) of paragraph 1 of Article 21 of the ICC Statute was silent on the *male captus* issue, use was made of the general rule of interpretation and the supplementary means of interpretation as can be found in the Vienna Convention on

the Law of Treaties. As textual/contextual/teleological interpretation of a number of provisions from the proper instruments of the ICC which could be seen as being (indirectly) relevant for the *male captus* discussion did not clarify whether the ICC Statute could be seen as clearly in favour of either *male captus bene detentus* or *male captus male detentus* (Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties), recourse was made to the *travaux préparatoires* of the ICC Statute (Article 32 of the Vienna Convention on the Law of Treaties). Although a number of interesting remarks were found in these documents regarding the correlation between the ICC and the issue of irregular arrests, including one explicit comment by the Jamaican delegate Patrick Robinson that *male captus bene detentus* should have no application to the ICC's jurisdiction, it was concluded that an examination of the *travaux préparatoires* had not elucidated the *general* opinion of the 120 States which voted in favour of the ICC Statute with respect to the *male captus* issue. As a result, it was found that an examination of several provisions from the ICC Statute and the latter's *travaux préparatoires* had brought no clarity with respect to the *male captus* issue, which meant that on this issue, there was a legal lacuna which had to be filled by looking at parts (b) and (c) of paragraph 1 of Article 21 of the ICC Statute.

However, before that was done, Chapter IX also looked at a related issue, namely what the ICC instruments said on the consequences of an unlawful arrest. It was already earlier established – also in this summary – that many aspects of the human rights *habeas corpus* provisions, thanks to Articles 55, 59 and 60 of the ICC Statute, were present in the arrest and surrender regime of the ICC, but that an unequivocal and explicit right for a suspect to challenge the lawfulness of his arrest and detention and to be released in the case of an unlawful arrest and detention was missing. It was questioned how the deletion of the remedy of release from the right to liberty and security, as can be found in Article 55, paragraph 1 (d) of the ICC Statute, had to be viewed. Had it to be seen as a deliberate choice of the drafters that this remedy is not applicable to suspects or was it simply forgotten or not deemed essential enough to mention in the ICC Statute?

Again, recourse was made to the Vienna Convention on the Law of Treaties. Also in the context of the remedy of release, textual/contextual/teleological interpretation of Article 55, paragraph 1 (d) of the ICC Statute (Article 31 of the Vienna Convention on the Law of Treaties) brought no relief, hence necessitating an examination pursuant to Article 32 of the Vienna Convention on the Law of Treaties (the *travaux préparatoires*).

After a detailed examination, it was concluded that it is hard to maintain that it is *clear* that the drafters of the ICC Statute intentionally deleted the remedy of release because they did not want this remedy to be available for a suspect unlawfully arrested or detained. Since the ICC legislation was arguably unclear on this point, and thus left a legal lacuna, there was justification for looking to part (b) of paragraph 1 of Article 21 of the ICC Statute.

Part (b) of paragraph 1 of Article 21 of the ICC Statute thus had to be considered, not only in the case of the real *male captus bene/male detentus* question,

but also in the case of the issue related to the *male captus* discussion, namely the remedy of release in the case of an unlawful arrest/detention.

An examination of part (b) of paragraph 1 of Article 21 of the ICC Statute showed that the term "applicable treaties" did not shed light on the *male captus* issue, but that this term *did* cover the remedy of release in the case of an unlawful arrest/detention and that this remedy could by applied by the ICC judges "where appropriate".

As concerns the meaning of the term "the principles and rules of international law", it was concluded that this term, in any case, included customary international law and that one could turn to the conclusion of Section 2 of Chapter VII of this book to determine what customary international law had to say on the *male captus* issue. This was something special, as the external evaluative framework of this study, which was (merely) created to see how similar or different the current ICC position on the *male captus* problem was in comparison with the position of other courts, had now entered, via the concept of customary international law, the less non-committal internal evaluative framework, a framework established to see how the actual ICC position had to be assessed in view of the Court's own law.

It was noted that Section 2 of Chapter VII of this book had clarified that one cannot generally state that either *male captus bene detentus* or *male captus male detentus* had reached customary international law status, because such general assertions did not do justice to the enormous variety of possible *male captus* situations and the different ways those varying situations were received by courts. In fact, Chapter VII had concluded that only one *male captus* situation could probably be seen as having customary international law status, namely the situation that judges will refuse jurisdiction in the case of an abduction performed by the authorities of the prosecuting forum followed by a protest and request for the return of the suspect by the injured State. However, it was also noted that because of the probable rationale of this rule and the different role of State sovereignty in the context of the ICC, one can question whether the judges would find it "appropriate" to transplant this rule into the specific system of the ICC. Notwithstanding this, it was also submitted that the ICC, even if it was indeed found that it would not be appropriate to transplant this rule into the context of the ICC, and thus that the Court would not *have* to follow it, *should* resolutely refuse jurisdiction if it were implicated in an abduction, whether or not that abduction was followed by a protest and request for the return of the suspect from the injured State.

After that, it was considered, now that Section 2 of Chapter VII had entered the internal evaluative framework of this study, whether Section 3 of Chapter VII (the principles distilled from the international(ised) criminal tribunals' *male captus* case law) might also enter this internal evaluative framework. Could these principles perhaps also fall under the notion of customary international law?

Using the traditional definition of customary international law, which focuses on *State* practice (but acknowledging that one can ask whether the formation of customary international law can still be seen as the privilege of States), it was concluded that the decisions of the ICTY/ICTR as such (hence not those decisions

presenting overviews of State practice) cannot be used to find customary international law. This could, however, be different with respect to internationalised criminal tribunals, some of which could be seen as forming part of a State's legal system.

Finally, the related topic of the remedy of release was addressed. It was concluded that this remedy could be seen as having customary international law status. Hence, if this remedy were not already to fall under the notion "applicable treaties", it would in any case be covered by the term "principles and rules of international law".

After this examination of customary international law, it was questioned whether the term "principles and rules of international law" could also cover more than just customary international law. It was concluded that it could and that the practice of the ICTY/ICTR (and this might perhaps also be valid for other international (judicial) institutions such as the HRC, the ECtHR and certain internationalised criminal tribunals) could be applied by the ICC judges if those judges, after a detailed analysis, are of the opinion that certain practices can be transplanted into the specific system of the ICC as a principle/rule of international law. In that case, the conclusions from Section 3 of Chapter VII might also enter the internal evaluative framework of this study. As regards these practices of international criminal tribunals, one could think of the acceptance of a broad concept of abuse of process (in that jurisdiction may be refused in very serious *male captus* cases, irrespective of the entity responsible) and the fact that the seriousness of the crimes with which the suspect is charged can be taken into account when applying the abuse of process doctrine. With respect to the related issue of the remedy of release, one could think of the fact that all these tribunals have stressed the importance of *habeas corpus*, even if the regulatory instruments of the tribunal in question did not explicitly contain such a provision.

However, it was also noted that if the ICC judges are of the opinion that it would not be appropriate to transplant the established practices of the international criminal tribunals with respect to the *male captus* issue, as principles and rules of international law, into the specific system of the ICC, or if they are of the opinion that one should not look at the jurisprudence of these tribunals in the context of this provision *at all*, then part (c) of paragraph 1 of Article 21 of the ICC Statute had to be looked at.

As a result, this last part of paragraph 1 of Article 21 of the ICC Statute was also examined. It was concluded that in determining whether there exist general principles related to the *male captus* problem, one could again turn to the overviews of Chapter V and the principles distilled in Section 2 of Chapter VII. Hence, here also, the results from the external evaluative framework could be used for the internal evaluative framework.

With respect to the *male captus bene/male detentus* maxim itself, it was found that the overviews of Chapter V clearly showed that one cannot make the general assertion that one of these maxims can be seen as a general principle of law nowadays. However, it was also remarked that there are certainly elements from the

male captus case law which were shared by most systems of law, elements which may perhaps – taking into account the overviews of this study being extensive but not exhaustive – be seen as general principles of law falling under the terminology used in Article 21, paragraph 1 (c) of the ICC Statute. For example, one could think of the fact that most courts confronted by a *male captus* will use their discretion, for instance (in the common law system) under the abuse of process doctrine, to balance all the different elements of the case to decide whether or not the *male captus* is so serious that jurisdiction must be refused. In addition, most courts seemed to refuse jurisdiction only if their own authorities are involved in the *male captus*. Finally, it appeared that quite a number of courts – although it was unclear whether "quite a number" was enough to lead to a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute – would also take into account the seriousness of the crimes with which the victim of the *male captus* is charged in deciding whether or not jurisdiction must be refused.

With respect to the related issue of the remedy of release, it was concluded that not only the general right to liberty and security/the right not to be arrested or detained arbitrarily, but also its more specific *habeas corpus* provision (including the release in the case of an unlawful (arrest or) detention) could be seen as a general principle of law.

Finally, it was noted that also with respect to part (c) (*cf.* the words "where appropriate" in the context of part (b)), the ICC judges will probably only use these solutions from the national level if they believe that they can transpose these solutions in the specific context of the ICC. That could mean that the ICC judges may follow the principles which can be related to the proper *male captus* issue mentioned above but may be more reluctant with respect to the problematic remedy of release in the case of an unlawful arrest/detention.

After a short rejection of paragraph 2 of Article 21 of the ICC Statute for the purpose of this study's internal evaluative framework, attention was paid to the final paragraph of this crucial article.

In the examination of paragraph 3 of Article 21 of the ICC Statute, it was argued that whenever the ICC exercises its jurisdiction, whenever it is involved in a case, that involvement, that exercise of jurisdiction, had to be applied and interpreted in conformity with those internationally recognised human rights which are relevant to the ICC's functioning. That exercise of jurisdiction/involvement, of course, included the proceedings in the courtroom, when the ICC is actually trying the case, but it would also include the exercise of jurisdiction/involvement in the pre-trial phase and hence also, for example, the actions of third parties when these parties make arrests/detentions/surrenders at the request of the ICC. Furthermore, it was remarked that this is the path the ICC should follow *in any case*: ensuring that whenever the ICC is involved in a case (including the actions of third parties working at the behest of the ICC), that involvement is consistent with internationally recognised human rights. However, it was argued that it would even be fairer for the ICC to take its responsibility for violations in the context of its case more generally. Although arrests/detentions made at the behest of the ICC will cover a large part of the ICC's

arrest/detention 'stock', the ICC may always be confronted by *male captus* claims which go beyond such situations (*cf.* abduction by private individuals). It would be highly just if the ICC, as the ultimate prosecuting forum, would also repair those violations, even if it were not involved in the *male captus*.

As regards the internationally recognised human rights which are relevant to the ICC's functioning in the context of the pre-trial phase, one could think, for example, of a broad concept of the right to a fair trial and the right to liberty and security, including the remedy of release in the case of an unlawful arrest/detention.

During the examination of paragraph 3, the earlier correlation between the different parts of paragraph 1 of Article 21 of the ICC Statute was re-assessed. This had consequences for the issue of the remedy of release. It was explained that in interpreting part (a) of paragraph 1 (the right to liberty and security without the remedy of release in the case of an unlawful arrest/detention), the ICC judges had to take into account paragraph 3. Since this latter paragraph includes the remedy of release in the case of an unlawful arrest/detention, the judges no longer had discretion to consider whether it would be "appropriate" to transplant (see part (b) of paragraph 1) or whether they can transpose (see part (c) of paragraph 1) the remedy of release into the context of the ICC. In other words, the remedy of release, in principle, would *have* to be applied. It was further explained that this outcome was perhaps not so problematic because this study had argued that it was not clearly established that the drafters of the ICC Statute intentionally wanted to delete this remedy. However, matters would turn out to be more complicated if one were of the opinion, on the basis of the information presented in Chapter IX, that it *was* in fact clearly the intention of the drafters to delete this remedy. In that case, it had to be ascertained which solution would take precedence here: the intention of the drafters (no remedy of release) or the remedy of release pursuant to paragraph 3. In this context, two different doctrinal choices were presented, that of Pellet (whose approach would lead to the remedy of release) and that of Hafner and Binder (whose approach would not lead to the remedy of release). This study was more in favour of Pellet's view.

Nevertheless, it was also acknowledged that the fact that the ICC judges, if they were to follow the view of Pellet, must apply the remedy of release, even if it was clearly the intention of the drafters not to grant this remedy, does not make the problems which can be related to this remedy suddenly disappear. Because of this, judges, it was submitted, could opt for the solution presented in this research; they could, while realising that this remedy, in principle, has to be respected and thus that remedies must be granted in the case of an unlawful arrest/detention, keep the suspect in custody and grant proper remedies, depending on the exact circumstances of the case. They could thereby also rely on the right to an effective remedy, another right which can certainly be seen as an internationally recognised human right pursuant to paragraph 3 of Article 21 of the ICC Statute.

In the last chapter of Part 4, Chapter X, this study tried to find the current ICC position on the *male captus* issue through an examination of the three ICC cases in which the *male captus* topic had played a (major) role in the proceedings: *Lubanga*

Dyilo, *Bemba Gombo* and *Katanga*. Since the final chapter of this book, Chapter XI, summarised the conclusions of Chapter X, it is appropriate to immediately go to the summary of Chapter XI now.

In the final part of this book, Part 5, consisting of one chapter only (Chapter XI), this study was concluded. Because this last chapter is so important as regards the findings of this study, this summary will pay most attention to this chapter. That one cannot briefly summarise this chapter was also a result of the first problem encountered in Chapter XI: after repeating the central question of this study as presented in Chapter I, it was remarked that it is difficult to give a plain answer to this question as it did not seem to be very clear what the ICC's current position on the *male captus* issue – a crucial part of the central question – is. This was for a number of reasons.

First of all, the Appeals Chamber's decision in *Lubanga Dyilo*, arguably the most authoritative decision on this matter, contained different formulations of what the *male detentus* threshold of the ICC could be. However, it was also noted that the broad first formulation (confirmed by the third formulation) – and not the restricted second formulation, which stipulated that "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed" – *probably* constituted the correct test:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped [original footnotes omitted, ChP].

Nevertheless, another problem with respect to the ICC's *male captus* position was identified. In the *Duch* case before the ECCC, it was held that the ICC Appeals Chamber in *Lubanga Dyilo* would also refuse jurisdiction, under the abuse of process doctrine, in the case of grave violations of the suspect's rights (thereby focusing on the more 'physical' words serious mistreatment/torture) *as such*, hence irrespective of the entity responsible. Reference was hereby made to the following words of the Appeals Chamber: "[T]he findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way." However, it was explained that whether the ICC Appeals Chamber, besides its above-mentioned *male detentus* test – which requires the involvement of the ICC (or third parties working at the behest/request of the ICC), see the words "by his/her accusers" – would also refuse jurisdiction in the case of grave violations/serious mistreatment/torture *as such*, irrespective of the entity responsible (and thus also in the case of private individuals), was not at all clear. First, it was pointed out that the remarks made by the Pre-Trial Chamber on serious mistreatment/torture were made in the context of the abuse of process doctrine, a doctrine which the Appeals Chamber has explicitly *rejected*. Secondly, there was uncertainty as regards the position of the Pre-Trial Chamber *itself* on the abuse of

process doctrine as it stated that its application, to date, "ha[d] been confined to instances of torture or serious mistreatment *by national authorities of the custodial State* in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [emphasis added and original footnotes omitted, ChP]". The italicised words are incorrect, but it was uncertain whether the Pre-Trial Chamber would nevertheless follow its words (requiring that the *male captus* be committed by national authorities) or whether it was of the opinion that these words were indeed erroneous, entailing it to also refuse jurisdiction in the case of serious mistreatment/torture, *irrespective* of the entity responsible, hence also including, for example, the actions of private individuals.

Another unclear issue was related to the fact that the Appeals Chamber seemingly agreed with the Pre-Trial Chamber's view that it would look at irregularities when these were committed in the context of concerted action between the ICC and third parties, even before the sending of the ICC request for arrest and surrender (hence before the constructive custody). This term, "concerted action", is very general and could encompass any involvement of the ICC in irregularities. However, even though the Appeals Chamber thus accepted the concerted action term, a term which could encompass a national arrest/detention if that arrest/detention were somehow related to the ICC proceedings, the Appeals Chamber also presented an additional requirement, namely that only violations of the suspect's rights which are related to the "process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court (…) may provide ground for halting the process". However, it was argued that that is a stricter condition.

A final unclear issue was that the ICC Appeals Chamber did not view a motion of a suspect who had allegedly been the victim of a *male captus*, and who argued that the ICC should refuse jurisdiction because of that *male captus*, as a challenge to its jurisdiction under Article 19 of the ICC Statute. It considered such a challenge to be a *sui generis*/atypical motion, seeking a stay of the proceedings. This view, with which the Appeals Chamber corrected the Pre-Trial Chamber's decision in this case, was, however, seemingly rejected by the decision of the Pre-Trial Chamber in *Katanga*, decided *after* the Appeals Chamber's decision in *Lubanga Dyilo*. Although the Trial Chamber in *Katanga* referred to the Appeals Chamber's view in *Lubanga Dyilo*, it did not comment further on it.

Although this study thus found several obscurities with respect to the ICC's position on the *male captus* issue, it could also present a few less ambiguous features which could be identified in the ICC's handling of an alleged *male captus* case.

First, the ICC did not accept the doctrine which is so often contrasted with the *male captus bene detentus* rule, the abuse of process doctrine, because it was not covered by Article 21 of the ICC Statute. However, what *was* covered by this provision, namely by its paragraph 3, was the human rights dimension of the abuse of process doctrine. It was that human rights dimension which the ICC used to solve *male captus* claims. It was clear that the ICC theoretically attached great importance

to human rights – and the human rights to a fair trial and to liberty and security (including the right to challenge the lawfulness of one's detention, a right which is not explicitly mentioned in the ICC's proper instruments) in particular.

The ICC furthermore appeared to concentrate on the violations themselves and not so much on the question of whether the ICC (or third parties working at the behest of the ICC) intentionally violated certain norms. However, what *seemed* to be required, see the *Bemba Gombo* case, was that violations had to result into actual prejudice to the suspect.

Another important aspect of the *male captus* issue was the role of the competent judicial authority of the custodial State in the whole procedure. Chapter XI showed that, in contrast to the Pre-Trial Chamber, the Appeals Chamber in *Lubanga Dyilo* did not explain to what extent that authority, under Article 59 of the ICC Statute, could look into irregularities prior to the official arrest/detention. In addition, and this time just like the Pre-Trial Chamber, the Appeals Chamber did not clarify the role of the ICC judges, who marginally supervise the points of Article 59, paragraph 2 (b) and (c) of the ICC Statute, in this context of the prior arrest/detention. Finally, again following the Pre-Trial Chamber, the Appeals Chamber did not elucidate to what extent provisions such as Article 21, paragraph 3 of the ICC Statute and Article 55, paragraph 1 (d) of the ICC Statute had to be considered here. The focus appeared to be on national law only.

A final point was that the Appeals Chamber seemed only interested in the ultimate remedy, the refusal of jurisdiction/a halt to the procedures.

Now that the ICC's current position on the *male captus* issue had been presented – taking into account the fact that some of its aspects were not very clear – that position was assessed in the context of this book's external evaluative framework, *vis-à-vis* the position of other courts.

First of all, it was explained that it appeared that the ICC, like almost every modern court or tribunal, did not accept the old-fashioned version of *male captus bene detentus* that jurisdiction will be exercised, *regardless of the way* that person came into the power of the Court. Human rights were considered to be of paramount importance and extended to the entire proceedings, including the pre-trial phase. This included the (for this study) so important human right to liberty and security, including its sub-right to challenge the lawfulness of one's detention, even if that sub-right was not explicitly mentioned in the proper instruments of the ICC. This position, it was asserted, resembled the position of other tribunals. As a result of this, the ICC judges will examine the pre-trial phase to see what kind of effect violations of these rights may have on the jurisdiction of the Court. It was noted that the Trial Chamber in *Katanga* did not do so on procedural grounds – and could be criticised for that – but that it was uncertain, and in fact improbable, for this decision to be viewed as support for the old-fashioned version of *male captus bene detentus* mentioned above.

Chapter XI continued by explaining that if one were of the opinion that the ICC Appeals Chamber's one and only *male detentus* test could be found in the first formulation from *Lubanga Dyilo* (see the block quotation mentioned above in this

summary), then the ICC shared the view of, for example, the ICTY Trial Chamber in *Nikolić* and the *Ebrahim* case in that the Prosecution (including third parties working at its behest) must come to court with clean hands. If that were not the case, for example, if the fundamental rights of the suspect had been violated in the process of bringing that suspect before the ICC, judges could conclude that one can no longer speak of a fair trial in the broad sense of the word, a conclusion which must lead to the ending of the case. It was noted that because the words "breaches of the fundamental rights of the suspect" were very generally formulated, these could include all kinds of *male captus* situations, such as abductions, luring situations and other techniques which could (possibly) be seen as violations of someone's right to liberty and security.

Before Chapter XI continued on this topic, it was pointed out that the ICC seemed to concentrate on the violations themselves and not so much on the question of whether the ICC (or third parties working at the behest of the ICC) intentionally violated certain norms. This could be considered a rather liberal stance as other courts had often demanded, in their *male detentus* tests, an intention on the part of the prosecuting authorities to commit the *male captus*. However, what *appeared* to be required, see the *Bemba Gombo* case, was that violations had to result into actual prejudice to the suspect. Nevertheless, other tribunal cases could be seen as supporting the view that the level of prejudice was only relevant for determining how serious the violations were (and, consequently, what kind of remedy had to be provided) and not for determining whether there were violations in the first place/whether the suspect would be entitled to a remedy.

Chapter XI then returned to the proposition that the ICC's words "breaches of the fundamental rights of the suspect" were so generally formulated that these could include all kinds of *male captus* situations, including abductions and luring situations.

It was explained that if the ICC were to refuse jurisdiction if the suspect's accusers were responsible for an abduction *as such*, it would side with the decisions in *Levinge*, *Bennett*, *Ebrahim* and *Beahan*. These were reasonings which fell short of the test about which more recent State practice seemingly agreed that it must, *in any event*, lead to rejection of the *male captus bene detentus* rule (see the *Toscanino* exceptions mentioned *supra*). With respect to the context of the tribunals, it was clarified that if the ICC were to refuse jurisdiction because the suspect's accusers were responsible for an abduction *as such*, the ICC would probably also side with the tribunal cases. Although none of these cases involved abductions perpetrated by the tribunal itself, one could refer here to general statements from, for example, *Nikolić* and *Barayagwiza*.

Turning to the concept of luring, this study explained that the ICC's phrase "breaches of the fundamental rights of the suspect" was so generally formulated that it could also cover a situation of luring, as long as the judges were of the opinion that that would constitute a violation of a suspect's fundamental rights (namely his right to liberty and security). In that case, the ICC would follow the more progressive inter-State cases of *Levinge* and *Bennett*, cases which (were considered

to) contain very general *male detentus* reasonings and which could cover luring operations (even though these cases themselves did not concern such operations), but would distance itself from the inter-State luring cases such as *Yunis* and *Stocké* where the judges would probably only refuse jurisdiction if the luring were accompanied by serious mistreatment. The tribunal context, Chapter XI continued, was, however, less straightforward. Although it was clear that if the ICC were to refuse jurisdiction in a case of luring as such, it would take a more liberal stance than the ICTY judges in *Dokmanović* had done, more general words from the tribunals had been issued after *Dokmanović*, which could also cover a luring operation.

Returning to 'the' position of the ICC: Chapter XI then remarked that if one were, however, of the opinion that the Appeals Chamber's requirement that one can no longer speak of a fair trial had to be seen in the strict sense of the word, namely a fair trial in the courtroom (see the second formulation of the ICC test mentioned *supra*, that which demands that the violations must be such that the accused can no longer make his defence, also about which this study concluded that it was uncertain that this is the ICC's *male detentus* position), the ICC's position was arguably different from most of the more recent national and international courts. Most of these courts – although there were some exceptions – seemingly also refused jurisdiction, not only if one can no longer speak of a fair trial in the strict sense of the word, but also in the broad sense of the word, namely if it were unfair in general/if it were to undermine the integrity of the court to have a trial in the first place (hereby often using the abuse of process doctrine).

Another point that needed to be assessed concerned the lack of clarity as to whether the Appeals Chamber's *male detentus* test demanded involvement of the ICC, or whether the ICC would also refuse jurisdiction in the case of, for example, serious mistreatment/torture, irrespective of the entity responsible, for instance, if that mistreatment/torture were committed by private individuals.

It was explained that if one assumed that the ICC only followed the *male detentus* test demanding ICC involvement, the ICC would follow most of the national cases which require the involvement of one's own people. However, in that case, it would also clearly deviate from the tribunal cases which recognise that, under the abuse of process doctrine, a doctrine which the ICC Appeals Chamber rejected, very serious *male captus* cases can lead to the ending of the case, irrespective of the entity responsible.

If the ICC (Appeals Chamber) were nevertheless to refuse jurisdiction in very serious *male captus* cases, irrespective of the entity responsible – this is how the co-investigating judges in *Duch* read the Appeals Chamber's decision – and if it were to follow the Pre-Trial Chamber's statement in that case (assuming that the reference to "torture or serious mistreatment *by national authorities of the custodial State* [emphasis added, ChP]" was erroneous), the ICC (Appeals Chamber) would also recognise that this *male detentus* avenue is not restricted to torture or serious mistreatment, see the Pre-Trial Chamber's words that the application of the abuse of process doctrine, "*to date* (…) ha[d] been confined to instances of torture or serious

mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [emphasis added and original footnotes omitted, ChP]". This meant, Chapter XI clarified, that the ICC might also refuse jurisdiction in serious *male captus* cases other than serious mistreatment/torture. It was noted that this stance appeared to be similar to the position of the tribunals. Although several cases, perhaps inspired by the Trial Chamber's words in *Dokmanović*, a case issued prior to (the abuse of process test from) the *Barayagwiza* case, had focused on the more 'physically' coloured words "serious mistreatment" and "torture", the more recent *Karadžić* case had clarified that serious mistreatment/torture are only to be seen as *examples* of such serious cases that a court may refuse jurisdiction.

Another point that Chapter XI had to discuss was the scope of review. As explained *supra*, there was lack of clarity as to whether the Appeals Chamber, prior to the constructive custody of the ICC, would examine irregularities during a national detention which result from concerted action between the ICC and third parties more generally or whether it would only consider irregularities if the suspect were in detention for the same crimes as he is now being prosecuted at the ICC.

First, the context of constructive custody itself was addressed. It appeared that the ICC accepted that it would review and in fact take responsibility for *any* violations which occur in this context, in the context of an arrest/detention executed at the behest of the ICC. It was noted that several tribunal cases could be interpreted as support for that view, although there were also cases in which the judges refused to review the legality of the national arrest/detention proceedings.

With respect to examining irregularities beyond the constructive custody it was explained that if the ICC were more generally to review irregularities which resulted from concerted action between the ICC and third parties, it would follow several (inter)national courts in which it was recognised that responsibility must be taken for action in which the prosecuting forum's own authorities participated, in which those authorities were involved. However, Chapter XI continued, there were also judges who looked more broadly at the issue of responsibility and did not confine themselves to concerted action. Finally, it was noted that if the ICC('s Appeals Chamber) were not to look at concerted action more generally but only at irregularities, prior to the constructive custody of the ICC, if the suspect were in detention for the same crimes as those for which he is now being prosecuted at the ICC, that stance would constitute a deviation from other (inter)national courts which simply appear to be interested in the seriousness of the pre-trial irregularities in general, whether or not a suspect was in detention for the same crimes as those for which the court is now prosecuting him.

After this, a few remaining points from the external assessment were briefly addressed.

First, it was noted that the competent judicial authority in the custodial State, because of Article 59 of the ICC Statute, had become a much more serious and powerful link in the surrender proceedings than the national authorities in the context of the UN *ad hoc* Tribunals.

Secondly, it was explained that the (possible) idea of the ICC that a *male captus* motion cannot be seen as a challenge to the ICC's jurisdiction (*ratione personae*) does not seem to be shared by other (inter)national courts, even if, strictly speaking, the motion challenges the *exercise* of personal jurisdiction and not the personal jurisdiction itself.

Thirdly, with respect to the ICC's sole focus on the ultimate remedy (*male detentus*): it was noted that the cases examined at the inter-State level did not clearly identify the reasoning that the suspect, if his claim for a *male detentus* was rejected, might be entitled to other remedies from the prosecuting forum such as a reduction of the sentence or financial compensation, although it was, of course, possible for the *male captus* victim to sue the kidnappers in a civil case. As regards the context of the tribunals, it was explained that the focus on the ultimate remedy alone, refusal of jurisdiction, could certainly be found here. Nevertheless, Chapter XI continued, there were also cases where the judges, after having rejected the *male detentus* claim, have examined whether the suspect would be entitled to other, less far-reaching, remedies instead.

Fourthly, it was remarked that the ICC had not yet explicitly mentioned the element 'seriousness of the crimes' when considering *male captus* claims, an element which could be found in the context of both inter-State and tribunal cases. However, this was not that strange as the ICC had rejected the abuse of process doctrine, a doctrine in which this element played a major role. Nevertheless, it was explained that if the ICC were to follow the Pre-Trial Chamber and consider refusing jurisdiction in the case of serious violations, irrespective of the entity responsible (assuming for now that that is the position of the Pre-Trial Chamber), one could expect that the ICC would not refuse jurisdiction too readily and in doing so, would refer to both the absence of responsibility on the part of the suspect's accusers and the importance of prosecution (read: the seriousness of the suspect's alleged crimes).

A last point was that the ICC did not explicitly support the *male captus bene/male detentus* maxim. This was similar to other courts and tribunals. Although the Appeals Chamber did contrast the *male captus bene detentus* rule with the abuse of process doctrine and although that latter doctrine was rejected by the Appeals Chamber, which could be interpreted as meaning that the Appeals Chamber followed the *male captus bene detentus* rule, this was certainly not the case, as the Appeals Chamber clearly supported a large part, namely the human rights dimension, of the abuse of process doctrine.

Then, Chapter XI assessed the ICC position on the *male captus* issue in the context of this study's internal framework, *vis-à-vis* the law of the ICC itself.

After having repeated the point also mentioned in this summary that this study has shown that the two evaluative frameworks could merge, that a number of unclear concepts from Article 21 of the ICC Statute – the central article of the internal evaluative framework – could encompass the results of the external evaluative framework, it was questioned whether a number of aspects of what the

ICC position on the *male captus* issue *could* be (as explained: this was not entirely clear) were in conformity with Article 21, paragraph 3 of the ICC Statute.

For example, it was explained that one can question whether the test which requires that certain violations must be such that a person can no longer make his defence before one can speak of the impossibility of a fair trial – which could be the ICC's *male detentus* test, although this was doubted by this study – was in fact in accordance with Article 21, paragraph 3 of the ICC Statute. It was noted that this provision definitely contained the human right to a fair trial and arguably a human right to a fair trial which was not limited to the fair trial in court but which extended to the entire proceedings. However, it was also remarked that if the ICC were to adhere to its words which focused on a broad concept of fair trial (and this was probably more likely), there would be no violation of the ICC's law. In this context, it was also explained that the ICC's view that a broad concept of a fair trial had to be cherished, even for persons charged with very serious crimes, was definitely in conformity with internationally recognised human rights.

It was then noted that Article 21, paragraph 3 of the ICC Statute also contained the human right to liberty and security, including a person's right to challenge the lawfulness of his detention, even if that right was not explicitly mentioned by the ICC Statute, and that the refusal of the judges in the *Katanga* case to look into the motion of the suspect challenging the lawfulness of his pre-trial arrest and detention, for the only reason that the motion was filed too late, might perhaps be interpreted as a violation of this right and thus of the ICC law. In this context, it was explained that this right was so crucial that the ICC, according to Article 21, paragraph 3 of the ICC Statute, must always accept and review such a challenge, especially if the motion argues that the unlawfulness of the arrest/detention was so serious that it had to lead to the ending of the case. This was the case, whether the challenge, strictly speaking, could be seen as a challenge to the ICC's jurisdiction or not.

Chapter XI then went on to explain that the fact that the ICC concentrated on the violations themselves (and not so much on the question of whether rights were violated intentionally) could be seen as being in accordance with the right to an effective remedy in the case of violations, a right of which Section 3 of Chapter IX had concluded that it could also be qualified as an internationally recognised human right. However, it was also remarked that the additional requirement as could be found in the *Bemba Gombo* case – that the violation must have caused actual prejudice to the suspect before remedies can be granted – would not be in accordance with this right.

Chapter XI then turned to the point that the ICC had acknowledged that whenever it exercised jurisdiction, whenever the ICC was involved in a case, that involvement had to be in accordance with internationally recognised human rights. This appeared to be a correct interpretation of Article 21, paragraph 3 of the ICC Statute. It was then explained that if the ICC('s Appeals Chamber) were to agree with the Pre-Trial Chamber that it would look, beyond the constructive custody of the suspect, to irregularities which result from concerted action between the ICC and third parties, that stance would be in accordance with the scope of Article 21,

paragraph 3 of the ICC Statute. However, it was also noted that if the Appeals Chamber followed its additional requirement that it would only look at irregularities suffered by the suspect if that suspect was in detention for the same crimes as those for which he is now being prosecuted at the ICC, this could be seen as a violation of Article 21, paragraph 3 of the ICC Statute because that provision applied to any situation in which the ICC is involved.

One of the most interesting points of the internal assessment was that the ICC's *male detentus* test assumed the involvement of the ICC (or third parties working at its behest). It appeared that the ICC would not refuse jurisdiction, for example, if private individuals were responsible for a very serious *male captus*. This would be unproblematic if the ICC had accepted the abuse of process doctrine, which is very general and which merely demands that judges must refuse jurisdiction if they feel that the *male captus* is so serious that it would undermine the integrity of the court/their sense of justice/the idea of a fair trial in general to continue the case. However, the ICC had rejected this doctrine. How was this rejection of the abuse of process doctrine to be assessed *vis-à-vis* the ICC's law?

It was noted that the ICC judges were right when they argued that this doctrine could not be found in the ICC's proper instruments pursuant to Article 21, paragraph 1 (a) of the ICC Statute. However, after having clarified that a certain provision of the ICC Statute – Article 4, paragraph 1 of the ICC Statute – "cannot be construed as providing power to stay proceedings for abuse of process", they concluded that Article 21, paragraph 1 (a) of the ICC Statute was exhaustive on the matter and hence that one did not have to look to Article 21, paragraph 1 (b) and (c) of the ICC Statute.

Serious doubts were raised, however, as to whether this conclusion was in accordance with the ICC's law. It was noted that it seemed far too easy to conclude that the ICC Statute was exhaustive on the matter simply because the abuse of process doctrine was not explicitly mentioned or implicitly covered (via – the seemingly irrelevant – Article 4, paragraph 1 of the ICC Statute) by the ICC instruments. It was explained that the judges, who arguably focused too much on the common law label 'abuse of process' here, had not seriously reviewed other relevant provisions which might shed light on the question of whether the ICC had power to issue a *male detentus* verdict in the case of a serious *male captus*, taking into account the rules of interpretation of the Vienna Convention on the Law of Treaties (as was done in Chapter IX of this book). Chapter XI maintained that the much more extensive review in Chapter IX had arguably shown that Article 21, paragraph 1 (a) of the ICC Statute, taking into account Article 21, paragraph 3 of the ICC Statute, was *not* exhaustive on the matter and thus that one could turn to Article 21, paragraph 1 (b) and (c) of the ICC Statute to fill this legal lacuna. And, as argued in that chapter, the power of a court to refuse jurisdiction in the case of a serious *male captus* might be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute (namely as practice of international courts) or as a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute. In addition, it was explained that because the power of a court to refuse jurisdiction

in very serious *male captus* cases, without looking at the exact label of this power (such as abuse of process/supervisory powers) now, was used by so many (inter)national courts, it could be seen as an inherent power of *any* court, including of the ICC (even if it could not be construed via Article 4, paragraph 1 of the ICC Statute).

Another important aspect from the internal assessment concerned the ICC's views on Article 59 of the ICC Statute. Although the Appeals Chamber in *Lubanga Dyilo* did not go into this matter, the Pre-Trial Chamber in that case clarified the fact that the competent judicial authority in the custodial State was not obliged to look into the pre-trial phase if that phase concerned national proceedings only. However, Chapter XI continued, that appeared to mean that the competent judicial authority was, nevertheless, allowed to do so and in fact, was obliged to do so if those national proceedings were somehow related to the ICC, for example, because the ICC was involved in them. It was noted that that would constitute a role in accordance with Article 21, paragraph 3 of the ICC Statute, which demanded compliance with internationally recognised human rights as from the moment the ICC was involved in a case, which may, of course, be the case before the official requests were sent to the national authorities. However, regarding the role of the ICC judges, as the supervisors marginally reviewing this provision, Chapter XI remarked that both the Pre-Trial Chamber and the Appeals Chamber did not discuss to what extent these judges could look into the phase before the official ICC requests were sent. In addition, both Chambers, and the same goes for the judges in *Bemba Gombo*, did not clearly review the execution of the ICC's official arrest in terms of provisions such as Articles 21, paragraph 3 and 55, paragraph 1 (d) of the ICC Statute. (They merely stressed the importance of such rights in their decisions more generally.) They seemed interested in national law alone. It was argued that this restrictive interpretation was in violation of the ICC's own law, since both provisions certainly apply to the Article 59 of the ICC Statute proceedings. (Article 21, paragraph 3 of the ICC Statute applies already as from the moment the ICC becomes involved in the case and Article 55, paragraph 1 (d) of the ICC Statute applies already as from the moment the ICC initiates an investigation.)

The final point which had to be addressed was that the Appeals Chamber was only interested in the ultimate remedy, the refusal of jurisdiction/a halt of the procedures. However, it was explained that Article 21, paragraph 3 of the ICC Statute contained the internationally recognised human right to an effective remedy in the case of a violation. This meant that every violation as from the moment the ICC becomes involved in the case had to be repaired, whether this leads to the ending of the case or not. Although it was possible that no violations occurred in *Lubanga Dyilo* as from the moment the ICC became involved in it (and hence that no violation of the ICC's law occurred in this case), the ICC was reminded not to forget in general that suspects would, however, be entitled, pursuant to Article 21, paragraph 3 of the ICC Statute, to appropriate remedies in the case of violations as from the moment the ICC becomes involved in the case.

Now that the central question of this study was answered, Chapter XI turned to the most important recommendations.

First of all, it was argued that the ICC should *at least* follow its own law. This meant that the ICC should reject all the above-mentioned reasonings which could be seen as being in violation of Article 21 of the ICC Statute, and in particular its paragraph 3.

Hence, it was argued that the ICC ought to abandon the old-fashioned and restrictive concept of a fair trial that certain violations must be such that a person can no longer make his defence before one can speak of the impossibility of a fair trial (if that concept was indeed supported by the ICC in the *male captus* discussion).

Furthermore, it was noted that it is to be welcomed that in theory, the ICC so often stressed the importance of human rights, even for suspects of the most serious crimes and even regarding rights which are not explicitly mentioned in the ICC Statute (such as the right to challenge the lawfulness of one's detention), but that also meant that suspects had to be able to exercise those rights in practice. However, it could be argued, Chapter XI continued, that the *Katanga* case, for example, did not crystallise that thought. It was submitted that judges should always *want* to find out what happened to their suspects, what the foundation of their case was. Consequently, they were not to focus too much on the exact title of the *male captus* motion or dismiss too readily the entire motion for being submitted too late. Judges could also censure the Defence for its tardiness and still *proprio motu* review the allegations. Although it was recognised that the ICC's system is in many respects unique and should be preserved as much as possible, it was also claimed that the judges could not hide behind this uniqueness to disregard what is arguably their main task, namely to try suspects of international crimes *in a fair way*. With that came a serious examination of the way in which those suspects were brought into the jurisdiction of the ICC, of the foundation of their case.

It was noted that the feeling one got from the *Katanga* case, that the judges did not seem to be *really* interested in a full examination of the legality of the pre-trial phase, could also be found in the *Lubanga Dyilo* and *Bemba Gombo* cases, where the judges did not seriously examine the relevance of provisions such as Articles 21, paragraph 3 and 55, paragraph 1 (d) of the ICC Statute in the context of Article 59 of the ICC Statute. In addition, one could also refer to the focus on the ultimate remedy in *Lubanga Dyilo* here. It was argued that the ICC must be very careful not to, in the words of Sluiter, "retreat within the safe limits of The Hague".

The ICC had stated that whenever it exercised jurisdiction, whenever it was involved in a case, that exercise of jurisdiction, that involvement (which included the actions of third parties working at the behest of the ICC) had to be in accordance with Article 21, paragraph 3 of the ICC Statute. This was a correct statement of the law, meaning, in turn, that the ICC Appeals Chamber's additional requirement that it would only look into irregularities if the suspect was in detention at the national level for the same crimes as those for which he is now being prosecuted at the ICC had to be abandoned. However, Chapter XI submitted that even though the first

statement was in accordance with the ICC's law, the judges should go one step further: they should examine *any* violation which occurs in the context of their case more generally, whether or not there is involvement on the part of the ICC. It was explained that normally, violations which occur during a period before the ICC was involved in a case will not readily be viewed as falling within the context of the ICC's case. Hence, this broader test was not to be feared too much from a practical point of view. Conversely, it had to be cherished from a legal point of view, because it was the only test which could enable judges to remedy violations which they deemed to fall within the context of their case, even if the ICC was not yet involved in it.

Another important recommendation was that if the ICC is confronted by a new *male captus* case, it should more extensively examine whether or not it has the power to refuse (the exercise of) jurisdiction in serious *male captus* cases, comparable with the abuse of process doctrine. Chapter XI asserted that the examination in Chapter IX had arguably shown that Article 21, paragraph 1 (a) of the ICC Statute was not exhaustive on the matter and hence that the judges could turn to Article 21, paragraph 1 (b) and (c) of the ICC Statute. If they agreed with this study that these provisions, via concepts such as "principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems of the world" could cover established practices of (inter)national courts, they could use these practices to solve their *male captus* problem.

As concerns "principles and rules of international law", Chapter XI pointed to the acceptance of a broad concept of abuse of process (in that jurisdiction might be refused in very serious *male captus* cases, irrespective of the entity responsible) and the fact that the seriousness of the crimes with which the suspect is charged could be taken into account when applying the abuse of process doctrine.

If these principles brought no relief, Chapter XI continued, the ICC might turn to the "general principles of law derived by the Court from national laws of legal systems of the world". These stipulated that most courts confronted by a *male captus* will use their discretion, for instance (in the common law system) under the abuse of process doctrine, to balance all the different elements of the case to decide whether or not the *male captus* is so serious that jurisdiction must be refused. In addition, most courts seemed to refuse jurisdiction only if their own authorities were involved in the *male captus*. Finally, it appeared that quite a number of courts – although it was unclear whether "quite a number" would be enough to lead to a general principle of law pursuant to Article 21, paragraph 1 (c) of the ICC Statute – would also take into account the seriousness of the crimes with which the victim of the *male captus* was charged in deciding whether or not jurisdiction had to be refused.

Finally, Chapter XI explained that because both the "principles and rules of international law" and the "general principles of law derived by the Court from national laws of legal systems of the world" seemed to accept an abuse of process-

like power, one could argue that *any* court, including the ICC, was invested with such an inherent power.

Hence, Chapter XI argued that even if the judges did not accept that the reasoning behind the abuse of process doctrine could be seen as a principle/rule of international law pursuant to Article 21, paragraph 1 (b) of the ICC Statute or otherwise as general principle of law derived by the Court from national laws of legal systems of the world pursuant to Article 21, paragraph 1 (c) of the ICC Statute, they had to embrace the abuse of process-like power they arguably already possessed ("inherent") – in the same way as they seemed to embrace the right of a suspect to challenge the lawfulness of his detention (probably including, in principle, the remedy to be released in the case of an unlawful arrest/detention), even if that right was not explicitly mentioned in the ICC instruments. In exercising that power, Chapter XI continued, they should balance all the different elements of the case in finding the most appropriate remedies for the violations, such as the seriousness of the alleged crimes/the importance of having the case continued and the seriousness of the *male captus*, which increased when the involvement of the ICC was greater (thereby looking at all the different possibilities of attributing conduct to the ICC, including, for example, acknowledgment and adoption of the conduct as its own), when the violations had been committed intentionally, when the *male captus* had caused great prejudice to the suspect, when the *male captus* was accompanied by serious mistreatment, *etc*.

Chapter XI then noted that if the ICC were not convinced that such a broad balancing exercise could be found in the ICC's law or could not be seen as an inherent power of the Court, it might, perhaps, be more susceptible to practical arguments. Chapter XI recalled that the *male detentus* test of the ICC 'only' took into account the human rights dimension of the abuse of process doctrine. In addition, it assumed the involvement of the ICC (or third parties working at its behest).

According to this study, this could lead to serious problems engendered by *male captus* situations, which, for example, involved violations of State sovereignty and/or violations committed by States/private individuals in which the ICC was not involved.

Chapter XI explained that under the abuse of process doctrine, judges could refuse jurisdiction if they are of the opinion that such a serious *male captus* in the context of an ICC case occurred that they can no longer, in good conscience, continue with the case. This is a very general test which could cover, for example, violations of State sovereignty and violations committed by States/private individuals in which the ICC was not involved. (It was noted in this context that it was probable, or at least to be hoped, that the ICC judges would not follow the 'carte blanche' decision of the ICTY Appeals Chamber's decision in *Nikolić* and would attach more importance to the value of State sovereignty, a concept which the judges of the "lateral" ICC could not ignore in the same way as the judges of the truly "vertical" ICTY had done.) However, Chapter XI continued, under the present

ICC test, this would not seem to be possible, whereas the ICC should definitively have the tools, the possibility to refuse jurisdiction in such situations.

Another important suggestion was connected to the previously mentioned right of a suspect to challenge the lawfulness of his arrest/detention. Chapter XI explained that if the judge is of the opinion that his arrest/detention is indeed unlawful (but not so serious that jurisdiction must be refused), he may wonder what the consequences of that determination must be, now that the ICC Statute does not mention the remedy of release in the case of an unlawful arrest/detention and now that this right, including its remedy of release, can be seen as having customary international law status and thus, in principle, is applicable to the ICC as well. Here, Chapter XI made it clear that the judges might turn to the examination of this remedy in Chapter IX, where it was concluded that pursuant to Article 21, paragraph 3 of the ICC Statute, this remedy is in principle to be accorded. However, it was also explained in that context (and also elsewhere in this book and in this summary) that the remedy is problematic because it is over-simplified, because it can be used as a *pro forma* remedy and finally because there is a risk that a suspect of international crimes will escape prosecution because he is released for a minor violation, for example, because he was not promptly informed of the reasons for his arrest. This study argued that not only in the context of the abuse of process doctrine (or a comparable doctrine which can be used in determining whether the *male captus* is so serious that jurisdiction must be refused) but also in the context of this problematic remedy of release, a judge should be able to consider all the relevant elements of the case, including the seriousness of the alleged crimes. That meant, Chapter XI continued, that a suspect of international crimes should not be released because of the determination of 'unlawful arrest/detention' but should remain in custody and should be granted other appropriate remedies, such as a reduction of the sentence (on the basis of Rule 145 of the ICC RPE), compensation (which in any case appeared to be mandatory pursuant to Article 85 of the ICC Statute) or perhaps merely a statement that a violation had occurred and that this had to be regretted, taking into account the seriousness of the *male captus*. However, Chapter XI also noted that if the unlawful arrest/detention was very serious, for example, because the ICC orchestrated an abduction, jurisdiction had to be refused and the person permanently released. This is a far-reaching consequence, but some *male captus* situations are so serious that the ICC, in good conscience, can no longer proceed with the case without undermining its integrity as an institution based on law. Furthermore, it was also stressed that the fact that the ICC could no longer try this suspect did not mean that it should not do everything in its power to ensure that the suspect was tried before another court. It still had a general duty to fight impunity, whether that fight takes place before the ICC or not.

However, Chapter XI asserted that the most important thing was that tribunals/ICC judges, as the final adjudicators, as the ultimate guarantors of the suspect's rights, remedy *every* violation occurring in the context of their case, whether or not that leads to a refusal of jurisdiction and irrespective of the entity responsible. It was argued that such an approach, in which context the ICC judges

might use the determinations of the competent judicial authority in the custodial State as a first indication of how certain irregularities at the national level had to be assessed, would deter parties in the arrest and surrender proceedings from committing irregularities, would best protect the integrity of the ICC and would provide fairness to the suspect, who would not become the victim of a legal vacuum due to the fact that his case had been fragmented over two or more jurisdictions. In addition, because not many *male captus* cases are so serious that jurisdiction must be refused, it was argued that neither would it easily jeopardise the victims' idea of fairness (in that a trial must be held). Moreover, it would lead to greater differentiation in a context which is sometimes overly focused on the ultimate remedy (refusal of jurisdiction). This, Chapter XI continued, would also 'soften' the old-fashioned *male captus bene detentus* image that international courts have. Even though it appeared that the ICC followed the *male captus male detentus* reasoning as concerns serious irregularities by the suspect's "accusers" (which included the actions of third parties working at the ICC's behest), something which was to be welcomed, it was explained that the *male captus* cases by which the ICC would be confronted would very often not concern such irregularities. This meant that *in practice*, the ICC would probably almost always continue a *male captus* case, which could, in a way, be seen as acceptance of the *male captus bene detentus* rule. (It was applauded in that respect that the ICC explicitly supported neither the *male captus bene detentus* nor the *male captus male detentus* rule, as these maxims were arguably the height of simplicity, leaving no room for differentiation at all.)

Regarding the above-mentioned point that it appeared that the ICC followed the *male captus male detentus* reasoning as concerns serious irregularities by the suspects "accusers"; this study was very much in favour of granting discretion, in the context of the abuse of process doctrine (or a comparable doctrine) and in the context of determining the consequences of an unlawful arrest/detention, to judges so that they balance all the relevant elements of the case. However, it was also aware of the fact that too much discretion can lead to problems, for example, in terms of equality, transparency and predictability. Hence, there had to be *some* beacons to guide this discretion.

First of all, Chapter XI submitted that in some cases, it had to be understood that there is normally only one possible outcome. For example, if it became clear that the OTP was involved in an abduction operation flouting all the relevant legal rules, the judges could not but refuse jurisdiction if they still wanted to be taken seriously as custodians of the law, whether or not that suspect was charged with serious crimes. This view, Chapter XI noted, which fell short of the test about which more recent State practice seemingly agreed that it must, *in any event*, lead to rejection of the *male captus bene detentus* rule, probably also constituted the view of the ICC and that was to be welcomed. In other less obvious cases, all the above-mentioned elements had to play a guiding role in determining whether or not jurisdiction ought to be refused. Thus, even though certain indicators had to be followed in the balancing exercise to ensure that the discretion is not unlimited, the ultimate responsibility, Chapter XI asserted, still had to lie with the judges because it was

shown that too harsh rules might also lead to abuse and because judges might always be confronted by situations not envisaged.

Finally, Chapter XI noted that this book was premised on two features of the ICC's system, namely that the ICC cannot try suspects *in absentia* and does not have its own police force. However, it was explained that one could obviously imagine that if the ICC were to be endowed with these features, this could decrease the chances of the ICC judges being confronted by a *male captus* case in the first place.

In this context, it was argued that although this study had shown that the idea of an own international *arrest* team was not yet politically feasible, the ICC might consider following the example of the ICTY in creating *tracking* teams. However, because the work of such teams consisted of traditional police work in the State in question, they had to have the consent of that State, which would obviously be very difficult, if not impossible, to obtain from uncooperative States.

Chapter XI then noted that allowing – under certain circumstances – trials *in absentia* would solve that problem.

However, as the ICC was simply not (yet) equipped with these features, it was explained that this meant that it must make (perhaps more) use of the tools it already has.

In this context, it was submitted more generally that the ICC must stay far away from dubious methods of bringing a suspect into its jurisdiction because resorting to such methods to reach a short-term goal, besides the fact that it undermines, at that particular moment, the values for which the ICC stands, and that it may not be that 'successful' at all given that such tactics can lead to the ending of the case (see *supra*), can seriously damage the ICC's mission in the long run.

This was, Chapter XI explained, because, among other things, the ICC needs the practical support of the international community, especially because it does not have its own enforcement arm. Hence, to ensure that it has the *constant* goodwill of States, the ICC's enforcers, it must *always* prosecute a suspect in a fair, law-abiding way. If sceptical, but mighty States (such as the US) see that the ICC is a fair court, Chapter XI continued, they may more readily become a party to the ICC Statute, which will in turn lead to greater support and a more powerful enforcement arm of the ICC.

As a result, this study argued that if judges are confronted by the dilemma presented in the very first chapter of this book, namely effectiveness (in the sense of achieving prosecutions and convictions) versus fairness, they should always opt for the latter concept. Only fairness can engender *real* effectiveness, meaning effectiveness in the long term.

Another important point expressed in Chapter XI was that introducing new tools *for the ICC* to increase its capabilities to start a trial, such as a provision on allowing trials *in absentia* (if that possibility were to be introduced in the future), runs the risk of masking the real problem, namely why the enforcement arm of the ICC, formed by *States* party to the ICC Statute (and States ordered by the UNSC to cooperate with the ICC), is not functioning as it should. It was remembered that States have

the prime obligation to arrest and surrender suspects and that this obligation must be taken very seriously.

According to Chapter XI, this meant, for example, that if suspects could not be apprehended by the custodial State, other States (or States working together in an international peacekeeping force) had to assist that State in its efforts. Not only logistically or financially, but perhaps also with an actual arrest team.

As regards uncooperative States, it was explained that third States had to turn to the carrot-and-stick method which had worked so well for the ICTY, meaning that they had to stress that cooperation with the ICC would lead to financial/political support and that non-cooperation would lead to embargoes/sanctions/political isolation. Such a method, Chapter XI continued, would have more legitimacy if it were executed within the context of a collectivity of States, such as international organisations. In this context, reference was also made to the role of the UNSC. Although Chapter XI acknowledged that this organ's relationship with the ICC is a difficult one, it was argued that *if* that organ decides that certain States must cooperate with the ICC and those States refuse to do so, the UNSC should act, much more than it has done until now. In this context, a number of strategies were presented which could help the UNSC in its efforts to fight impunity and to save its own credibility.

In short, Chapter XI argued that the international community, the enforcement pillar of the ICC, must (better) understand that it has major responsibilities in the functioning, effectiveness and thus success and credibility of the ICC. The international community has, in the words of Rastan, a responsibility to enforce here.

Chapter XI, Part 5 and this study ended with a brief epilogue in which it was hoped, among other things, that this study (including its critical observations as can be found in Subsection 2.3 and Section 3 of Chapter XI), or the discussions which it may engender, will inspire and help the ICC when it is confronted by a new *male captus* situation to issue a decision which does (more) justice to its difficult but commendable objective, namely to fight impunity in a fair way. A fight, as was argued in Section 3 of Chapter XI, that can only be won if the international community takes its responsibility as the ICC's enforcer seriously.

SAMENVATTING (DUTCH SUMMARY)

In Deel 1 (en Hoofdstuk I) van dit boek maakte de lezer kennis met het onderwerp van deze studie. De geruchtmakende ontvoering van Adolf Eichmann in Argentinië op 11 mei 1960 en de recente kidnapping van de van terrorisme verdachte Abu Omar in Italië op 17 juni 2003 lieten zien dat het gebruik van onregelmatige methoden destijds een optie was, en nu nog steeds een optie is, bij het in hechtenis nemen van verdachten, vooral als de belangen groot zijn dan wel als zodanig worden beschouwd.

Omdat het Internationaal Strafhof (IS) eveneens met verdachten van ernstige misdrijven moet omgaan, rees de vraag hoe dit Hof, het – volgens deze studie – meest belangrijke instituut op het gebied van internationaal strafrecht, zich opstelt ten aanzien van verdachten die beweren dat de manier waarop zij onder de jurisdictie van het Hof zijn gebracht onregelmatig was (*male captus*). Zou het ten gronde kiezen – natuurlijk rekening houdend met het feit dat veel zou/zal afhangen van de precieze omstandigheden van het geval – voor effectiviteit (in de zin van het tot stand komen van vervolgingen en veroordelingen) en zijn jurisdictie blijven uitoefenen ondanks de *male captus* (*male captus bene detentus*) of zou het van oordeel zijn dat waarden als *fairness*, mensenrechten en de integriteit van het proces eisen dat in het geval van een *male captus*, de uitoefening van jurisdictie moet worden geweigerd (*male captus male detentus/ex iniuria ius non oritur*)?

Dit leidde tot de volgende centrale vraag:

Hoe gaat het IS momenteel om met de dilemma's die een male captus *zaak met zich meebrengt en hoe dient deze aanpak beoordeeld te worden?*

Om deze vraag te kunnen beantwoorden werd uiteengezet dat er twee toetsingskaders zouden worden gecreëerd; een extern kader (om na te gaan hoe vergelijkbaar of verschillend de *male captus* opstelling van het IS was ten opzichte van de opstelling van andere hoven die eerder met dit probleem te maken hebben gehad) en een intern kader (om na te gaan hoe de opstelling van het IS moet worden beoordeeld ten opzichte van zijn eigen recht op basis van Artikel 21 van het IS Statuut).

Naast het beantwoorden van deze centrale vraag werd duidelijk gemaakt dat deze studie nog twee andere doelen had, namelijk 1) het meer in het algemeen samenvoegen van twee fascinerende onderwerpen die nog niet eerder in één boek zijn verschenen (het IS en het *male captus bene detentus* maxime) en 2) het bijdragen aan de *male captus* discussie zelf, aan de discussie hoe IS rechters en rechters in het algemeen het best kunnen omgaan met vermeende onregelmatigheden in de voorfase van de aan hen voorgelegde zaak, aan de discussie op welke wijze een zowel effectief als eerlijk proces kan worden bereikt.

In Deel 2 van deze studie werd het maxime *male captus bene detentus* zelf onder de loep genomen.

Hoofdstuk II onderzocht de herkomst van het maxime en merkte onder andere op dat hoewel *male captus bene detentus* in de literatuur vaak is bestempeld als een "ancient" of "old" *Romeins* maxime, een bescheiden Romeins strafrechtelijk onderzoek liet zien dat het maxime helemaal geen antieke wortels leek te hebben en dat de uit vier woorden bestaande Latijnse spreuk in feite relatief modern zou kunnen zijn.

In elk geval was de oudste tekst waarin deze studie het maxime tegenkwam M.H. Cardozo's artikel 'When Extradition Fails, Is Abduction the Solution?', dat werd gepubliceerd in de *American Journal of International Law* van januari 1961.

Hoofdstuk II onderzocht ook de herkomst van de gedachte achter het maxime en concludeerde dat de juridische redenering in de Engelse *Ex Parte Susannah Scott* zaak, van de hand van *Lord Chief Justice* Tenterden van de *Court of King's Bench*, van dinsdag 19 mei 1829, waarschijnlijk de oudste *male captus bene detentus* gedachte is met een werkelijk méér jurisdicties omvattende, internationale, dimensie – de dimensie waar deze studie zich op richtte.

In Hoofdstuk III werden de verschillende elementen van het maxime diepgaand onderzocht aan de hand van vier hoofdvragen: 1) "Welke *male captus* situaties bestaan er?" 2) "Wat wordt er geschonden door deze *male captus* situaties?" 3) "Wie schendt?" en 4) "Wat zijn de gevolgen van zulke schendingen?"

In het kader van de eerste hoofdvraag werd allereerst toegelicht dat, ook al kunnen *male captus* situaties elke onregelmatigheid in de juridische voorfase omvatten die gezien kan worden als een onregelmatigheid welke valt binnen de context van een bepaalde zaak (inclusief, bijvoorbeeld, een onregelmatige voorlopige hechtenis), Hoofdstuk III zich zou concentreren op drie basis *male captus* situaties die keken naar de onregelmatigheid van de aanhouding: verkapte uitlevering, *luring* en kidnapping/ontvoering. Omdat deze situaties uit de horizontale, interstatelijke context voortkomen, werd toegelicht dat deze context de voornaamste achtergrond zou zijn waartegen Hoofdstuk III zou worden besproken.

Na deze drie basis *male captus* situaties te hebben besproken werd uiteengezet welke waarden zij zouden kunnen schenden (staatssoevereiniteit, mensenrechten – waaronder de belangrijkste twee: het recht op vrijheid en veiligheid/het recht niet te worden onderworpen aan willekeurige arrestatie of gevangenhouding, rechten met een volgens deze studie internationaal gewoonterechtelijke/algemeen internationaalrechtelijke status – en het meer algemene concept *rule of law*) en

welke uitzonderingen van toepassing zouden kunnen zijn om te bewerkstelligen dat geen schendingen plaatsvinden: toestemming, zelfverdediging en humanitaire gronden (ten aanzien van een schending van staatssoevereiniteit) alsmede oorlog of een andere algemene noodtoestand (ten aanzien van een mensenrechtschending).

In het kader van de mensenrechtelijke context werden twee belangrijke bepalingen besproken, namelijk artikel 9, lid 1 van het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten (IVBPR) en artikel 5, lid 1 van het Europees Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele Vrijheden (EVRM). Naast een meer theoretische analyse van beide bepalingen werd onderzocht hoe de mensenrechtelijke organen die toezicht houden op het IVBPR (namelijk het Mensenrechtencomité) en het EVRM (namelijk de (nu niet meer bestaande) Europese Commissie voor de Rechten van de Mens en het Europees Hof voor de Rechten van de Mens) deze bepalingen hadden geïnterpreteerd in de context van vermeende *male captus* zaken.

Een interessante observatie uit deze context was dat er een verschil waarneembaar is tussen enerzijds de Europese Commissie voor de Rechten van de Mens en het Europees Hof voor de Rechten van de Mens, die de houding van de gelaedeerde staat nog steeds belangrijk achten bij het bepalen of een kidnapping/ontvoering mensenrechten schendt, en anderzijds het Mensenrechtencomité, dat enkel en alleen oog lijkt te hebben voor de belangen van het individu en dus kan concluderen dat een mensenrechtschending heeft plaatsgevonden, zelfs indien de 'gelaedeerde' staat heeft samengespannen in de operatie en dus zelfs indien er geen probleem is vanuit een klassiek (interstatelijk) internationaalrechtelijk oogpunt.

Meer in het algemeen leek het erop dat terwijl het Mensenrechtencomité alleen de belangen van het individu op het oog heeft, de Europese instituten ook de andere kant van de medaille meenemen, namelijk het belang van samenwerking tussen staten bij het vervolgen van vermeende criminelen – een opvatting die zeer goed werd verwoord in de beroemde *Öcalan* zaak. Een opvatting die ook misbruikt kan worden om enigszins dubieuze procedures in de voorfase van het strafproces door de vingers te zien. In dat opzicht is het niet vreemd dat de literatuur verscheidene zaken van de Europese instituten, inclusief de *Öcalan* zaak, heeft bekritiseerd wegens het (impliciet) steunen van het *male captus bene detentus* maxime.

De bespreking van de derde hoofdvraag van Hoofdstuk III – "Wie schendt?" – maakte duidelijk dat niet alleen staten/staatsambtenaren, maar ook particulieren betrokken kunnen zijn bij de verschillende *male captus* situaties. Het behandelde de controversiële kwestie of particulieren *als zodanig* waarden als staatssoevereiniteit en mensenrechten kunnen schenden en concludeerde dat er geen pasklaar antwoord is op deze vraag. Daarom werd geopperd, hierbij gebruik makende van het voorbeeld van een kidnapping van een persoon door particulieren in de context van de tribunalen, dat men meer in het algemeen kon stellen dat, zelfs wanneer men van oordeel is dat particulieren, in principe, niet het recht op vrijheid en veiligheid van die persoon of de soevereiniteit van de gelaedeerde staat hebben kunnen schenden, het eveneens moeilijk is om de ontvoering als een puur private schending van

nationaal recht te zien. Omdat de kidnapping de reden is waarom de verdachte nu voor zijn rechters staat, heeft deze een zekere publieke dimensie gekregen. Men zou dus kunnen beargumenteren, overigens zonder te beweren dat het tribunaal in zo'n geval het recht op vrijheid en veiligheid van deze persoon of de soevereiniteit van de gelaedeerde staat heeft geschonden, dat een (inbreuk gelijkend op een) schending van het recht van vrijheid en veiligheid van die persoon of van de soevereiniteit van de gelaedeerde staat desondanks *heeft* plaatsgevonden in de context van de tribunaalzaak en dat het tribunaal deze schending zou moeten herstellen. Natuurlijk mag/moet dan, bij het bepalen van de gevolgen van deze schending/inbreuk, rekening gehouden worden met het feit dat deze is begaan door particulieren.

Na deze discussie werd de minder controversiële kwestie onderzocht hoe gedrag van particulieren kan worden toegerekend aan de staat met behulp van de *Draft articles on the responsibility of States for internationally wrongful acts* van de *International Law Commission* (zoals artikel 11 over gedrag dat de staat erkent en tot het zijne maakt), de *Eichmann* zaak en het concept *due diligence*.

De vierde en laatste hoofdvraag van dit hoofdstuk behandelde de gevolgen van de verschillende schendingen. In deze context werden onderwerpen behandeld als *reparation* (zoals teruggave van de verdachte in het geval van schending van staatssoevereiniteit), *remedies* (zoals vrijlating van de verdachte in het geval van schending van het recht op vrijheid en veiligheid) en *abuse of process* (zoals het aanhouden van de zaak in het geval van schending van de *rule of law*). Bovendien werd nagegaan hoe deze verschillende gevolgen gezien moesten worden indien deze werden vergeleken met de *male detentus* uitkomst, dat wil zeggen de weigering om jurisdictie uit te oefenen.

Een belangrijk punt, aangestipt in de laatste pagina's van dit hoofdstuk, was dat de remedie vrijlating in het geval van een onrechtmatige (arrestatie en) detentie (zie artikel 9, lid 4 van het IVBPR en artikel 5, lid 4 van het EVRM) naar het oordeel van deze studie problematisch is. Indien een persoon slachtoffer is geworden van een onrechtmatige arrestatie/detentie (maar niet van een die zo ernstig is dat het leidt tot het einde van de zaak) moet hij, strikt genomen, worden vrijgelaten. Echter, vrijlating sluit een nieuwe arrestatie ter plekke en een hernieuwde uitoefening van jurisdictie niet uit. Dit komt omdat bovengenoemde bepalingen eenvoudigweg spreken over vrijlating (als zodanig) en niet over bijvoorbeeld vrijlating/afwijzing van de zaak *with prejudice to* de Aanklager, hetgeen betekent dat de Aanklager geen nieuw proces meer tegen deze verdachte kan starten na diens vrijlating. Een nieuwe arrestatie is dus niet uitgesloten, zeker als de verdachte is aangeklaagd voor ernstige misdrijven en vervolging zeer belangrijk wordt geacht. In zo'n geval zouden de vervolgende autoriteiten kunnen beweren dat deze 'remedie' (de 'vrijlating') de initiële *iniuria* van de onregelmatigheid heeft hersteld en dat het proces vervolgens gewoon doorgang kan vinden. Echter, in dat geval zou de verdachte alleen maar een *pro forma* remedie verkrijgen, hetgeen niet overeenkomt met het idee dat een remedie daadwerkelijk en effectief moet zijn, zie artikel 2, lid 3 onder (a) van het IVBPR en artikel 13 van het EVRM. Bovendien houdt de *pro forma* vrijlating geen

rekening met de exacte mate van ernst van de onregelmatigheid. Met andere woorden, het is niet alleen een *pro forma*, maar ook een ongenuanceerde remedie.

Daarom werd gesteld dat het beter zou zijn wanneer de rechter deze problematische remedie van de vrijlating zou vermijden en dat hij, wanneer hij vaststelt dat de arrestatie/detentie van een persoon onrechtmatig is, eenvoudigweg de meest geëigende remedie zou verlenen die rekening houdt met alle omstandigheden van het geval, niet alleen de ernst van de *male captus*, maar ook de ernst van de vermeende misdrijven van de verdachte en het belang om de zaak voort te zetten. Als men deze route volgt, kan men nog steeds recht doen aan het hierboven genoemde 'gezond verstand' idee dat schuilgaat achter de onmiddellijke nieuwe arrestatie, namelijk dat verdachten van ernstige misdrijven indien mogelijk vervolgd moeten worden – hoewel een *male detentus* uitkomst natuurlijk ook voor zulke verdachten niet kan worden uitgesloten – maar zal men ook de vreemde, *pro forma* release en onmiddellijke nieuwe arrestatie vermijden en deze vervangen door *werkelijke* remedies, zoals strafvermindering en/of compensatie. De rechter kan dan rekening houden met de exacte ernst van de onregelmatigheid bij het bepalen in welke mate strafvermindering of compensatie aan de verdachte zou moeten worden verleend. Zo'n oplossing zou naar het oordeel van deze studie fairder zijn ten opzichte van de verdachte en bovendien beter in staat zijn om nuance in het systeem aan te brengen. Ook ontloopt deze oplossing de (terechte) kritiek die men van verschillende actoren kan verwachten wanneer een verdachte wordt vrijgelaten wegens een onregelmatigheid die niet zo ernstig is dat deze tot het einde van de zaak leidt (in zulke ernstige gevallen dient het publiek te begrijpen dat het hof geen andere keuze heeft dan jurisdictie te weigeren en de verdachte vrij te laten (maar nu daadwerkelijk)), maar die desondanks met zich meebrengt dat de detentie als onrechtmatig moet worden beschouwd en dat, strikt genomen, de verdachte moet worden vrijgelaten. Zelfs indien deze verdachte, gezien zijn vermeende ernstige misdrijven, waarschijnlijk ter plekke opnieuw zou worden gearresteerd, kan men aannemen dat het publiek/de internationale gemeenschap/de slachtoffers niet zullen begrijpen hoe, bijvoorbeeld, een verdachte van genocide kan worden vrijgelaten omdat hij niet onverwijld op de hoogte is gebracht van de redenen van zijn arrestatie, zeker indien deze persoon *niet* opnieuw gearresteerd wordt en vervolgens de vlucht neemt.

Na deze tamelijk theoretische hoofdstukken over het *male captus bene detentus* maxime dook Deel 3 van deze studie in de praktijk, met het doel een extern toetsingskader te creëren aan de hand waarvan de huidige *male captus* opstelling van het IS kon worden vergeleken.

Hoofdstuk IV bevatte een korte introductie die uiteenzette hoe het grootste deel van het boek methodologisch aangepakt ging worden.

In Hoofdstuk V werd *male captus* rechtspraak uit de context tussen staten kritisch beschreven en geanalyseerd. Het hoofdstuk was verdeeld in drie categorieën en behandelde tientallen interstatelijke zaken uit de volgens deze studie twee belangrijkste rechtssystemen (*common* en *civil law*) en een derde categorie interessante zaken die niet (duidelijk) waren onder te brengen in één van deze

categorieën. Alle drie de categorieën behandelden zowel oudere als meer recente zaken (de meer recente zaken beginnende bij de *Toscanino* zaak uit 1974) in de hoop om duidelijker te zien of het maxime zich in een bepaalde richting ontwikkelde of niet.

Alvorens naar de hoofdconclusies van dit hoofdstuk te gaan, die werden samengevat in Hoofdstuk VII, moeten hier eerst de algemene kenmerken van het tussenliggende Hoofdstuk VI worden besproken.

In Hoofdstuk VI werd *male captus* rechtspraak uit de context tussen staten en internationale/geïnternationaliseerde straftribunalen – opnieuw kritisch – beschreven en geanalyseerd. De 'focus' lag op de volgens deze studie twee belangrijkste internationale straftribunalen, het Joegoslavië Tribunaal (ICTY) en het Rwanda Tribunaal (ICTR). Daarom werden niet alleen tien *male captus* zaken berecht door deze VN *ad hoc* Tribunalen uitgebreid bediscussieerd (*Dokmanović*, *Todorović*, *Milošević*, *Nikolić*, *Tolimir* en *Karadžić* (ICTY) en *Barayagwiza*, *Semanza*, *Kajelijeli* en *Rwamakuba* (ICTR)), maar ook de belangrijkste kenmerken van het verticale samenwerkings- en overleveringsregime van deze Tribunalen behandeld. Verklaard werd dat dit regime zich schijnbaar voornamelijk richtte op effectiviteit, op de verplichting van staten om verdachten over te leveren, en in mindere mate op de rechten van de over te leveren/overgeleverde personen. Desalniettemin werd ook opgemerkt dat de rechtspraak enkele gebreken op papier had hersteld, zoals de afwezigheid van een recht op *habeas corpus*, een recht de rechtmatigheid van de detentie aan te vechten en vrijgelaten te worden in het geval van een onrechtmatige (arrestatie of) detentie. Tenslotte passeerden ook enige interessante strategieën om een verdachte in hechtenis te nemen de revue, zoals het gebruik van verzegelde aanklachten, vredestroepen, *tracking teams* en politieke druk van derde staten en organisaties (denk aan de *carrot-and-stick* methode ten aanzien van geldmiddelen en lidmaatschappen van organisaties).

Daarentegen werden er slechts een paar algemene opmerkingen gewijd aan het juridisch samenwerkingssysteem in de context van de geïnternationaliseerde straftribunalen – tribunalen die half internationaal, half nationaal zijn – omdat het voor het doel van deze studie niet nodig was alle verschillende samenwerkingsregimes van deze tribunalen, die zeer lijken op de horizontale interstatelijke samenwerkingsregimes, in detail uiteen te zetten. Dat achteraf ontdekt werd dat de context van de geïnternationaliseerde straftribunalen slechts één zaak leek te bevatten waarin het *male captus* probleem een belangrijk facet van de procedure uitmaakte (de *Duch* zaak voor de Buitengewone Kamers in de Hoven van Cambodja (ECCC), die ging over een vermeende onregelmatige voorlopige hechtenis) zou thans, met de wijsheid van nu, gezien kunnen worden als een andere rechtvaardiging voor een minder vergaande bespreking van het juridisch samenwerkingssysteem in de context van de geïnternationaliseerde straftribunalen. Hoofdstuk VI eindigde tenslotte met enkele interessante observaties afkomstig uit zaken van geïnternationaliseerde straftribunalen die niet gezien konden worden als echte *male captus* zaken, maar die desondanks onderwerpen aanstipten die meer in het algemeen aan het centrale onderwerp van dit boek konden worden verbonden en

die eerder in Hoofdstuk VI de revue waren gepasseerd, zoals *habeas corpus* en *abuse of process*.

Het laatste hoofdstuk van dit deel was Hoofdstuk VII, dat beginselen afgeleid uit Hoofdstukken V en VI samenvatte en aldus het externe toetsingskader van deze studie creëerde.

Ten aanzien van de interstatelijke context (Hoofdstuk V) werd opgemerkt dat de meeste rechters uit de oudere *male captus* zaken de uitoefening van jurisdictie zouden doorzetten, hierbij aangevende dat zij de manier waarop een persoon onder de jurisdictie van de staat van het nu berechtende gerecht was gebracht niet konden of niet wilden (omdat het toch geen verschil zou uitmaken) bezien, zelfs wanneer er onregelmatigheden konden zijn gepleegd (door de autoriteiten van die staat) in de buitenlandse voorfase van het strafproces (*male captus bene detentus*). Aldus hingen zij de *non-inquiry* regel en een beperkte notie van een eerlijk proces aan, namelijk door dat deel uit te sluiten dat er toe geleid had dat de persoon überhaupt naar de rechtszaal was gebracht.

Met de komst van mensenrechtenverdragen als het IVBPR en de rijzende status van het individu in de internationale context, leken rechters meer aandacht te besteden aan concepten als een eerlijk proces en waren zij eerder geneigd om de buitenlandse voorfase van het strafproces te bezien, ongeacht de vraag of er wel of niet een protest was gekomen van de gelaedeerde staat.

Dit betekende echter niet dat het *male captus bene detentus* tijdperk ten einde gekomen was en dat *male captus male detentus* of *ex iniuria ius non oritur* nu het door rechters geprefereerde richtsnoer was.

Ook al leek het erop dat de oude(rwetse) versie van de *male captus bene detentus* regel (dat rechters de manier waarop de verdachte onder de jurisdictie van de staat van het nu berechtende gerecht was gekomen niet kunnen of niet willen bezien) (terecht) was opgegeven, werd ook geconcludeerd dat veel rechters nog steeds beslissingen nemen die gekwalificeerd zouden kunnen worden als *male captus bene detentus* beslissingen; niet omdat zij zeggen de vermeende onregelmatigheden in de buitenlandse voorfase van het strafproces niet te kunnen of niet te willen bezien (en dus dat zij jurisdictie gaan uitoefenen, ongeacht de omstandigheden waaronder de verdachte onder de jurisdictie van de staat van het nu berechtende gerecht is gekomen), maar omdat zij van oordeel zijn, na de buitenlandse voorfase van het strafproces te hebben onderzocht, dat de vermeende *male captus* in kwestie niet ernstig genoeg is om afstand te doen van jurisdictie; een (niet zo ernstige) *male captus bene detentus*. Opgemerkt werd dat veel afhing van de precieze omstandigheden en de vraag hoe deze omstandigheden gewogen dienden te worden in de *balancing exercise* waarvoor rechters een duidelijke voorkeur hebben.

In sommige gevallen werd de *male captus* zo ernstig geacht dat rechters van oordeel waren dat het weigeren van jurisdictie de enige manier was om waarden als respect voor staatssoevereiniteit, *due process of law*/de mensenrechten van de verdachte en de *rule of law*/de integriteit van de (executieve/gerechtelijke) procedures te beschermen. Veel gehanteerd in dat opzicht was de *abuse of process* doctrine, die uit de *common law* context stamt, maar wiens grondgedachte naar het

oordeel van deze studie ook gevonden kan worden in de overwegingen van rechters uit andere juridische contexten: gerechten hebben in principe jurisdictie (*bene detentus*), maar zullen hun discretie gebruiken om geen jurisdictie uit te oefenen (*male detentus*) wanneer de *male captus* zo ernstig is dat het een *abuse of proces* van het gerecht zou zijn om jurisdictie te blijven uitoefenen.

Deze algemene opmerkingen toepassende op de verschillende basis *male captus* situaties zoals gepresenteerd in Hoofdstuk III van dit boek (verkapte uitlevering, *luring* en ontvoering – *male captus* situaties wier definities overigens impliceren dat zij opzettelijk zijn uitgevoerd) en beginnende met ontvoering, concludeerde Hoofdstuk VII dat het erop leek dat de meer recente zaken aantoonden dat gerechten jurisdictie zouden weigeren in het geval van een ontvoering (uitgevoerd door de eigen agenten van de vervolgende staat op het grondgebied van een andere staat, zonder diens toestemming) die 1) gepaard ging met ernstige mensenrechtschendingen/ernstige mishandeling *of* 2) werd gevolgd door een protest en verzoek tot teruggave van de verdachte door de gelaedeerde staat. Het leek zelfs dat de statenpraktijk in het algemeen aangaf dat in deze twee omstandigheden (de twee zogenaamde *Toscanino* mogelijkheden/uitzonderingen) jurisdictie moest worden geweigerd. Ten aanzien van de tweede situatie werd zelfs een verdergaande conclusie getrokken, namelijk dat internationaal gewoonterecht schijnbaar aangaf dat een *male detentus* moest volgen. Ook werd onderstreept dat bovengenoemde situaties gevallen zijn waarin *male captus bene detentus in elk geval* verworpen werd. Echter, dat betekende niet dat gerechten geen gebruik hebben gebruikt van lagere *male captus male detentus* drempels bij ontvoeringen. Er zijn ook *male captus* zaken geweest waar gerechten een *male detentus* standaard hebben voorgesteld waarin een protest van de gelaedeerde staat of ernstige mishandeling niet vereist is. Het leek er echter op dat deze lagere drempels, ook al vallen deze toe te juichen, en zelfs indien deze zaken gezien kunnen worden als bewijs van een zekere trend in de statenpraktijk, niet evenveel steun kregen in de rest van de wereld als de twee *Toscanino* mogelijkheden. Het was naar het oordeel van deze studie dan ook niet goed vol te houden dat in *elke* zaak waarin een ontvoering plaatsvond (zelfs een zonder ernstige mishandeling of zonder een protest en een verzoek tot teruggave van de verdachte) de statenpraktijk (laat staan: internationaal gewoonterecht) aangaf dat een gerecht een *male detentus* beslissing zal uitvaardigen.

Ten aanzien van de andere twee *male captus* technieken, *luring* en verkapte uitlevering (en andere minder ernstige onregelmatige methoden die niet duidelijk in deze drie basis *male captus* situaties zijn onder te brengen, zoals een informele overdracht tussen twee staten zonder enige procedurele waarborg), lieten nogal wat van de meer recente zaken lieten zien dat zulke technieken, zelfs als zij niet even ernstig worden geacht als ontvoering, nog steeds kunnen leiden tot een weigering om de zaak voort te zetten – iets wat wederom kan worden toegejuicht – mits de eigen autoriteiten van de nu berechtende staat betrokken waren bij de *male captus*. Dat betekende ook dat gerechten in het algemeen de zaak zouden voortzetten wanneer de eigen autoriteiten van de vervolgende staat *niet* betrokken waren bij de *male captus*. Echter, er waren ook nogal wat recente zaken waarin zulke technieken

waren gebruikt en waar werd vastgesteld dat de eigen autoriteiten van de vervolgende staat betrokken waren geweest bij de *male captus*, maar waar het gerecht toch niet jurisdictie weigerde. Deze zaken toonden aan dat een *luring* operatie of een verkapte uitlevering als zodanig niet beschouwd worden als een dermate ernstige *male captus* dat dit moet leiden tot het einde van de zaak.

Een belangrijke observatie uit Hoofdstuk VII was dat het element 'ernst van de vermeende misdrijven waarvoor de verdachte is aangeklaagd' soms een rol leek te spelen in de *balancing exercise* van de rechter; misschien had er dan inderdaad een *male captus* plaatsgevonden, maar gezien het feit dat de vermeende misdrijven van de verdachte ernstiger waren en de voortzetting van het proces dus van groter belang was, leidde een dergelijke *male captus* niet tot het einde van de zaak.

Kortom, veel hing af van de precieze omstandigheden, van vragen als: wat voor *male captus* vond plaats, was de *male captus* opzettelijk gepleegd, wie pleegde de *male captus*, leidde de *male captus* tot een schending van de soevereiniteit van een andere staat (inclusief een protest en een verzoek tot teruggave van de verdachte), was de verdachte ernstig mishandeld tijdens de *male captus* en was het slachtoffer van de *male captus* aangeklaagd voor ernstige misdrijven? Tenslotte werd opgemerkt dat rechters soms ook aan de hele *male captus* discussie voorbijgingen door eenvoudigweg te stellen dat er überhaupt geen *male captus* had plaatsgevonden, zelfs indien er aanwijzingen waren dat iets onregelmatigs was gebeurd.

Ten aanzien van de beginselen afgeleid uit de zaken tussen staten en internationale/geïnternationaliseerde straftribunalen (Hoofdstuk VI) werd geconcludeerd dat volgens deze studie de tribunalen tegenwoordig de ouderwetse versie van het *male captus bene detentus* maxime verwerpen, in die zin dat zij niet het idee aanhangen dat de tribunalen jurisdictie hebben, *ongeacht* de omstandigheden waarin de verdachte voor hen was gebracht. Dit kon worden verklaard uit het feit dat deze tribunalen, na een wellicht wat dubieuze start, vaak het belang van mensenrechten, *due process* en een eerlijk proces hebben benadrukt en deze concepten in het algemeen niet hebben beperkt tot het proces in de rechtszaal. Deze (toe te juichen) opstelling kon worden verklaard door de omstandigheid dat toen de in dit hoofdstuk besproken tribunalen opkwamen – vanaf de jaren 90 van de vorige eeuw – concepten als mensenrechten en een eerlijk proces al stevig wortel hadden geschoten in de denkrichting van rechters. Het veel oudere idee dat een proces moest worden voortgezet, *wat er ook* was gebeurd tijdens de procedures die een verdachte voor het gerecht hadden gebracht, was eenvoudigweg niet meer in overeenstemming met deze ideeën.

Echter, ook in deze context van de internationale/geïnternationaliseerde straftribunalen werd aangetoond dat dit niet betekende dat deze als een *male captus male detentus* context kon worden beschouwd. Integendeel, hoewel in de interstatelijke context nog verschillende *male captus* zaken resulteerden in een *male detentus* uitkomst, was er maar één zaak in de context van de internationale/geïnternationaliseerde straftribunalen waar een *male captus* leidde tot een *male detentus* uitkomst: de *Barayagwiza* zaak voor het ICTR. Echter, zelfs die

uitkomst werd aangepast (in een *bene detentus* uitkomst, 'verzacht' met strafvermindering) nadat de regering van Rwanda, die niet toestond dat zo'n 'grote vis' als Barayagwiza aan justitie zou ontsnappen, haar samenwerking met het Tribunaal had opgezegd en nadat de Kamer van Beroep haar beslissing had herzien. Daarom werd beweerd dat de tribunalen, zelfs als zij de ouderwetse versie van het maxime niet steunen en zelfs als zij niet expliciet voorstander zijn van het *male captus bene detentus* maxime, toch gemakkelijker geassocieerd werden met het laatste maxime dan met zijn tegenpool *male captus male detentus*. Hoe kon dit worden verklaard?

Hoofdstuk VII maakte duidelijk dat de tribunalen, net als de meeste nationale gerechten, stellen dat zij in principe jurisdictie hebben (*bene detentus*), maar dat een ernstige *male captus* situatie, op grond van de discretionaire *abuse of process* doctrine, tot een *male detentus* uitkomst kan leiden. Hierbij hebben de tribunalen een brede versie van de *abuse of process* doctrine omarmd, in die zin dat het bij het bepalen of de *male captus* zo ernstig is dat jurisdictie zou moeten worden geweigerd, niet zou uitmaken of de entiteit die de *male captus* heeft gepleegd al dan niet aan het tribunaal gerelateerd kan worden. Deze opvatting, zo zette Hoofdstuk VII uiteen, gaat duidelijk verder dan de nationale *abuse of process* doctrine waar de betrokkenheid van de autoriteiten van het vervolgende forum vereist lijkt te zijn.

Echter, zelfs als de tribunalen een bredere versie van de *abuse of process* doctrine hadden omarmd, en zelfs als de tribunalen leken te aanvaarden – dit was niet helder vanwege de onduidelijke beslissing van de Kamer van Beroep van het ICTY in *Nikolić*, naar het oordeel van deze studie de belangrijkste *male captus* beslissing van de tribunalencontext – dat zij jurisdictie zouden weigeren in het geval van een 'normale' ontvoering gepleegd door hun eigen mensen – en aldus zouden 'duiken' onder de *male detentus* standaard van het interstatelijke niveau – werden zij nog steeds gemakkelijker geassocieerd met de *male captus bene detentus* regel omdat geen enkele *male captus* situatie uiteindelijk had geleid tot een *male detentus* uitkomst. Dit, zo vervolgde Hoofdstuk VII, kon verklaard worden door de volgende twee factoren. (Opgemerkt zij dat de volgende twee factoren uitgaan van het bestaan van een *male captus*. Echter, net als de gerechten op het interstatelijke niveau kunnen ook tribunalen van oordeel zijn dat er überhaupt geen *make captus* had plaatsgevonden, zelfs als men kan betwijfelen of dat wel juist is.)

Allereerst zal de *male captus*, omdat de tribunalen geen eigen politiemacht hebben, vaak gepleegd worden door derde partijen. Dit vermindert natuurlijk de ernst van de *male captus*.

De tweede factor die kan verklaren dat de tribunalen nog steeds gemakkelijker worden geassocieerd met de *male captus bene detentus* regel is dat de rechters, zelfs wanneer zij vaststellen dat er zich een ernstige *male captus* heeft voorgedaan, ook oog hebben voor de andere kant van de medaille, namelijk de omstandigheid dat de verdachte is aangeklaagd voor ernstige misdrijven en dat de internationale gemeenschap eist dat de verdachte, indien mogelijk, vervolgd zou moeten worden. Ten gronde hebben de rechters dus te bepalen, hierbij rekening houdend met elk

aspect van de aan hen voorgelegde zaak, wat belangrijker is: de *male captus* of het feit dat de verdachte wordt vervolgd.

Met andere woorden, hoewel een ernstige *male captus* tot een *male detentus* uitkomst kan leiden, zelfs ten aanzien van verdachten van ernstige misdrijven (denk aan het bovengenoemde punt dat de tribunalen waarschijnlijk jurisdictie zullen weigeren wanneer hun eigen mensen betrokken zijn bij een ontvoering) is de *male captus* vaak niet zo ernstig. Niet alleen ten aanzien van de gebruikte *male captus* techniek, maar ook ten aanzien van de actoren die verantwoordelijk zijn voor de *male captus*.

Uiteengezet werd dat een door het Bureau van de Aanklager (OTP) georganiseerde ontvoering dus tot het einde van de zaak kan leiden terwijl dat niet het geval hoeft te zijn bij een ontvoering uitgevoerd door derde partijen (zie ook de beslissing van de Kamer van Beroep van het ICTY in *Nikolić*). Dit zal waarschijnlijk echter anders zijn wanneer deze ontvoering gepaard gaat met andere ernstige schendingen/onregelmatigheden, zoals ernstige mishandeling. (Opgemerkt zij dat zelfs wanneer de tribunalen zich hier vaak concentreerden op ernstige mishandeling, de standaard 'slechts' zulke ernstige schendingen/onregelmatigheden vereist dat de rechter de zaak niet kan voortzetten, maar niet noodzakelijkerwijs ernstige mishandeling/op marteling gelijkende omstandigheden.) In zo'n geval kan de *male captus* ook tot een *male detentus* uitkomst leiden, zelfs wanneer de OTP niet verantwoordelijk is voor de *male captus*.

Wat betreft de minder ernstige *male captus* situaties zoals *luring* zette Hoofdstuk VII uiteen dat een *luring* operatie uitgevoerd door de OTP door de vingers werd gezien door de Kamer van Berechting van het ICTY in *Dokmanović*, maar dat die *bene detentus* uitkomst anders kon zijn geweest wanneer de *luring* gepaard was gegaan met, bijvoorbeeld, ernstige mishandeling. Bovendien werd ook opgemerkt dat de algemene redeneringen uit, bijvoorbeeld, de *Nikolić* en *Barayagwiza* zaken, zaken die werden berecht ná de *Dokmanović* zaak, met zich mee kunnen brengen dat tribunaalrechters, geconfronteerd met op *luring* gelijkende situaties, van oordeel zijn dat de OTP niet met *clean hands* naar het hof is gekomen, dat deze zijn toevlucht heeft genomen tot illegale handelingen en dus dat jurisdictie moet worden geweigerd.

Deze studie heeft het bovengenoemde element 'ernst van de vermeende misdrijven' erkend in de context van de discretionaire *abuse of process* doctrine, maar heeft er ook voor gewaarschuwd dat dit geen *carte blanche* mag worden ten aanzien van het overleveren van verdachten van ernstige misdrijven aan de tribunalen (en hetzelfde geldt voor de interstatelijke context): de visie dat men tot op zekere hoogte rekening kan houden met de ernst van de misdrijven wanneer men moet besluiten wat de gevolgen zullen zijn van een bepaalde *male captus*, kan op geen enkele wijze gezien worden als instemming met het gebruik van bepaalde *male captus* technieken in de context van internationale misdrijven. Sommige *male captus* situaties zijn zo ernstig – bijvoorbeeld omdat de OTP opzettelijk ernstige (procedurele) onregelmatigheden heeft gepleegd in het proces van overlevering van een verdachte aan justitie, zoals een ontvoering – dat jurisdictie geweigerd zou

moeten worden indien het tribunaal serieus genomen wil worden als *recht*shof, of het nu te maken heeft met een verdachte van ernstige misdrijven of niet. Men zou hier ook praktische overwegingen kunnen noemen; naar het oordeel van deze studie zou het voortzetten van de zaak onder zulke omstandigheden ook schadelijk zijn voor de totale missie van het tribunaal. Bovendien mag men niet vergeten dat de negatieve gevolgen van het voortzetten van een ontvoeringszaak niet beperkt hoeven te blijven tot de context van de tribunalen. Voor nationale staten/gerechten kunnen deze internationale instituties gezien worden als de na te volgen voorbeelden. Wanneer werknemers van een tribunaal betrokken zijn bij een ontvoering en daar – in zekere zin – mee wegkomen (omdat de rechters geen jurisdictie weigeren), dan kunnen nationale staten/gerechten verwijzen naar de aanpak van het tribunaal om hun eigen (mogelijk) dubieuze methoden teneinde verdachten voor het gerecht te brengen te rechtvaardigen of om hun 'goedkeuring' van zulke methoden te verdedigen door de zaak voort te zetten. Dat zou op zijn beurt weer schade berokkenen aan de integriteit van deze staten/gerechten, aan de mensenrechten van hun verdachten en – wat veel belangrijker is voor de horizontale context dan voor de tribunalencontext – aan de absolute fundering van het interstatelijke niveau zelf, namelijk aan het respect voor de soevereiniteit van een andere staat.

Hoofdstuk VII verduidelijkte dat het element 'ernst van de vermeende misdrijven' ook werd aanvaard in de meer controversiële context van de gevolgen van de vaststelling dat de arrestatie of detentie van een persoon onrechtmatig was. Wijzende op de problemen van de remedie vrijlating zoals eerder in Hoofdstuk III van dit boek vastgesteld, en benadrukkende dat een vrijlating in de context van de tribunalen zelfs nog gemakkelijker er toe kan leiden dat een verdachte van internationale misdrijven, vanwege relatief kleine onregelmatigheden, aan de greep van justitie ontsnapt, werd aangegeven dat, hoewel het recht natuurlijk moet worden gerespecteerd, men ook voorzichtig moet zijn om het recht niet op zulke strikte wijze toe te passen dat dit tot groot onrecht verwordt: *summum ius*, *summa iniuria*.

Met andere woorden, onderstreepte Hoofdstuk VII, de mensenrechten van *alle* verdachten moeten geëerbiedigd worden. Het feit dat men te maken heeft met verdachten van internationale misdrijven kan op geen enkele wijze aangegrepen worden als excuus om mensenrechten te schenden of om te stellen dat überhaupt geen schending heeft plaatsgevonden wanneer zo'n schending overduidelijk aanwezig was. Ook moeten, waar schendingen plaatsvinden, geëigende remedies worden verleend. Echter, bij het verlenen van deze remedies moet men in het oog houden dat men niet mogelijk de weg vrijmaakt voor absurde gevolgen die niets meer met het concept rechtvaardigheid te maken hebben, bijvoorbeeld, door een strikte toepassing van de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie. In zo'n geval zou het naar het oordeel van deze studie juister zijn om in plaats daarvan een verdachte van internationale misdrijven in hechtenis te houden en geëigende en werkelijke remedies te verlenen, rekening houdende met de ernst van de *male captus*.

Een laatste belangrijk punt van Hoofdstuk VII dat in deze samenvatting genoemd zou moeten worden, is dat werd gesteld dat *alle* schendingen die plaatsvinden in de

context van een tribunaalzaak hersteld moeten worden, en dit niet alleen wanneer deze schendingen aan het tribunaal kunnen worden toegerekend (hoewel het duidelijk is dat betrokkenheid van het tribunaal tot meer verstrekkende remedies kan leiden).

Deze suggestie was in de context van de *abuse of process* doctrine niet controversieel; in de context van de vraag of de *male captus* zo ernstig is dat de rechters naar eer en geweten de zaak niet kunnen voortzetten hebben de tribunalen bevestigd dat zij de schendingen zullen bezien, ongeacht welke entiteit verantwoordelijk is voor deze schendingen.

Dit lag echter veel minder duidelijk ten aanzien van minder ernstige schendingen welke niet binnen het domein van de *abuse of process* doctrine komen. Desalniettemin werd gesteld dat het nogal vreemd zou zijn wanneer de tribunalen alleen de acties van derde partijen zouden bezien indien deze acties een bepaalde mate van ernst bereiken. Als het tribunaal bereid is, via de *abuse of process* doctrine, om de *ultieme* verantwoordelijkheid te nemen voor acties van derde partijen (namelijk door het weigeren van jurisdictie), dan zou het ook heel wel in staat moeten zijn verantwoordelijkheid te nemen voor minder ernstige schendingen. Om veilig te stellen dat de verdachte niet het slachtoffer wordt van de omstandigheid dat zijn proces over twee of meer systemen is verdeeld is het fair als de laatste oordelende instantie, het tribunaal, in de context van wiens zaak deze schendingen hebben plaatsgevonden, de verantwoordelijkheid neemt voor *elke* schending. Dit impliceert natuurlijk weer dat de rechter in staat moet zijn na te gaan hoe de arrestatie/detentie/overlevering was uitgevoerd *'on the ground'*, bijvoorbeeld, of de entiteiten die de arrestatie uitvoerden op verzoek van het tribunaal alle (nationale) arrestatieprocedures hebben geëerbiedigd. Immers, wanneer een arrestatie duidelijk in strijd was met zulke procedures, is het moeilijk vol te houden dat het recht van een persoon op vrijheid en veiligheid niet was geschonden, zelfs wanneer alle regels van het tribunaal (zoals het uitvaardigen van een geldige aanklacht en een arrestatiebevel) zijn nageleefd.

Uiteengezet werd dat in deze specifieke context tribunaalbeslissingen zijn uitgevaardigd die er een enigszins *non-inquiry*/op *male captus bene detentus* gelijkende visie op na houden en die het idee ondersteunen dat de rechtmatigheid van de nationale arrestatie/detentieprocedures niet onderzocht kan worden. Echter, er waren ook zaken die geïnterpreteerd konden worden als inhoudend dat het tribunaal zou bezien wat er op het nationaal niveau gebeurde en dat het zelfs elke schending zou herstellen die plaatsvond in die context, ook indien het tribunaal, strikt genomen, hier geen verantwoordelijkheid voor droeg.

Echter, als het inderdaad juist was dat de rechtspraak beide interpretaties bevatte, dan zou de rechter, zo werd gesteld, moeten kiezen voor de tweede interpretatie, de interpretatie die alle onregelmatigheden in de voorfase van het strafproces onderzoekt en die niet de toerekening van de schendingen aan het tribunaal/de strikte juridische verantwoordelijkheid van het tribunaal voor deze schendingen eist. Afschrikking, de integriteit van het proces en *simple fairness* ten opzichte van de verdachte (in die zin dat voorkomen wordt dat de verdachte in een juridisch vacuüm

terechtkomt) eisen dat het nu vervolgende forum alle schendingen herstelt die in de context van zijn zaak zijn gepleegd. Deze opstelling zou ook het (impopulaire) *male captus bene detentus* imago dat de tribunalen hebben, kunnen 'verzachten'; het verlenen van remedies voor alle schendingen die zich hebben voorgedaan in de context van hun zaken laat zien dat de tribunalen zich niet alleen bekommeren om het vervolgen van verdachten van internationale misdrijven, maar ook om het veilig stellen van een eerlijk proces voor deze verdachten. In dit kader kon men mensen die bezwaar hebben tegen deze opstelling ook gerust stellen, in die zin dat het verlenen van remedies geen drastische gevolgen hoeft te hebben. Aannemelijk is dat de rechter heel vaak geconfronteerd zal worden met slechts geringe schendingen. Voor zulke schendingen past het om geringe remedies te verlenen, bijvoorbeeld, een (beperkte) strafvermindering in het geval van veroordeling. Dit leidt ertoe dat zowel aan het rechtvaardigheidsgevoel van de persoon in kwestie (in die zin dat de jegens hem begane schendingen worden hersteld) als aan dat van de slachtoffers/de internatonale gemeenschap als geheel (in die zin dat een verdachte van internationale misdrijven, indien deze schuldig wordt bevonden, een geëigende (hetgeen vaak zal betekenen: zware) straf voor zijn daden krijgt) tegemoet wordt gekomen.

Na dit belangrijke hoofdstuk, waaraan dienovereenkomstig de nodige aandacht is besteed in deze samenvatting, werd het tijd om Deel 4 van dit boek te behandelen, dat de context van het IS onder de loep nam. In het eerste hoofdstuk van dit deel, Hoofdstuk VIII, werd het meer algemene samenwerkingsregime, inclusief de meer specifieke arrestatie- en overdrachtsbepalingen, onderzocht. In deze context werd ook de rol van internationale troepen bij het overdragen van verdachten aan het IS behandeld. Een cruciaal onderwerp, onder andere omdat staten die wensen samen te werken met het IS hier vaak niet toe in staat zijn omdat de oorlog die de aandacht van het IS heeft getrokken misschien ook het juridische systeem van deze staten heeft geruïneerd.

In Hoofdstuk VIII werd speciale aandacht besteed aan artikel 59, lid 2 van het IS Statuut, een op *habeas corpus* gelijkende bepaling die gezien kan worden als een van de meest belangrijke in het arrestatie- en overdrachtssysteem van het IS, de bepaling waar het nationale en internationale niveau elkaar ontmoeten. Opgemerkt werd dat er nog vrij veel vragen blijven bestaan ten aanzien van deze bepaling, waarvan de belangrijkste is wat de gevolgen zijn wanneer de bevoegde gerechtelijke autoriteit in de 'staat van bewaring' vaststelt dat een persoon niet is aangehouden overeenkomstig de juiste procedure en dat de rechten van die persoon niet zijn geëerbiedigd. Geconcludeerd werd dat het antwoord op deze vraag van staat tot staat kan verschillen maar dat men het om meerdere redenen, inclusief het belangrijke feit dat niet-medewerkende staten deze bepaling zouden kunnen misbruiken, met de meeste auteurs eens kon zijn dat nationale autoriteiten zeer afkerig zouden moeten zijn de overdracht van een verdachte te weigeren wanneer op het nationale niveau wordt vastgesteld dat een persoon niet is aangehouden overeenkomstig de juiste procedure of dat de rechten van die persoon niet zijn geëerbiedigd. Desalniettemin zou een staat heel wel gerechtvaardigd kunnen stellen dat vrijlating de juiste

juridische remedie is in het geval van schendingen. Echter, voor dat geval werden de nationale autoriteiten aan de eerder gesignaleerde problemen met betrekking tot deze remedie herinnerd. Sterker, in de context van het IS zou een vrijlating van een verdachte zelfs nog gemakkelijker kunnen leiden tot een ontsnapping, nu de vrijgelaten verdachte naar vele staten die niet partij zijn bij het IS zou kunnen vluchten. Staten die, in principe, niet verplicht zijn samen te werken met het IS, een kenmerk dat niet aanwezig is in de context van het ICTY/ICTR.

Bovendien werd er ook aan herinnerd dat artikel 59 van het IS Statuut – dat in het algemeen veel meer belang hecht aan nationaal recht (geïnterpreteerd in het licht van mensenrechtenrecht) en nationale autoriteiten dan het verticale regime van het ICTY/ICTR doet – 'slechts' het arrestatieproces voor *staten* reguleert en dat de arrestatieprocedures voor bijvoorbeeld vredestroepen – indien deze mandaat hebben om arrestaties uit te voeren voor het IS – onduidelijk blijven. Niettemin werden verschillende voorstellen van rechtswetenschappers besproken die deze problemen zouden kunnen oplossen, zoals een directe overdracht van de verdachte door vredestroepen aan het IS, op voorwaarde dat bepaalde waarborgen worden geëerbiedigd.

Een belangrijk punt, opgemerkt in Hoofdstuk VIII, was dat vele aspecten van de mensenrechtelijke *habeas corpus* bepalingen, dankzij de artikelen 55, 59 en 60 van het IS Statuut, voorkwamen in het arrestatie- en overdrachtsregime van het IS, en dat dit een belangrijke verbetering was vergeleken met de juridische context van het ICTY/ICTR, maar dat een ondubbelzinnig en expliciet recht van de verdachte om de rechtmatigheid van zijn arrestatie en detentie aan te vechten en om in het geval van een onrechtmatige arrestatie en detentie vrijgelaten te worden, ontbrak. Dit nogal merkwaardige punt zou terugkomen in Hoofdstuk IX.

Tenslotte werd geconcludeerd dat Hoofdstuk VIII had uitgewezen dat het regime van het IS zowel verticale als horizontale elementen bevat en dat de door Currie geïntroduceerde term "lateraal" daarvoor een passende (en in ieder geval originele) kwalificatie zou kunnen zijn.

In het volgende hoofdstuk, Hoofdstuk IX, werd het interne toetsingskader van deze studie gecreëerd door middel van een analyse van artikel 21 van het IS Statuut. Niet alleen de inhoud van de drie verschillende leden van dit artikel, maar ook de samenhang tussen de drie onderdelen van het eerste lid werden behandeld aan de hand van zowel doctrine als rechtspraak.

Aangezien artikel 21, lid 1 onder (a) van het IS Statuut zweeg over de *male captus* kwestie, werd gebruik gemaakt van de algemene regel van uitlegging en de aanvullende middelen van uitlegging zoals deze gevonden kunnen worden in het Verdrag van Wenen inzake het verdragenrecht. Daar een tekstuele/contextuele/teleologische uitlegging van enkele bepalingen van de eigen IS documenten die gezien zouden kunnen worden als (indirect) relevant voor de *male captus* discussie geen opheldering gaf over de vraag of het IS Statuut gezien kon worden als duidelijk de voorkeur gevende aan hetzij *male captus bene detentus* hetzij *male captus male detentus* (artikel 31, lid 1 van het Verdrag van Wenen inzake het verdragenrecht), werd aansluiting gezocht bij de *travaux préparatoires*

van het IS Statuut (artikel 32 van het Verdrag van Wenen inzake het verdragenrecht). Hoewel in deze documenten enkele interessante opmerkingen werden aangetroffen met betrekking tot de correlatie tussen het IS en de kwestie van onregelmatige arrestaties, inclusief een expliciete opmerking van de Jamaicaanse gedelegeerde Patrick Robinson dat *male captus bene detentus* niet van toepassing zou moeten zijn op de jurisdictie van het IS, werd geconcludeerd dat een analyse van de *travaux préparatoires* niet de *algemene* opvatting van de 120 staten die vóór het IS Statuut hadden gestemd met betrekking tot de *male captus* kwestie, had verduidelijkt. Daarom werd geoordeeld dat een analyse van verschillende bepalingen van het IS Statuut en diens *travaux préparatoires* geen duidelijkheid had geschapen ten aanzien van de *male captus* kwestie, hetgeen betekende dat er op dit punt een juridische lacune was die moest worden ingevuld met behulp van artikel 21, lid 1 onder (b) en (c) van het IS Statuut.

Echter, alvorens dit werd gedaan ging Hoofdstuk IX ook een gerelateerd punt na, namelijk wat de IS documenten zeiden over de gevolgen van een onrechtmatige arrestatie. Eerder was al vastgesteld – ook in deze samenvatting – dat vele aspecten van de mensenrechtelijke *habeas corpus* bepalingen, dankzij de artikelen 55, 59 en 60 van het IS Statuut, voorkwamen in het arrestatie- en overdrachtsregime van het IS, maar dat een ondubbelzinnig en expliciet recht van de verdachte om de rechtmatigheid van zijn arrestatie en detentie aan te vechten en om in het geval van een onrechtmatige arrestatie en detentie vrijgelaten te worden, ontbrak. De vraag werd gesteld hoe het ontbreken van de remedie vrijlating, van het recht op vrijheid en veiligheid, zoals dat teruggevonden kan worden in artikel 55, lid 1 onder (d) van het IS Statuut, gezien moest worden. Moest het gezien worden als een doelbewuste keuze van de opstellers dat deze remedie niet van toepassing is op verdachten of was het eenvoudigweg vergeten of niet belangrijk genoeg geacht om te vermelden in het IS Statuut?

Opnieuw werd aansluiting gezocht bij het Verdrag van Wenen inzake het verdragenrecht. Ook in de context van de remedie vrijlating bood een tekstuele/contextuele/teleologische uitlegging van artikel 55, lid 1 onder (d) van het IS Statuut (artikel 31 van het Verdrag van Wenen inzake het verdragenrecht) geen soelaas, hetgeen een analyse op basis van artikel 32 van het Verdrag van Wenen inzake het verdragenrecht (de *travaux préparatoires*) noodzakelijk maakte.

Na een gedetailleerde analyse werd geconcludeerd dat het moeilijk was vol te houden dat het *duidelijk* is dat de opstellers van het IS Statuut bewust de remedie vrijlating hadden weggelaten omdat zij niet wilden dat deze remedie voorhanden was voor een verdachte die onrechtmatig was gearresteerd of gedetineerd. Nu de IS wetgeving op dit punt een juridische lacune vertoonde, was het gerechtvaardigd om artikel 21, lid 1 onder (b) van het IS Statuut tegen het licht te houden.

Artikel 21, lid 1 onder (b) van het IS Statuut moest dus onderzocht worden, niet alleen in het kader van de echte *male captus bene/male detentus* vraag, maar ook in het kader van het punt gerelateerd aan de *male captus* discussie, namelijk de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie.

Een analyse van artikel 21, lid 1 onder (b) van het IS Statuut liet zien dat de term "applicable treaties" geen licht wierp op de *male captus* kwestie, maar dat deze term *wel* de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie behelsde en dat deze remedie zou kunnen worden toegepast door de IS rechters "where appropriate".

Ten aanzien van de betekenis van de term "the principles and rules of international law" werd geconcludeerd dat deze term in ieder geval internationaal gewoonterecht omvatte en dat men aan de hand van de conclusie van paragraaf 2 van Hoofdstuk VII van dit boek kon nagaan wat internationaal gewoonterecht te zeggen had over de *male captus* kwestie. Dit was iets bijzonders, aangezien het externe toetsingskader van deze studie, dat (slechts) was gecreëerd om na te gaan hoe vergelijkbaar of verschillend de huidige opstelling van het IS ten aanzien van de *male captus* kwestie was in vergelijking met de opstelling van andere hoven, nu via het begrip internationaal gewoonterecht, het minder vrijblijvende interne toetsingskader, dat was opgezet om te zien hoe de actuele opstelling van het IS beoordeeld moest worden in het licht van het eigen recht van het Hof, was binnengedrongen.

Opgemerkt werd dat paragraaf 2 van Hoofdstuk VII van dit boek had verduidelijkt dat men niet in het algemeen kan stellen dat *male captus bene detentus* of *male captus male detentus* een internationaal gewoonterechtelijk status had bereikt, aangezien zulke algemene beweringen geen recht deden aan de enorme variëteit aan mogelijke *male captus* situaties en de verschillende manieren waarop deze uiteenlopende situaties door gerechten waren behandeld. Sterker, Hoofdstuk VII had geconcludeerd dat slechts één *male captus* situatie waarschijnlijk gezien kon worden als een met internationaal gewoonterechtelijke status, namelijk de situatie dat rechters jurisdictie zullen weigeren in het geval van een ontvoering, uitgevoerd door de autoriteiten van het vervolgende forum en gevolgd door een protest en verzoek tot teruggave van de verdachte door de gelaedeerde staat. Echter, opgemerkt werd ook dat men zich vanwege de mogelijke beweegreden achter deze regel en de andere rol van staatssoevereiniteit in de context van het IS kan afvragen of de rechters het "appropriate" zouden vinden om deze regel naar het specifieke systeem van het IS over te zetten. Desondanks werd ook gesteld dat het IS, zelfs wanneer inderdaad kon worden geoordeeld dat het niet gepast zou zijn om deze regel naar de context van het IS over te zetten en dus dat het Hof deze niet *hoefde* te volgen, het resoluut jurisdictie *zou moeten* weigeren als het betrokken zou zijn bij een ontvoering, of deze ontvoering nu wel of niet was gevolgd door een protest en een verzoek tot teruggave van de verdachte door de gelaedeerde staat.

Hierna werd de vraag gesteld, nu paragraaf 2 van Hoofdstuk VII het interne toetsingskader van deze studie was binnengedrongen, of ook paragraaf 3 van Hoofdstuk VII (de beginselen afgeleid uit de *male captus* rechtspraak van de internationale/geïnternationaliseerde straftribunalen) eveneens dit interne toetsingskader zouden kunnen binnendringen. Zouden deze beginselen misschien ook onder de notie internationaal gewoonterecht kunnen vallen?

Gebruik makende van de traditionele definitie van internationaal gewoonterecht, die zich richt op de *staten*praktijk (maar erkennende dat men zich kan afvragen of de vorming van internationaal gewoonterecht nog wel gezien kan worden als het privilege van staten), werd geconcludeerd dat de beslissingen van het ICTY/ICTR als zodanig (dus niet die beslissingen die overzichten van de statenpraktijk presenteerden) niet gebruikt kunnen worden om internationaal gewoonterecht op te sporen. Dit kon echter anders zijn ten aanzien van geïnternationaliseerde straftribunalen, waarvan enkele gezien zouden kunnen worden als deel uitmakende van het juridische systeem van een staat.

Tenslotte werd het gerelateerde onderwerp van de remedie vrijlating behandeld. Geconcludeerd werd dat deze remedie gezien kon worden als een met internationaal gewoonterechtelijke status. Wanneer deze remedie dus niet al zou vallen onder de notie "applicable treaties", zou ze in ieder geval gedekt worden door de term "principles and rules of international law".

Na deze analyse van internationaal gewoonterecht werd de vraag gesteld of de term "principles and rules of international law" ook méér zouden kunnen behelzen dan slechts internationaal gewoonterecht. Geconcludeerd werd dat dit inderdaad het geval was en dat de praktijk van het ICTY/ICTR (en dit zou misschien ook gelden voor andere internationale (juridische) instituten zoals het Mensenrechtencomité, het Europees Hof voor de Rechten van de Mens en bepaalde geïnternationaliseerde straftribunalen) door de IS rechters zou kunnen worden toegepast wanneer deze rechters, na een uitvoerige analyse, van oordeel zijn dat bepaalde praktijken kunnen worden overgezet naar het specifieke systeem van het IS als een beginsel/regel van internationaal recht. In dat geval zouden ook de conclusies van paragraaf 3 van Hoofdstuk VII het interne toetsingskader van deze studie kunnen binnendringen. Wat betreft deze praktijken van de internationale straftribunalen zou men kunnen denken aan de aanvaarding van een breed concept *abuse of process* (in die zin dat jurisdictie in zeer ernstige *male captus* zaken kan worden geweigerd, ongeacht welke entiteit verantwoordelijk is) en aan de omstandigheid dat, bij het toepassen van de *abuse of process* doctrine, rekening kan worden gehouden met de ernst van de misdrijven waarvoor de verdachte is aangeklaagd. Ten aanzien van de gerelateerde kwestie van de remedie vrijlating zou men kunnen denken aan het feit dat al deze tribunalen het belang van *habeas corpus* hebben onderstreept, zelfs indien de regulerende documenten van het tribunaal in kwestie niet zo'n expliciete bepaling bevatten.

Echter, opgemerkt werd ook dat wanneer de IS rechters van oordeel zijn dat het niet gepast zou zijn om de vaste praktijk van internationale straftribunalen met betrekking tot de *male captus* kwestie, als beginselen en regels van internationaal recht, naar het specifieke systeem van het IS over te zetten, of als zij van oordeel zijn dat men *helemaal* niet de jurisprudentie van deze tribunalen zou moeten bezien in de context van deze bepaling, dat dan artikel 21, lid 1 onder (c) van het IS Statuut moest worden onderzocht.

Dientengevolge werd ook het laatste onderdeel van artikel 21, lid 1 van het IS Statuut geanalyseerd. Geconcludeerd werd dat bij het nagaan of er algemene

beginselen bestaan ten aanzien van het *male captus* probleem, men opnieuw de overzichten van Hoofdstuk V en de afgeleide beginselen van paragraaf 2 van Hoofdstuk VII kon bezien. Ook hier konden dus de resultaten van het externe toetsingskader gebruikt worden voor het interne toetsingskader.

Ten aanzien van het *male captus bene/male detentus* maxime zelf werd geoordeeld dat de overzichten van Hoofdstuk V duidelijk aantoonden dat men niet in het algemeen kan stellen dat een van beide maximes tegenwoordig gezien kan worden als een algemeen rechtsbeginsel. Echter, er werd ook opgemerkt dat er zeker elementen zijn uit de *male captus* rechtspraak die gedeeld werden door de meeste rechtssystemen, elementen die wellicht – rekening houdende met de omstandigheid dat de overzichten van deze studie uitgebreid maar niet uitputtend waren – gezien kunnen worden als algemene rechtsbeginselen op basis van de terminologie gebruikt in artikel 21, lid 1 onder (c) van het IS Statuut. Men kon bijvoorbeeld denken aan het feit dat de meeste gerechten geconfronteerd met een *male captus* hun discretie zullen gebruiken, bijvoorbeeld (in het *common law* systeem) met behulp van de *abuse of process* doctrine, om al de verschillende elementen van de zaak te wegen teneinde te beslissen of de *male captus* wel of niet zo ernstig is dat jurisdictie moet worden geweigerd. Bovendien leken de meeste gerechten alleen jurisdictie te weigeren wanneer hun eigen autoriteiten bij de *male captus* zijn betrokken. Tenslotte leek het erop dat nogal wat gerechten – hoewel onduidelijk was of "nogal wat" voldoende was om tot een algemeen rechtsbeginsel op basis van artikel 21, lid 1 onder (c) van het IS Statuut te komen – rekening zouden houden, bij het besluit of jurisdictie wel of niet geweigerd moet worden, met de ernst van de misdrijven waarvoor het slachtoffer van de *male captus* was aangeklaagd.

Ten aanzien van de gerelateerde kwestie van de remedie vrijlating werd geconcludeerd dat niet alleen het algemene recht op vrijheid en veiligheid/het recht niet te worden onderworpen aan willekeurige arrestatie of gevangenhouding, maar ook zijn meer specifieke *habeas corpus* bepaling (inclusief de vrijlating in het geval van een onrechtmatige (arrestatie of) detentie), gezien kon worden als een algemeen rechtsbeginsel.

Tenslotte werd opgemerkt dat ook ten aanzien van onderdeel (c) (vergelijk de woorden "where appropriate" in de context van onderdeel (b)) de IS rechters waarschijnlijk alleen deze oplossingen van het nationale niveau zullen hanteren indien zij menen dat zij deze oplossingen kunnen overbrengen naar het specifieke systeem van het IS. Dat zou kunnen betekenen dat de IS rechters de bovengenoemde beginselen zouden kunnen volgen die aan de echte *male captus* kwestie gerelateerd kunnen worden, maar meer afwijzend zouden kunnen staan tegenover de problematische remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie.

Na een korte verwerping van artikel 21, lid 2 van het IS Statuut voor het doel van het interne toetsingskader van deze studie, werd aandacht besteed aan het laatste lid van dit cruciale artikel.

In de analyse van artikel 21, lid 3 van het IS Statuut werd gesteld dat iedere keer dat het IS jurisdictie uitoefent, iedere keer dat het betrokken is bij een zaak, die

betrokkenheid, die uitoefening van jurisdictie, toegepast en geïnterpreteerd diende te worden op een wijze verenigbaar met die internationaal erkende mensenrechten die relevant zijn voor het functioneren van het IS. Die uitoefening van jurisdictie/betrokkenheid omvatte natuurlijk het proces in de rechtszaal, wanneer het IS daadwerkelijk een zaak berecht, maar het zou ook de uitoefening van jurisdictie/betrokkenheid in de voorfase van het strafproces omvatten en dus ook, bijvoorbeeld, de acties van derde partijen indien deze partijen arrestaties/detenties/overdrachten uitvoeren op verzoek van het IS. Bovendien werd opgemerkt dat het IS *in elk geval* dat pad zou moeten volgen: ervoor zorg dragen dat iedere keer dat het IS betrokken is bij een zaak (inclusief de acties van derde partijen die werken op verzoek van het IS), die betrokkenheid verenigbaar is met internationaal erkende mensenrechten. Aangevoerd werd echter dat het zelfs nog fairder zou zijn wanneer het IS zijn verantwoordelijkheid neemt voor schendingen in de context van zijn zaak in het algemeen. Hoewel arrestaties/detenties uitgevoerd op verzoek van het IS een groot deel vormt van de 'voorraad' IS arrestaties/detenties, kan het IS altijd geconfronteerd worden met *male captus* claims die verder gaan dan deze situaties (vergelijk de ontvoering door particulieren). Het zou zeer gerechtvaardigd zijn wanneer het IS, als het ultiem berechtende forum, ook zulke schendingen zou herstellen, zelfs wanneer het niet betrokken was bij de *male captus*.

Wat betreft de internationaal erkende mensenrechten die relevant zijn voor het functioneren van het IS in de context van de voorfase van het strafproces zou men bijvoorbeeld kunnen denken aan een breed concept van het recht op een eerlijk proces en op het recht op vrijheid en veiligheid, inclusief de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie.

Tijdens de analyse van lid 3 werd de eerdere correlatie tussen de verschillende onderdelen van artikel 21, lid 1 van het IS Statuut opnieuw beoordeeld. Dit had consequenties voor de kwestie van de remedie vrijlating. Uiteengezet werd dat bij het interpreteren van artikel 21, lid 1 onder (a) van het IS Statuut (het recht op vrijheid en veiligheid zonder de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie) de IS rechters ook lid 3 in ogenschouw dienden te nemen. Aangezien dit laatste lid de remedie vrijlating in het geval van een onrechtmatige arrestatie/detentie omvat, hadden de rechters niet langer een discretie om na te gaan of het "appropriate" zou zijn om de remedie vrijlating naar de context van het IS over te zetten (zie lid 1 onder (b)) of om na te gaan of zij deze remedie zouden kunnen overbrengen in deze context (zie lid 1 onder (c)). Met andere woorden, de remedie vrijlating zou in beginsel toegepast *moeten* worden. Vervolgens werd uiteengezet dat deze uitkomst wellicht niet zo problematisch was aangezien deze studie had betoogd dat niet duidelijk kon worden vastgesteld dat de opstellers van het IS Statuut bewust deze remedie achterwege wilden laten. Echter, de zaken zouden gecompliceerder worden als men, op basis van de informatie gepresenteerd in Hoofdstuk IX, van oordeel zou zijn dat het juist *wel* duidelijk de bedoeling was van de opstellers om deze remedie achterwege te laten. In dat geval moest worden nagegaan welke oplossing hier voorrang zou hebben: de bedoeling

van de opstellers (geen remedie vrijlating) of de remedie vrijlating op basis van lid 3. In dit kader werden twee doctrinaire keuzen gepresenteerd, die van Pellet (wiens aanpak zou leiden tot de remedie vrijlating) en die van Hafner en Binder (wier aanpak niet zou leiden tot de remedie vrijlating). Deze studie had meer sympathie voor Pellets visie.

Erkend werd echter ook dat het feit dat de IS rechters, indien zij de visie van Pellet zouden volgen, de remedie vrijlating moeten toepassen, zelfs wanneer het duidelijk de bedoeling was van de opstellers om deze remedie niét te verlenen, niet tot gevolg heeft dat de problemen die kunnen worden verbonden aan deze remedie plotseling verdwijnen. Daarom werd betoogd dat rechters konden kiezen voor de in dit onderzoek aangedragen oplossing; zij zouden, zich realiserende dat deze remedie in principe moet worden geëerbiedigd en dus dat remedies moeten worden verleend in het geval van een onrechtmatige arrestatie/detentie, de verdachte in hechtenis kunnen houden en echte remedies verlenen, een en ander afhankelijk van de precieze omstandigheden van het geval. Zij zouden daarbij ook kunnen vertrouwen op het recht op een effectieve remedie, een ander recht dat zeker gezien kan worden als een internationaal erkend mensenrecht op basis van artikel 21, lid 3 van het IS Statuut.

In het laatste hoofdstuk van Deel 4, Hoofdstuk X, trachtte deze studie de huidige opstelling van het IS ten aanzien van de *male captus* kwestie vast te stellen door middel van een analyse van de drie zaken van het IS waarin het *male captus* item een (belangrijke) rol had gespeeld in het proces: *Lubanga Dyilo*, *Bemba Gombo* en *Katanga*. Aangezien het laatste hoofdstuk van dit boek, Hoofdstuk XI, de conclusies van Hoofdstuk X samenvatte, is het aangewezen om nu direct door te gaan naar de samenvatting van Hoofdstuk XI.

In het laatste deel van dit boek, Deel 5, dat slechts uit één hoofdstuk (Hoofdstuk XI) bestond, kwam deze studie ten einde. Omdat dit hoofdstuk zo belangrijk is voor de bevindingen van deze studie zal deze samenvatting daaraan de meeste aandacht besteden. Dat men dit hoofdstuk niet kort kan samenvatten was ook een gevolg van het eerste probleem waar Hoofdstuk XI op stuitte: na de centrale vraag van deze studie zoals gepresenteerd in Hoofdstuk I te hebben herhaald, werd opgemerkt dat het moeilijk is een helder antwoord te geven op deze vraag omdat de huidige opstelling van het IS ten aanzien van de *male captus* kwestie – een cruciaal onderdeel van de centrale vraag – niet erg duidelijk leek. Dit had verscheidene redenen.

Allereerst bevatte de beslissing van de Kamer van Beroep in *Lubanga Dyilo*, volgens deze studie de meest gezaghebbende beslissing ten aanzien van deze kwestie, verschillende formuleringen van wat de *male detentus* drempel van het IS zou kunnen zijn. Echter, opgemerkt werd ook dat de brede eerste formulering (bevestigd door de derde formulering) – anders dan de beperkte tweede formulering, die bepaalde dat "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his[/her] rights, no fair trial can take place and the proceedings can be stayed" – *waarschijnlijk* de correcte standaard was:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped [oorspronkelijke voetnoten weggelaten, ChP].

Echter, een ander probleem ten aanzien van de *male captus* opstelling van het IS werd gesignaleerd. In de *Duch* zaak voor het ECCC werd gesteld dat de Kamer van Beroep van het IS in *Lubanga Dyilo* ook jurisdictie zou weigeren, op grond van de *abuse of process* doctrine, in het geval van zware schendingen van de rechten van verdachte (waarbij men zich concentreerde op de meer 'fysieke' woorden ernstige mishandeling/marteling) *als zodanig*, dus ongeacht welke entiteit verantwoordelijk is. Hierbij werd verwezen naar de volgende formulering van de Kamer van Beroep: "[T]he findings of the Pre-Trial Chamber respecting the absence of torture or serious mistreatment have not been shown to be erroneous in any way." Er werd echter uiteengezet dat het helemaal niet duidelijk was of de Kamer van Beroep van het IS, naast haar bovengenoemde *male detentus* standaard – die de betrokkenheid vereist van het IS (of van derde partijen die werken op verzoek van het IS), zie de woorden "by his/her accusers" – ook jurisdictie zou weigeren in het geval van zware schendingen/ernstige mishandeling/marteling *als zodanig*, ongeacht welke entiteit verantwoordelijk is (dus ook in het geval van particulieren). Allereerst werd aangegeven dat de opmerkingen over ernstige mishandeling/marteling van de Kamer van Vooronderzoek gemaakt waren in de context van de *abuse of process* doctrine, een doctrine die de Kamer van Beroep expliciet had *verworpen*. In de tweede plaats was er onduidelijkheid over de opstelling van de Kamer van Vooronderzoek *zelf* ten aanzien van de *abuse of process* doctrine aangezien zij opmerkte dat de toepassing van deze doctrine, tot op heden, "ha[d] been confined to instances of torture or serious mistreatment *by national authorities of the custodial State* in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [nadruk toegevoegd en oorspronkelijke voetnoten weggelaten, ChP]". De cursieve woorden zijn niet correct, maar het was onduidelijk of de Kamer van Vooronderzoek desondanks haar formulering zou volgen (die vereist dat de *male captus* wordt gepleegd door de nationale autoriteiten) of dat zij van oordeel zou zijn dat deze woorden inderdaad onjuist waren, hetgeen met zich zou mee zou brengen dat zij ook jurisdictie zou weigeren in het geval van ernstige mishandeling/marteling, *ongeacht* welke entiteit verantwoordelijk is en bijvoorbeeld dus ook acties van particulieren omvattende.

Een ander onduidelijk punt had te maken met het feit dat de Kamer van Beroep schijnbaar akkoord ging met de visie van de Kamer van Vooronderzoek, te weten dat zij onregelmatigheden zou bezien indien deze waren gepleegd in de context van *concerted action* tussen het IS en derde partijen, zelfs vóórdat het verzoek van het IS tot aanhouding/overdracht was verstuurd (dus voor de *constructive custody*). Deze term, "concerted action", is zeer algemeen en zou elke betrokkenheid van het IS bij onregelmatigheden kunnen omvatten. Echter, zelfs indien de Kamer van Beroep de term *concerted action* aldus zou aanvaarden, een term die een nationale

arrestatie/detentie zou kunnen behelzen indien deze arrestatie/detentie op een bepaalde manier aan het IS proces kon worden gekoppeld, stelde de Kamer van Beroep tevens een aanvullende voorwaarde, namelijk dat alleen schendingen van de rechten van verdachte die gerelateerd zijn aan het "process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court (…) may provide ground for halting the process". Dat was echter, zo werd gesteld, een striktere voorwaarde.

Een laatste onduidelijkheid was dat de Kamer van Beroep van het IS een *motion* van een verdachte die beweerde het slachtoffer te zijn geweest van een *male captus*, en die volhield dat het IS jurisdictie zou moeten weigeren vanwege die *male captus*, niet zag als een betwisting van haar jurisdictie op grond van artikel 19 van het IS Statuut. Zij zag een dergelijk verweer als een *sui generis*/atypische *motion* die aanhouding van de zaak verlangde. Deze zienswijze, op grond waarvan de Kamer van Beroep de beslissing van de Kamer van Vooronderzoek in deze zaak corrigeerde, werd echter schijnbaar verworpen in de beslissing van de Kamer van Vooronderzoek in *Katanga*, uitgesproken *na* de beslissing van de Kamer van Beroep in *Lubanga Dyilo*. Ofschoon de Kamer van Berechting in *Katanga* refereerde aan de zienswijze van de Kamer van Beroep in *Lubanga Dyilo*, leverde zij daar verder geen commentaar op.

Hoewel deze studie dus op verschillende onduidelijkheden met betrekking tot de opstelling van het IS ten aanzien van de *male captus* kwestie was gestuit, kon zij ook een paar minder onbegrijpelijke kenmerken aanduiden van de manier waarop het IS omgaat met een vermeende *male captus* zaak.

In de eerste plaats aanvaardde het IS de doctrine die zo vaak tegenover de *male captus bene detentus* regel wordt gesteld, de *abuse of process* doctrine, niet, omdat deze niet werd gedekt door artikel 21 van het IS Statuut. Echter, wat *wel* was gedekt door deze bepaling, namelijk door lid 3, was de mensenrechtelijke dimensie van de *abuse of process* doctrine. Het was die mensenrechtelijke dimensie die het IS gebruikte om *male captus* claims op te lossen. Het was duidelijk dat het IS in theorie veel belang hechtte aan mensenrechten – en de mensenrechten op een eerlijk proces en op vrijheid en veiligheid (inclusief het recht de rechtmatigheid van de detentie aan te vechten, een recht dat niet expliciet genoemd wordt in de eigen documenten van het IS) in het bijzonder.

Het IS leek zich verder te concentreren op de schendingen zelf en niet zozeer op de vraag of het IS (of derde partijen die werkten op verzoek van het IS) opzettelijk bepaalde normen schond(en). Wat echter *wel* vereist leek te zijn, zie de *Bemba Gombo* zaak, was dat de schendingen moesten resulteren in werkelijk nadeel voor de verdachte.

Een ander belangrijk aspect van de *male captus* kwestie betrof de rol van de bevoegde gerechtelijke autoriteit van de 'staat van bewaring' in de hele procedure. Hoofdstuk XI liet zien dat de Kamer van Beroep in *Lubanga Dyilo*, in tegenstelling tot de Kamer van Vooronderzoek, niet uiteenzette in hoeverre die autoriteit, op basis van artikel 59 van het IS Statuut, onregelmatigheden voorafgaand aan de officiële arrestatie/detentie zou kunnen bezien. Bovendien, en dit keer juist zoals de Kamer

van Vooronderzoek, verduidelijkte de Kamer van Beroep niet de rol van de IS rechters, die marginaal toezien op het bepaalde in artikel 59, lid 2 onder (b) en (c) van het IS Statuut, in deze context van de eerdere arrestatie/detentie. Tenslotte, en hierbij weer de Kamer van Vooronderzoek volgend, helderde de Kamer van Beroep niet op in hoeverre rekening moest worden gehouden met bepalingen zoals artikel 21, lid 3 van het IS Statuut en artikel 55, lid 1 onder (d) van het IS Statuut. Men leek zich alleen op nationaal recht te concentreren.

Een laatste punt was dat de Kamer van Beroep alleen geïnteresseerd leek in de ultieme remedie, de weigering van jurisdictie/het stilleggen van het proces.

Nu de huidige opstelling van het IS ten opzichte van de *male captus* kwestie was beschreven – rekening houdend met het feit dat verschillende aspecten niet erg duidelijk waren – werd die opstelling beoordeeld in de context van het externe toetsingskader van dit boek, *vis-à-vis* de opstelling van andere hoven.

Allereerst werd uiteengezet dat het erop leek dat het IS, zoals bijna elke modern gerecht of tribunaal, niet de ouderwetse versie van *male captus bene detentus* aanvaardde dat jurisdictie zal worden uitgeoefend, *ongeacht de manier* waarop de verdachte in het gezag van het Hof was gekomen. Mensenrechten werden zeer belangrijk geacht en strekten zich uit tot het gehele proces, inclusief de voorfase van het strafproces. Dit omvatte het (voor deze studie) zo belangrijke mensenrecht op vrijheid en veiligheid, inclusief zijn deelrecht om de rechtmatigheid van de detentie aan te vechten, zelfs indien dat deelrecht niet expliciet was genoemd in de eigen documenten van het IS. Deze opstelling, zo werd gesteld, leek op de opstelling van andere tribunalen. Op grond daarvan zullen IS rechters de voorfase van het strafproces onderzoeken om na te gaan wat voor effect schendingen van deze rechten zouden kunnen hebben op de jurisdictie van het Hof. Er werd opgemerkt dat de Kamer van Berechting in *Katanga* dit niet had gedaan op procedurele gronden – en hiervoor kon worden bekritiseerd – maar dat het onduidelijk, en zelfs onwaarschijnlijk, was dat deze beslissing gezien kon worden als steun voor de hierboven genoemde ouderwetse versie van *male captus bene detentus*.

Hoofdstuk XI zette vervolgens uiteen dat wanneer men van oordeel was dat de enige echte *male detentus* standaard van de Kamer van Beroep van het IS gevonden kon worden in de eerste formulering uit *Lubanga Dyilo* (zie het bovengenoemde blokcitaat in deze samenvatting), het IS dan de zienswijze deelde van, bijvoorbeeld, de Kamer van Berechting van het ICTY in *Nikolić* en de *Ebrahim* zaak, in die zin dat de Aanklager (inclusief derde partijen die op zijn verzoek werken) naar het gerecht moeten komen *with clean hands*. Indien dat niet het geval zou zijn, bijvoorbeeld indien de fundamentele rechten van de verdachte geschonden waren in diens overdrachtsproces aan het IS, dan zouden rechters kunnen concluderen dat men niet meer van een eerlijk proces in de brede zin des woords kan spreken, een conclusie die tot het einde van de zaak moet leiden. Er werd opgemerkt dat nu de omschrijving “breaches of the fundamental rights of the suspect” zeer algemeen was geformuleerd, deze allerlei *male captus* situaties zou kunnen omvatten, zoals ontvoeringen, *luring* situaties en andere technieken die (mogelijk) gezien konden worden als schendingen van iemands recht op vrijheid en veiligheid.

Voordat Hoofdstuk XI verder ging met dit onderwerp, werd aangegeven dat het IS zich leek te concentreren op de schendingen zelf en niet zozeer op de vraag of het IS (of derde partijen die werken op verzoek van het IS) opzettelijk bepaalde normen hebben geschonden. Dit kon worden beschouwd als een vrij liberale opvatting omdat andere hoven in hun *male detentus* standaarden vaak een intentie hadden geëist aan de zijde van de vervolgende autoriteiten om de *male captus* te plegen. Echter, wat *wel* vereist leek te zijn, zie de *Bemba Gombo* zaak, was dat schendingen moesten resulteren in werkelijk nadeel voor de verdachte. Andere tribunaalzaken konden daarentegen gezien worden als steun voor de visie dat de mate van nadeel alleen relevant was om de ernst van de schendingen te bepalen (en derhalve wat voor soort remedie moest worden verleend) en niet voor de vraag of er überhaupt schendingen waren/of de verdachte recht had op een remedie.

Vervolgens kwam Hoofdstuk XI terug op het punt dat de omschrijving van het IS "breaches of the fundamental rights of the suspect" zo algemeen was geformuleerd dat deze allerlei soorten *male captus* situaties zou kunnen omvatten, inclusief ontvoeringen en *luring* situaties.

Uiteengezet werd dat indien het IS jurisdictie zou weigeren wanneer de *accusers* van de verdachte verantwoordelijk waren voor een ontvoering *als zodanig*, het zich zou aansluiten bij beslissingen als *Levinge*, *Bennett*, *Ebrahim* en *Beahan*. Daar ging het om opvattingen die onder de standaard 'doken' ten aanzien waarvan de meer recente statenpraktijk het er schijnbaar over eens was dat deze, *in elk geval*, moet leiden tot een verwerping van de *male captus bene detentus* regel (zie de hierboven genoemde *Toscanino* uitzonderingen). Met betrekking tot de context van de tribunalen werd verduidelijkt dat indien het IS jurisdictie zou weigeren wanneer de *accusers* van de verdachte verantwoordelijk zouden zijn voor een ontvoering *als zodanig*, het IS zich waarschijnlijk ook zou aansluiten bij de tribunaalzaken. Hoewel geen van deze zaken betrekking had op door het tribunaal zelf uitgevoerde ontvoeringen kon men hier verwijzen naar algemene verklaringen uit, bijvoorbeeld, *Nikolić* en *Barayagwiza*.

Overstappende naar het concept *luring* zette deze studie uiteen dat de omschrijving van het IS "breaches of the fundamental rights of the suspect" zo algemeen geformuleerd was dat het ook een *luring* situatie kon omvatten, zolang de rechters maar van oordeel waren dat dit een schending van de fundamentele rechten van de verdachte (namelijk zijn recht op vrijheid en veiligheid) zou opleveren. Als dat zo zou zijn, zou het IS de meer progressieve interstatelijke zaken *Levinge* en *Bennett* volgen, zaken die/waarvan men vindt dat zij zeer algemene *male detentus* redeneringen bevatten en die *luring* situaties zouden kunnen omvatten (zelfs indien deze zaken zelf geen *luring* operaties betroffen), maar dat het zich zou distantiëren van de interstatelijke *luring* zaken als *Yunis* en *Stocké* waar de rechters waarschijnlijk alleen jurisdictie zouden weigeren indien de *luring* gepaard zou gaan met ernstige mishandeling. De tribunalencontext, zo vervolgde Hoofdstuk XI, was echter minder duidelijk. Hoewel helder was dat wanneer het IS jurisdictie zou weigeren in een *luring* zaak als zodanig, het zich liberaler zou opstellen dan de ICTY rechters in *Dokmanović* hadden gedaan, waren er meer algemene

omschrijvingen van de tribunalen bekendgemaakt na *Dokmanović* die ook een *luring* operatie zouden kunnen omvatten.

Terugkerende naar 'de' opstelling van het IS merkte Hoofdstuk XI vervolgens op dat indien men daarentegen van oordeel zou zijn dat het vereiste van de Kamer van Beroep dat men niet langer kan spreken van een eerlijk proces, gezien moest worden in de beperkte zin des woords, namelijk een eerlijk proces in de rechtszaal (zie de bovengenoemde tweede formulering van de standaard van het IS, welke vereist dat de schendingen van dien aard moeten zijn dat de aangeklaagde niet meer zijn verdediging kan voeren, ten aanzien waarvan deze studie ook concludeerde dat het onduidelijk was of dit de *male detentus* opstelling is van het IS), dat dan de opstelling van het IS naar het oordeel van deze studie afwijkend was van de meeste meer recente nationale en internationale hoven. De meeste van deze hoven – hoewel er ook een paar uitzonderingen waren – weigerden schijnbaar ook jurisdictie, niet alleen wanneer men niet meer kan spreken van een eerlijk proces in de beperkte zin des woords, maar ook in de brede zin, namelijk wanneer het meer in het algemeen unfair zou zijn/het de integriteit van het hof zou ondermijnen om überhaupt een zaak te beginnen (hierbij vaak gebruik makende van de *abuse of process* doctrine).

Een ander punt dat beoordeeld moest worden betrof de onduidelijkheid over de vraag of de *male detentus* standaard van de Kamer van Beroep betrokkenheid van het IS vereiste, of dat het IS ook jurisdictie zou weigeren in het geval van, bijvoorbeeld, ernstige mishandeling/marteling, ongeacht welke entiteit verantwoordelijk is, zoals wanneer die mishandeling/marteling was gepleegd door particulieren.

Uiteengezet werd dat als men ervan uitging dat het IS alleen de *male detentus* standaard volgde die betrokkenheid van het IS zelf vereist, het IS dan de meeste nationale zaken zou volgen die de betrokkenheid van eigen mensen eisen. Echter, in dat geval zou dit ook duidelijk afwijken van de tribunaalzaken die erkennen dat, op grond van de *abuse of process* doctrine, een doctrine die de Kamer van Beroep van het IS verwierp, zeer ernstige *male captus* zaken kunnen leiden tot het einde van de zaak, ongeacht welke entiteit verantwoordelijk is.

Indien (de Kamer van Beroep van) het IS echter jurisdictie zou weigeren bij zeer ernstige *male captus* zaken, ongeacht welke entiteit verantwoordelijk is – zó hebben de onderzoeksrechters in *Duch* de beslissing van de Kamer van Beroep gelezen – en indien zij/het de uiteenzetting van de Kamer van Vooronderzoek in die zaak zou volgen (uitgaande van het feit dat de verwijzing naar "torture or serious mistreatment *by national authorities of the custodial State* [nadruk toegevoegd, ChP]" onjuist was), dan zou (de Kamer van Beroep van) het IS ook erkennen dat deze *male detentus* route niet beperkt is tot marteling of ernstige mishandeling, zie de formulering van de Kamer van Vooronderzoek dat de toepassing van de *abuse of process* doctrine "*to date* (…) ha[d] been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal [nadruk toegevoegd en oorspronkelijke voetnoten weggelaten, ChP]". Dit betekende, zo verduidelijkte Hoofdstuk XI, dat het IS ook jurisdictie zou kunnen

weigeren in andere ernstige *male captus* zaken dan ernstige mishandeling/marteling. Opgemerkt werd dat deze opvatting vergelijkbaar leek te zijn met de opstelling van de tribunalen. Hoewel verschillende zaken, wellicht geïnspireerd door de terminologie van de Kamer van Berechting in *Dokmanović*, een zaak die was berecht vóór (de *abuse of process* standaard van) de *Barayagwiza* zaak, zich hadden geconcentreerd op de meer 'fysiek' getinte woorden "serious mistreatment" en "torture", had de recentere *Karadžić* zaak verduidelijkt dat ernstige mishandeling/marteling slechts gezien moeten worden als *voorbeelden* van zaken die zo ernstig zijn dat een hof jurisdictie zou kunnen weigeren.

Een ander punt dat Hoofdstuk XI moest bespreken betrof de *scope of review*. Zoals hierboven besproken, bestond er onduidelijkheid over de vraag of de Kamer van Beroep, voorafgaand aan de *constructive custody* van het IS, onregelmatigheden zou onderzoeken tijdens een nationale detentie die meer in het algemeen het gevolg zijn van *concerted action* tussen het IS en derde partijen of dat zij alleen onregelmatigheden zou bezien wanneer de verdachte in detentie zou verblijven voor dezelfde misdrijven als waarvoor hij nu berecht wordt bij het IS.

Allereerst werd de context van de *constructive custody* zelf behandeld. Het leek erop dat het IS aanvaardde dat het *alle* schendingen zou onderzoeken en daarvoor verantwoordelijkheid zou nemen die plaatsvinden in deze context, dat wil zeggen met betrekking tot een arrestatie/detentie uitgevoerd op verzoek van het IS. Opgemerkt werd dat verschillende tribunaalzaken gezien konden worden als steun voor die visie, hoewel er ook zaken waren waarin de rechters weigerden de rechtmatigheid van de nationale arrestatie/detentie procedures te beoordelen.

Ten aanzien van het onderzoeken van onregelmatigheden, anders dan die gepleegd in de *constructive custody*, werd uiteengezet dat indien het IS meer in het algemeen onregelmatigheden zou bezien die het resultaat waren van *concerted action* tussen het IS en derde partijen, het verschillende (inter)nationale hoven zou volgen die erkend hadden dat verantwoordelijkheid moet worden genomen voor een actie waarin eigen autoriteiten van het vervolgende forum participeerden, waarbij die eigen autoriteiten betrokken waren. Echter, zo vervolgde Hoofdstuk XI, er waren ook rechters die de kwestie van verantwoordelijkheid breder bezagen en die zich niet beperkten tot *concerted action*. Tenslotte werd opgemerkt dat indien (de Kamer van Beroep van) het IS niet *concerted action* in het algemeen zou bezien, maar alleen onregelmatigheden, voorafgaand aan de *constructive custody* van het IS, wanneer de verdachte in detentie zou verblijven voor dezelfde misdrijven als waarvoor hij nu wordt vervolgd bij het IS, die opvatting zou afwijken van andere (inter)nationale hoven die enkel geïnteresseerd lijken te zijn in de ernst van de onregelmatigheden in de voorfase van het strafproces, los van de vraag of de verdachte nu wel of niet in detentie zat voor dezelfde misdrijven als waarvoor het hof hem nu vervolgt.

Hierna werden nog enkele overgebleven punten van het externe toetsingskader kort behandeld.

Allereerst werd opgemerkt dat de bevoegde gerechtelijke autoriteit in de 'staat van bewaring', op grond van artikel 59 van het IS Statuut, een veel serieuzere en

invloedrijkere schakel was geworden in de overdrachtsprocedures dan de nationale autoriteiten in de context van de VN *ad hoc* Tribunalen.

In de tweede plaats werd uiteengezet dat de (mogelijke) opvatting van het IS dat een *male captus motion* niet gezien kan worden als een betwisting van de jurisdictie (*ratione personae*) van het IS, niet gedeeld lijkt te worden door andere (inter)nationale hoven, zelfs als, strikt genomen, de *motion* de *uitoefening* van persoonlijke jurisdictie en niet de persoonlijke jurisdictie zelf betwist.

In de derde plaats werd ten aanzien van de omstandigheid dat het IS zich alleen concentreerde op de ultieme remedie (*male detentus*), opgemerkt dat de zaken onderzocht op het interstatelijke niveau niet duidelijk de zienswijze aanhingen dat de verdachte, wanneer zijn claim voor een *male detentus* was verworpen, recht zou kunnen hebben op andere remedies van het vervolgende forum zoals strafvermindering of financiële compensatie, hoewel het natuurlijk mogelijk bleef voor het *male captus* slachtoffer om zijn kidnappers in een civiele zaak aan te klagen. Met betrekking tot de context van de tribunalen werd uiteengezet dat het gegeven dat men enkel aandacht had voor de ultieme remedie, weigering van jurisdictie, hier zeker kon worden teruggevonden. Echter, zo vervolgde Hoofdstuk XI, er waren ook zaken waarin de rechters, na de *male detentus* claim te hebben verworpen, hebben onderzocht of de verdachte niettemin recht zou hebben op andere, minder verstrekkende, remedies.

In de vierde plaats werd opgemerkt dat het IS nog niet expliciet het element 'ernst van de misdrijven' had genoemd bij het beoordelen van *male captus* claims, een element dat kon worden gevonden in de context van zowel de interstatelijke zaken als de tribunaalzaken. Dit was echter niet zo vreemd aangezien het IS de *abuse of process* doctrine had verworpen, een doctrine waarin dit element een belangrijke rol speelde. Uiteengezet werd dat indien het IS de Kamer van Vooronderzoek echter zou volgen en zou overwegen jurisdictie te weigeren in het geval van ernstige schendingen, ongeacht welke entiteit verantwoordelijk is (vooralsnog aannemende dat dit de opstelling van de Kamer van Vooronderzoek is), men dan kan verwachten dat het IS niet te gemakkelijk jurisdictie zou weigeren en in dat kader zou verwijzen zowel naar de afwezigheid van verantwoordelijkheid aan de zijde van de *accusers* van de verdachte als naar het belang van vervolging (lees: de ernst van de vermeende misdrijven van de verdachte).

Een laatste punt was dat het IS niet expliciet het *male captus bene/male detentus* maxime onderschreef. Dit was vergelijkbaar met andere gerechten en tribunalen. Ofschoon de Kamer van Beroep de *male captus bene detentus* regel en de *abuse of process* doctrine tegenover elkaar stelde en hoewel deze laatste doctrine door de Kamer van Beroep verworpen werd, hetgeen geïnterpreteerd zou kunnen worden als aanwijzing voor het feit dat de Kamer van Beroep de *male captus bene detentus* regel volgde, was dit laatste zeker niet het geval, aangezien de Kamer van Beroep duidelijk een aanmerkelijk gedeelte, namelijk de mensenrechtelijke dimensie, van de *abuse of process* doctrine ondersteunde.

Vervolgens beoordeelde Hoofdstuk XI de opstelling van het IS met betrekking tot de *male captus* kwestie in de context van het interne toetsingskader van deze studie, *vis-à-vis* het recht van het IS zelf.

Na het in deze samenvatting reeds genoemde punt herhaald te hebben dat deze studie had laten zien dat de twee toetsingskaders konden samengaan, dat enige onduidelijke begrippen uit artikel 21 van het IS Statuut – het centrale artikel van het interne toetsingskader – de resultaten van het externe toetsingskader konden omvatten, werd de vraag gesteld of enkele aspecten van wat de opstelling van het IS met betrekking tot de *male captus* kwestie zou *kunnen* zijn (zoals reeds uiteengezet was deze niet helemaal helder), in overeenstemming waren met artikel 21, lid 3 van het IS Statuut.

Uiteengezet werd bijvoorbeeld dat men zich kan afvragen of de standaard die vereist dat bepaalde schendingen van dien aard moeten zijn dat de persoon niet meer zijn verdediging kan voeren alvorens men kan spreken van de onmogelijkheid van een eerlijk proces – hetgeen de *male detentus* standaard van het IS zou kunnen zijn, hoewel dit werd betwijfeld door deze studie – wel in overeenstemming was met artikel 21, lid 3 van het IS Statuut. Opgemerkt werd dat deze laatste bepaling zeker het mensenrecht op een eerlijk proces omvatte en wel, naar het oordeel van deze studie, op een eerlijk proces dat niet was beperkt tot een eerlijk proces in de rechtszaal, maar dat zich uitstrekte tot de gehele procedure. Echter, aangegeven werd ook dat indien het IS zou blijven bij zijn omschrijving die zich richtte op een breed concept van een eerlijk proces (en dat was waarschijnlijk aannemelijker), er geen schending van het IS recht zou zijn. In deze context werd ook uiteengezet dat de visie van het IS dat een breed concept van een eerlijk proces gekoesterd moest worden, zelfs ten aanzien van personen die aangeklaagd zijn voor zeer ernstige misdrijven, zeker verenigbaar was met internationaal erkende mensenrechten.

Vervolgens werd opgemerkt dat artikel 21, lid 3 van het IS Statuut ook het mensenrecht op vrijheid en veiligheid omvatte, inclusief het recht van een persoon om de rechtmatigheid van zijn detentie aan te vechten, zelfs als dat recht niet expliciet genoemd was door het IS Statuut, en dat de weigering van de rechters in de *Katanga* zaak om de *motion* van de verdachte te bezien die de rechtmatigheid van zijn arrestatie en detentie in de voorfase van het strafproces aanvocht, enkel en alleen omdat de *motion* te laat was ingediend, mogelijk gezien zou kunnen worden als een schending van dit recht en dus van het IS recht. In dit verband werd uiteengezet dat dit recht zo cruciaal was dat het IS, op basis van artikel 21, lid 3 van het IS Statuut, een dergelijk verweer altijd moet toelaten en moet bezien, al helemaal wanneer de *motion* aanvoert dat de onrechtmatigheid van de arrestatie/detentie zo ernstig was dat het tot het einde van de zaak zou moeten leiden. Dit was het geval, ongeacht of het verweer, strikt genomen, nu wel of niet gezien kon worden als een betwisting van de jurisdictie van het IS.

Hoofdstuk XI zette vervolgens uiteen dat de omstandigheid dat het IS zich concentreerde op de schendingen zelf (en niet zozeer op de vraag of rechten opzettelijk waren geschonden), gezien kon worden als zijnde in overeenstemming met het recht op een effectieve remedie in het geval van schendingen, een recht

waarvan paragraaf 3 van Hoofdstuk IX had geconcludeerd dat het ook kon worden gekwalificeerd als een internationaal erkend mensenrecht. Echter, er werd ook aangegeven dat het aanvullende vereiste zoals gevonden kon worden in de *Bemba Gombo* zaak – te weten dat de schending daadwerkelijk nadeel moet hebben berokkend aan de verdachte voordat remedies kunnen worden toegekend – niet in overeenstemming met dit recht zou zijn.

Hoofdstuk XI bezag vervolgens het gegeven dat het IS had erkend dat het iedere keer dat het jurisdictie zou uitoefenen, iedere keer dat het betrokken was bij een zaak, die betrokkenheid verenigbaar diende te zijn met internationaal erkende mensenrechten. Dit leek een correcte interpretatie van artikel 21, lid 3 van het IS Statuut te zijn. Daarna werd uiteengezet dat indien (de Kamer van Beroep van) het IS akkoord zou gaan met de zienswijze van de Kamer van Vooronderzoek dat zij/het, behalve de onregelmatigheden gepleegd in de *constructive custody* van de verdachte, ook onregelmatigheden zou bezien die het resultaat zijn van *concerted action* tussen het IS en derde partijen, deze opvatting in overeenstemming zou zijn met de draagwijdte van artikel 21, lid 3 van het IS Statuut. Echter, opgemerkt werd ook dat indien de Kamer van Beroep vast hield aan haar aanvullende vereiste, te weten dat zij alleen onregelmatigheden begaan tegen de verdachte zou bezien wanneer deze verdachte in detentie verbleef voor dezelfde misdrijven als waarvoor hij nu vervolgd wordt bij het IS, dit als een schending van artikel 21, lid 3 van het IS Statuut zou kunnen worden gezien, aangezien die bepaling van toepassing was op èlke situatie waarbij het IS is betrokken.

Een van de meest interessante punten van het interne toetsingskader was dat de *male detentus* standaard van het IS uitging van de betrokkenheid van het IS (of van derde partijen die voor het IS werken). Het leek dat het IS niet jurisdictie zou weigeren indien bijvoorbeeld particulieren verantwoordelijk zouden zijn voor een zeer ernstige *male captus*. Dit zou niet problematisch zijn wanneer het IS de *abuse of process* doctrine had aanvaard, die zeer algemeen is en slechts vereist dat de rechters jurisdictie moeten weigeren indien zij van mening zijn dat de *male captus* zo ernstig is dat het de integriteit van het hof/hun rechtsgevoel/het idee van een eerlijk proces in het algemeen zou ondermijnen indien de zaak zou worden voortgezet. Echter, het IS had deze doctrine verworpen. Hoe diende deze verwerping van de *abuse of process* doctrine te worden beoordeeld *vis-à-vis* het recht van het IS?

Opgemerkt werd dat de rechters van het IS gelijk hadden toen zij stelden dat deze doctrine niet in de eigen IS documenten op basis van artikel 21, lid 1 onder (a) van het IS Statuut kon worden gevonden. Echter, na verduidelijkt te hebben dat een zekere bepaling in het IS Statuut – artikel 4, lid 1 van het IS Statuut – "cannot be construed as providing power to stay proceedings for abuse of process", concludeerden zij dat artikel 21, lid 1 onder (a) van het IS Statuut uitputtend was ten aanzien van deze kwestie en dus dat artikel 21, lid 1 onder (b) en (c) van het IS Statuut niet behandeld hoefde te worden.

Serieuze twijfel werd echter geuit of deze conclusie wel in overeenstemming was met het recht van het IS. Opgemerkt werd dat het veel te eenvoudig leek om te

concluderen dat het IS Statuut ten aanzien van deze kwestie uitputtend was om de enkele reden dat de *abuse of process* doctrine niet expliciet genoemd danwel impliciet (via – het ogenschijnlijk irrelevante – artikel 4, lid 1 van het IS Statuut) gedekt werd door de IS documenten. Uiteengezet werd dat de rechters, die naar het oordeel van deze studie zich hier teveel concentreerden op de *common law* kwalificatie '*abuse of process*', niet serieus andere relevante bepalingen hadden onderzocht welke licht konden werpen op de vraag of het IS de mogelijkheid had om een *male detentus* oordeel uit te spreken in het geval van een ernstige *male captus*, met in acht name van de regels van uitlegging van het Verdrag van Wenen inzake het verdragenrecht (zoals was gedaan in Hoofdstuk IX van dit boek). Hoofdstuk XI stelde dat het aanmerkelijk uitgebreidere onderzoek in Hoofdstuk IX naar het oordeel van deze studie had aangetoond dat artikel 21, lid 1 onder (a) van het IS Statuut, rekening houdende met artikel 21, lid 3 van het IS Statuut, *niet* uitputtend was ten aanzien van deze kwestie en dat men dus aandacht zou kunnen besteden aan artikel 21, lid 1 onder (b) en (c) van het IS Statuut teneinde deze juridische lacune in te vullen. En zoals in dat hoofdstuk betoogd, de mogelijkheid van een hof om jurisdictie te weigeren in het geval van een ernstige *male captus* zou gezien kunnen worden als een beginsel/regel van internationaal recht op basis van artikel 21, lid 1 onder (b) van het IS Statuut (namelijk als praktijk van internationale hoven) dan wel als een algemeen rechtsbeginsel op basis van artikel 21, lid 1 onder (c) van het IS Statuut. Bovendien werd uiteengezet dat, nu de mogelijkheid van een hof om in zeer ernstige *male captus* zaken jurisdictie te weigeren, zonder nu te letten op de precieze kwalificatie daarvan (zoals *abuse of process*/*supervisory powers*), door zoveel (inter)nationale hoven was aangewend, dit gezien zou kunnen worden als een inherente mogelijkheid van *ieder* hof, inclusief van het IS (zelfs indien dit niet geconstrueerd zou kunnen worden via artikel 4, lid 1 van het IS Statuut).

Een ander belangrijk aspect van het interne toetsingskader betrof de visie van het IS met betrekking tot artikel 59 van het IS Statuut. Hoewel de Kamer van Beroep in *Lubanga Dyilo* niet inging op deze kwestie, verduidelijkte de Kamer van Vooronderzoek in deze zaak dat de bevoegde gerechtelijke autoriteit in de 'staat van bewaring' niet verplicht was de voorfase van het strafproces te bezien indien die fase alleen nationale procedures betrof. Echter, zo vervolgde Hoofdstuk XI, dat leek te betekenen dat het de bevoegde gerechtelijke autoriteit dus wel toegestaan was dit te doen en deze zelfs verplicht was dit te doen in het geval dat die nationale procedures op enigerlei wijze in verband gebracht konden worden met het IS, bijvoorbeeld omdat het IS betrokken was bij deze procedures. Opgemerkt werd dat dat een rol zou zijn in overeenstemming met artikel 21, lid 3 van het IS Statuut, dat verenigbaarheid met internationaal erkende mensenrechten eiste vanaf het moment dat het IS betrokken was bij een zaak, hetgeen natuurlijk het geval kan zijn vóórdat de officiële verzoeken aan de nationale autoriteit waren verzonden. Echter, ten aanzien van de rol van de IS rechters, de supervisoren die deze bepaling marginaal beoordelen, merkte Hoofdstuk XI op dat noch de Kamer van Vooronderzoek, noch de Kamer van Beroep bespraken in hoeverre deze rechters de fase voordat de officiële IS verzoeken waren verstuurd, konden bezien. Bovendien onderzochten

beide Kamers, en hetzelfde geldt voor de rechters in *Bemba Gombo*, niet duidelijk de wijze van tenuitvoerlegging van de officiële IS arrestatie aan de hand van bepalingen als artikel 21, lid 3 en 55, lid 1 onder (d) van het IS Statuut. (Zij onderstreepten in hun beslissingen slechts het belang van zulke rechten in het algemeen.) Zij leken alleen geïnteresseerd in nationaal recht. Gesteld werd dat deze beperkte interpretatie in strijd was met het eigen recht van het IS, aangezien beide bepalingen zeker van toepassing zijn op de procedures van artikel 59 van het IS Statuut. (Artikel 21, lid 3 van het IS Statuut is reeds van toepassing vanaf het moment dat het IS betrokken raakt bij de zaak en artikel 55, lid 1 onder (d) van het IS Statuut is reeds van toepassing vanaf het moment dat het IS een onderzoek start.)

Het laatste punt dat behandeld moest worden was dat de Kamer van Beroep alleen geïnteresseerd was in de ultieme remedie, de weigering van jurisdictie/het stilleggen van het proces. Echter, uiteengezet werd dat artikel 21, lid 3 van het IS Statuut het internationaal erkende mensenrecht op een effectieve remedie bevatte in geval van een schending. Dit betekende dat elke schending vanaf het moment dat het IS betrokken raakt bij de zaak hersteld moest worden, of dit nu wel of niet leidt tot het einde van de zaak. Hoewel het mogelijk was dat er geen schendingen hadden plaatsgevonden in *Lubanga Dyilo* vanaf het moment dat het IS daarbij betrokken raakte (en dus dat schending van het IS recht niet had plaatsgevonden in deze zaak), werd het IS er in het algemeen aan herinnerd niet te vergeten dat verdachten, op basis van artikel 21, lid 3 van het IS Statuut, recht zouden hebben op geëigende remedies in het geval van schendingen vanaf het moment dat het IS bij de zaak betrokken raakt.

Nu de centrale vraag van deze studie was beantwoord, stapte Hoofdstuk XI over naar de belangrijkste aanbevelingen.

Allereerst werd betoogd dat het IS *tenminste* zijn eigen recht zou moeten volgen. Dit betekende dat het IS alle bovenstaande opvattingen zou moeten verwerpen die gezien zouden kunnen worden als zijnde in strijd met artikel 21 van het IS Statuut, en dan met name lid 3 daarvan.

Aldus werd gesteld dat het IS het ouderwetse en beperkte concept van een eerlijk proces zou moeten prijsgeven, te weten dat sommige schendingen van dien aard moeten zijn dat de persoon niet meer zijn verdediging kan voeren alvorens men kan spreken van de onmogelijkheid van een eerlijk proces (indien dat concept inderdaad gesteund werd door het IS in de *male captus* discussie).

Verder werd opgemerkt dat het toe te juichen valt dat het IS in theorie zo vaak het belang van mensenrechten heeft onderstreept, zelfs voor verdachten van de meest ernstige misdrijven en zelfs ten aanzien van rechten die niet expliciet genoemd zijn in het IS Statuut (zoals het recht de rechtmatigheid van de detentie aan te vechten), maar dat betekende ook dat verdachten in staat moesten zijn om deze rechten in de praktijk uit te oefenen. Echter, gesteld kon worden, zo vervolgde Hoofdstuk XI, dat bijvoorbeeld de *Katanga* zaak die gedachte niet concretiseerde. Gesteld werd dat rechters altijd zouden moeten *willen* uitzoeken wat er gebeurd was met hun verdachten, wat het fundament was van de aan hen voorgelegde zaak. Dit betekende ook dat zij zich niet teveel zouden moeten concentreren op de precieze

titel van de *male captus motion* en niet te gemakkelijk de gehele *motion* zouden moeten verwerpen omdat deze te laat werd ingediend. Rechters zouden ook de Verdediging kunnen berispen voor haar nalatigheid en nog steeds *proprio motu* de beschuldigingen beoordelen. Hoewel werd erkend dat het systeem van het IS in vele opzichten uniek is en zoveel mogelijk zou moeten worden geëerbiedigd, werd ook gesteld dat de rechters zich niet daarachter zouden kunnen verschuilen om te veronachtzamen wat naar het oordeel van deze studie hun belangrijkste taak is, namelijk het *op een faire wijze* berechten van verdachten van internationale misdrijven. Daarbij behoorde een serieus onderzoek naar de manier waarop deze verdachten onder de jurisdictie van het IS waren gebracht, naar het fundament van de aan hen voorgelegde zaak.

Opgemerkt werd dat de indruk die men kreeg in de *Katanga* zaak, te weten dat de rechters niet *werkelijk* geïnteresseerd leken in een volledig onderzoek naar de rechtmatigheid van de voorfase van het strafproces, zich ook deed voelen in de *Lubanga Dyilo* en *Bemba Gombo* zaken, waar de rechters niet serieus de relevantie van bepalingen als de artikelen 21, lid 3 en 55, lid 1 onder (d) van het IS Statuut onderzochten in de context van artikel 59 van het IS Statuut. Bovendien zou men hier ook kunnen wijzen op het feit dat men zich concentreerde op de ultieme remedie in *Lubanga Dyilo*. Gesteld werd dat het IS behoedzaam moest zijn om niet, in de woorden van Sluiter "retreat within the safe limits of The Hague".

Het IS had aangegeven dat iedere keer dat het jurisdictie uitoefende, iedere keer dat het betrokken was bij een zaak, die uitoefening van jurisdictie, die betrokkenheid (welke ook de acties van derde partijen omvatte die op verzoek van het IS werken) in overeenstemming moest zijn met artikel 21, lid 3 van het IS Statuut. Dat was een correcte uiteenzetting van het recht, hetgeen weer met zich meebracht dat afstand moest worden gedaan van het aanvullende vereiste van de Kamer van Beroep van het IS, dat zij alleen onregelmatigheden zou bezien wanneer de verdachte op het nationaal niveau in detentie verbleef voor dezelfde misdrijven als waarvoor hij nu wordt berecht bij het IS. Echter, Hoofdstuk XI stelde dat, zelfs wanneer de eerstgenoemde uiteenzetting in overeenstemming was met het recht van het IS, de rechters een stap verder zouden moeten gaan: zij zouden *elke* schending die plaatsvindt in de context van de aan hen voorgelegde zaak in het algemeen moeten onderzoeken, los van de vraag of er nu wel of geen betrokkenheid is aan de zijde van het IS. Uiteengezet werd dat normaal gesproken schendingen die plaatsvinden in een periode waarin het IS nog niet betrokken was bij de zaak, niet snel gezien zullen worden als schendingen die vallen binnen de context van de IS zaak. Praktisch gezien behoefde men dus voor deze bredere standaard niet beducht te zijn. Maar juridisch gezien moest men deze koesteren, omdat het de enige standaard was die rechters in staat zou kunnen stellen om schendingen te herstellen waarvan zij van mening waren dat deze vallen binnen de context van de aan hen voorgelegde zaak, zelfs wanneer het IS er nog niet bij betrokken was.

Een andere belangrijke aanbeveling was dat indien het IS geconfronteerd wordt met een nieuwe *male captus* zaak, het diepgaander zou moeten onderzoeken of het wel of niet de mogelijkheid heeft om (de uitoefening van) jurisdictie te weigeren in

het geval van ernstige *male captus* zaken, vergelijkbaar met de *abuse of process* doctrine. Hoofdstuk XI stelde dat de analyse in Hoofdstuk IX naar het oordeel van deze studie had aangetoond dat artikel 21, lid 1 onder (a) van het IS Statuut niet uitputtend was ten aanzien van deze kwestie en dus dat de rechters aandacht zouden kunnen besteden aan artikel 21, lid 1 onder (b) en (c) van het IS Statuut. Indien zij het eens zouden zijn met deze studie dat deze bepalingen, via begrippen als "principles and rules of international law" en "general principles of law derived by the Court from national laws of legal systems of the world", de vaste praktijk van (inter)nationale hoven zouden kunnen omvatten, dan zouden zij deze praktijk kunnen gebruiken om hun *male captus* probleem op te lossen.

Ten aanzien van de "principles and rules of international law" wees Hoofdstuk XI op het aanvaarden van een breed *abuse of process* concept (in die zin dat jurisdictie zou kunnen worden geweigerd in zeer ernstige *male captus* zaken, ongeacht welke entiteit verantwoordelijk is) en het feit dat bij het toepassen van de *abuse of process* doctrine rekening gehouden kon worden met de ernst van de misdrijven waarvoor de verdachte is aangeklaagd.

Wanneer deze beginselen geen opening boden, zo vervolgde Hoofdstuk XI, dan zou het IS aandacht kunnen besteden aan de "general principles of law derived by the Court from national laws of legal systems of the world". Deze bepaalden dat de meeste gerechten, geconfronteerd met een *male captus*, hun discretie zullen gebruiken, bijvoorbeeld (in het *common law* systeem) met behulp van de *abuse of process* doctrine, om al de verschillende elementen van de zaak te wegen teneinde te besluiten of de *male captus* al dan niet zo ernstig is dat jurisdictie moet worden geweigerd. Bovendien leken de meeste gerechten alleen jurisdictie te weigeren indien hun eigen autoriteiten bij de *male captus* waren betrokken. Tenslotte leek het erop dat nogal wat gerechten – hoewel onduidelijk was of "nogal wat" voldoende zou zijn om tot een algemeen rechtsbeginsel op basis van artikel 21, lid 1 onder (c) van het IS Statuut te komen – ook rekening zouden houden, bij de beslissing of wel of geen jurisdictie moest worden geweigerd, met de ernst van de misdrijven waarvoor het slachtoffer van de *male captus* was aangeklaagd.

Tenslotte zette Hoofdstuk XI uiteen dat, nu zowel de "principles and rules of international law" als de "general principles of law derived by the Court from national laws of legal systems of the world" een op *abuse of process* gelijkende mogelijkheid leken te aanvaarden, men zou kunnen betogen dat *ieder* hof, inclusief het IS, over zo'n inherente mogelijkheid beschikte.

Hoofdstuk XI voerde dus aan dat zelfs indien de rechters niet aanvaardden dat de gedachte achter de *abuse of process* doctrine gezien kon worden als een beginsel/regel van internationaal recht op basis van artikel 21, lid 1 onder (b) van het IS Statuut, dan wel als een algemeen rechtsbeginsel dat door het Hof werd ontleend aan de nationale wetten van rechtsstelsels van de wereld op basis van artikel 21, lid 1 onder (c) van het IS Statuut, zij de op *abuse of process* gelijkende mogelijkheid moesten omarmen die zij naar het oordeel van deze studie al bezaten ("inherent") – op dezelfde manier als zij het recht leken te omarmen van een verdachte om de rechtmatigheid van zijn detentie aan te vechten (waarschijnlijk

inclusief, in beginsel, de remedie om vrijgelaten te worden in het geval van een onrechtmatige arrestatie/detentie), zelfs als dat recht niet expliciet genoemd was in de IS documenten. Bij het uitoefenen van deze mogelijkheid, zo vervolgde Hoofdstuk XI, zouden zij dan al de verschillende elementen van de zaak moeten afwegen om tot de meest geëigende remedies voor schendingen te komen, zoals de ernst van de vermeende misdrijven/het belang om de zaak voort te zetten en de ernst van de *male captus*, welke toenam naarmate de betrokkenheid van het IS groter was (waarbij gelet kon worden op alle verschillende mogelijkheden om gedrag aan het IS toe te rekenen, inclusief, bijvoorbeeld, gedrag dat het (IS) erkent en tot het zijne maakt), naarmate de schendingen opzettelijk waren gepleegd, naarmate de *male captus* groot nadeel aan de verdachte had berokkend, naarmate de *male captus* met ernstige mishandeling gepaard was gegaan, *etc*.

Hoofdstuk XI merkte vervolgens op dat indien het IS niet overtuigd was dat zo'n brede *balancing exercise* gevonden kon worden in het recht van het IS of niet gezien kon worden als een inherente mogelijkheid van het Hof, het wellicht meer ontvankelijk zou kunnen zijn voor praktische argumenten. Hoofdstuk XI riep in herinnering dat de *male detentus* standaard van het IS 'slechts' rekening hield met de mensenrechtelijke dimensie van de *abuse of process* doctrine. Bovendien ging het uit van betrokkenheid van het IS (of van derde partijen die op zijn verzoek werken).

Volgens deze studie kon dit leiden tot ernstige problemen veroorzaakt door *male captus* situaties, die, bijvoorbeeld, schendingen van staatssoevereiniteit en/of schendingen gepleegd door staten/particulieren waarbij het IS niet was betrokken, inhielden.

Hoofdstuk XI zette uiteen dat rechters met behulp van de *abuse of process* doctrine jurisdictie zouden kunnen weigeren wanneer zij van oordeel zijn dat zo'n ernstige *male captus* in de context van een zaak van het IS heeft plaatsgevonden dat zij de zaak niet langer naar eer en geweten kunnen voortzetten. Dit is een heel algemene standaard welke bijvoorbeeld schending van staatssoevereiniteit en schendingen gepleegd door staten/particulieren waarbij het IS niet was betrokken, zou kunnen omvatten. (In dit kader werd opgemerkt dat het waarschijnlijk, of in ieder geval: te hopen, was dat de IS rechters niet de 'carte blanche' beslissing van de Kamer van Beroep van het ICTY in *Nikolić* zouden volgen en méér belang zouden hechten aan staatssoevereiniteit, een concept dat de rechters van het "laterale" IS niet konden negeren op dezelfde manier als de rechters van het werkelijk "verticale" ICTY hadden gedaan.) Echter, zo vervolgde Hoofdstuk XI, dit leek niet mogelijk te zijn bij de huidige IS standaard, terwijl het IS zeker het gereedschap, de mogelijkheid zou moeten hebben om in zulke situaties jurisdictie te weigeren.

Een andere belangrijke aanbeveling was verbonden met het reeds genoemde recht van een verdachte om de rechtmatigheid van zijn arrestatie/detentie aan te vechten. Hoofdstuk XI zette uiteen dat indien de rechter van oordeel is dat diens arrestatie/detentie inderdaad onrechtmatig is (maar niet zo ernstig dat jurisdictie moet worden geweigerd), hij zich kan afvragen wat de gevolgen van deze vaststelling moeten zijn, nu het IS Statuut niet de remedie vrijlating in het geval van

een onrechtmatige arrestatie/detentie noemt en nu dit recht, inclusief de remedie vrijlating, gezien kan worden als een recht met internationaal gewoonterechtelijke status en dus in principe ook van toepassing is op het IS. Op dit punt verduidelijkte Hoofdstuk XI dat de rechters zich zouden kunnen aansluiten bij de analyse van deze remedie in Hoofdstuk IX, waar werd geconcludeerd dat op basis van artikel 21, lid 3 van het IS Statuut deze remedie in principe zou moeten worden verleend. Echter, in die context (en tevens elders in dit boek en in deze samenvatting) werd ook betoogd dat deze remedie problematisch is omdat ze ongenuanceerd is, omdat ze gebruikt kan worden als een *pro forma* remedie en tenslotte omdat er een risico is dat een verdachte van internationale misdrijven aan vervolging zal ontsnappen omdat hij wordt vrijgelaten ten gevolge van een lichte schending, bijvoorbeeld, omdat hij niet onverwijld op de hoogte was gebracht van de redenen van zijn arrestatie. Deze studie stelde dat een rechter niet alleen in de context van de *abuse of process* doctrine (of een vergelijkbare doctrine welke gebruikt kan worden om na te gaan of de *male captus* zo ernstig is dat jurisdictie moet worden geweigerd), maar ook in de context van deze problematische remedie in staat zou moeten zijn rekening te houden met alle relevante facetten van de zaak, inclusief de ernst van de vermeende misdrijven. Dat betekende, zo vervolgde Hoofdstuk XI, dat een verdachte van internationale misdrijven niet zou moeten worden vrijgelaten bij de vaststelling 'onrechtmatige arrestatie/detentie', maar in hechtenis zou moeten blijven en andere geëigende remedies zou moeten krijgen, zoals strafvermindering (op basis van Regel 145 van de IS Reglement van Proces- en Bewijsvoering), compensatie (hetgeen in ieder geval verplicht leek op basis van artikel 85 van het IS Statuut) of wellicht enkel een verklaring dat een schending had plaatsgevonden en dat dit te betreuren was, een en ander met in acht name van de ernst van de *male captus*. Echter, Hoofdstuk XI merkte ook op dat wanneer de onrechtmatige arrestatie/detentie zeer ernstig was, bijvoorbeeld omdat het IS een ontvoering organiseerde, dan jurisdictie zou moeten worden geweigerd en de verdachte definitief vrijgelaten zou moeten worden. Dit is een verstrekkend gevolg, maar sommige *male captus* situaties zijn zo ernstig dat het IS niet in gemoede de zaak kan voortzetten zonder zijn integriteit als *rechts*instituut te ondermijnen. Bovendien werd ook benadrukt dat de omstandigheid dat het IS niet langer deze verdachte zou kunnen berechten, niet betekende dat het er niet alles aan zou moeten doen om te bewerkstelligen dat de verdachte voor een ander hof werd berecht. Het had nog steeds een algemene verplichting om te strijden tegen straffeloosheid, of die strijd nu wel of niet voor het IS plaatsvindt.

Echter, Hoofdstuk XI stelde dat het belangrijkste punt was dat tribunalen/IS rechters, als zijnde de laatste oordelende instanties, als de ultieme hoeders van de rechten van verdachte, *elke* schending die plaatsvindt in de context van de aan hen voorgelegde zaak herstellen, of dit nu wel of niet leidt tot een weigering van jurisdictie en ongeacht welke entiteit verantwoordelijk is. Aangevoerd werd dat zo'n aanpak, in welk kader de IS rechters gebruik zouden kunnen maken van de bevindingen van de bevoegde gerechtelijke autoriteit in de 'staat van bewaring', als eerste indicatie hoe bepaalde onregelmatigheden op het nationale niveau dienden te

worden beoordeeld, partijen betrokken bij het arrestatie- en overdrachtsproces zou afschrikken om onregelmatigheden te plegen, het best de integriteit van het IS zou kunnen beschermen en *fairness* zou kunnen bieden aan de verdachte, die zo niet het slachtoffer zou worden van een juridisch vacuüm veroorzaakt door het feit dat zijn zaak over twee of meer jurisdicties was verdeeld. Bovendien werd gesteld dat, aangezien niet veel *male captus* zaken zo ernstig zijn dat jurisdictie moet worden geweigerd, het ook niet snel het *fairness* idee van de slachtoffers (in die zin dat een proces moet worden gevoerd) in gevaar zou brengen. Verder zou het ook tot meer nuance leiden in een context die zich soms te veel richt op de ultieme remedie (weigering van jurisdictie). Dit, zo vervolgde Hoofdstuk XI, zou ook het ouderwetse *male captus bene detentus* imago 'verzachten' dat internationale tribunalen hebben. Zelfs indien het erop leek dat het IS de *male captus male detentus* zienswijze volgde ten aanzien van ernstige onregelmatigheden gepleegd door de "*accusers*" van de verdachte (hetgeen ook de actie van derde partijen die voor het IS werken omvatte), iets dat toegejuicht moest worden, werd betoogd dat de *male captus* zaken waarmee het IS geconfronteerd zou worden niet vaak zulke onregelmatigheden met zich mee zouden brengen. Dat betekende dat *in de praktijk* het IS waarschijnlijk bijna altijd de *male captus* zaak zou voortzetten, hetgeen, in zekere zin, gezien zou kunnen worden als aanvaarding van de *male captus bene detentus* regel. (In dat opzicht werd toegejuicht dat het IS noch de *male captus bene detentus* noch de *male captus male detentus* regel expliciet onderschreef, aangezien deze maximes naar het oordeel van deze studie het toppunt van eenvoud waren en totaal geen ruimte boden voor nuance.)

Wat betreft het bovengenoemde punt dat het erop leek dat het IS de *male captus male detentus* zienswijze volgde met betrekking tot ernstige onregelmatigheden gepleegd door de "*accusers*" van de verdachte: deze studie sprak zich zeer uit voor het toekennen van discretie aan rechters, in de context van de *abuse of process* doctrine (of een vergelijkbare doctrine) en in de context van het vaststellen van de gevolgen van een onrechtmatige arrestatie/detentie, teneinde alle relevante elementen van de zaak te wegen. Echter, zij was er zich ook van bewust dat teveel discretie tot problemen kan leiden, bijvoorbeeld, op het gebied van gelijkheid, transparantie en voorspelbaarheid. Er moesten dus *bepaalde* bakens zijn om deze discretie vorm te geven.

Allereerst stelde Hoofdstuk XI dat in sommige gevallen men diende te begrijpen dat er normaal gesproken maar één uitkomst mogelijk was. Indien bijvoorbeeld duidelijk zou worden dat de OTP betrokken was bij een ontvoeringsoperatie die alle relevante juridische regels negeerde, dan zouden de rechters alleen maar jurisdictie kunnen weigeren, indien zij tenminste nog serieus genomen wilden worden als hoeders van het recht, of de verdachte nu wel of niet aangeklaagd was voor ernstige misdrijven. Deze visie, merkte Hoofdstuk XI op, die onder de standaard 'dook' ten aanzien waarvan de meer recente statenpraktijk het schijnbaar eens was dat deze, *in elk geval*, moet leiden tot een verwerping van de *male captus bene detentus* regel, was waarschijnlijk ook de visie van het IS en dat viel toe te juichen. In andere, minder duidelijke, zaken dienden alle bovengenoemde elementen een leidende rol te

spelen bij het bepalen of wel of geen jurisdictie moest worden geweigerd. Hoewel dus bepaalde indicatoren gevolgd moesten worden in de *balancing exercise* om te bereiken dat de discretie niet ongelimiteerd is, diende de ultieme verantwoordelijkheid, zo stelde Hoofdstuk XI, toch te liggen bij de rechters, aangezien aangetoond was dat té strikte regels ook tot misbruik konden leiden en omdat rechters altijd geconfronteerd zouden kunnen worden met niet voorziene situaties.

Tenslotte merkte Hoofdstuk XI op dat het boek twee kenmerken van het IS systeem had vóórondersteld, namelijk dat het IS geen verdachten *in absentia* kan berechten en dat het geen eigen politiemacht heeft. Uiteengezet werd echter dat men zich natuurlijk zou kunnen voorstellen dat wanneer het IS wèl deze kenmerken zou hebben, de kans kleiner zou kunnen worden dat IS rechters überhaupt geconfronteerd zouden worden met een *male captus* zaak.

In deze context werd gesteld dat hoewel deze studie had laten zien dat het idee van een eigen internationaal *arrestatie*team nog niet politiek haalbaar was, het IS zou kunnen overwegen het voorbeeld van het ICTY te volgen met betrekking tot het creëren van *tracking* teams. Echter, omdat het werk van zulke teams bestond uit traditioneel politiewerk in de staat in kwestie, hadden zij ook toestemming nodig van die staat, hetgeen uiteraard erg lastig, zo niet onmogelijk, te verkrijgen zou zijn van niet-meewerkende staten.

Hoofdstuk XI merkte vervolgens op dat het toestaan – onder bepaalde omstandigheden – van processen *in absentia* dat probleem zou oplossen.

Echter, omdat het IS eenvoudigweg (nog) niet was toegerust met deze kenmerken werd uiteengezet dat dit betekende dat het (wellicht meer) gebruik moet maken van het gereedschap dat het al heeft.

In deze context werd in het algemeen gesteld dat het IS verre moet blijven van dubieuze methoden om een verdachte onder zijn jurisdictie te brengen, omdat het uitwijken naar zulke methoden teneinde een korte termijn doel te bereiken, naast het feit dat het op dat specifieke moment reeds de waarden waar het IS voor staat ondermijnt, en naast het feit dat zo'n aanpak helemaal nog niet zo 'succesvol' hoeft te zijn aangezien zulke tactieken kunnen leiden tot het einde van de zaak (zie hierboven), de missie van het IS op lange termijn ernstig kan beschadigen.

Dit kwam, zo zette Hoofdstuk XI uiteen, omdat, onder andere, het IS de praktische steun van de internationale gemeenschap nodig heeft, in het bijzonder omdat het niet over een eigen handhavingsarm beschikt. Om veilig te stellen dat het dus de *voortdurende* welwillendheid van staten heeft, van de handhavers van het IS, moet het *altijd* een verdachte op een faire, rechtsbestendige manier vervolgen. Wanneer sceptische gestemde, maar machtige staten (zoals de VS) zien dat het IS een fair hof is, zo vervolgde Hoofdstuk XI, dan zouden zij wel eens sneller partij kunnen worden bij het IS Statuut, hetgeen op zijn beurt weer zal leiden tot meer steun en een meer daadkrachtigere handhavingsarm van het IS.

Daarom stelde deze studie dat wanneer rechters geconfronteerd worden met het dilemma zoals gepresenteerd in het allereerste hoofdstuk van dit boek, namelijk effectiviteit (in de zin van het tot stand komen van vervolgingen en veroordelingen)

versus *fairness*, zij altijd voor het laatste concept zouden moeten kiezen. Alleen *fairness* kan leiden tot *werkelijke* effectiviteit, namelijk effectiviteit op lange termijn.

Een ander belangrijk punt dat werd duidelijk gemaakt in Hoofdstuk XI was dat het introduceren van nieuwe hulpmiddelen *voor het IS* teneinde diens mogelijkheden om een proces te starten te vergroten, zoals een bepaling die processen *in absentia* toestaat (als die mogelijkheid geïntroduceerd zou worden in de toekomst), het risico in zich bergt dat het echte probleem wordt gemaskeerd, namelijk de vraag waarom de handhavingsarm van het IS, gevormd door *staten* die partij zijn bij het IS Statuut (en staten die door de VN Veiligheidsraad verordonneerd zijn samen te werken met het IS) niet functioneert zoals hij zou moeten functioneren. Er werd aan herinnerd dat staten de voornaamste verplichting hebben tot het arresteren en overdragen van verdachten en dat deze verplichting zeer serieus moet worden genomen.

Volgens Hoofdstuk XI betekende dit bijvoorbeeld dat als verdachten niet konden worden aangehouden door de 'staat van bewaring', andere staten (of staten die samenwerken in een internationale vredesmacht) die staat in zijn pogingen dienden te ondersteunen. Niet alleen logistiek en financieel, maar wellicht ook met een echt arrestatieteam.

Ten aanzien van niet-meewerkende staten werd uiteengezet dat derde staten gebruik moesten maken van de *carrot-and-stick* methode die zo goed had gewerkt voor het ICTY, hetgeen betekende dat zij dienden te onderstrepen dat samenwerking met het IS zou leiden tot financiële/politieke steun en dat niet-samenwerking zou leiden tot embargo's/sancties/politiek isolement. Zo'n methode, vervolgde Hoofdstuk XI, zou meer legitimiteit hebben indien deze zou worden uitgevoerd in het kader van een collectiviteit van staten, zoals internationale organisaties. In deze context werd ook verwezen naar de rol van de VN Veiligheidsraad. Hoewel Hoofdstuk XI erkende dat de verhouding tussen dit orgaan en het IS een lastige is, werd aangevoerd dat *als* dit orgaan beslist dat bepaalde staten moeten samenwerken met het IS en als die staten dat weigeren te doen, de VN Veiligheidsraad in actie moet komen en wel veel krachtdadiger dan hij tot nu toe heeft gedaan. In dit kader werden ook enkele strategieën gepresenteerd die de VN Veiligheidraad zouden kunnen helpen in zijn pogingen om de strijd met straffeloosheid aan te gaan en om zijn eigen geloofwaardigheid te behouden.

Kortom, Hoofdstuk XI stelde dat de internationale gemeenschap, de handhavingspilaar van het IS, (beter) moet begrijpen dat zij grote verantwoordelijkheden heeft in het functioneren, de effectiviteit en dus het succes en de geloofwaardigheid van het IS. De internationale gemeenschap heeft hier, in de woorden van Rastan, een *responsibility to enforce*.

Hoofdstuk XI, Deel 5 en deze studie eindigden met een kort nawoord waarin onder andere de hoop werd uitgesproken dat deze studie (inclusief haar kritische observaties van deelparagraaf 2.3 en paragraaf 3 van Hoofdstuk XI), dan wel de discussies die zij zou kunnen oproepen, het IS zullen inspireren en behulpzaam zijn indien dit geconfronteerd wordt met een nieuwe *male captus* situatie om een beslissing te nemen die (meer) recht doet aan zijn moeilijke, maar zo

prijzenswaardige doelstelling, namelijk om op een faire manier te strijden tegen straffeloosheid. Een strijd, waarvan paragraaf 3 van Hoofdstuk XI had aangevoerd dat deze alleen gewonnen kon worden wanneer de internationale gemeenschap haar verantwoordelijkheid als de handhaver van het IS serieus neemt.

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Christophe Paulussen LL.M M.Phil (1979) was born in Maastricht where he also attended high school (gymnasium alpha). After a year of French (language) courses at the *Université Marc Bloch* (Strasbourg) and the *Université Catholique de l'Ouest* (Angers), he went to Tilburg to study law. After a *propedeuse* Dutch law (*cum laude*), a *doctoraal* International and European Law (with distinction) and a research master (*cum laude*), he started working as a PhD candidate at the Department of European and International Public Law, where he also co-lectured, among other things, the master's course 'International Criminal Prosecution of Genocide, War Crimes and Crimes against Humanity'. Inspiration for the subject of his PhD thesis was drawn from the (more or less homonymic) thesis of his *doctoraal* studies which won not only the Tilburg University Thesis Prize 2004 but also the first prize for master's theses in the framework of the Max Van Der Stoel Human Rights Award 2004.

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