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Does the International Criminal Court have the capacity to act in conformity with the right to liberty?

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Dissertation submitted to the Kent Law School
in partial fulfillment for the requirements for the award of the degree of
Doctor of Philosophy in Law

University of Kent
Brussels School of International Studies

April 2016

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Word Count: 92.074

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ABBREVIATIONS

- AC: Appeals Chamber
- AfCHPR : African Charter on Human and Peoples' Rights
- AfCmHPR : African Commission on Human and Peoples' Rights
- AfCtHPR : African Court on Human and Peoples' Rights
- AmCHR : American Convention on Human Rights
- CAR : Central African Republic
- CoE : Council of Europe
- DRC : Democratic Republic of the Congo
- ECCC: Extraordinary Chambers in the Courts of Cambodia
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights
- HRC : Human Rights Committee
- IACtHR : Inter-American Court on Human Rights
- IAmCHR : Inter-American Commission on Human Rights
- ICC : International Criminal Court
- ICCPR : International Covenant on Civil and Political Rights
- ICJ : International Court of Justice
- ICTR : International Criminal Tribunal for Rwanda
- ICTY : International Criminal Tribunal for Former Yugoslavia
- IHRL : International Human Rights Law
- PCIJ : Permanent Court of International Justice
- PTC : Pre-Trial Chamber
- RPE : Rules of Procedure and Evidence
- SCSL : Special Court of Sierra Leone
- SPSC : Special Panel for Serious Crimes in East Timor
- STL : Special Tribunal for Lebanon
- TC : Trial Chamber
- UDHR : Universal Declaration of human rights
- UK : United Kingdom
- UN : United Nations

INTRODUCTION

As noted by Françoise Tulkens, then a judge of the European Court of Human Rights (ECtHR), ‘issues of “détentions préventives” are among the most problematic ones in so far as application of human rights in international criminal proceedings is concerned’.¹ These issues are considered problematic as regards international human rights law (IHRL) since international criminal proceedings last for several years, meaning that the accused remain in detention with no real prospect of provisional release despite still being presumed innocent and despite the fact that an acquittal is far from being a remote possibility. For example, Bagambiki spent eight years in the detention centre of the International Criminal Tribunal for Rwanda (ICTR) despite his acquittal at first instance, six years after his arrest. After his acquittal on appeal, he was released to a safe house where he was detained for another year before being authorized to enter Belgium where his family lived.² Likewise, Ndindiliyimana spent 11 years in the detention centre of the ICTR before his release was ordered at first instance. After this order for his release, Ndindiliyimana spent nearly three years in detention in a safe house and was finally acquitted on appeal in 2013. It was only in September 2014, when he finally obtained a visa to enter Belgium to join his family, that he could leave the safe house.³ Their cases could even be considered fortunate if compared with Ntagerura who is still in the same safe house since his first acquittal in February 2004 and his acquittal on appeal in February 2006.⁴ These are only three of thirteen acquittals by the ICTR. Acquittals were also fairly common before the International Criminal Tribunal for the former Yugoslavia (ICTY), where the total stands at eighteen. Admittedly, ‘détentions préventives’ were slightly less problematic in this case because the proceedings before the ICTY were more expeditious than before the ICTR⁵ and because, notwithstanding the ICTY

¹ Speaking in her personal capacity (as cited in S. Golubok, ‘Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation?’ (2010)9(2) *Law & Practice of International Courts & Tribunals* 297).

² K. J. Heller, ‘What Happens to the Acquitted?’ (2008)21(3) *Leiden Journal of International Law* 664.

³ ‘Rwanda: Acquitted Rwandan General to Go to Belgium’ *All Africa* (17 September 2014) available at allafrica.com/stories/201409171541.html (last accessed 4 January 2016).

⁴ André Ntagerura *Trial Watch* (22 October 2012) available at <http://www.trial-ch.org/fr/ressources/trial-watch/trial-watch/profils/profile/565/action/show/controller/Profile/tab/legal-procedure.html> (last accessed 4 January 2016).

⁵ J. A. Meernik, ‘Is Justice Delayed at the International Criminal Court?’ (2008-2009)91 *Judicature* 286.

policy of detention during the trial, a significant number of its accused had been granted provisional release before their trials opened.⁶

Would the statement of Judge Tulkens also be applicable to the International Criminal Court (ICC)? In other words, is pre-trial detention and/or detention pending trial before the ICC also problematic in light of IHRL? To date, the ICC has granted interim release only to those charged with the commission of offences against the administration of justice – and this after nearly one year of detention. None of the accused charged with international crimes has ever been granted interim release, and there is already one acquittal out of three judgments: that of Ngudjolo, who was acquitted after 22 months of pre-trial detention and 38 months of detention pending trial. In addition, Mbarushimana spent 14 months in detention before the ICC declined to confirm the charges against him. It is true that, unlike the ICTY and the ICTR, the ICC can provide for compensation in case of a miscarriage of justice.⁷ Nonetheless, an acquittal or a dismissal of the charges does not necessarily imply a miscarriage of justice.⁸

Why would a judge of a human rights court, or more generally IHRL, care about issues arising before international criminal courts? The answer is simple: because international criminal proceedings may affect the rights of the accused who are protected by IHRL. For example, pre-conviction detention represents an infringement of the liberty of the person detained; in particular, it concerns the detention of a person who has not yet been judged and who should therefore still be presumed innocent. The right to liberty and the presumption of innocence are thus endangered by such detention and even more so if the right to be tried within a reasonable time is not respected.⁹ Furthermore, apart from the infringement of the right to liberty, detention

⁶ ICTY website, available at <http://www.icty.org/sid/291> (last accessed 4 January 2016).

⁷ Article 85 of the ICC Statute (Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3).

⁸ M. Fedorova, S. Verhoeven and J. Wouters, 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings' (June 2009) *Working Paper n°27* available at <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp137e.pdf> (last accessed 4 January 2016) 26; C. L. Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2011)60(1) *American University Law Review* 61; A. Trotter, 'Pre-Conviction Detention in International Criminal Trials' (2013)11 *Journal of International Criminal Justice* 374.

⁹ B. Farrel, 'The Right to a Speedy Trial before International Criminal Tribunals' (2003)19 *South African Journal on Human Rights* 99; D. J. Rearick, 'Innocent Until Alleged Guilty: Provisional Release at the ICTR' (2003)44 *Harvard International Law Journal* 577; M. A. Fairlie, 'The Precedent of Pretrial Release at the ICTY: A Road Better Left Less

on remand also impacts on other human rights, such as the right to a family and private life or the right to freedom of assembly, association and expression.¹⁰ It also touches upon the right to a fair trial. Indeed, detention challenges the finding of evidence and of witnesses and makes contact with counsel difficult given, *inter alia*, the strict time limits. Consequently, detention complicates the respect of the right of the accused to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing, which are minimum guarantees for a fair trial.¹¹ This explains why IHRL protects the accused on trial in international proceedings.

But why should international criminal tribunals care about the human rights of their accused? Are they under an obligation to do so? Focusing on the issue of pre-conviction detention before the ICC, this is one of the questions I attempt to answer in this thesis. To this end, I explain the extent to which the ICC is bound to respect the right to liberty and I examine the conformity of its legal framework with that right. I also study the manner in which the ICC deals with this right in practice, through an extensive analysis of its case law regarding interim release up to 31 December 2015. The analysis of these decisions reveals that it may seem illusory in practice to require the respect of the right to liberty by the ICC. The problem, it is argued is would be that the right to liberty is defined according to the context in which a domestic criminal tribunal operates, which differs from that of the ICC. For instance, while contemplating the possibility of an interim release, the ICC needs to take into account the fact that a territory is required to implement this release, a condition arguably not envisaged by IHRL.

Traveled' (2010)33(4) *Fordham International Law Journal* 1108-1110; Davidson (n8) 13; K. Doran, 'Provisional Release in International Human Rights Law and International Criminal Law' (2011)11 *International Criminal Law Review* 708; R. Sznajder, 'Provisional Release at the ICTY : Rights of the Accused and the Debate that Amended a Rule' (2013)11(1) *Northwestern Journal of International Human Rights* 112.

¹⁰ M. Macovei, *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights* (Council of Europe, 2004) 6; Davidson (n8) 24; M. Schönteig, 'The overuse of pre-trial detention: causes and consequences' (2013)92(1) *Criminal Justice Matters* 18-19.

¹¹ Article 14 of the ICCPR (International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171); article 6 of the ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222); article 8 of the AmCHR (American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123); article 7 of the AfCHPR (African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58).

For this reason, this thesis does not focus merely on the first research question related to the legal obligation incumbent upon the ICC to take this right into account. It also focuses on the issue of the ability of the ICC to respect the right to liberty of its accused despite the specific context in which it operates. To determine this specificity, the context in which other international tribunals operate is thus examined. It is thereby revealed that the ability of the ICC to respect the right to liberty of its accused mostly depends on the goodwill of the member states and of the ICC. The legal possibilities for the ICC or for the accused to influence this goodwill are therefore studied. The study focuses especially on the Netherlands and on Belgium. Indeed, the former is the host state of the ICC and consequently a key actor for interim release issues. The latter is the only state so far that has signed an agreement with the ICC aiming at the implementation of decisions of provisional release. It should be noted that the expression ‘interim release’ is used in the provisions of the ICC whereas the rules of the ICTY and the ICTR refer to ‘provisional release’, but this difference in terminology is of no significance to the discussion.

Instead of using arguments related to the place of human rights in the hierarchic order or to the need for the ICC to respect human rights in order to sustain its legitimacy,¹² I adopt a legal positivist approach with a view to determining whether the ICC has a legal obligation to take into account the right to liberty and, if so, the extent to which the Court is capable of meeting this obligation. I also study the obligations of the states parties deduced from the ICC obligation as well as those deriving from their accession to human rights treaties. By positivism, I do not refer to the classical perspective according to which ‘Law is regarded as a unified system of rules that [...] emanate from state will’ and to which ‘Law is ‘an “objective” reality’ that strictly needs to be distinguished from law “as it should be”’.¹³ Indeed, it is now widely recognized among positivists that legal orders cannot be purely value-neutral and that, if the consent of states is still primordial

¹² See G. Sluiter, ‘Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law’ (2010)8(3) *Northwestern Journal of International Human Rights* 257; B. Swart, ‘Damaska and the Faces of International Criminal Justice’ (2008)6(1) *Journal of International Criminal Justice* 100; M. Klamberg, ‘What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime’ (2010)79(2) *Nordic Journal of International Law* 283; L. Gradoni, D. A. Lewis, F. Mégret, S. M. H. Nouwen, J. David Ohlin, A. Reisinger-Coracini and S. Zappalà, ‘General Framework of International Criminal Procedure’ in G. Sluiter and others, *International Criminal Procedure. Principles and Rules* (OUP, 2013) 59.

¹³ B. Simma and A. L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999)93 *American Journal of International Law* 304; I. Gillich, ‘The Normativity of Principles. Within the Positivist Theory of International Law’ (2015-2016)41 *North Carolina Journal of International Law* 1-9.

to establish the validity of international law, this consent can also be established by their direct practice or even by their indirect practice through their membership in international organisations.¹⁴ Simma's 'enlightened positivism' or modern positivism is one of the representatives of this evolution.¹⁵ Simma challenges the classical view of positivism by recognizing that 'international law should serve certain ends of justice', by looking at the practice of international institutions to interpret international law and by recognizing that 'international law has moved from a set of bilateral relations among states, each advancing its own interest, to one of community interest' so that there is a 'the need to bolster the protection of individual human rights even as it might offend the sensibilities of states'.¹⁶ This PhD thesis adopts Simma's approach of positivism and, as positivism requires, uses the formalist method that analyses the traditional sources of international law.

The positivist approach is the most appropriate to address the human rights obligations of the ICC for two reasons. First, only an analysis of the sources of international law can identify the extent of these obligations. Secondly, a legal analysis is more likely to convince the ICC and its member states of the necessity to take into account these obligations than arguments related to the legitimacy and supremacy of human rights since the impact of the latter arguments would depend on their individual moral sensibilities and the larger political interests.¹⁷ It is also the most appropriate given the ICC as subject of analysis since, as noted by Cryer,

The dominant philosophy that can be seen in relation to both the Rome Statute and the

¹⁴ For a presentation of this evolution: M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (CUP, 2001) 243-246; J. Waldron, 'Normative (or Ethical) Positivism' in J. Coleman (ed), *Hart's Postscript. Essays on the Postscript to the Concept of Law* (OUP, 2001); R. Cryer, 'Déjà vu in International Law' (2002)65 *The Modern Law Review* 946-947; J. Kammerhofer, 'International Legal Positivism' August 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477317 (last accessed 6 September 2016) 2-14; Gillich (n13) 1-9.

¹⁵ Simma and Paulus (n13) 308, 311.

¹⁶ Simma and Paulus (n13) 308; Gillich (n13) 6; S. Ratner, 'From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities' in U. Fastenrath (eds.) *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (OUP, 2011) 157-165; E. Stein, 'Bruno Simma, The Positivist?' in U. Fastenrath (eds.) *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (OUP, 2011) 20-22.

¹⁷ Simma and Paulus (n13) 303.

Also about A. Cassese: R. Cryer, 'International Criminal Tribunals and the Sources of International Law. Antonio Cassese's Contribution to the Canon', (2012)10 *Journal of International Criminal Justice* 1048.

early practice of the ICC is legal positivism, with a strict understanding of legality (*nullum crimen sine lege*) on the part of the drafters on one hand, and a concern with giving the drafters what they wanted, rather than setting out their own view of international justice on the part of the judicial branch of the Court (at least in the AC).¹⁸

The suitability of using positivism to address human rights issues has been questioned, especially because of its formalist method. One of the criticisms is related to the fact that the traditional sources of international law are supposed to determine the content of legal obligations existing between states.¹⁹ Nonetheless, as shown in Part I., section 3.3. and in Part II., section 5, this criticism is largely misguided. Simma rightly held that, ‘as a matter of law, human rights conventions are no different from other treaties with respect to the centrality of reciprocity and the possibility of inter-state enforcement’²⁰ and that ‘however, formal sources remain the core of international legal discourse. Without them, there is no “law properly so-called”.’²¹ As noted earlier, bypassing traditional sources of international law, and therefore state consent, because of the ‘exceptional’ character of human rights, is less likely to convince states who are precisely the actors that require convincing. This is illustrated by the distinction that Simma and Paulus make between instinct and professionalism:

The applicability of humanitarian law to internal armed conflicts appears to us to be a good test case for the practical use of the methodologies chosen: On the one hand, the changing reality, in which international conflicts increasingly give way to internal violence, militates in favor of a concomitant change in the law. Our humanitarian instincts strongly demand that we treat the legal consequences of distinctions between international and internal conflicts, between wartime and peacetime atrocities, as irrelevant. On the other hand, our professionalism does not allow us simply to follow this urge [instinct] without regard to “international law as it is,” as compared to “how it

¹⁸ R. Cryer, ‘The philosophy of international criminal law’ in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Elgar Publishing, 2011) 253.

¹⁹ See e.g. F. Mégret, ‘International Human Rights Law’ in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Elgar Publishing, 2011) 211; F. Mégret, ‘The Apology of Utopia: Some Thoughts on Koskenniemi Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law’ (2013) *27 Temple International & Comparative Law Journal* 463.

²⁰ In Ratner (n16) 160.

²¹ Simma and Paulus (n13) 308.

should be.” Governments charged with violations of humanitarian law constantly remind us of that very difference, which seems so utterly out of place from a humanitarian standpoint. After all, it usually is governments we are dealing with when we present our views of “the law.” In our view, it is precisely this need to get our legal message through to other people, especially representatives of states who might not share our individual moral or religious sensibilities, that constitutes one of the main reasons for the adoption of a positivist view of international law.²²

In this case, my instinct is to pursue the cosmopolitanism ideal, namely the fact that ‘the individual human being is the relevant “unit” of moral worth’ and that ‘this moral worth should be applied to all human beings equally and universally across the globe, regardless of an individual’s place of birth or affiliation to other local communities.’²³ Nonetheless, my professionalism implies that I use a positivist approach to address the human rights obligations by the ICC instead of my instinct.

This professionalism however does not mean that positivism is incompatible with my instinct and that positivism leads necessarily to a conservative point of view, as is argued by some of its detractors²⁴. Indeed, this criticism disregards the fact that a legal analysis does not lose its legal character because a political project sits behind it.²⁵

This political project will reveal itself in the choice of interpretations. Koskenniemi rightly held that, if international law is a universal language understood by everyone, this does not imply

²² Simma and Paulus (n13) 302-303.

²³ R. Cryer, T. Hervey, B. Sokhi-Bulley and A. Bohm, *Research Methodologies in EU and International Law* (Hart Publishing, 2011) 46.

Regarding cosmopolitanism, see T. W. Pogge, ‘Cosmopolitanism and Sovereignty’ (1992) 103 *Ethics* 48-75; P. Hayden, ‘Cosmopolitanism and the Need for Transnational Criminal Justice. The Case of the International Criminal Court’ (2004) *Theoria* 69-95; P. McAuliffe, ‘From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism’ (2014)13 *Chinese Journal of International Law* 264-265.

²⁴ E.g. L.L. Fuller, ‘Positivism and Fidelity of Law – A Reply to Professor Hart’ (1958)71 *Harvard Law Review* 630; J. D. Goldsworthy, ‘The Self-Destruction of Legal Positivism’ (1990) *Oxford Journal of Legal Studies* 458.

²⁵ H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958)71(4) *Harvard Law Review* 612; M. Koskenniemi, ‘The Politics of International Law’ (1990)1 *European Journal of International Law* 9; M. Koskenniemi, *The Politics of International Law* (Hart, 2011) 153.

that there is only one right answer.²⁶ Simma and Paulus also recognize that ‘it is obvious that the interpretation of law – as of any text – is subject to the individual preferences and political choices of the lawyer’.²⁷ Enlightened positivism is thus not insensitive to Bassiouni’s contention that ‘as objective or pragmatic as one might desire a rule-finding process to be, it is nevertheless always predicated on certain values, just as much as such a process seeks or aims to achieve a value-orientated goal’.²⁸ Nevertheless, the difference is that positivism does ‘not give up the claim to normativity and the prescriptive force of law’.²⁹ Indeed,

[m]aybe a decision maker will decide to disobey a rule-for whatever reason, moral or immoral, egoistic or altruistic, humanitarian or state-interested. But the lawyer’s role is not to facilitate the decision maker’s dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things.³⁰

Another criticism of positivism is linked to the fact that positivism does not integrate extra-legal factors whereas such factors also influence actors of international law and their reaction to it.³¹ In this case, the legal analysis reveals that the ability of the ICC to respect the right to liberty of its accused mostly depends on the goodwill of the member states and of the ICC. Their answers to plural requests from the ICC or from the accused are therefore studied. Despite this study’s finding that extra-legal considerations influence the reaction of the ICC and its member states towards their human rights obligations, this influence does not make the analysis any less legal. Indeed, if these factors lead the state to violate its obligations, it does not mean that there was in fact no obligation. Therefore, it is relevant to examine the legal instruments that could have an impact on the goodwill of the ICC and of its member states, whether because of an obligation stemming from the ICC cooperation regime or because of an

²⁶ Koskenniemi (n14) 490, 502-517; Cryer (n14) 947; J. A. Beckett, ‘Rebel Without a Cause? Martti Koskenniemi and the Critique Legal Project’ (2006)7(12) *German Law Journal* 1051.

²⁷ Simma and Paulus (n13) 303.

²⁸ M. C. Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1989-1990)11 *Michigan Journal of International Law* 775.

²⁹ Simma and Paulus (n13) 308.

³⁰ Simma and Paulus (n13) 307.

³¹ E.g. Fuller (n24) 630, 641; Goldsworthy (n24) 449, 456.

obligation stemming from IHRL. This faith in law³² does not prevent that these extra-legal factors might lead the state not to respect its legal obligation or even to disengage itself of its obligation by opting out from the system that imposes it (e.g. a treaty). The fact that international law finds its source in state consent does not mean that the state has to give its consent each time. A state ought to respect its commitments or follow the adequate procedure in order to escape its commitments. A violation of commitments caused by extra-legal factors does not diminish the legal nature of the obligation. Therefore, although the role of these extra-legal considerations is recognised,³³ it will not be examined in detail in this doctoral thesis, which focuses on the legal aspects of the obligations of the ICC.

To summarize, in this thesis I endeavour to answer the research question whether the ICC has a legal obligation to respect the right to liberty and, if so, whether it has the capacity to do so. I also put forward a framework wherein this capacity is made compatible with the legal obligation to respect the right to liberty incumbent upon the ICC and its State Parties. For this purpose, the law that the ICC has to respect is analysed first. Secondly, the human rights regime regarding pre-conviction detention is defined and the respect thereof by the ICC is studied. Thirdly, following the presentation of the arguments related to the pertinence of an application of the right to liberty given the specific context in which the ICC appears to operate, this allegedly specific context is examined and compared with the context of other international tribunals. Finally, after outlining the specificities of the ICC context, several ways to legally eliminate these specificities are envisaged through an analysis of the ICC cooperation regime and the enforcement regime of international human rights instruments such as the International

³² As held by Scott, 'legal positivists believe that law *should* be obeyed even if it is not' (S. V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994)5 *European Journal of International Law* 314).

³³ See : D. Bosco, *Rough Justice: the International Criminal Court in a World of Power Politics* (OUP, 2014) 4; V. Peskin, 'Assessing the Contemporary International Criminal Tribunals: Performance, Persuasion, and Politics' (2014)108 *ASIL Proceedings* 122-125; C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015); O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016); R. H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill, 2016) 445-452.

Covenant on Civil and Political Rights (ICCPR)³⁴ or the European Convention on Human Rights (ECHR)³⁵.

If this thesis might be seen as a guide for a defence lawyer at the ICC since it aims to foster the application of human rights, this by no means negates the fact that it is based on a legal analysis recognizing the role of state consent. Furthermore, it raises theoretical issues, on the one hand regarding the appropriateness of the traditional sources of international law for IHRL and of the application of IHRL to international organizations, and, on the other hand, regarding the coherence of the legal regime of the ICC, its use by the judges in light of the wishes of its founding fathers and its limits due to external factors. It also points to practical aspects regarding the right to liberty which states should consider before setting up an international tribunal. These issues have never been presented in this light in the literature. Furthermore, the apparent contradiction between the interpretation of the legal sources of the ICC and their application by its judges has never been demonstrated on the basis of an expansive study of the case law of the ICC on a specific right, i.e. the right to liberty. Admittedly, there already exist a number of studies on the right for provisional release before the ICTY but, as will be seen later, their findings cannot be transposed as such to the ICC given the existing institutional differences. Furthermore, in contrast to this thesis, the authors of those studies do not attempt to define the right to liberty despite the fragmentation of IHRL and do not search for solutions in the IHRL regime capable of addressing the identified weaknesses of the ICTY regarding its approach to provisional release.

³⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222

PART. I. THE RESPECT BY THE ICC OF THE RIGHT TO LIBERTY

1. Determination of the law applicable to the ICC: Article 38 of the ICJ Statute versus Article 21 of the ICC Statute

Determining whether the ICC ought to take into account the right to liberty of its accused requires the examination of the law applicable to the ICC. This applicable law is identified using the formalist method, namely through the analysis of the traditional sources of international law, the ICC being subject to international law.

Other approaches could be used to justify the necessity for the ICC to respect the right to liberty. Focusing on the concept of delegation is one of them.³⁶ Starting from the principle that the ICC would not be allowed to act in violation of the pre-existing obligations of its states parties, this approach would determine the law by which the 123 states parties to the ICC are

³⁶ See C. M. Chaumont, 'La signification du principe de spécialité des organisations internationales' in J. Baugniet (eds.), *Mélanges offerts à Henri Rolin. Problèmes de droit des gens* (Pedone, 1964) 59; R. McCorquodale, 'International Organisations and International Human Rights Law: One Giant Leap for Humankind' in K. Kaikobad and M. Bohlander (eds.), *International Law and Power Perspectives on Legal Order and Justice* (Brill, 2009) 145, 155; O. De Schutter, 'Human Rights and the Rise of International Organisations: the Logic of Sliding Scales in the Law of International Responsibility' in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 63; F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations' in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 134; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 84; S. Vasiliev, 'Fairness and its Metric in International Criminal Procedure', 18 April 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177 (last accessed 21 March 2013) 37-38.

bound. In addition to the obvious difficulties linked to the number of states parties and to the access to their legislation, De Schutter rightly notices that ‘this line of reasoning ultimately fails on practical grounds, as it results in excessive obstacles being imposed upon international co-operation’.³⁷ Another approach would be to start from the principle that IHRL benefits from a hierarchic position in international law due to the fact that some human rights could pretend to the status of *ius cogens* or of rights *erga omnes*.³⁸ This method would therefore examine to what extent the right to liberty could qualify as such right and could potentially be applicable to the ICC because of this superior position. The problem is the lack of agreement on a list of these ‘superior’ rights and the weak legal analysis that thus stems from it.³⁹ Thirdly, the applicability of human rights to the ICC could also be justified with policy arguments. This is the idea that the ICC is a tool for the fight against impunity for international crimes and the associated massive violations of human rights.⁴⁰ Therefore, as Sloane puts it, ‘[i]t would be ironic and counterproductive were [international criminal law] trials to undermine some international human

³⁷ De Schutter (n36) 54.

³⁸ See S. Stapleton, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’ (1999)31 *New York University Journal of International Law and Politics* 546; D. Shelton, ‘Hierarchy of Norms and Human Rights: Of Trumps and Winners’ (2002)65 *Saskatchewan Law Review* 307; G-J. A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law International, 2005) 17; O. De Schutter, *International Human Rights Law* (CUP, 2010) 61; J. Vidmar, ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?’ in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (OUP, 2012) 13-41.

³⁹ See B. Simma and P. Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988-1989)12 *Australian Yearbook of International Law* 82-108; A. Orakhelashvili, *Peremptory Norms in International Law* (OUP, 2006); C. Tomuschat and J-M. Thouvenin, *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, 2006) 1-19; M. Milanovic, ‘Norm Conflict in International Law: With Human Rights?’ (2009-2010)20 *Duke Journal of Comparative and International Law* 69-132; M. Addo, *The Legal Nature of International Human Rights* (Martinus Nijhoff, 2010) 60-79.

⁴⁰ Preamble of the ICC statute: ‘Affirming 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 by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’;

See Swart (n12) 100; Klamberg (n12) 283; J. David Ohlin, ‘A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law’ (2009)14 *UCLA Journal of International Law and Foreign Affairs* 83; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 59; Sluiter (n12) 257.

rights standards in an effort to vindicate others'.⁴¹ Nonetheless, this type of argument is rather subjective and is not so obvious when applied to the right to liberty. Indeed, Gaynor rightly illustrated the ambivalence concerning this right by noting that 'few of us would wish to encounter at the local bookshop a person accused of mass murder, perusing the shelves; freed on provisional release while he waits for his trial to begin but most of us would express unease at the concept of a person, presumed innocent, detained in a prison block for several years before his trial, and for several more until the trial concludes'.⁴²

In contrast with these approaches, the examination of the sources of international law, as required by the formalist method, is feasible and would lead to a legally confirmed answer. To determine the law applicable to the ICC, the instinctive reaction is to turn to Article 38 of the Statute of the International Court of Justice (ICJ)⁴³, which sets out the law applicable to the ICJ. This article is usually considered as the starting point to examine the sources of international law binding upon its subjects.⁴⁴ According to this article, these sources are:

- 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 59⁴⁵, 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.

⁴¹ R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007)43 *Stanford Journal of International Law* 39, 42 (as cited by Davidson (n8) 11).

⁴² F. Gaynor, 'Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia' in J. Doria (ed.), *The Legal Regime of the ICC: Essays in Honour of the Professor J. P. Blishchenko* (Brill, 2008) 184.

⁴³ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 15 UNCTAD 355

⁴⁴ Bassiouni (n28) 782; Shelton (n38) 45; V-D. Degan, 'On the Sources of International Criminal Law' (2005)4(1) *Chinese Journal of International Law* 49; I. Brownlie, *Principles of Public International Law* (OUP, 2008, 7th edition) 5; M. Shaw, *International Law* (CUP, 2008, 6th edition) 71.

⁴⁵ Article 59: The decision of the Court has no binding force except between the parties and in respect of that particular case.

This article is considered to be applicable to the ICC since, as an international organization benefiting from international legal personality,⁴⁶ the ICC is bound by international law, as defined in Article 38 of the ICJ Statute.⁴⁷ This view is supported by the advisory opinion of the ICJ on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, which states that international organizations ‘are subjects of international law, and as such, are bound by any obligation incumbent upon them under general rules of international law’^{48, 49}.

The recourse to Article 38 is the method of choice of the *ad hoc* tribunals to determine the law applicable to them. As noted by Vasiliev, ‘in identifying sources of applicable law, ICTY judges naturally resorted to categories listed in Article 38 of the ICJ Statute, thereby assuming their applicability and relevance to the work of the court’.⁵⁰ The reason is that ‘the normative corpus to be applied by the Tribunal principaliter, i.e. to decide upon the principal issues submitted to it, is international law’.⁵¹ However, even if this is the approach adopted by some scholars to determine the law applicable to the ICC, the issue of the determination of the obligations ‘incumbent upon’ the ICC remains so that this view is not really helpful to resolve the issue in this case.⁵²

⁴⁶ Article 4(1) of the ICC Statute: 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.

See W. Rückert, ‘Article 4’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 121-127.

⁴⁷ L. Gradoni, ‘International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down?’ (2006)19(3) *Leiden Journal of International Law* 851; G. Acquaviva, ‘Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations’ (2007)20(3) *Leiden Journal of International Law* 614; N. Croquet, ‘The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights’ Jurisprudence?’ (2011)11(1) *Human Rights Law Review* 98.

⁴⁸ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) (1980) ICJ Rep 73, 89-90 §37.

⁴⁹ Shelton (n38) 307; Gradoni (n47) 851; K. Zeegers, ‘De Invloed van Internationale Mensenrechten op Internationaal Strafprocesrecht’ in D. Abels, M. M. Dolman and K.C.J. Vriend (eds.), *Dialectiek van Nationaal en Internationaal Strafrecht* (Boom Juridische Uitgevers, 2013) 53-55.

⁵⁰ Vasiliev (n36) 11.

Regarding the applicable law of the *ad hoc* tribunals, see Gradoni (n47) 847-873; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 66-73; Vasiliev (n36) 8-35.

⁵¹ Judgment, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, TC, ICTY, 14 January 2000 §539.

⁵² Vasiliev (n36) 12; Zeegers (n49) 57; C. Deprez, ‘The Authority of Strasbourg Jurisprudence from the Perspective of the International Criminal Court’ (2015)3 *European Journal of Human Rights* 280.

In addition, in comparison with the *ad hoc* tribunals which are subsidiary bodies of the United Nations (UN), the ICC is an international organization set up by treaty. Its status in international law is therefore different.⁵³ Besides, in contrast to Article 38 of the ICJ Statute and to the other international criminal tribunals,⁵⁴ Article 21 of the ICC Statute lists its own applicable law. Therefore, debates regarding the applicability of the rules of international law due to their status in international law are less relevant for the ICC since the drafters of the ICC settled this issue by developing their own hierarchy of the applicable rules.⁵⁵ Consequently, one must be aware that the reasoning followed in this thesis cannot be transposed as such to the other international or internationalized criminal tribunals since Article 21 of the ICC Statute does not apply to these tribunals. For this reason, regarding the case law of other international tribunals, the ICC is of opinion that ‘decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the [Rome] Statute’ and that ‘the precedent of the *ad hoc* Tribunals is in no sense binding on the Trial Chamber at this Court’.⁵⁶ Nonetheless, the fact that the precedent of the *ad hoc* tribunals is not binding does not mean that the ICC would not refer to them when it finds them relevant, as demonstrated by the ICC case law.⁵⁷

⁵³ A. Pellet, ‘Applicable Law’ in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. II (OUP, 2002) 1052; G. Sluiter, ‘Naleving van de rechten van de mens door internationale straftribunalen’ (2002)27 *NJCM-bulletin* 703; A. Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks’ in M. Bergsmo (ed.), *Human Rights for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff, 2003) 19; Gradoni (n47) 849; D. Akande, ‘Sources of International Criminal Law’ in A. Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, 2009) 53.

⁵⁴ G. Hochmayr, ‘Applicable Law in Practice and Theory’ (2014)12 *Journal of International Criminal Justice* 655.

⁵⁵ The debate regarding *ius cogens* subsists but is, as seen later, irrelevant for the purpose of this thesis since the right to liberty is applicable to the ICC through a combination of Article 21(1)(a) and 21(3) of the ICC Statute.

⁵⁶ Decision regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 30 November 2007 §44.

⁵⁷ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, PTCI, ICC, 4 March 2009 (‘*Al Bashir* arrest warrant’); Decision on application for interim release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCII, ICC, 14 April 2009 (‘*Bemba* interim release decision of 14 April 2009’); Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 20 November 2009 entitled “Decision on the motion of the defence for Germain Katanga for a declaration on unlawful detention and stay of proceedings”, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 7 December 2010; Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, PTCII, ICC, 13 July 2012; Judgment on the appeal of Mr Laurent Koudou Gbagbo against

Article 21 of the ICC Statute stipulates that:

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.

Despite being similar to Article 38 of the ICJ Statute, Article 21 does not merely restate it. Rather, it presents some particularities. Firstly, it does not use the same language; for example, there is no explicit reference to custom. Secondly, it follows from the expressions ‘in the first place’ and ‘in the second place’ that Article 21 installs a hierarchy among the sources.⁵⁸ Thirdly, it

the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, AC, ICC, 26 October 2012 (‘*Laurent Gbagbo* interim release judgment of 26 October 2012’); Third Decision on Bosco Ntaganda’s Interim Release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 17 July 2014;

G. Bitti, ‘Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 299.

⁵⁸ It is commonly admit that Article 38 does not: Brownlie (n44) 5; Shaw (n44) 5; R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009)12 *New Criminal Law Review* 393-394; M. Elewa

departs from Article 38 as it does not mention the ‘teachings of the most highly qualified publicists of the various nations’ as a potential source. These particularities demonstrate the intention of the founding states to derogate from Article 38 and to make Article 21 *lex specialis* of Article 38.⁵⁹ For this reason, contrary to other scholars who combine Article 38 and Article 21 to examine the law applicable to the ICC,⁶⁰ I have referred exclusively to Article 21 for this analysis of the applicable law to the ICC even if it will be shown that these two articles do not really differ in practice.

Bassiouni does not agree with the conclusion that Article 21 is *lex specialis* of Article 38. For him, the founding states intended to make Article 10 of the ICC Statute⁶¹ prevail over Article 21.⁶² This position is isolated, however, and Bassiouni does not explain where or when the founding states expressed this intention. In addition, Bassiouni admits that, had the intent of the drafters not been expressed, ‘the specificity of Article 21 would control over the generality of Article 10’.⁶³ Given the lack of proof of this intent, in line with Vasiliev, Deprez and Zeegers,⁶⁴ in this thesis I adopt the position that Article 21 is *lex specialis* of Article 38.

Therefore, the different sources stated in Article 21 are studied in order to determine whether and to what extent human rights, especially the right to liberty, are applicable to the ICC and its judges.

Badar and N. Higgins, ‘General principles of law in the early jurisprudence of the ICC’ in T. Mariniello (ed.), *The International Criminal Court in Search of Its Purpose and Identity* (Routledge, 2015) 265.

⁵⁹ For a similar view: C. Deprez, ‘Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors’ (2012)12 *International Criminal Law Review* 729; Vasiliev (n36) 13; Zeegers (n49) 58.

See also ILC, ‘Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law’, Fifty-Eight session, (1 May – 9 June and 3 July – 11 August 2006) UN Doc A/CN.4/L.682, 34-65.

⁶⁰ Eg.: Gradoni (n47) 854; Deprez (n52) 280.

⁶¹ Article 10 of the ICC Statute: Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

⁶² M.C. Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers, 2013, 2nd Edition) 657.

⁶³ Bassiouni (n62) 657.

⁶⁴ Deprez (n59) 729; Vasiliev (n36) 13; Zeegers (n49) 58.

1.1 Article 21(1) and 21(2) of the ICC Statute: The classical sources

According to Article 21(1)(a), the ICC has first to apply the Statute, the Elements of Crimes and its Rules of Procedure and Evidence (RPE). The first step is thus to look at these sources to examine whether they recognize the right to liberty explicitly or through provisions on provisional release. A first glance reveals that, if the right to liberty is not expressly recognized by the ICC provisions, Articles 58 and 60 of the Statute, in combination with Rules 118–120 of the RPE and Regulation 51, regulate the process of issuing an arrest warrant and the possibility of interim release. Therefore, Article 21(1)(a) requires that these provisions constitute the core ones to be applied by the ICC judges when dealing with interim release issues. The absence of explicit recognition of the right to liberty means that, independently of Article 21(3), this right would apply as such only to the extent that these core provisions reflect it. Since, as demonstrated in section 4, the ICC legal regime does not really suffer lacunae regarding its interim release provisions, the other sources of Article 21(1) will not be used for this study because the hierarchic order used in Article 21(1) provides for their use only when the ICC provisions leave a situation unregulated. Nonetheless, it is interesting to present these other sources in order for the analysis to be complete.

Article 21(1)(b) then specifies that, in a case where the ICC provisions do not regulate a situation, and only in this case,⁶⁵ the judges shall apply ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’. Some authors argue that the expression ‘applicable treaties’ could refer to human rights treaties.⁶⁶ However, other scholars rightly reject this possibility since these treaties are addressed to states and since they only bind their member states.⁶⁷ This view is strengthened by the fact that, as shown by the *travaux préparatoires*, the drafters did not refer to human rights treaties such as the ICCPR during the discussions on this article.⁶⁸ Be that as it may, even assuming that this

⁶⁵ J. Verhoeven, ‘Article 21 of the Rome Statute and the Ambiguities of Applicable Law’ (2002)33 *Netherlands Yearbook of International Law* 11; Bitti (n57) 294, 296; Hochmayr (n54) 661.

⁶⁶ Degan (n44) 80; M. McAuliffe deGuzman, ‘Article 21’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 705-706; Fedorova, Verhoeven and Wouters (n8) 10.

⁶⁷ Pellet (n53) 1073; S. Vasiliev, ‘Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality’ (Toogdag Seminar, Utrecht University, 18 April 2008) available at <http://ssrn.com/abstract=1718960> (last accessed 21 March 2015); Naert (n36) 130.

⁶⁸ P. Saland, ‘International Criminal Law Principles’ in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 215; McAuliffe deGuzman (n66) 705.

provision left the door open to the application of such human rights treaties, the problem of the identification of the treaties applicable to the ICC would arise given the obscurity of the expression ‘applicable treaties’ and the fact that not all the states parties to the ICC are bound by the same treaties. Consequently, I do not contend that human rights could be applied to the ICC through their conventional form.

The second paragraph of Article 21 also refers to ‘the principles and rules of international law’. For most scholars, these principles and rules correspond to customary international law.⁶⁹ The ICC seems to share this point of view.⁷⁰ The fear of potential breaches of the principle of the legality of offences and punishment would explain the avoidance of the term ‘custom’.⁷¹ For McAuliffe deGuzman, this expression might also ‘reflect the drafters’ intention to enable the Court to apply principles that are neither derived from national laws nor part of customary international law. Such principles might derive from (...) international legal conscience, the nature of the international community, and natural law.’⁷² The only explanation offered by the working group is that it refers to international public law.⁷³ These ‘principles and rules of international law’ have to be distinguished from the general principles of law referred by Article 21(1)(c).⁷⁴ It can be concluded from this paragraph that human rights would thus be applicable to the ICC as long as there is a lacuna in the ICC legal regime, which is not the case for the interim release regime, and as long as they could qualify as customary international law.

Article 21(1)(c) mentions, as third subsidiary source, the ‘general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the

⁶⁹ Pellet (n53) 1071-1072; Verhoeven (n65) 9; McAuliffe deGuzman (n66) 706-707; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 71; Zeegers (n49) 57; Hochmayr (n54) 669; S. Bailey, ‘Article 21(3) of the Rome Statute: A Plea for Clarity’ (2014)14 *International Criminal Law Review* 521.

⁷⁰ Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCl, ICC, 27 January 2007 §274, §311.

⁷¹ Pellet (n53) 1057, 1071; C. Stahn and L. van den Herik, ‘Fragmentation’, Diversification and ‘3D’ Legal Pluralism, International Criminal Law as the Jack-in-the-Box?’ in C. Stahn and L. van den Herik (eds.), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012); Vasiliev (n36) 18; A. Bufalini, ‘International Law in the Interpretation of the ICC Statute’ (2015) *The Law and Practice of International Courts and Tribunals* 238.

⁷² McAuliffe deGuzman (n66) 707.

⁷³ W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010) 384.

⁷⁴ Hochmayr (n54) 669.

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'. These general principles of law correspond to those referred to by Article 38 of the ICJ Statute.⁷⁵

Next to these mandatory sources, Article 21(2) stipulates that 'the Court may apply principles and rules of law as interpreted in its previous decisions'. At first glance, the insertion of this paragraph is a bit puzzling. As noted by Verhoeven, 'it would be sheer nonsense to affirm that the Court is forbidden to apply principles and rules as interpreted in its previous decisions' since 'this would imply that it is obliged to change its interpretation in each of its judgments'.⁷⁶ Be that as it may, this source is not very helpful for the determination of the applicability of the right to liberty to the ICC as it does not solve the problem of the first application.

The analysis of these sources reveals that, save for the hierarchy established by Article 21, the sources are similar to those of Article 38 of the ICJ Statute. Admittedly, Article 21 does not expressly refer to doctrine as direct source. Nevertheless, it does not prevent the ICC from using this source to define the unwritten law,⁷⁷ so that this exclusion is just apparent. Consequently, the debate of the primacy of Article 21 ICC Statute or of Article 38 ICJ Statute does not have real consequences in practice if the analysis is limited to the sources listed by Article 21(1) and (2). Nonetheless, in contrast with Article 38, Article 21(3) adds a general principle of interpretation that has, or at least should have, an impact on the use of the classical sources referred to by these two articles. The examination of this principle is crucial for this analysis since it expressly refers to human rights.

1.2 Article 21(3) of the ICC Statute: a rule of interpretation

Article 21(3) of the ICC Statute provides that:

⁷⁵ Pellet (n53) 1073; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 71.

⁷⁶ Verhoeven (n65) 13.

⁷⁷ See R. Cryer, 'Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders' in K. Kaikobad and M. Bohlander (eds.) *International Law and Power Perspectives on Legal Order and Justice* (Brill, 2009) 183-206; A. Zammit, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals' (2013)14(2) *Melbourne Journal of International Law* 608-642.

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.

This paragraph adds thus an explicit reference to human rights and an anti-discrimination clause. The examination of this anti-discrimination clause is beyond the scope of this study due to its lack of relevance for this topic.

Despite appearances, this reference to human rights does not mean that the issue of the applicability of the right to liberty to the ICC is solved. Young rightly points out that:

Such a phrase could denote reference to a wide variety of sources of law, including customary international law, (...) widely ratified treaty law, (...) and even regional human rights instruments (...). The broad notion of ‘human rights’ could encompass both ‘soft law’ and more traditional sources of law. It could potentially entail reference to jurisprudence of international courts, tribunals and quasi-judicial bodies and even to the law of national legal systems.⁷⁸

Interestingly, in spite of the existence of these numerous potential interpretations, due to the vagueness of the expression ‘internationally recognized human rights’, the *travaux préparatoires* reveal that, in comparison to the anti-discrimination clause, the choice of this reference was not debated.⁷⁹ This is surprising because, as implied by Young, the choice of inserting such a paragraph raises several issues: the legal status of this paragraph, the scope of ‘internationally’ and the definition of ‘recognized’.

⁷⁸ R. Young, ‘Internationally recognised human rights before the International Criminal Court’ (2011)60(1) *International & Comparative Law Quarterly* 199;

See also A. Davidson, ‘Human Rights Protection before the International Criminal Court, Assessing the Scope and Application of Article 21(3) of the Rome Statute’ (2016)18 *International Community Law Review* 83.

⁷⁹ H. Friman, ‘Rights of Persons Suspected or Accused of a Crime’ in R. Lee (ed.), *The International Criminal Court: the making of the Rome Statute* (Kluwer Law International, 1999) 254; G. Hafner and C. Binder, ‘The Interpretation of Article 21 (3) ICC Statute Opinion Reviewed’ (2004)9 *Austrian Review of International and European Law* 166; McAuliffe deGuzman (n66) 711; D. Sheppard, ‘The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21(3) of the Rome Statute’ (2010)1 *International Criminal Law Review* 68.

1.2.1 The legal status of Article 21(3)

The status of Article 21(3) raises the first issue. Is it a distinct source of law applicable to the ICC⁸⁰ or rather a rule of interpretation⁸¹? As seen in section 2, the ICC judges do not give a consistent answer to this question.

The interpretation of Article 21(3) as a rule of interpretation is the most convincing one and is the one generally accepted.⁸² As argued by Young,

The purpose of paragraphs (1) and (2) [of Article 21] is to identify specific sources of applicable law for the Court. They do so by commencing with the language: ‘the Court shall *apply*. ...’ and ‘the Court may *apply*’ (emphasis added) respectively. Article 21(3) does not follow this same linguistic structure. Unlike paragraphs 1 and 2, it is not clearly setting out a statement of the sources of law to be applied. It does not present the Court as subject, but uses the passive voice in a manner which, on plain reading, could be understood as overarching. This different format of article 21(3) could indicate that, unlike paragraphs 1 and 2, article 21(3) is not setting out an independent source of substantive applicable law for the Court, but establishing a more general rule which must govern both the interpretation and application of the sources of law expressly identified in paragraphs 1 and 2. In this manner, article 21(3) constitutes an overriding general rule of interpretation, rather than a source of substantive applicable law.⁸³

⁸⁰ Sheppard (n79) 63.

⁸¹ Saland (n68) 214; Pellet (n53) 1058; Akande (n53) 60; M. Fedorova and G. Sluiter, ‘Human Rights as *Minimum Standards* in International Criminal Proceedings’ (2009)1 *Human Rights and International Legal Discourse* 24; Schabas (n73) 385; Young (n78) 189, 191, 198.

⁸² Sheppard (n79) 63; Young (n78) 189, 191, 198.

⁸³ Young (n78) 193-194.

See also Davidson (n78) 84.

Nonetheless, qualifying Article 21(3) as a rule of interpretation raises the issue of the nature of the ICC Statute because this nature would affect the way this rule should be interpreted. Indeed, if the general rule of interpretation, as stated by Article 31 of the Vienna Convention on the Law of Treaties,⁸⁴ is that ‘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’, two principles of interpretation are used to interpret human rights treaties⁸⁵: the principle of effectiveness, ‘which implies that rights interpreted should be practical and effective and not theoretical and illusory’, and the principle of evolutive interpretation, ‘which implies the dynamic character of human rights and thus accords only limited value to preparatory work’.⁸⁶ These principles have been expressly recognized by the ECtHR⁸⁷ and the Inter-American Court on Human Rights (IACtHR).⁸⁸

⁸⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331

⁸⁵ Fedorova and Sluiter (n81) 32-33.

See also K. De Feyter, ‘Treaty Interpretation and the Social Sciences’ in F. Coomans, F. Grünfeld and M. T. Kamminga (eds.), *Methods of Human Rights Research* (Intersentia, 2009) 217; K. Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009)42 *Vanderbilt Journal of Transnational Law* 905-947; J. Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010)23 *Harvard Human Rights Journal* 1-50; C. Pitea, ‘Interpreting the ECHR in the Light of “Other” International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?’ in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.) *International Courts and the Development of International Law. Essays in Honour of Tullio Treves* (Springer, 2013) 545-559; E. Bjorge, *The Evolutionary Interpretation of Treaties* (OUP, 2014) 23-54; Gillich (n13) 13-19.

⁸⁶ Fedorova and Sluiter (n81) 32-33.

See A. Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005)5(1) *Human Rights Law Review* 72-78; M. Killander, ‘Interpreting Regional Human Rights Treaties’ (2010)13(7) *SUR International Journal on Human Rights* 145-169; D. Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*’ (2010)79 *Nordic Journal of International Law* 245-277.

⁸⁷ ECtHR, Judgment, *Marckx v. Belgium* (App. No. 6833/74), 13 June 1979 §31; ECtHR, Judgment, *Airey v. Ireland* (App. No. 6289/73), 9 October 1979 §24; ECtHR, Judgment, *Artico v. Italy* (App. No. 6694/74), 13 May 1980 §33; ECtHR, Judgment, *Demir and Baykara v. Turkey* (App. No. 34503/97), 12 November 2008 §65; ECtHR, Judgment, *Cudak v. Lithuania* (App. No. 15869/02), 23 March 2010 §36; ECtHR, Judgment, *El-Masri v. The Former Yugoslav Republic of Macedonia* (App. No. 39630/09), 13 December 2012 §134.

⁸⁸ IACtHR, Judgment, *Constitutional court v. Peru*, 31 January 2001 §105; IACtHR, Judgment, *Ricardo Canese v. Paraguay*, 31 August 2004 §178.

Consequently, should Article 21(3) be interpreted in light of the principle of effectiveness and the principle of evolutive interpretation? Or should Article 21(3) be interpreted restrictively since these techniques could conflict with the principle of strict interpretation applicable to criminal law? This distinction is important because, as seen *infra*, the words ‘internationally’ and ‘recognized’ could lead to several interpretations. Robinson convincingly demonstrated that when ‘human rights and humanitarian interpretive techniques are replicated in ICL [international criminal law], fostering broad, victim-focused, dynamic interpretations’, it ‘not only conflicts with the principle of legality but also encourages exuberant interpretations that contravene culpability and fair labelling’.⁸⁹ Nonetheless, regarding the right to liberty, this issue is not a real one. In fact, Robinson’s remarks are only pertinent for substantive rights and not for procedural ones since ‘ensuring fair trials (...) appertains to the domain par excellence of human rights law’.⁹⁰ Therefore, interpreting the right to liberty in light of the principle of effectiveness would not put the principle of legality at risk. As held by Gillich,

if the parties use the term "human rights" in a treaty without further defining or clarifying it, this term has to be understood according to its meaning in general international law and, unless otherwise indicated, taking into account subsequent changes in the nature and content of the concept of human rights that have taken place after the conclusion of the treaty.⁹¹

It stems from the lack of reservation expressed about Article 21(3) and its use of the expression ‘human rights’ that the drafters intended this body of law to be applied as such with its own tools of interpretation so that the principle of effectiveness, besides being recognized by the ICC,⁹² should play a role in this analysis.

⁸⁹ D. Robinson, ‘The Identity Crisis of International Criminal Law’ (2008)21(4) *Leiden Journal of International Law* 925-963.

See also W. Schabas, ‘Droit pénal international et droit international des droits de l’homme: faux frères?’ in M. Henzelin and R. Roth (eds.), *Le droit pénal à l’épreuve de l’internationalisation* (Bruylant, 2002) 165-181; P. P. Soares, ‘Tackling human rights and international criminal law: the practice of international tribunals and the call for rationalized legal pluralism’ (2012)23(1) *Criminal Law Forum* 161-191.

⁹⁰ Soares (n89) 183.

⁹¹ Gillich (n13) 15.

⁹² Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo*

If the recognition of Article 21(3) as a rule of interpretation is not really contested, the question whether human rights, thanks to Article 21(3), would trump the ICC provisions is not settled. For Vasiliev, qualifying Article 21(3) as an interpretive principle amounts to ‘unequivocally elevat[ing] internationally recognized human rights to the status of superior norms and makes their function as the obligatory and prime interpretive devices formal’.⁹³ This vision is recognized by other scholars⁹⁴ and is the right conclusion according to the principle of effectiveness. This conclusion is also bolstered by the argument that, had the drafters intended to make the ICC provisions prevail, they would have expressly recognized human rights law as a subsidiary source. Other authors, such as Hafner and Binder⁹⁵ or Gallant⁹⁶, agree on the fact that human rights prevail on the RPE but reach the opposite conclusion for the ICC Statute. For example, Gallant states that:

Internationally recognized human rights are adopted as part of the ICC Statute, and are superior to RPE adopted under the Statute. They are not stated as being superior to the ICC Statute itself. That is, they are not stated as *ius cogens* (...). 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.⁹⁷

Since the ICC Statute refers explicitly to human rights in a different paragraph, a ‘textual and intent-based approach’,⁹⁸ the first approach is favoured. Be that as it may, as seen *infra*, issue of conflict between the ICC Statute and IHRL does not arise for this study.

Article 21(3) requires both a consistent ‘interpretation’ and a consistent ‘application’ of law with internationally recognized human rights. As noted by Bitti, ‘it appears therefore that

Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, Presidency, ICC, 10 March 2009 §27 (‘*Ngudjolo* Presidency decision’).

⁹³ Vasiliev (n36) 43.

⁹⁴ Pellet (n53) 1082; Stahn and van den Herik (n71).

⁹⁵ Hafner and Binder (n79) 172, 174.

⁹⁶ K. Gallant, ‘Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court’ in M. C. Bassiouni, *International Criminal Law- Volume II. Enforcement* (Transnational Publishers, 1999) 702-703.

⁹⁷ Gallant (n96) 702-703.

⁹⁸ It must be noted that this approach characterises rather a conservative-Statist theory : McAuliffe (n23) 264.

“application” is something different from “interpretation”. According to him, ‘it implies that a certain result must be reached (...) and that such a result must be in conformity with internationally recognized human rights’.⁹⁹ The distinction between interpretation and application is very subtle though and without real practical impact since a correct interpretation should lead to the correct application.

It stems from these considerations that all the ICC provisions need to be interpreted and applied consistently with internationally recognized human rights. In case of conflict, the former should be put aside in favour of the latter. In case of lacunae in the ICC provisions, the other sources stated by Article 21 should also be interpreted in conformity with ‘internationally recognized human rights’. Nevertheless, the issue of identification of such rights remains and is the question to which this investigation now turns.

1.2.2 The scope of ‘internationally’

As noted by Young, the scope of the expression ‘internationally recognized human rights’ is not straightforward because IHRL is derived from many sources which do not have the same normative status: these sources are so-called universal treaties, regional treaties, soft law and the case law of human rights institutions. The preparatory works do not provide any indication regarding the sources to use¹⁰⁰ as if ‘the drafters of the Statute considered that “internationally recognized human rights” are readily capable of identification’.¹⁰¹ As held by Bailey, ‘beyond express reference to treaty standards, implicit acknowledgement of the role of international custom, and reference to fair trial rights, there was no discussion as to the content of this phrase’.¹⁰² In addition, the *ad hoc* tribunals do not use this expression so that their practice is not helpful in understanding the intention of the drafters of the ICC Statute.¹⁰³ Hafner and Binder demonstrate that, notwithstanding being ‘extensively used in international relations’ as a generally

⁹⁹ Bitti (n57) 285-304.

¹⁰⁰ The ILC draft did not mention human rights as law applicable to the ICC. It stipulated that ‘the Court shall apply this Statute, applicable treaties and the principles and rules of general international law and to the extent applicable, any rule of national law’.

See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, *Official Records*, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc A/CONF.183/13 (Vol II), various plenary meetings, 222-224.

¹⁰¹ Young (n78) 194.

¹⁰² Bailey (n69) 530.

¹⁰³ Young (n78) 195-196.

accepted standard of reference, the expression ‘internationally recognized’ ‘is neither precisely defined nor consistently detailed’.¹⁰⁴

The scope of the expression ‘internationally’ is debated in the literature. Sheppard distinguishes two potential interpretations regarding this scope. The first one is a minimalist one: ‘any norm that was recognised as a human right would be sufficient to bind the court pursuant to Article 21(3)’ since this article ‘does not incorporate any requisite level of international recognition, but sets the international nature of the recognition itself as the relevant criterion’.¹⁰⁵ This approach is tantamount to adopting ‘all human rights norms existing in the corpus of international law’.¹⁰⁶ Other authors recognize this possibility.¹⁰⁷

Sheppard also suggests a second potential approach, a contextual one according to which the pertinent regional conventions would be identified depending on which state would have been supposed to prosecute the case.¹⁰⁸ This approach is illustrated by the practice of the ICTY which, in some instances, applied the standards of the ECHR as binding law on the ground that the accused must be granted at least the same level of protection as he would have enjoyed if he had been charged in the territory of the former Yugoslavia, in the interest of equal treatment.¹⁰⁹ For Ohlin, the application of the human rights standards of the states concerned is preferable because it helps to strengthen the rule of law and because the procedure will be more accepted by the victims and the defendant as these are the standards to which they are accustomed.¹¹⁰ Nonetheless, this second approach is rather isolated and seems to contravene the anti-discrimination clause contained in Article 21(3) since it would lead to a difference of treatment between the accused.¹¹¹ In addition, if a case concerns a conflict spread among several states, the identification of the state that would have had jurisdiction is not necessarily straightforward.

¹⁰⁴ Hafner and Binder (n79) 183;

See also Bailey (n69) 527-528.

¹⁰⁵ Sheppard (n79) 63-66.

¹⁰⁶ Sheppard (n79) 63-66.

¹⁰⁷ Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 86.

¹⁰⁸ Sheppard (n79) 63-66.

¹⁰⁹ Decision on Provisional Release, *Prosecutor v. Mrđić*, Case No. IT-02-59-PT, TC, ICTY, 15 April 2002 §§25-27.

¹¹⁰ David Ohlin (n40) 112-113.

See also Davidson (n78) 89.

¹¹¹ Hochmayr (n54) 674.

Besides these two approaches suggested by Sheppard, Hafner and Binder argue that the expression ‘internationally’ necessarily excludes the regional conventions from the equation.¹¹² To my knowledge, they are the only ones to suggest this approach.

All these approaches seem to be cogent and one is not legally prevalent over the others. In this thesis, I adopt the first one since, as seen in the following sub-section, it respects the consent of the states thanks to the requirement that rights be recognized implies that the right stated in a regional convention should be corroborated by other regional conventions or a universal one.

1.2.3 The definition of ‘recognized’

Regardless of the issue of the geographical scope, the issue of the definition of ‘recognized’ arises. What does it entail? Does the absence of reference to ‘binding’ mean that the ICC judges have also to pay attention to soft law, like the Universal Declaration of human rights (UDHR), the general comments of the ICCPR or the resolutions of the UN General Assembly? And what about the case law of human rights institutions? The *travaux préparatoires* do not address this issue either.

Since the founding states explicitly chose to refer to ‘recognized’ human rights and not to ‘binding’ human rights, it is argued that the scope is thus larger. Therefore, when the soft law or the case law of human rights institutions is necessary to define a human right, this soft law and this case law should be understood as ‘recognized’ if they are internationally uncontested. Consequently, with most scholars,¹¹³ in this thesis I argue that, if the ICC is not bound as such by this soft law or that case law, it is still obliged to take them into consideration and to interpret and apply its law in conformity with them as long as they are internationally uncontested. I adopt the conclusion of the study conducted by Cassese regarding the *ad hoc* tribunals and the use of the ECtHR’s case law since it could be transposed to the ICC:

¹¹² Hafner and Binder (n79) 186.

¹¹³ G. Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’ (2002-2003)37 *New England Law Review* 938, 940; J. Nicholls, ‘Evidence: Hearsay and Anonymous Witnesses’ in R. Haveman and others (eds.), *Supranational Criminal Law: A System Sui Generis* (Intersentia, 2003) 287; Gradoni (n47) 855; Vasiliev (n67); Sheppard (n79) 69; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 90.

Recourse to such case law should only serve to establish the existence of rules of customary international law, or to elucidate general principles of international procedure and principles of criminal law common to the major legal systems of the world. Lastly, such recourse may contribute to establishing the precise interpretation of international conventional or customary norms that are obscure, incomplete or ambiguous. In other words, the case law of the European Court should never be applied as such, but only as a supplementary means of elucidating rules or principles of international law.¹¹⁴

In order to define an internationally recognized human right, the principle is thus to start with the relevant treaty, customary international law or general principle of law and then to use the existing soft law or case law when these norms are not sufficient to understand the scope of a right. This method will be illustrated in section 3 for the determination of the content of the right to liberty.

1.3 Conclusion

Using the formalist method, it has been demonstrated that the law applicable to the ICC is determined by Article 21 of its Statute, which is *lex specialis* to Article 38 of the ICJ Statute. In this case, since, as seen in section 4, the regime of interim release provided by the ICC provisions does not suffer from any lacunae, only the ICC provisions will be examined and the other subsidiary sources are left aside. In addition, Article 21(3) requires that the law applicable to the ICC to be interpreted and applied in conformity with internationally recognized human rights. Consequently, the regime of interim release provided by the ICC rules should be interpreted and applied in conformity with the right to liberty as it is internationally recognized. Nonetheless, before defining this right, it is interesting to understand whether the ICC judges share the same opinion regarding the application of IHRL to them.

2. The ICC judges and international human rights law

As demonstrated in the previous section, the ICC provisions regarding interim release have to be interpreted and applied in conformity with the right to liberty as internationally recognized. But are the ICC judges of the same opinion? These theoretical arguments from the

¹¹⁴ Cassese (n53) 50.

previous section put aside, what is the ICC judges' attitude regarding their applicable law, and more specifically regarding the application of human rights to their rulings? First, it must be noted that the ICC has always referred to Article 21 of its Statute to determine its applicable law. Secondly, the Appeals Chamber (AC) stressed the importance of human rights for the ICC proceedings but failed to clarify the meaning of Article 21(3):

Article 21(3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. (...) 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.¹¹⁵

No further clarification has been provided by another chamber. Thirdly, the ICC judges have not yet adopted a uniform and constant position towards IHRL, probably considering that this position should vary depending on the case. In fact, their decisions can be classified in several categories: those refusing to apply IHRL in a specific case; those using IHRL *ad abundantiam*, namely when the clarity of the ICC provisions would not require such use; those using IHRL to give content to the ICC provisions and those using IHRL to reject the application of the ICC rules. It must be noted that this lack of constant position was also noted by Cassese regarding the *ad hoc* tribunals' attitude towards the ECtHR's case law. Cassese even qualified this approach as being wild because if 'they have often referred to this case law in support of an interpretation they had already adopted (a sort of *a posteriori* legitimisation), or to find a legal solution to specific unresolved problems, which is perfectly legitimate', they 'have not always sought to determine whether the transposition of European Court case law was appropriate, nor the correct means of doing so'.¹¹⁶ The same characterization as 'wild' is used by Deprez regarding the appropriation by the ICC of ECtHR's case law.¹¹⁷

¹¹⁵ Judgment on the Prosecutor's Application of Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, ICC-01/04, AC, ICC, 13 July 2006 §11; Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, AC, ICC, 14 December 2006 §§36-37.

¹¹⁶ Cassese (n53) 50;

In the same sense, see S. Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilisation' (2015)84 *Nordic Journal of International Law* 387.

¹¹⁷ Deprez (n52) 294.

These different attitudes of the ICC judges will be examined in more detail in the following subsection.

2.1. The impact of Article 21(3)

2.1.1. The refusal of application of human rights

The refusal to apply IHRL has arisen, to my knowledge, only in two decisions. In its *witness proofing* decision, Pre-Trial Chamber (PTC) I refused to apply Article 21(3) because ‘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’.¹¹⁸ This decision was criticized by Young because ‘this fails to recognize that the process of determining that there is no applicable law under article 21(1) is itself a process of interpretation of the law, which therefore must be informed by article 21(3)’.¹¹⁹ Later on, PTCI rectified its position and rightly held that:

The 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 the Law of the Treaties and *article 21(3) of the Statute*.¹²⁰ (emphasis added)

In another decision, without referring to Article 21(3), PTCII rejected the pertinence of applying to the ICC the *non-refoulement* principle since ‘only a State which possesses territory is

¹¹⁸ Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 8 November 2006 §10.

¹¹⁹ Young (n78) 201.

¹²⁰ *Al Bashir* arrest warrant (n57) §44.

actually able to apply' this rule.¹²¹ Nonetheless, as seen in sub-section 2.1.4., in the same decision, the judge referred to Article 21(3) to disregard Article 93(7) of the ICC Statute.

These two positions are isolated and were used in specific cases. Besides, PTCI seems to have changed its position and PTCII establishes in the same decision the importance of human rights.

2.1.2. The use of international human rights law *ad abundantiam*

In some cases, the ICC judges refer to IHRL to confirm that the way they apply and interpret the ICC provisions is in conformity with this law. In these cases, they content to state the theoretical content of the relevant human right without learning concrete lessons from it. This use is different from the third approach since IHRL is not used to give further content to an ICC provision. This second approach is usually illustrated in the ICC decisions by the reference to Article 21(3), which PTCI expressly qualified as 'a general principle of interpretation',¹²² and by the interchangeable reference to different human rights conventions, to their case law and to soft law, in order to demonstrate the rightness of the chosen reasoning. Since these references do not appear, at least according to the motivation of their decisions, to have any effects on the way the judges apply the ICC provisions, they are said to be *ad abundantiam*. It is interesting to note that, if most of these decisions refer to Article 21(3), they do not give any explanation regarding the choice of instruments of IHRL.

The case law regarding detention issues is revealing of this practice. For example, referring to Article 21(3), PTCI held that the expression 'reasonable grounds to believe' found in Article 58 of the ICC Statute had to be 'consistent with the 'reasonable suspicion' standard provided for in article 5(1)(c) of the [ECHR] and the interpretation of the [IACtHR] in respect of

¹²¹ Decision on an *Amicus Curiae* application and on the "Requête tendant à obtenir présentations des témoins DRC D02P0350, DRC D02P0236, DRC D02P0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 9 June 2011 §64 ('*Katanga and Ngudjolo Amicus Curiae* decision').

¹²² Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 10 March 2008 §7; Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pretrial detention of Germain Katanga, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 18 March 2008 §6 ('*Katanga* interim release decision of 18 March 2008').

the fundamental right of any person to liberty under article 7 of the American Convention on Human Rights'.¹²³ It did not give any more explanation regarding this standard and its impact on the expression 'reasonable grounds to believe'. Similarly, PTCII¹²⁴ and PTCIII¹²⁵ enunciated the definition of the right to liberty by referring to the ICCPR, the American Convention on Human Rights (AmCHR)¹²⁶, the African Charter on Human and Peoples' Rights (AfCHPR)¹²⁷ and to the ECHR and their case law without learning anything from it. The AC confirmed this reasoning and referred to the case law of the ECtHR and IACtHR to confirm the conformity of the ICC provisions with the right to liberty¹²⁸ and the right to be tried without undue delay^{129 130}.

¹²³ Decision on the Prosecutor's Application for a warrant of arrest, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 10 February 2006 §12 ('*Lubanga* arrest warrant').

Same sense: Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Case No. ICC-02/05-01/07, PTCI, ICC, 27 April 2007 §28; Review of detention and decision on the "third defence request for interim release", *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, PTCI, ICC, 16 September 2011 ('*Mbarushimana* interim release decision of 16 September 2011');

Same sense with an additional reference to the case law of the HRC: *Katanga* interim release decision of 18 March 2008 (n122).

¹²⁴ Decision on the interim release of Jean-Pierre Bemba Gombo and convening hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCII, ICC, 14 August 2009 §35, §38, §57, §59 ('*Bemba* interim release decision of 14 August 2009'); Decision on the Prosecutor's Application under Article 58, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 13 July 2012 §13.

¹²⁵ Decision on application for interim release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCIII, ICC, 21 August 2008 §36, §43, §46, §55 ('*Bemba* interim release decision of 21 August 2008'); Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCIII, ICC, 30 November 2011 §27 ('*Laurent Gbagbo* Article 58 decision').

¹²⁶ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

¹²⁷ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58

¹²⁸ Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 16 December 2008 §§28-32; Decision on the application for the interim release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 18 October 2006 ('*Lubanga* interim release decision of 18 October 2006').

See also: Second review of the "Decision on the application for the interim release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 11 June 2007; Decision on the application for

This trend to use Article 21(3) as a general rule of interpretation and to refer to diverse human rights instruments without demonstrating the necessity to do so or without inferring anything from it does not only exist in the case law regarding detention. For example, to corroborate its interpretation of Article 67(2) of the ICC Statute which deals with issues of disclosure, the AC referred to the ECtHR's case law despite its lack of utility for the adopted reasoning.¹³¹

The risk of this practice is that these references to IHRL would only be perceived as a formality by the participants and therefore ultimately lead to some disillusion. In addition, by qualifying Article 21(3) only as 'a general principle of interpretation' and by enumerating only in theory the principles of IHRL, the fact that Article 21(3) also requires the application of the ICC provisions in conformity with IHRL is not taken into account. Consequently, such use of Article

interim release of Mathieu Ngudjolo Chui, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 27 March 2008; Décision relative à la Requête du Procureur aux fins de délivrance d'un mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCIII, ICC, 10 June 2008 §24, §90 ('Bemba Article 58 decision'); Review of the "decision on the conditions of the pre-trial detention of Germain Katanga", *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 18 August 2008; Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Case No. ICC-02/05-01/07, PTCI, ICC, 27 September 2008 §28 ('Harun Article 58 decision'); Second review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 19 November 2008 §19 ('Ngudjolo interim release decision of 19 November 2008'); Decision on application for interim release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCIII, ICC, 16 December 2008 §31, §46.

¹²⁹ Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 20 November 2009 entitled "Decision on the motion of the defence for Germain Katanga for a declaration on unlawful detention and stay of proceedings", *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 19 July 2010 §45.

¹³⁰ Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, AC, ICC, 3 February 2010 §31.

¹³¹ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, AC, ICC, 21 October 2008 §§46-47.

21(3) does conform to its letter as long as it does not remain only a formal reference to IHRL which would ultimately be contradicted by the practical solution adopted by the judge.

2.1.3. The content determination function of human rights

Another function assigned to human rights by the ICC judges is to give content to ICC rules that are not sufficiently detailed. In this case, the judges not only interpret but also apply the ICC provisions in conformity with IHRL.

The scarcity of provisions in the ICC Statute regarding the rights of victims has led to an expansive use of this function. For example, PTCI deduced the victims' right to participate in the proceedings at the investigation stage from the case law of the ECtHR and the IACtHR.¹³² Likewise, the way to evaluate the prejudice mentioned by Regulation 85¹³³ was determined by PTCI thanks to the case law of the ECtHR and the IACtHR and to some soft law, such as the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'¹³⁴ and the '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'¹³⁵.¹³⁶ Trial Chamber (TC) I referred to the same soft law when determining victims' applications for participation.¹³⁷ Similarly, to reach the conclusion that a deceased person may be represented by his or her successors in the proceedings, PTCIII applied both human

¹³² Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, *Situation in the DRC*, ICC-01/04, PTCI, ICC, 17 January 2006 §52-53 (*DRC decision of 17 January 2006*).

¹³³ Rules of Procedure and Evidence, ICC-ASP/1/3, 3-10 September 2002 (ICC RPE).

¹³⁴ UN General Assembly Res 40/34 (29 November 1985) UN Doc A/RES/40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹³⁵ UN General Assembly Res 60/147 (16 December 2005) UN Doc A/RES/60/147 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.

¹³⁶ *DRC decision of 17 January 2006* (n132) §§115-116.

¹³⁷ Decision on victims' participation, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 18 January 2008 §35; Decision on the applications by victims to participate in the proceedings, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 15 December 2008 §48.

rights treaties and soft law documents.¹³⁸ In another case, to determine which procedural rights of the victims were included in the expression ‘personal interests of the victims’, PTCI invoked the victims’ right to the truth as developed in the doctrine and in the case law of the IACtHR, the ECtHR and the Columbian and the Peruvian Constitutional Courts.¹³⁹ Another example is the conclusion inferred from the ECtHR’s case law that the right to fair trial applies ‘as soon as the Chamber has issued the summonses to appear in accordance with article 58(7) of the Statute’.¹⁴⁰

This approach is also illustrated by the insistence of the presidency on the need to interpret human rights in such a way as to make them effective. After noting Regulation 179(1) of the Regulations of the Registry regulating the right of the accused to receive family visits and the terms of Article 21(3), the presidency stressed the fact that the ECtHR has frequently emphasized that the nature of human rights is such that they must be interpreted in a practical and effective, rather than theoretical and illusory, manner. It then deduced that this right of family visits necessitated these visits to be funded by the Court even if it was not foreseen in its legal provisions.¹⁴¹ It is interesting to note that, despite the fact that the right to receive family visits was stipulated in Regulation 179, the presidency recalled that this right was guaranteed, among others, by the case law of the ECtHR¹⁴² and by soft law regarding detention, such as the Standard Minimum Rules, the Body of Principles,¹⁴³ the European Prison Rules,¹⁴⁴ the concluding observations of the UN Committee Against Torture¹⁴⁵ and the Standards of the European Committee for the Prevention of Torture¹⁴⁶. It is thus also an example of the use of IHRL *ad*

¹³⁸ Fourth Decision on Victims' Participation, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCIII, ICC, 12 December 2008 §§16-17, §44.

¹³⁹ Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 13 May 2008 §32 (*Katanga and Ngudjolo* decision of 13 May 2008’).

¹⁴⁰ Decision on variation of summons conditions, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, ICC-01/09-02/11, PTCII, ICC, 4 April 2011 §11.

¹⁴¹ *Ngudjolo* Presidency decision (n92) §31.

¹⁴² *Ngudjolo* Presidency decision (n92) §§27-29.

¹⁴³ UN General Assembly Res 43/173 (9 December 1988) UN Doc A/RES/43/173 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

¹⁴⁴ Council of Europe Recommendation (CoE) Rec (2006)2 on the European Prison Rules (11 January 2006).

¹⁴⁵ CAT, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture to Tajikistan, CAT/C/TJK/CO/1 (7 December 2006) §7.

¹⁴⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CoE) on The CPT standards CPT/InfTE (2002) 1- Rev 2006, §51.

abundantiam since there was no reason for the presidency to justify the existence of a right already stipulated in the ICC rules.

In its two judgments regarding the applications of a stay of proceedings in the *Lubanga* case, the AC went even further. Indeed, it held that Article 64(2) of the Statute implied a responsibility to ensure the fairness of the proceedings and that, according to Article 21(3), this responsibility should be understood as recognizing the power to organize such stay of proceedings even if this power had not been conferred by any ICC rules.¹⁴⁷ IHRL was thus really used as a way to compensate for a lacuna in these rules.

This application of Article 21(3) is clearly in conformity with the terms of this article and therefore with the conclusion reached in the first section of this thesis.

2.1.4. The prevalence of human rights on the Statute

In the specific case of detained witnesses who had already testified before the ICC and who wanted to apply for asylum, PTCII concluded that, according to Article 21(3), it had to ‘ensure full exercise of the right to effective remedy which is clearly derived from internationally recognized human rights’, namely in the UDHR, the ICCPR, the ECHR, the AfCHPR and the AmCHR.¹⁴⁸ It decided consequently that it was unable to apply Article 93(7) of the Statute, the provision regulating the return of detained witnesses, since its application would deprive the detained witnesses of their right to apply for asylum and of their fundamental right to effective remedy.¹⁴⁹ On appeal, TCII explicitly held, without further explaining its reasoning, that Article 21(3) made human rights prevail on the Statute.¹⁵⁰

¹⁴⁷ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, ICC-01/04-01/06, AC, ICC, 14 December 2006 §37; 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 of stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga*, ICC-01/04-01/06, AC, ICC, 21 October 2008 §77.

¹⁴⁸ *Katanga and Ngudjolo Amicus Curiae* decision (n121) §§69-70.

¹⁴⁹ *Katanga and Ngudjolo Amicus Curiae* decision (n121) §73.

¹⁵⁰ Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/, TCII, ICC, 1 October 2013 §29.

To my knowledge, it is the only example where a Chamber took a clear stance regarding the superiority of IHRL over the ICC Statute. As seen in sub-section 1.2.1., this position corresponds to the view of most scholars.

2.2. The scope of ‘internationally recognized human rights’

If this analysis of the case law demonstrates that the ICC judges merely agree with the status that most scholars, myself included, grant to Article 21(3), namely that it is a general principle of interpretation that trumps the ICC rules in case of lacuna or contradiction, this analysis does not provide a real understanding of the meaning of the expression ‘internationally recognized human rights’. On the contrary, it reveals that universal and regional conventions, the case law of these instruments and soft law are cited, rather incoherently, without explanation regarding this seemingly random choice. The judges do not elaborate on their choice to refer to specific conventions in one case and not in another one and on the pertinence of referring to the case law of human rights institutions or to soft law instruments. In other words, rather than explaining the expression ‘internationally recognized human rights’, the ICC judges content themselves identifying as many concurrent sources as possible to justify the reference to a human right without any explanations as to the relations between these sources and to their binding character.¹⁵¹ This confusion is aggravated by the fact that, in some cases, while referring to these instruments, the judges do not even cite Article 21(3).¹⁵² As noted by Deprez regarding the case law of the ECtHR, ‘the ICC’s stance on the matter lies in a vague and indeterminate zone, somewhere between pure obligation and mere information’.¹⁵³

Sheppard¹⁵⁴ contends that the only attempt at explanation of this expression is provided by Judge Pikis in one dissenting opinion:

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 UDHR

¹⁵¹ Croquet (n47) 109; Vasiliev (n36) 30-31; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 88.

¹⁵² DRC decision of 17 January 2006 (n132) §§52-53; *Katanga and Ngudjolo* decision of 13 May 2008 (n139) §32.

¹⁵³ Deprez (n52) 293.

¹⁵⁴ Sheppard (n79) 48.

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.¹⁵⁵

Nonetheless, this statement does not equate to a real explanation.¹⁵⁶ Indeed, for example, it does not clarify why or whether Judge Pikis considers the UDHR and regional treaties as binding.

2.3. Conclusion

It stems from these considerations that the ICC judges do seem to consider human rights as applicable to their proceedings. Nonetheless, the ICC case law not being consistent in its reference to and use of IHRL, this case law does not really shed light on the legal basis for such application. In fact, even if Article 21(3) seems to be the door by which human rights enter into the ICC proceedings, the judges do not explain how this article has to be applied. The only lesson learnt by this study is that the ICC judges seem to adopt an eclectic approach, namely that they refer interchangeably to any human rights instruments regardless of their degree of recognition.

The ICC judges are even less clear than their counterparts at the ICTY and the ICTR which have already been qualified by Cassese as adopting a ‘wild’ approach. In fact, even if they do not explain how they reach the conclusion that some rights are customary international law or general principles of law, the *ad hoc* tribunals at least give some explanations regarding the status of the conventions used and of the case law interpreting these conventions. They usually consider that the ICCPR reflects customary international law and that the regional conventions and the case law of the human rights institutions ‘are persuasive authority which may be of assistance in applying and interpreting the Tribunal’s applicable law’ but that ‘they are not binding of their own accord’.¹⁵⁷

¹⁵⁵ 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”, dissenting opinion of Judge Pikis, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, AC, ICC, 13 February 2007 §16 (*Lubanga* interim release judgment of 13 February 2007).

¹⁵⁶ Bailey (n69) 523.

¹⁵⁷ Cassese (n53) 17; Gradoni (n47) 854.

This lack of explanation is even more to be regretted since Article 21(3) is not clear and leaves the door open to many interpretations. This lack of explanation is also problematic because, as argued by Cassese regarding the practice of the *ad hoc* tribunals, such explanation would be:

necessary not only for reasons of *legal rigour*, but also to satisfy the fundamental requirements of the *principle of fair trial*, especially the obligation, derived from this principle, to respect the rights of the accused. Indeed, the adoption of a legally rigorous approach reduces the margin for arbitrary decisions by the international judge (*arbitrium judicis*): if the defence knows in advance the legal logic that can and will be followed by the judges, their conclusions may reasonably be anticipated. If, on the contrary, the judges proceed a little ‘too rapidly’, their reasoning is less foreseeable, and the defence is deprived of the means to reasonably anticipate the judges’ conclusions.¹⁵⁸

My aim in this thesis is to compensate for this lack of explanation by determining the content of the right to liberty as ‘an internationally recognized human right’ and by examining whether the ‘interpretation and the application’ of the ICC provisions by the ICC judges is consistent with this right. Indeed, stemming from the previous considerations, the ICC judges are supposed to apply and interpret the ICC provisions regarding interim release in conformity with the right to liberty as internationally recognized. The first step is thus to define this right in order to be able to assess the conformity of the ICC provisions with it and then to assess the respect of this right by the ICC.

3. Pre-trial detention and detention pending trial in international human rights law

3.1. Identification of human rights relevant to pre-trial detention and detention pending trial

The main human right relevant to pre-trial detention and detention pending trial is the right to liberty. The presumption of innocence could also be considered as relevant. Nonetheless,

¹⁵⁸ Cassese (n53) 20.

if it is settled that this presumption is a guarantee of fair trial,¹⁵⁹ the link between the presumption of innocence and the right to liberty is not accepted without any controversy. From a human rights perspective, this link is certainly obvious. In *Cagas v. Philippines*, the Human Rights Committee (HRC) expressly stated that excessive pre-trial detention affects the right to be presumed innocent.¹⁶⁰ Furthermore, the IACtHR highlighted the exceptional character of such detention by reference to the presumption of innocence.¹⁶¹ According to the ECtHR, the necessity of the detention on remand must be assessed in light of the presumption of innocence¹⁶² and the pre-trial procedures should ‘be conducted, so far as possible, as if the defendant were innocent’.¹⁶³ The idea is, as the Inter-American Commission on Human Rights (IAmCHR) noted, that ‘the guarantee of the presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably’.¹⁶⁴

Nonetheless, others share the view that, as once argued by the ICTY, if the presumption of innocence were decisive on the issue of provisional release, ‘no accused would ever be detained, as all are presumed innocent’.¹⁶⁵ The Special Court of Sierra Leone (SCSL) also ruled that ‘the “presumption of innocence” is no more (but no less) than the principle that the Prosecution must prove beyond reasonable doubt the guilt of the defendant’ and that ‘it has no

¹⁵⁹ ICCPR: Article 14§2: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

ECHR: Article 6§2: 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

AmCHR: Article 8§2: 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

AfCHPR: Article 7§1 (b) Every individual shall have the right to have his cause heard. This comprises: (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.

¹⁶⁰ HRC, *Cagas v. Philippines* (Comm. No. 788/1997), CCPR/C/73/D/788/1997, 31 January 2002;

Fairlie (n9) 1113.

¹⁶¹ IACtHR, Judgment, *Bayarri v. Argentina*, 30 October 2008 §110.

¹⁶² ECtHR, Judgment, *Bykov v. Russia* (App. No. 4378/02), 10 March 2009 §63.

¹⁶³ A. Ashworth, ‘Four threats to the presumption of innocence’ (2006)10 *The International Journal of Evidence and Proof* 248.

¹⁶⁴ IACmHR, *Giménez v. Argentina* (Case No. 11.245), 1 March 1996.

¹⁶⁵ Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, AC, ICTY, 14 December 2006 §12 (‘*Milutinovic* provisional release decision of 14 December 2006’).

application or relevance to the preconditions for bail'.¹⁶⁶ Its justification is that 'innocent defendants may nevertheless try to avoid a lengthy trial or to threaten those who have made statements against them'.¹⁶⁷ The proponents of this vision, among others, the US Supreme Court,¹⁶⁸ argue that the presumption of innocence has no impact on reviewing the necessity of detention on remand and is only an evidentiary principle which, as such, should be limited to the trial phase.¹⁶⁹ In their view, this presumption would only mean that, when a person is charged with a criminal offence, the prosecution bears the burden of proving beyond reasonable doubt guilt of that offence.

In other words, the first position sees the presumption of innocence 'as a safeguard against violation of human rights at all stages of the criminal process' whereas the second one sees it 'as a safeguard against mistaken conviction'.¹⁷⁰ This debate is rather theoretical without significant consequences, since, while recognizing the impact of presumption of innocence on detention on remand, human rights instruments recognize the possibility of such detention. The principle is thus rather that, as noted by the ICC:

There is no inconsistency between the accused's right to a fair trial and the presumption of innocence on the one hand and a judicial process in which the accused is detained to ensure his appearance at trial and to prevent his interference with the Court's processes on the other.¹⁷¹

Due to the controversy on the application of presumption of innocence in pre-trial detention and detention pending trial and the lack of real impact of this issue, this thesis only focuses on the right to liberty. Nonetheless, as urged by Stevens, the presumption of innocence is kept in mind as 'an important but abstract principle operating in the background' so that 'it

¹⁶⁶ Appeal against decision refusing bail, *Prosecutor against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-04-14, AC, SCSL, 11 March 2005 §37 ('Norman bail decision').

¹⁶⁷ *Norman* bail decision (n166) §37.

¹⁶⁸ R. Kitai, 'Presuming innocence' (2002)55 *Oklahoma Law Review* 258.

¹⁶⁹ Kitai (n168) 275-276; A. Ashworth (n163) 243; Fairlie (n9) 1109.

¹⁷⁰ Kitai (n168) 275-276.

¹⁷¹ Decision on applications for provisional release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 16 August 2011 ('Bemba interim release decision of 16 August 2011').

constantly reminds us that we are dealing with a possible innocent individual and that a possibility of error in accusing this person exists'.¹⁷²

3.2. Adopted definition of Article 21(3)

It was demonstrated that, when an issue such as the interim release regime is covered by ICC provisions, Article 21(3) requires the ICC judges to interpret and to apply them in conformity with 'internationally recognized human rights'. Nonetheless, this notion is very vague and the ICC's case law unhelpful to understand it better. It is thus important to recall the approach adopted in this thesis.

Article 21(3) is considered as a general rule of interpretation applicable to the provisions regulating the interim release regime. To be qualified as 'internationally recognized', a binding character is not required because the choice of the word 'recognized' cannot be seen as synonymous with 'binding'. This is accepted by the ICC judges since they do not hesitate to refer to soft law. However, albeit not binding, the components of the right to liberty regarding provisional release cannot be contested and, given the 'international' requirement, they must be accepted in most of the countries of the world. The goal is thus to establish the minimum human rights standards that govern provisional release and that are accepted as *ius commune*.

It has to be kept in mind that Article 21(3) is open to several interpretations so that the ICC judges could legally choose to adopt a more extensive interpretation and to apply higher standards. Such an attitude would be more in harmony with the human rights vision. Indeed, as argued by Judge Pocar in the *Mrksic and Sljivancanin case*, the highest-standard solution is something that IHRL itself dictates: 'one of the key principles in the international protection of human rights is that when there are diverging international standards, the highest should prevail'.¹⁷³

¹⁷² L. Stevens, 'Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use' (2009)17 *European Journal of Crime, Criminal Law and Criminal Justice* 170.

¹⁷³ In Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 86.

Nevertheless, in order to respect the consent of member states, for the purpose of this analysis, I adopt a definition of the right to liberty that is recognized, and therefore not contested, in most parts of the world.

3.3. Identification of the sources of the right to liberty

Since the right to liberty is not defined in the ICC Statute, external sources implied by Article 21(3) have to be identified. Indeed, if Article 21 establishes the law applicable to the ICC and should thus be considered as *lex specialis* with respect to Article 38 of the ICJ Statute, then Article 21(3) leads to an indirect application of external sources to identify ‘internationally recognized human rights’. As seen before, Article 38 of the ICJ Statute lists the applicable law for the ICJ and is used to determine the existence of an obligation of international law and its content.¹⁷⁴ According to this article, these sources are:

- 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.

For some authors, this article is not complete since there exist other sources of international law, such as the principles of international law or the unilateral acts of states or of organizations.¹⁷⁵ This debate is beyond the scope of this thesis and only the traditional sources will be used since they are the ones commonly used to define IHRL and since they are sufficient to reach a common definition of the right to liberty.

Before examining the substantive definition of this right, some particularities linked to the use of the traditional sources of international law to determine the content of IHRL need to be

¹⁷⁴ Bassiouni (n28) 782; Brownlie (n44) 5; Shaw (n44) 5.

¹⁷⁵ See H. G. Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources’ (2007)93 *Iowa Law Review* 65-129; Brownlie (n44) 5; Shaw (n44) 19, 121; N. Arajärvi, ‘Is There a Need for a New Sources Theory in International Law? A Proposal for an Inclusive Positivist Model’ (2012)106 *American Society International Law Proceedings* 370-373.

stressed. In fact, IHRL is a specific branch of international law in the sense that it does not regulate relations among states but relations between a state and its population and in the sense that it is very fragmented due to the multiplicity of instruments and institutions interpreting it.

Even if Article 38 of the ICJ Statute does not establish a hierarchy,¹⁷⁶ its order will be followed to present the sources of IHRL since ‘the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge’.¹⁷⁷

3.3.1. IHRL treaties

The main human rights treaties are the ICCPR, the International Covenant for Economic, Social and Cultural Rights and the other UN Conventions elaborating on certain rights, dealing with certain categories of persons who may need special protection or seeking to eliminate discrimination. Next to these so-called universal treaties, there are also regional conventions such as the ECHR,¹⁷⁸ the AmCHR and the AfCHPR.

Four binding instruments are relevant to the right to liberty: the ICCPR, the ECHR, the AmCHR and the AfCHPR. The pertinence of this type of source to establish a *ius commune* can be questioned since treaties are just binding on their signatories and since the states parties of these conventions differ. In addition, their members may have expressed reservations¹⁷⁹ and the rights they contain are not phrased in exactly the same way.

Nevertheless, on the one hand, there are many similarities between the provisions of these treaties because they are all derived from the UDHR.¹⁸⁰ As held by De Schutter, ‘whether they are adopted at the universal or regional levels, all human rights treaties are derived from the UDHR, from which they borrow, sometimes quite literally, much of their language. It is therefore quite natural for international courts or quasi-judicial bodies, whether they belong to

¹⁷⁶ Bassiouni (n28) 782; Degan (n44) 50; Shelton (n38) 295; Brownlie (n44) 5; Shaw (n44) 5.

¹⁷⁷ G. Gaja, ‘General Principles of Law’ *Max Planck Encyclopedia of Public International Law*; Bassiouni (n28) 782.

¹⁷⁸ It must be noted that the EU Charter will not be examined since, according Article 52 §3 of the Charter, when the Charter contains rights that stems from the ECHR, their meaning and scope are the same, which is the case for the studied framework.

¹⁷⁹ See Stapleton (n38) 580-583; Shelton (n38) 313-318; Fedorova and Sluiter (n81) 55; De Schutter (n38) 96.

¹⁸⁰ De Schutter (n38) 31.

regional or to universal systems, to cite one another'.¹⁸¹ Brownlie can thus be contested when he contends that, 'in the real world of practice and procedure, there is no such entity as "International Human Rights Law"'.¹⁸² On the contrary, this thesis is intended to demonstrate that a common denominator can be found regarding the right to liberty and its vision of pre-conviction detention. These four conventions will thus be examined in order to determine the minimum content of the right to liberty recognized by each of them. It must be mentioned that the issue of the reservations is not relevant in this case because they do not contain any reservations about the issue of provisional release as such.¹⁸³

On the other hand, despite this fragmentation of IHRL among the different conventions, it is important to examine these conventions due to the ways in which treaties may interplay with unwritten law: the treaty may reflect customary law, it may crystallize a customary rule and a treaty provision may subsequently become accepted as reflecting custom.¹⁸⁴ This reasoning can be transposed to general principles of law,¹⁸⁵ which as seen in sub-section 3.3.3., is the source used in this thesis. The objective is thus to identify a common regime through the treaties by which states are bound and then to control whether this regime has reached the status of customary international law or, as favoured in this case, of general principles of law.

¹⁸¹ De Schutter (n38) 31-32.

¹⁸² Brownlie (n44) 554

Nonetheless, in his comments of Brownlie's *Principles of Public International Law*, Crawford did not reiterate this comment of Brownlie. Instead, Crawford noted that 'there may be something approaching a 'common core' of human rights at the universal and regional levels' but 'that any such common core is partial and imperfect – and it hides altogether the many differences in the articulations of the various rights in the various treaties' (J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012, 8th edition) 643).

¹⁸³ https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en;

See Stapleton (n38) 580.

¹⁸⁴ ICJ, *Cases Concerning North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (Merits) (1969) ICJ Rep 4 §71;

F. Forrest Martin, 'Delineating a Hierarchical Outline of International Law Sources and Norms' (2002)65 *Saskatchewan Law Review* 355; R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006)11(2) *Journal of Conflict & Security Law* 242.

¹⁸⁵ N. Kaufman Hevener and A. Steven Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978)27(3) *International and Comparative Law Quarterly* 612.

It must be noted that 'the connection between customs and principles dose not, however, end there, as customs draw on principles and principles may derive from customs' (Bassiouni (n28) 811).

3.3.2. Customary international law

The second source of law recognized by Article 38 of the ICJ Statute is customary international law, or ‘evidence of a general practice accepted as law’. The traditional elements of customs are duration, uniformity and consistency of the practice by states, generality of this practice and *opinio juris sive necessitatis*.¹⁸⁶ These elements raise some issues regarding the pertinence of customary international law for establishing IHRL.¹⁸⁷ The main problem is that, in practice, no single state truly respects all human rights. There is thus a discrepancy between the practice and *opinio iuris* so that one element of customary international law, at least in its traditional conception, is missing.

This problem is the reason why some scholars plea in favour of the adoption of a new definition of customary international law that would give prevalence to *opinio iuris* and blur the distinction between physical practice and verbal practice.¹⁸⁸ For example, the International Law Association recognizes that practice can be constituted of ‘verbal acts’ like

diplomatic statements (...), policy statements, press releases, official manuals (...), instructions to armed forces, comments by governments on draft treaties, legislation,

¹⁸⁶ T. Treves, Customary International Law *Max Planck Encyclopedia of Public International Law*; Brownlie (n44) 5; Shaw (n44) 6-12, 72-93.

¹⁸⁷ See O. Schachter, *International Law in Theory and Practice* (Springer, 1991) Ch. XV; H. Thirlway, ‘Human rights in customary law: an attempt to define some of the issues’ (2015)28(3) *Leiden Journal of International Law* 495-506.

¹⁸⁸ See R. B. Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1995-1996)25 *Georgia Journal of International and Comparative Law* 1-30; A. E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001)95 *American Journal of International Law* 757-791; De Schutter (n38) 50.

On this debate, see A. D’Amato, ‘Trashing Customary International Law’ (1987)81 *American Journal of International Law* 101-109; H. E. Chodosh, ‘Neither Treaty nor Custom: The Emergence of Declarative International Law’ (1991)26 *Texas International Law Journal* 87-124; I. R. Gunning, ‘Modernizing Customary International Law: The Challenge of Human Rights’ (1991)31(2) *Virginia Journal of International Law* 211-245; R. Kolb, ‘Selected problems in the theory of customary international law’ (2003)50(2) *Netherlands International Law Review* 123; A. T. Guzman, ‘Saving Customary International Law’ (2005)27 *Michigan Journal of International Law* 116-177; E. Voyiakis, ‘A Theory of Customary International Law’ (25 January 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895462 (last accessed 5 January 2016); B. D. Leppard, *Customary International Law: A New Theory with Practical Applications* (CUP, 2010); M. Wood, First Report on Formation and Evidence of Customary International Law, UN Doc. A/CN.4/663 (2013) 28.

decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt.¹⁸⁹

If it is not contested that such acts can suggest the existence of a practice, proponents of this new definition of custom stretch this concept very far by suggesting that the existence of a custom could only be demonstrated by these verbal acts.¹⁹⁰

This conception finds some grounds in the ICJ's practice since, as argued by Treves, it distinguishes 'from the normal customary law rules, a category of such rules for which the search for the objective and the subjective elements is not required'.¹⁹¹ For example, the ICJ accepted in the *Nicaragua case* that 'inconsistencies between what a State says is the law and what it does are not fatal, so long as it does not try to excuse its non-conforming conduct by asserting that it is legally justified'.¹⁹² Nonetheless, the statements of the ICJ concern international humanitarian law and the right of self-determination rather than IHRL. In addition, it must be noted that the International Law Commission seems to recognize that 'there may (...) be a difference in application of the two-element approach in different fields (of international law)' but concludes

¹⁸⁹ Committee on Formation of Customary (General) International Law, 'Final Report on Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (ILA, 2000) 14.

¹⁹⁰ See Simma and Alston (n39) 82-108; A. D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995-1996)25 *Georgia Journal of International and Comparative Law* 47-98; Lillich (n188) 8-9, 13-14; T. Meron, 'Revival of Customary International Law' (2005)99(4) *American Journal of International Law* 817-834; E. Kadens and E. Young, 'How Customary is Customary International Law?' (2012-2013)54 *William & Mary Law Review* 885-920; Roberts (n188) 757-791.

¹⁹¹ Treves (n186);

Nonetheless, for some scholars, this practice of the ICJ does not demonstrate the existence of customary international law: S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015)26(2) *European Journal of International Law* 431-434.

For others, it rather demonstrates the existence of general principles of law: De Schutter (n38) 54; M. O'Boyle and M. Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law' in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 221.

¹⁹² ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) (1986) ICJ Rep 14 §22.

that ‘the essential nature of customary international law as a general practice accepted as law must not be distorted’.¹⁹³

This relaxed approach to custom was also adopted by the *ad hoc* tribunals. They grant less importance to state practice and focus rather on the *opinio iuris* which can be found in primary sources (treaties) or in other instruments of international law (e.g., UN documents) or judicial decisions.¹⁹⁴ It is the idea, as suggested by Clapham, that ‘our changing notions of what is considered humane can generate new binding rules in the field of international human rights and humanitarian law without recourse to mysteries of evaluating state practice and *opinio iuris*’.¹⁹⁵

Admittedly, not only does this new conception help avoid the problem of the inconsistency of the practice, but it also circumvents the question of identifying the relevant practice. This second issue should not be disregarded. Indeed, such establishment would require the examination of the practice of each state regarding this right and of its position vis-à-vis this right and the determination that this practice is due to a feeling that the state has to act in a certain way because of an international obligation.¹⁹⁶ In other words, as held by Vasiliev, ‘conclusive determination of the scope of customary human rights is methodologically an arduous task and, arguably, a “mission impossible”’.¹⁹⁷ This ‘modern vision of custom’, according to which the establishment of verbal practice would be sufficient,¹⁹⁸ could prove this statement to be irrelevant.

Nonetheless, De Schutter rightly argued that ‘this “modern” view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new

¹⁹³ ILC, ‘Third report on identification of customary international law’, Sixty-Seventh session, (4 May – 5 June and 6 July – 7 August 2015) UN Doc A/CN.4/682 7-8.

¹⁹⁴ Cassese (n53) 19-52; Fedorova and Sluiter (n81) 27; Vasiliev (n36) 20-24; T. Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law’ (1996)90(2) *American Journal of International Law* 239-240.

¹⁹⁵ A. Clapham, *Human Rights Obligations of Non-State Actors* (OUP, 2006) 88.

¹⁹⁶ Zeegers (n49) 59; Talmon (n191) 421.

¹⁹⁷ Vasiliev (n67);

See also Fedorova and Sluiter (n81) 26; Zeegers (n49) 60; Vasiliev (n116) 392-393.

¹⁹⁸ Simma and Alston (n39) 82-108; D’Amato (n190) 47-98; Lillich (n188) 18; Roberts (n188) 757-791; Kadens and Young (n190) 885-920.

disguise'.¹⁹⁹ Indeed, its potential result is, for example, that general resolutions or declarations would become binding even though the binding effect of the UN General Resolutions was expressly rejected by the founders of the UN.²⁰⁰ This 'modern view' does not thus always rest on states' consent. Criticizing this modern view of custom, Simma and Alston underlined the risks of the vagueness of such new definition:

The mainstream position, particularly in the United States, satisfies its appetite by resorting to a progressive, streamlined theory of customary law, more or less stripped of the traditional practice requirement, and through this dubious operation is able to find a customary law of human rights wherever it is needed.²⁰¹

In the same vein, Kadens and Young rightly stressed the incongruity of reference to custom as a source of IHRL:

The role of [IHRL] is frequently to *challenge* existing arrangements and practices. It is an odd thing, to say the least, to invoke *custom* to challenge conditions in oppressive societies or the abuses of long-entrenched despotic regimes. That is no doubt why human rights advocates so frequently seek to define the content of customary law by reference to aspirational documents like General Assembly resolutions or the open-ended provisions of treaties like the Universal Declaration of Human Rights.²⁰²

It is beyond the scope of this thesis to examine this debate in further detail.²⁰³ In any case, it is posited that this new definition of custom is not needed because the potential flaws of the traditional definition for becoming a source for IHRL can be compensated by using general principles of law as a source.²⁰⁴ As Maki noted, 'a general practice among states, as well as the recognition of the legal character of such practice, is required for customary law to be applicable.

¹⁹⁹ De Schutter (n36) 70.

²⁰⁰ J. Cabranes, 'Customary International Law: What It Is and What It Is Not' (2011)22 *Duke Journal of Comparative and International Law* 143-152.

²⁰¹ Simma and Alston (n39) 107;

For a criticism, see Lillich (n188) 1-30.

²⁰² Kadens and Young (n190) 918-919.

²⁰³ See above (n188).

²⁰⁴ Bassiouni (n28) 778.

In contrast, application of general principles of law does not require any such general practice among states.²⁰⁵ This could be illustrated by the assertion of the ICC Judge Steiner regarding the status of the right to truth, which he qualified as ‘an emerging customary norm, as well as a general principle of law’.²⁰⁶ Indeed, it implies that the general principle already exists whereas it is not yet fully formed as customary international law, probably because of a lack of practice due to its novel character. Upon the suggestion of Simma and Alston,²⁰⁷ of De Schutter,²⁰⁸ and of Meron,²⁰⁹ this thesis will thus have recourse to the third source mentioned by Article 38 of the ICJ Statute, namely the general principles of law, in order to define the right to liberty.

3.3.3. General principles of law

It is thus contended that general principles of law are more adequate to define the content of IHRL. It is usually accepted that the principles aimed at by Article 38 are principles existing in domestic legal systems that can be transposed to the international legal order.²¹⁰ This source is thus interesting for establishing human rights since they are recognized both in domestic legal systems and at the international level.

The first caveat for human rights as a general principle is that human rights seem to be rights and not principles. Nevertheless, general principles of law identified so far in the case law of international courts and arbitral tribunals ‘include, inter alia, the principle of good faith, the obligation to make reparation for international wrongs, the principle of *res judicata*, the principle

²⁰⁵ L. J. Maki, ‘General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention’ (1980)10 *California Western International Law Review* 276.

²⁰⁶ *Katanga and Ngudjolo* decision of 13 May 2008 (n139) §32.

²⁰⁷ Simma and Alston (n39) 107.

²⁰⁸ De Schutter concludes that ‘a more promising normative source of human rights in general public international law – allowing to impose on international organisations certain human rights obligations – is in the general principles of law, also mentioned in Article 38 (1) of the Statute of the International Court of Justice among the sources of international law’ (De Schutter (n36) 128).

²⁰⁹ H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995/96)25 *Georgia Journal of International and Comparative Law* 351.

²¹⁰ See Bassiouni (n28) 769-771, 775-776; Maki (n205) 275; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 71; O’Boyle and Lafferty (n191) 196; Nonetheless, a minority view regards ‘General Principles’ merely as a means of assistance in the interpretation and application of conventional and customary law: see Bassiouni (n28) 775-776.

of estoppel, the principle of *jus novit curia*, equality of the parties to a dispute, the rights of the defence, and *respect for fundamental human rights*.²¹¹ The fact that ‘the general principles mentioned in Article 38 §1 (c) included the concept of human rights and their protection’ was also argued by Judge Tanaka in his dissenting opinion in the *South-West Africa case*.²¹² Besides, after having analysed the case law of the ICJ regarding general principles of law, De Schutter concludes that these principles ‘have been interpreted as implying that human rights should qualify among the latter principles, and thus as forming part of general international law’.²¹³ Likewise, referring to Green who, in 1955, denied the possibility for human rights to qualify as general principle, O’Boyle and Lafferty concluded that ‘the practice of the International Court of Justice, the European and Inter-American Courts of Human Rights, and the Court of Justice of the European Union, suggests the contrary is true today’.²¹⁴ It has thus been accepted that human rights could qualify for being such principles.

Stemming from the use of ‘recognized’, the second condition for being a general principle is that these principles need to be recognized by the major legal systems of the world.²¹⁵ As noted by Bassiouni, ‘the rule must exist in a number of States, but the rule does not have to meet the test of “universal acceptance,” and no quantitative or numerical test for States having such a “principle” has ever been established’.²¹⁶ Admittedly, there is the obsolete reference in Article 38 to the controversial expression ‘civilized people’ but it is now commonly agreed that this reference is not actual anymore.²¹⁷ This condition of ‘recognized’ thus only requires a recognition

²¹¹ O’Boyle and Lafferty (n191) 196 (emphasis added).

²¹² ICJ, *Cases on South-West Africa, Second Phase (Ethiopia v. South Africa, Liberia v. South Africa)* (Merits, dissenting Opinion of Judge Tanaka) (1996) ICJ Rep 6 250;

O’Boyle and Lafferty (n191) 207-208.

²¹³ De Schutter (n38) 54;

See also O’Boyle and Lafferty (n191) 221.

It must be noted that others authors who did the same analysis reached the conclusion that the ICJ refers to customary international law: Treves (n186).

²¹⁴ O’Boyle and Lafferty (n191) 221.

²¹⁵ Gaja (n177).

²¹⁶ Bassiouni (n28) 788;

See also Kaufman Hevener and Steven Mosher (n185) 602; Maki (n205) 277; M. Panezi, ‘Sources of Law in Transition. Re-visiting General Principles of International Law’ (2007) *Ancilla Iuris* 74; Gaja (n177).

²¹⁷ B. Vitanyi, ‘Les positions doctrinales concernant le sens de la notion de “principes généraux du droit reconnu par les nations civilisées”’ (1982) *Revue générale de droit international public* 54; Bassiouni (n28) 789; Panezi (n216) 74.

in a high number of states,²¹⁸ which, as shown in the previous section, corresponds to the scope that this current analysis gives to the expression ‘internationally recognized’ contained in Article 21(3) of the ICC Statute. Consequently, if a human right can qualify as a general principle of law, Article 21(3) obliges the ICC judges to take this right into account.

Since this source does not require any practice, the recourse to general principles of law avoids the question of the identification of the practice and that of the discrepancy between *opinio iuris* and this practice. Admittedly, the identification of general principles of law is supposed to require ‘a comparison between national systems, the search for common “principles”, and their transposition to the international sphere’.²¹⁹ Nonetheless, if a human right is stipulated in a treaty, the ratification of this treaty implies that somehow this right becomes part of the municipal law.²²⁰ It is thus sufficient to examine in how many and in which conventions a human right is recognized in order to gauge its ‘internationally recognized’ character. This approach makes it possible to bypass the fact that the ICC member states are not party to the same treaties while respecting states’ consent at the same time since these principles need to be recognised by them. Needless to say that the treaty or the different treaties that recognize a human right need to have enough members for this right to be considered as a general principle.

Despite these advantages, there are not many references to this source in the literature.²²¹ The legislation of states is easier to identify than the practice of states as required by customary international law, however. It must be noted that the legislation of states equates to *opinion iuris* and the way the legislation is applied and respected equates to practice so that, contrary to the general principles of law, both are required to establish the existence of customary international law. Furthermore, the possible translation of human rights as international law is assumed given the existence of international human rights conventions. As held by Meron,

It is surprising that ‘the general principles of law recognized by civilized nations’ (...) have not received greater attention as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments. As

²¹⁸ Elewa Badar and Higgins (n58) 268.

²¹⁹ Pellet (n53) 1073-1074.

²²⁰ Article 27 of the Vienna Convention.

²²¹ For example, in his article regarding finding a source for human rights, D’Amato does not mention general principles once: D’Amato (n190) 47-98.

human rights norms stated in international instruments come to be reflected in national laws, (...) Article 38(1)(c) will [or might] increasingly become one of the principal methods for the maturation of such standards into the mainstream of international law.²²²

For all these reasons, in order to determine the content of the right to liberty, this thesis will examine whether the provisions of human rights conventions regarding provisional release can also be considered as general principles of law. If so, the right to liberty would indubitably meet the conditions provided by Article 21(3) since a general principle is in any case international and binding whereas Article 21(3) only requires the right to be international and recognized.

3.3.4. Role of the subsidiary means for the identification

The problem with the recourse to human rights conventions to define a human right is that they are usually not sufficiently detailed to determine the content and the scope of a right. They only contain general standards and therefore, as noted by Warbrick, only provide for ‘a mere skeleton of what is required’.²²³ Nonetheless, each of the treaties has at least one institutional body whose mandate is to interpret its provisions. These bodies are the following: the HRC for the ICCPR; the ECtHR for the ECHR; the IAmCHR and the IACtHR for the AmCHR; and the African Commission on Human and Peoples’ Rights (AfCmHPR) and the African Court on Human and Peoples’ Rights (AfCtHPR) for the AfCHPR.

All these bodies have to some extent the power to interpret the convention they are linked to. Their decisions are never binding as such for all the states parties to the convention.²²⁴

²²² Hannum (n209) 351.

²²³ C. Warbrick, ‘International Criminal Rights and Fair Trial’ (1998)3 *Journal of Armed Conflict* 50.

²²⁴ Articles 32§1, 33, 34, 46, 47 of the ECHR; Article 33 of the ECHR; Articles 41, 62§3, 63 and 68 of the AmCHR; Articles 45, 47 and 56 of the AfCHPR and Article 3§1 and 30 of the Optional Protocol to the AfCHPR;

See also Committee on International Human Rights Law and Practice, ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies’ in International Law Association Report of the Seventy-First Conference (Berlin 2004) (ILA, 2004) 626; A. Nollkaemper and R. van Alebeek, ‘The Legal Status of Decision by Human Rights Treaty Bodies in National Law’ *Amsterdam Law School Legal Studies Research Paper* n°2011-02, 21 April 2011 available at <http://ssrn.com/abstract=1817532> (last accessed 21 March 2015) 73; H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context. Law Politics Moral*, (OUP, 2007 (third edition)) 913-916; Shaw (n44) 320; D. Shelton, ‘The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies’ in H. P. Hestermeyer and others (eds.) *Coexistence, Cooperation and Solidarity* (Martinus Nijhoff, 2011) 559.

Nonetheless, this lack of binding character only concerns the actions required by these decisions. Could a different conclusion be reached regarding the *in abstracto* interpretation, or *res interpretata*, of the rights provided by these bodies? It has to be kept in mind that Article 21(3) does not require a binding definition of a human right but well a recognized one. Besides, the ICC does not seem to have any problem referring to this *res interpretata*, even if the ICC fails to explain its reasoning regarding their potential binding character.²²⁵

Several explanations adduce that this *res interpretata* should be considered as being an integral part of the right contained in the convention. Legally, the most convincing one is to consider this case law as a subsidiary source to which Article 38 of the ICJ Statute refers, namely ‘the judicial decisions and the teachings of the most highly qualified publicists of the various nations’. The judicial character of the ECtHR, of the IACtHR and of the AfCtHPR cannot be contested. Some scholars,²²⁶ and the HRC itself,²²⁷ propose the quasi-jurisdictional character of the HRC, of the IAMCHR and of the AfCmHR. Their decisions could also be considered as the teachings referred to by Article 38. Arai convincingly held that:

It is also possible to contend that general comments being the fruits of elaborate doctrinal discourse of the leading experts on [IHRL], their status and weight as a material source of international law are comparable to, but more authoritative than the writing of leading publicists within the meaning of Article 38(1)(d) of the Statute of the ICJ.²²⁸

The qualification of the *res interpretata* of the decisions of the human rights bodies as subsidiary sources of international law demonstrates the need to take them into account to define an internationally recognized human right in the sense of Article 21(3). As held by Cassese, these

²²⁵ For a study of the attitude of the ICC towards the ECtHR’s case law, see Deprez (n52) 278-296.

²²⁶ Y. Arai-Takahashi, *The Law of Occupation* (Brill, 2009) 517-518.

See also: Sluiter (n113) 940; Y. Arai-Takahashi, ‘Fair Trial Guarantees in Occupied Territory – The Interplay between International Humanitarian Law and Human Rights Law’ in R. Arnold and N. Quéniwet, *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Martinus Nijhoff, 2008) 460; Nollkaemper and van Alebeek (n224) 41; Shelton (n224) 568.

²²⁷ UNHRC, ‘General Comment 33’ (5 November 2008) UN Doc CCPR/C/GC/33 §11.

²²⁸ Arai-Takahashi (2008) (n226) 461; Arai-Takahashi (2009) (n226) 468.

decisions should be used to demonstrate, among others, ‘whether a general principle of international law exists’.²²⁹

Another convincing explanation is, as suggested by Arai, ‘to argue that the states parties to the ICCPR have agreed to “delegate” to the monitoring body (HRC) the power of clarifying the meaning of this treaty’.²³⁰ In fact, most of the treaties confer expressly this power to their bodies. In any case, this power is implicit since it is essential for them to carry out their functions.²³¹ A consequence of this delegation is that it would counter the principle of good faith to deny any effect to this *res interpretata*. This explanation seems to be adopted by the IAmCHR which, in its *Loayza Tamayo v. Peru* judgment, while continuing to state that the ordinary meaning of the term ‘recommendations’ means that they are not legally binding, held that:

However, in accordance with the principle of good faith (...) if a State signs and ratifies an international treaty, especially one concerning human rights, (...) it has the obligation to make every effort to comply with the recommendations of a protection organ (...).²³²

In this vein, Judge Pocar (former HRC member) rightly argued in his partially dissenting opinion to the *Mrkšić and Šljivancanin* appeal judgment that ‘no reasons exist to permit the International Tribunal to subtract itself from applying the principles enshrined in the ICCPR, in accordance with the meaning given to them by the [HRC], that is, the very body entrusted to interpret the ICCPR for the overall purpose of monitoring its application and implementation’.²³³

Nonetheless, this explanation has less legal basis than the previous one and does not really rest on states’ consence since it could be argued that the states delegated their power only partially to interpret the conventions and that they did not delegate to these bodies a power to deliver a binding interpretation.

²²⁹Cassese (n53) 19; A. Zammit, ‘A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals’ (2013)24(2) *European Journal of International Law* 649-661.

²³⁰ Arai-Takahashi (2009) (n226) 468.

²³¹ Committee on International Human Rights Law and Practice, ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies’ in International Law Association Report of the Seventy-First Conference (Berlin 2004) (ILA, 2004) 627.

²³² IACtHR, Judgment, *Loayza Tamayo v. Peru*, 17 September 1997 §§80-81.

²³³ Judgment, Partially Dissenting Opinion, *Prosecutor v. Mile Mrkšić and Veselin Šljivancanin*, Case No. IT-95-13, AC, ICTY, 5 May 2009 §3.

A third justification for taking into account at least the judgments of the regional courts is a practical one. Their judgments being binding on the states concerned and these courts being likely to follow their previous reasoning,²³⁴ the *res interpretata* would have, as argued by Trechsel regarding the ECtHR, ‘a de facto binding effect in all member states’.²³⁵ The same reasoning can be applied to the other bodies. The idea is that, to avoid future condemnation, the states have to conform to the interpretation provided by the institutional body even if this interpretation is not binding as such upon them.²³⁶ However, the ICC not being members of any of these courts or commissions, it would not fear any condemnation for its violation of their case law. Nonetheless, as seen in part II, this lack of respect could have an impact on the responsibility of its own member states.

It has also been argued that the decisions of the human rights bodies have to be taken into account because they would amount to the subsequent practice referred to by Article 31(3)(b) of the Vienna Convention on the Law of Treaties. This article stipulates that the interpretation of a provision of a treaty shall take ‘into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. The problem is that this explanation grants the human rights bodies the power to give an authentic interpretation of the treaty whereas, as pointed out by a judge of the former Permanent Court of International Justice (PCIJ), ‘the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it’.²³⁷ Therefore, for the International Law Commission, the so-called subsequent practice has to emanate from the states parties and cannot emanate as such from the bodies entrusted with the interpretation of the treaty.²³⁸ In a recent case, the ICJ also seems to require the participation of all states parties in order for a non-binding decision of a treaty body to amount to subsequent practice as meant by Article 31(3)(b) of the Vienna Convention.²³⁹ This

²³⁴ Treves (n186) 55.

²³⁵ S. Trechsel, ‘Rights in Criminal Proceedings under the ECHR and the ICTY’ in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the ICTY* (OUP, 2011) 157.

²³⁶ A. Bodnar, ‘*Res Interpretata*: Legal Effect of the European Court of Human Rights’ Judgments for Other States Than Those Which Were Party to the Proceedings’ in Y. Haeck and E. Brems (eds.) *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) 223.

²³⁷ PCIJ, *Question of Jaworzina*, (Advisory Opinion) (1923) CPIJ, Series B, No. 8, 37, Commentaries 106.

²³⁸ ILC, ‘First report on subsequent agreements and subsequent practice in relation to treaty interpretation’, Sixty-Fifth session, (6 May – 7 June and 8 July – 9 August 2013) UN Doc A/68/10.

²³⁹ ICJ, *The Whaling Case (Australia v. Japan, New Zealand Intervening)* (Merits) (2014) ICJ Rep 148 §83.

reasoning is thus debated. Be that as it may, as seen before, this explanation is not needed to demonstrate that the ICC judges have to take into account the *res interpretata* of the decisions of the human rights bodies.

In summary, regardless of the binding status of the decisions of human rights bodies, their interpretation of a right has to be taken into account to define an internationally recognized human right, with the condition that this interpretation be internationally uncontested in the sense developed earlier. The main reason is that they can qualify as subsidiary means of interpretation within the meaning of Article 38 of the ICJ Statute. In addition, the principle of good faith requires them to be taken into account. It is also a matter of fact that the interpretation given by these institutions has become part of the treaties, these institutions referring to their previous decisions. Since this legal analysis will use this interpretation only if it is uncontested by states, it respects states' consent.

The specific status of the ECtHR's case law needs to be stressed. Indeed, the ECtHR is the body most often cited by the other supervisory bodies themselves or by the international criminal tribunals, probably because it is 'one of the most advanced forms of any kind of international legal process'.²⁴⁰ It has a lot of state parties – more than the IAmCHR –, a strong institutional framework – contrary to the HRC –, and a plethora of cases.²⁴¹ In addition, the ECtHR's case law is a good reference for the international tribunals since the ECtHR exercises jurisdiction over states with both civil law and common law systems.²⁴² Besides, the ECHR also served as a blueprint for the other conventions.²⁴³ The case law of the ECtHR will be thus cited more than that of the other bodies. Nonetheless, this analysis still requires the reasoning of the ECtHR to be confirmed by other bodies in order to qualify as 'internationally recognized'.

Regarding the supervisory body, the IWC, established by the Whaling Convention, the ICJ held that 'Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of [VCLT 31(3)(a) & (b)]'.

²⁴⁰ Knoop (n38) 15.

²⁴¹ Croquet (n47) 123-126.

²⁴² Trechsel (n235) 150.

²⁴³ Croquet (n47) 123-124; R. Roth and F. Tulkens, 'The influence of the European Court of Human Rights' case law on (international) criminal law: introduction' (2011)9(3) *Journal of International Criminal Justice* 574.

3.3.5. Soft law?

As seen before, some ICC judges do not hesitate to refer to soft law issued by international organizations, such as the UN, which is not linked to a specific human rights treaty. Admittedly, if not internationally contested, it could be argued that the principles emanating from this soft law should be taken into account. Nonetheless, the use of this source is not recognized by Article 38 of the ICJ Statute since it does not amount to international 'law' so that it will not be taken into account for this analysis. Be that as it may, this use is not justified for the right to liberty given the fact that it is sufficiently defined by the other sources.

3.3.6. Conclusion

It stems from these considerations that, in order to define the right to liberty which the ICC interim release regime should respect, inquiries will need to be made into the human rights conventions and the decisions of their institutional bodies related to the provisional release issue. The focus is on these sources because customary international law is not appropriate to define the content of human rights and because general principles of law may be identified by the human rights conventions – since the national order is supposed to reflect these principles – and by the decisions of their institutional bodies as subsidiary means of interpretation. The fact that this analysis keeps only the components of the right to liberty revealed by the treaties and the bodies interpreting them when they corroborate each other guarantees these components are sufficiently internationally accepted to demonstrate the existence of a general principle of law.

3.4. Definition of the right to liberty

For the purpose of this study, only the aspects of the right to liberty pertinent to a person detained pending a future trial are examined. The objective is to establish a *ius commune* with the aspects that are uncontested in most parts of the world in order to be sure it fits the requirements of Article 21(3). As stated before, despite Brownlie's previous comment on the alleged non-existence of such an entity as 'International Human Rights Law',²⁴⁴ it is argued that a common denominator can be found regarding the right to liberty and pre-conviction detention.

²⁴⁴ Brownlie (n44) 554 (see (n182)).

3.4.1. Legal basis of the detention

The right to liberty is recognized by the ICCPR,²⁴⁵ the ECHR,²⁴⁶ the AmCHR²⁴⁷ and the AfCHPR.²⁴⁸ The right is phrased differently depending on the convention, however.²⁴⁹ The only

²⁴⁵ Article 9 of the ICCPR: 1. 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.

(...)

3. 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 judgment.

(...)

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

²⁴⁶ Article 5 of the ECHR: 1. 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:

(...)

(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;

(...)

3. 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 authorised 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.

4. 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.

5. 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.

²⁴⁷ Article 7 of the AmCHR: 1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

(...)

5. Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. 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

real common condition is that any detention must have a legal basis. This condition corresponds to the general interdiction of arbitrary detention. It stems from this condition that, as held by Dörr, ‘the human right to liberty does not, strictly speaking, grant freedom from detention, but obliges States to set up substantive preconditions and procedural requirements for detention in legal terms and to comply with them in practice’.²⁵⁰ Pre-conviction detention must thus be regulated by law.

In addition, according to IHRL, the permissible scope of detention has to be narrowly construed. For example, the ICCPR expressly states that such detention should not be the general rule and that it should be ordered only if reasonable and necessary.²⁵¹ The HRC makes clear that ‘pre-trial detention should be an exception as short as possible’.²⁵² Likewise, the IACtHR held that ‘liberty is always the rule, and its limitation or restriction the exception’²⁵³ and that the use of detention on remand ‘should be exceptional, limited by the principle of lawfulness, the presumption of innocence, and the need and proportionality in keeping with what is strictly necessary in a democratic society’ because ‘it is a precautionary rather than a punitive measure’.²⁵⁴ The ECtHR requires such detention to be exceptional by stating that it is justified only when ‘there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty’.²⁵⁵ The presumption is thus in favour of release before and pending trial.²⁵⁶ The

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.

²⁴⁸ Article 6 of the AfCHPR: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

²⁴⁹The expression “convention” is used in its generic meaning.

²⁵⁰ O. Dörr, ‘Detention, Arbitrary’ *Max Planck Encyclopedia of Public International Law*.

²⁵¹ Article 9 of the ICCPR.

²⁵² UNHRC, ‘General Comment 35’ (16 December 2014) UN Doc CCPR/C/GC/35.

²⁵³ IACtHR, Judgment, *Yvon Neptune v. Haiti*, 6 May 2008 §90.

²⁵⁴ IACtHR, Judgment, *Bayarri v. Argentina*, 30 October 2008 § 69.

See also IACtHR, Judgment, *Suarez Rosero v. Ecuador*, 17 November 1997 §77.

²⁵⁵ ECtHR, Judgment, *Jablonski v. Poland* (App. No. 33492/96), 21 December 2000 §79; ECtHR, Judgment, *Chraidi v. Germany* (App. No. 65655/01), 26 October 2006 §35; ECtHR, Judgment, *Bykov v. Russia* (App. No. 4378/02), 10 March 2009 §62.

AfCmHPR confirmed this presumption,²⁵⁷ so that it is established that this presumption is recognized worldwide.

This presumption implies that the possibility of the implementation of alternative measures to detention needs to be assessed. In fact, for the HRC, preventive detention is arbitrary when states are unable to demonstrate ‘that other, less intrusive, measures could not have achieved the same end’, or that ‘it is not necessary in all circumstances of the case and proportionate to the ends sought’.²⁵⁸ Article 5 of the ECHR expressly provides that ‘release may be conditioned by guarantees to appear for trial’.²⁵⁹ As the ECtHR noted, ‘the detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances.’²⁶⁰ Likewise, the AmCHR stipulates that a detainee’s ‘release may be subject to guarantees to assure his appearance for trial’.²⁶¹ According to the IACtHR, there should be ‘no measure that is less onerous in relation to the affected right, among all those that are similarly appropriate to achieve the proposed objective’.²⁶² No explicit mention of the obligation to assess alternative measures has been found in the African human rights regime. Nonetheless, this obligation should be considered as being internationally recognized since it is required by the ICCPR and since it is a logical corollary of the exceptional character of the detention on remand, which is recognized in the African regime. In any case, as will be seen, Article 60 of the ICC Statute and Rule 119 of the RPE provide for the possibility of conditional release.

²⁵⁶ ECtHR, Judgment, *McKay v. The United Kingdom* (App. No. 543/03), 3 October 2006 §30.

²⁵⁷ AfCmHR, *Civil Liberties Organization (in respect of Nigeria Bar Association) v. Nigeria* (Comm. No. 101/93), 1995; AfCmHR, *Jawara v. Gambia* (Comm. Nos. 147/95 and 149/96), 2010; AfCmHR, *Shumba v. Zimbabwe* (Comm. No. 288/2004), 2012 §173.

²⁵⁸ ICJ, ‘International Commission of Jurists (ICJ) Comments to the UN Human Rights Committee on its Half-Day of General Discussion in Preparation for a General Comment on Article 9 (Liberty and Security of the Person) of the International Covenant on Civil and Political Rights’, September 2012, available at <http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/ICJ.pdf> (last accessed 23 March 2015).

²⁵⁹ ECtHR, Judgment, *Jablonski v. Poland* (App. No. 33492/96), 21 December 2000 §83.

²⁶⁰ ECtHR, Judgment, *Witold Litwa v. Poland* (App. No. 26629/95), 4 April 2000 §78.

²⁶¹ Article 7 §5 of the AmCHR.

²⁶² IACtHR, Judgment, *Yvon Neptune v. Haiti*, 6 May 2008 §98.

Examples of these alternative measures are: undertakings to appear before a judicial authority as and when required, undertakings not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority; requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees for appearance at the pending trial.²⁶³

It stems from these considerations that the fact that the possibility of pre-conviction detention must be provided by law, that it should be the exception and that alternative measures should be envisaged are internationally recognized components of the right to liberty. Nonetheless, it is undeniable that such detention exists in every country and that prisons are crowded with persons awaiting trial. This situation does not contravene IHRL as long as a judicial control exists and as long as it is demonstrated that some conditions are fulfilled.

3.4.2. The right to be brought promptly before a judge

IHRL does not recognize as such a right to bail or to release pending trial. Rather, it recognizes the right to have a court decide on the lawfulness of a suspect's detention promptly after arrest²⁶⁴ in order to verify if this detention is necessary. Except for the AfCHPR, all the three conventions require a judicial control. The ICCPR stipulates that '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'.²⁶⁵ The AmCHR holds that 'any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power'.²⁶⁶ Similarly, the ECHR provides that 'everyone arrested or detained in accordance with

²⁶³ Council of Europe Recommendation (CoE) Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

²⁶⁴ Davidson (n8) 13.

²⁶⁵ Art. 9§3 of the ICCPR.

²⁶⁶ Article 7§5 of the AmCHR.

the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power'.²⁶⁷ The lack of such provision in the AfCHPR is compensated by the fact that the African Commission provides for it in its Resolution on Fair Trial.²⁶⁸

The bodies interpreting these instruments provide more details. According to the ECtHR, this judicial control of the detention must be automatic, notably because arrested persons who have been subjected to ill-treatment or are vulnerable persons such as the mentally weak or those who do not speak the language of the judicial officer might be incapable of lodging an application.²⁶⁹ The necessity of the automatic character is also recognized by the HRC.²⁷⁰ The ECtHR adds that the detention 'must be regularly reviewed'.²⁷¹ This necessity of a regular control stems logically from the fact that the detention must remain necessary. Regarding the requirement of promptness, namely the delay in which the detainee has to appear before a judge, the ECtHR has always refused to fix a precise time limit and insists that 'the question whether or not the requirement of promptness has been satisfied must be assessed in each case according to its special features'.²⁷² This is also the position adopted by the HRC.²⁷³ It must be noted that, for the ECtHR, this control would not cease to apply at the beginning of a trial.²⁷⁴

²⁶⁷ Article 5§3 of the ECHR.

²⁶⁸ AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Section M 3(a).

²⁶⁹ ECtHR, Judgment, T.W. v. Malta (App. No. 25644/94), 29 April 1999 §43; ECtHR, Judgment, McKay v. The United Kingdom (App. No. 543/03), 3 October 2006 §34.

²⁷⁰ HRC, Zhanna Kovsh (Abramova) v. Belarus (Comm. No. 1787/2008), CCPR/C/107/D/1787/2008, 27 March 2013 §7.3; HRC, O. Pichugina v. Belarus (Comm. No. n°1592/2007), CCPR/C/108/D/1592/2007, 17 July 2013 §7.3.

²⁷¹ ECtHR, Judgment, Bezicheri v. Italy (App. No. 11400/85), 25 October 1989;

See also UN General Assembly Res 43/173 (9 December 1988) UN Doc A/RES/43/173 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11(3).

²⁷² ECtHR, Judgment, De Jong, Baljet and Van den Brink v. the Netherlands (App. Nos. 8805/79, 8896/79, 9242/81), 22 May 1984, §§52, 49 and 41 in D. Chatzivassiliou, 'The guarantees of judicial control with respect to deprivation of liberty under Article 5 of the European Convention of human rights: An overview of the Strasbourg case-law' (2004)5(4) ERA- Forum 499-519.

²⁷³ HRC, McLawrence v. Jamaica (Comm. No. 702/1996), CCPR/ C/60/D/702/1996, 18 July 1997; HRC, Kurbanov v. Tajikistan (Comm. No. 1096/2002), CCPR/C/79/D/1096/2002, 6 November 2003; See also L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OSAIL, 2011) 287.

²⁷⁴ ECtHR, Judgment, Wemhoff v. Germany (App. No. 2122/64), 27 June 1968 §§7-8.

According to the ECtHR,²⁷⁵ the HRC,²⁷⁶ and the AfCmHR,²⁷⁷ this control has to be done by an authority offering guarantees of independence from the executive and the parties. In addition, in order to guarantee the effectiveness of the right to challenge the lawfulness of the detention, this authority must have the power to order the release of the detainee.²⁷⁸ This is one of the reasons why the ECtHR does not accept a system of mandatory detention for a certain type of offences.²⁷⁹ The other reason is that, according to the ECtHR, ‘the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence’.²⁸⁰ This was clearly expressed by the former European Commission on Human Rights regarding the former section 25 of the United Kingdom Criminal Justice and Public Order Act 1994, which precluded the possibility of pre-trial release for those charged with one among a list of enumerated crimes if previously convicted of one of those crimes.²⁸¹ Similarly, the ECtHR condemned Malta because the magistrate before whom the applicant had appeared had no power to order his release.²⁸² The HRC followed a similar reasoning.²⁸³ The same principle can be inferred from the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. It prescribes that the purpose of the judicial review includes giving ‘the detainee the opportunity to challenge the lawfulness of his or her detention and [to secure] release if the arrest or detention violates his or her rights’.²⁸⁴ If this power to order release is not expressly prescribed in the American human rights system, this

²⁷⁵ ECtHR, Judgment, *Neumeister v. Austria* (App. No. 1936/63), 27 June 1968 §9; ECtHR, Judgment, *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), 28 October 1998 §148.

²⁷⁶ HRC, *Kulomin v Hungary* (Comm. No. 591/1992), CCPR/C/50/D/521/1992, 22 March 1996 §11.3; HRC, *A. Smantser v. Belarus* (Comm. No. 1178/2003), CCPR/C/94/D/1178/2003, 23 October 2008 §10.2.

²⁷⁷ AfCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), Section M 3(a).

²⁷⁸ ECtHR, Judgment, *T.W. v. Malta* (App. No. 25644/94), 29 April 1999 §48; ECtHR, Judgment, *Caballero v. UK* (App. No. 32819/96), 8 February 2000 §30; ECtHR, Judgment, *Medvedyev and others v. France* (App. No. 3394/03), 29 March 2010 §125.

²⁷⁹ ECtHR, Judgment, *Ivan Atanasov v. Bulgaria* (App. No. 12853), 2 December 2010.

²⁸⁰ ECtHR, Judgment, *Govorushko v. Russia* (App. No. 42940/06), 25 October 2007.

²⁸¹ ECtHR, Judgment, *Schiesser v. Switzerland* (App. No. 7710/76), 4 December 1979 §31; ECtHR, Judgment, *Caballero v. UK* (App. No. 32819/96), 8 February 2000 §45, §54; *Fairlie* (n9) 1101-1178.

²⁸² ECtHR, Judgment, *T.W. v. Malta* (App. No. 25644/94), 29 April 1999 §48.

²⁸³ HRC, *A vs. Australia* (Comm. No. 560/1993), CCPR/C/59/D/560/1993, 3 April 1997 §9.5.

²⁸⁴ AfCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), Section M 3(b).

prescription stems from the need to interpret the convention in order to make its rights effective.²⁸⁵ Indeed, why provide for judicial control if this control could not lead to the release of the accused?

It can therefore be concluded that it is internationally recognized that an independent officer with the power to order the release of the accused has to control the necessity of his or her detention automatically and regularly.

3.4.3. Criteria justifying detention

In order to appreciate the necessity of the detention, IHRL prescribes that several conditions be fulfilled. The first condition is that the person is suspected of having committed an offence. The ICCPR refers to a person ‘arrested or detained on a criminal charge’,²⁸⁶ and the AmCHR to a person detained in view of a future trial.²⁸⁷ The ECHR is more precise. It states that there must be “‘a reasonable suspicion’” of a commission of a criminal offence’,²⁸⁸ which presupposes ‘the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence’.²⁸⁹ Likewise, the IACtHR held that ‘suspicion must be based on specific facts (...) not mere conjectures (...) a State should not detain someone to investigate him’,²⁹⁰ and that it is necessary that ‘the findings of the national judicial authorities are adequately “relevant and sufficient” to justify continued detention’.²⁹¹ The AfCmHPR also states that a person may only be arrested on ‘reasonable suspicion or for probable cause’.²⁹² The suspicion of commission of a criminal offence must persist during the whole detention.²⁹³

²⁸⁵ IACtHR, Judgment, *Constitutional court v. Peru*, 31 January 2001 §105.

²⁸⁶ Article 9 §3 of the ICCPR.

²⁸⁷ Article 7 §4 of the AmCHR.

²⁸⁸ Article 5 §1.c of the ECHR.

²⁸⁹ ECtHR, Judgment, *Labita v. Italy* (App. No. 26772/95), 6 April 2000 §155.

²⁹⁰ IACmHR, *Giménez v. Argentina* (Case No. 11.245), 1 March 1996 §83.

²⁹¹ IACmHR, *Giménez v. Argentina* (Case No. 11.245), 1 March 1996 §83.

²⁹² AfCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), Section M 1(b).

See also AfCmHR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, (Comm. No. 102/93), 1998 §55.

²⁹³ ECtHR, Judgment, *Labita v. Italy* (App. No. 26772/95), 6 April 2000 §153.

Only the ECHR specifies the other conditions related to the assessment of the necessity of pre-conviction detention, namely the fact that ‘it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so’.²⁹⁴ The ECtHR added as other conditions the risk of prejudicing the administration of justice, disturbing the public order and posing a danger to the accused himself.²⁹⁵ Likewise, the HRC recognizes the risk of committing a new offence as an acceptable ground for detention and admits detention ‘where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party’.²⁹⁶ Similarly, for the AfCmHPR, ‘unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial’.²⁹⁷ The IAmCHR requires pre-conviction detention only to ‘be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice’,²⁹⁸ because ‘failure to comply with these requirements is tantamount to a sentence without conviction, which is contrary to universally recognized general principles of law’.²⁹⁹ It stems from these considerations that it can be assumed that the suspicion of having committed an offence, the risk of flight and the risk of prejudice to the administration of justice are recognized internationally as being part of the human rights regime regarding provisional release. If the risk of committing further offences is only stated by the ECtHR and the HRC, it can still be considered as internationally sufficient given the universal character of the ICCPR. On the contrary, the risk of disturbing the public order and of the

²⁹⁴ Article 5§1.c of the ECHR.

²⁹⁵ ECtHR, Judgment, *Letellier v. France* (App. No. 12369/86), 26 June 1991 §39; ECtHR, Judgment, *W. v. Switzerland* (App. No. 14379/88), 26 January 1993 §36; ECtHR, Judgment, *I.A. v. France* (App. No. 1/1998/904/1116), 23 September 1998 §104, §110; ECtHR, Judgment, *Kauczor v. Poland* (App. No. 45219/06), 3 February 2009 §46; ECtHR, Judgment, *Aleksandr Makarov v. Russia* (App. No. 15217/07), 12 March 2009 §136.

²⁹⁶ HRC, *Van Alphen v. The Netherlands* (Comm. No. 305/1988), CCPR/C/39/D/305/1988, 23 July 1990 §5.8; HRC, *W.B.E. v. The Netherlands* (Comm. No. 432/1990), CCPR/C/46/D/432/1990, 23 October 1992 §6.3; HRC, *Hill v. Spain* (Comm. No. 526/1993), CCPR/C/59/D/526/1993, 2 April 1997 §12.3; HRC, *Morais v. Angola* (Comm. No. 1128/2002), CCPR/C/83/D/1128/2002, 25 March 2005 §6.1; HRC, *A. Smantser v. Belarus* (Comm. No. 1178/2003), CCPR/C/94/D/1178/2003, 23 October 2008 §10.3.

²⁹⁷ AfCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), Section M 1(e).

²⁹⁸ IACtHR, Judgment, *Bayarri v. Argentina*, 30 October 2008, §74; IACtHR, Judgment, *Yvon Neptune v. Haiti*, 6 May 2008 §98.

²⁹⁹ IACtHR, Judgment, *The « Juvenile Reeducation Institute » v. Paraguay*, 2 September 2004 §229.

danger to the accused do not seem to be internationally recognized since they were only stated by the ECtHR.

These conditions were further elaborated by the ECtHR and the IACtHR. Regarding the risk of flight, it is admitted that it necessarily diminishes as the detention continues because the balance of the sentence that the person concerned may expect to serve is reduced.³⁰⁰ The character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted are relevant to assess this risk.³⁰¹ A previous history of flight after being charged with an offence or the previous necessity of an extradition may also be relevant.³⁰² The ECtHR also held that ‘the severity of the sentence faced is a relevant element in the assessment of the risk of absconding (...) but it is not sufficient after a certain lapse of time to justify the length of detention’,³⁰³ or that ‘the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier’.³⁰⁴ The risk that the accused, if released, would take action to prejudice the administration of justice, such as interacting with witnesses or destroying evidence, can also justify detention on remand.³⁰⁵ The ECtHR considers that this risk continues to exist only as long as the evidence has not been collected or the witnesses heard.³⁰⁶ The IACtHR reached the same conclusion.³⁰⁷

³⁰⁰ ECtHR, Judgment, *Neumeister v. Austria* (App. No. 1936/63), 27 June 1968 §10; ECtHR, Judgment, *Matznetter v. Austria* (App. No. 2178/64), 10 November 1969 §11.

³⁰¹ ECtHR, Judgment, *Neumeister v. Austria* (App. No. 1936/63), 27 June 1968 §10; ECtHR, Judgment, *W. v. Switzerland* (App. No. 14379/88), 26 January 1993 §33; ECtHR, Judgment, *Sopin v. Russia* (App. No. 57319/10), 18 December 2012 §42;

See also IACmHR, *Bronstein and Al. v. Argentina* (Case No. 11.205), 11 March 1997 §29.

³⁰² ECtHR, Judgment, *Punzelt v. the Czech Republic* (App. No. 31315/96), 25 April 2000.

³⁰³ ECtHR, Judgment, *B. v. Austria* (App. No. 8/1989/168/224), 23 February 1990 §44; ECtHR, Judgment, *Chraidi v. Germany* (App. No. 65655/01), 26 October 2006 §40; ECtHR, Judgment, *Sopin v. Russia* (App. No. 57319/10), 18 December 2012 §41.

³⁰⁴ ECtHR, Judgment, *Stögmüller v. Austria* (App. No. 1602/62), 10 November 1969 §15.

³⁰⁵ HRC, *Van Alphen v. The Netherlands* (Comm. No. 305/1988), CCPR/C/39/D/305/1988, 23 July 1990 §5.8; ECtHR, Judgment, *Letellier v. France* (App. No. 12369/86), 26 June 1991 §39; HRC, *W.B.E. v. The Netherlands* (Comm. No. 432/1990), CCPR/C/46/D/432/1990, 23 October 1992 §6.3; HRC, *Hill v. Spain* (Comm. No. 526/1993), CCPR/C/59/D/526/1993, 2 April 1997 §12.3; HRC, *Morais v. Angola* (Comm. No. 1128/2002), CCPR/C/83/D/1128/2002, 25 March 2005 §6.1; HRC, *A. Smantser v. Belarus* (Comm. No. 1178/2003), CCPR/C/94/D/1178/2003, 23 October 2008 §10.3.

³⁰⁶ ECtHR, Judgment, *Letellier v. France* (App. No. 12369/86), 26 June 1991 §39; ECtHR, *Clooth v. Belgium* (App. No. 49/1990/240/311), 27 November 1991 §43; ECtHR, Judgment, *I.A. v. France* (App. No. 1/1998/904/1116),

3.4.4. Permanent justification of these conditions and length of detention

States have to demonstrate that detention is justified to counter the dangers that the accused would present if released and that these risks could not be suppressed by alternative measures. Therefore, to justify the necessity of the detention, states need to explain their decisions.³⁰⁸ They have to ‘show that there are “relevant and sufficient” reasons to justify his or her continued detention’.³⁰⁹ According to the HRC, the lack of motivation would amount to an arbitrary detention.³¹⁰ It stems from this obligation of motivation that the burden of proof of the fulfilment of the conditions for detention rests on the prosecuting authorities. Indeed, according to the ECtHR, the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release.³¹¹ It noted that ‘shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases’.³¹²

After a certain lapse of time, states do not only have to demonstrate relevant and sufficient grounds to maintain the detention but also ‘to display “special diligence” in the conduct of the proceedings’ to avoid undue delay.³¹³ There is no indication in the conventions about what

23 September 1998 §110; ECtHR, Judgment, Mamedova v. Russia (App. No. 7064/05), 1 June 2006 §79.

³⁰⁷ IACmHR, Bronstein and Al. v. Argentina (Case No. 11.205), 11 March 1997 §35.

³⁰⁸ IACtHR, Judgment, Yvon Neptune v. Haiti, 6 May 2008 §98; ECtHR, Judgment, Smirnova v. Russia (App. Nos. 46133/99 and 48183/99), 24 July 2003 §73.

³⁰⁹ IACmHR, Giménez v. Argentina (Case No. 11.245), 1 March 1996 §83; ECtHR, Judgment, Neumeister v. Austria (App. No. 1936/63), 27 June 1968 §4; ECtHR, Castravet v. Moldavia (App. No. 23393/05), 13 March 2007 §30; ECtHR, Judgment, Sopin v. Russia (App. No. 57319/10), 18 December 2012 §36.

³¹⁰ HRC, Morais v. Angola (Comm. No. 1128/2002), CCPR/C/83/D/1128/2002, 25 March 2005 §3.1; Fairlie (n9) 1146.

³¹¹ ECtHR, Judgment, Bykov v. Russia (App. No. 4378/02), 10 March 2009 §64.

³¹² ECtHR, Judgment, Ilijkov v. Bulgaria (App. No. 33977/96), 26 July 2001 §85; ECtHR, Judgment, Sopin v. Russia (App. No. 57319/10), 18 December 2012 §37.

³¹³ IACmHR, Giménez v. Argentina (Case No. 11.245), 1 March 1996 §83; ECtHR, Judgment, B. v. Austria (App. No. 8/1989/168/224), 23 February 1990 §42; ECtHR, Judgment, Letellier v. France (App. No. 12369/86), 26 June 1991 §35; ECtHR, Judgment, Ilijkov v. Bulgaria (App. No. 33977/96), 26 July 2001 §77; ECtHR, Judgment, Chraid v. Germany (App. No. 65655/01), 26 October 2006 §36; ECtHR, Judgment, Bykov v. Russia (App. No. 4378/02), 10 March 2009 §64.

would constitute ‘a reasonable time’ or ‘undue delay’.³¹⁴ Nonetheless, the HRC, the ECtHR and the IACtHR link the reasonable duration with this criterion of ‘special diligence’.³¹⁵ According to the ECtHR, a detention is prolonged beyond a reasonable time ‘when (and to the extent that) the investigation and trial are conducted less expeditiously than is possible consistently with the proper administration of justice or when, alternatively, there is no good reason in the public interest (e.g. that the accused might escape) to continue it any further pending trial’.³¹⁶ The HRC, the ECtHR, the IACtHR and the IACmHR recognize three factors to assess the special diligence: the complexity of the proceedings, the behaviour of the accused and the behaviour of the national authorities.³¹⁷ For all human rights instruments, the sanction of the violation of this requirement of due diligence is the release of the accused.³¹⁸ This requirement of special diligence is built on the assumption that detention on remand should be exceptional and therefore of the shortest possible duration.

It stems from these considerations that the right to liberty, as internationally recognized, requires the decisions of detention to be motivated on the basis of the elements brought by the prosecuting authorities and the procedures to be conducted with special diligence and to provide for the release of the accused in case of lack of respect of these requirements.

³¹⁴ Macovei (n10) 35.

³¹⁵ IACmHR, Giménez v. Argentina (Case No. 11.245), 1 March 1996 §83; ECtHR, Judgment, B. v. Austria (App. No. 8/1989/168/224), 23 February 1990 §42; ECtHR, Judgment, Letellier v. France (App. No. 12369/86), 26 June 1991 §35; ECtHR, Judgment, Ilijkov v. Bulgaria (App. No. 33977/96), 26 July 2001 §77; ECtHR, Judgment, Chraidi v. Germany (App. No. 65655/01), 26 October 2006 §36; ECtHR, Judgment, Bykov v. Russia (App. No. 4378/02), 10 March 2009 §64; HRC, Eligio Cedeno v. Bolivarian Republic of Venezuela (Comm. No. 1940/2010), CCPR/C/106/D/1940/2010, 4 December 2012.

³¹⁶ D. J. Harris, ‘Recent Cases on Pre-Trial Detention and Delay in Criminal Proceedings in the European Court of Human Rights’ (1970)44 *British Yearbook of International Law* 92.

³¹⁷ HRC, Eligio Cedeno v. Bolivarian Republic of Venezuela (Comm. No. 1940/2010), CCPR/C/106/D/1940/2010, 4 December 2012; IACtHR, Judgment, Bayarri v. Argentina, 30 October 2008 §107; IACtHR, Judgment, Heliodoro Portugal v. Panama, 12 August 2008 §149; IACmHR, Giménez v. Argentina (Case No. 11.245), 1 March 1996 §103; AfCHPR, Article 19 v. Eritrea (Comm. No. 275/2003), 16-30 May 2007 §97; Doran (n9) 717; Doswald-Beck (n273) 293; Trechsel (n235) 167-169; W. Schomburg, ‘Development of Human Rights before International Criminal Tribunals: A European Perspective’ available at hrcak.srce.hr/file/129734 (last accessed 21 March 2015) 909-938.

³¹⁸ Article 9§3 of the ICCPR, Article 5§3 of ECHR, Article 7 §5 of AmCHR;

If the AfCHPR does not expressly recognize it, a subsequent resolution issued by the African Commission interpreted Article 7 of the AfCHPR to require that an accused be ‘tried within a reasonable time or be released’.

3.4.5. Conclusion: a *ius commune*?

It can be concluded from this analysis that the right to liberty, as internationally recognized, admits the possibility to detain someone who has allegedly committed an offence but requires it to be provided for by law and to be strictly necessary since the presumption is in favour of release. The necessity of the detention is assessed in light of potential alternative measures and in light of a potential risk of flight, of prejudicing the administration of justice and of committing new offences. These grounds need to be expressly demonstrated by the detaining authorities. In addition, these authorities must ensure a procedure to control automatically and regularly the necessity of the detention. This control has to be exercised promptly by an independent authority with the power to order the release of the detainee. Finally, the procedure has to be conducted with special diligence or the accused would have to be released.

4. Compliance of the ICC regime with this right to liberty

As explained above, Article 21(1)(a) of the ICC Statute, in combination with its third paragraph, requires that, first, the judges should determine the ICC provisions relevant to the detention on remand and then they should interpret and apply them in conformity with the right to liberty. This analysis starts thus by examining whether the Statute is itself in conformity with this right before assessing whether the judges interpret and apply these provisions correctly. This analysis is also important in order to determine whether the interim release regime has lacunae in order to see if recourses have to be made to the other sources listed in Article 21(1).

4.1. Examination of the Statute

4.1.1. Human rights listed in the Statute

The first thing to note is that no reference to the right to liberty is made in the ICC instruments. There is no provision equivalent to Article 9 of the ICCPR or Article 5 of the ECHR whereas both the fair trial guarantees and the presumption of innocence benefit from a specific recognition in the Statute.³¹⁹ It must be noted that the presumption of innocence is

³¹⁹ Presumption of innocence : art. 66 of the ICC Statute;

Fair trial : art. 67 of the ICC Statute.

presented as a guarantee relevant for the trial only regarding burden of proof issues. Therefore, the ICC regime seems to consider the presumption of innocence rather ‘as a safeguard against mistaken conviction’ than ‘as a safeguard against violation of human rights at all stages of the criminal process’.³²⁰ It is thus doubtful that this article could be seen as an indirect recognition of the right to liberty.³²¹

No explanation was provided regarding the absence of the recognition of this right in the ICC provisions and its potential insertion was not debated during their drafting. A reason could be its absence in the legal instruments of the other international(ized) criminal tribunals. Reacting to this absence, the ‘international expert framework on international criminal procedure law’ pleads in favour of its insertion in the Statutes of the Tribunals because ‘it would serve to demonstrate the tribunals’ strong adherence to this right and also function as a safety net in case there are gaps in the tribunals’ positive law’.³²²

Be that as it may, several components of the right to liberty were inserted directly in the ICC provisions. In addition, the absence of an explicit right to liberty does not necessarily mean that the ICC does not respect it or, as it will be seen, that its regime is not in conformity with it.

4.1.2. Articles 58 and 60 of the ICC Statute

Several provisions concerning detention by the ICC exist in the Rome Statute. This thesis focuses on those regarding the issuance of an arrest warrant by the ICC and the possibility of interim release before the ICC, namely Articles 58 and 60 of the ICC Statute, respectively. It does not examine the regime of detention by a member state while waiting for the case to be transferred to the ICC, which is covered by Article 59 of the ICC Statute.³²³ In fact, the

³²⁰ Kitai (n168) 276.

³²¹ See Part I, section 3.1.

³²² K. de Meester, K. Pitcher, R. Rastan and G. Sluiter, ‘Investigation, Coercive Measures, Arrest, and Surrender’ in G. Sluiter and others (eds.), *International Criminal Procedure. Principles and Rules* (OUP, 2013) 349.

³²³ See M. M. El Zeidy, ‘Critical Thoughts on Article 59(2) of the ICC Statute’ (2006)4 *Journal of International Criminal Justice* 448-465; G. Sluiter, ‘Human rights protection in the ICC pre-trial phase’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 467-474; A. Hartwig, ‘Pre-Trial Detention of the Suspect’ in C. Safferling (ed.), *International Criminal Procedure* (OUP, 2012) 297-298.

procedure varies according to each state and it does not concern the guarantee of the right to the liberty by the ICC as such.

The interpretation and the application of the ICC provisions for each accused will be examined in section 5. Nonetheless, the general interpretations of these provisions are mentioned in the current section.

4.1.2.1. Arrest and detention

At any time after the initiation of an investigation, when the prosecutor has identified a person who allegedly committed crimes within the jurisdiction of the court in a place where a situation was open, he or she can apply to the PTC for the issuance of a warrant of arrest if the arrest appears necessary. The prosecutor can also decide to apply only for the issuance of a summons to appear if such a summons is deemed sufficient to ensure the person's appearance.³²⁴ In contrast with the *ad hoc* tribunals,³²⁵ the ICC rules thus require the prosecutor to seek authorization from a judge before the provisional arrest of a suspect.

The choice between the issuance of an arrest warrant or a summons to appear is in conformity with the right to liberty since, contrary to the *ad hoc* tribunals,³²⁶ Article 58 does not envisage arrest as the only possibility. This choice does not exist when the accused is already detained by national authorities because 'the possibility provided for in the Statute to issue a summons to appear with conditions restricting liberty clearly indicates that the summons is intended to apply only to those individuals who are not already detained'.³²⁷ A summons to appear is also not an option when the state of origin does not cooperate because 'the summons to appear is intended for individuals that are not only personally willing to appear on a voluntary basis but are also in a position to do so'.³²⁸ In both cases, there must be reasonable grounds to

³²⁴ Article 58 of the ICC Statute.

³²⁵ Article 40 bis of the ICTY RPE and of the ICTR RPE.

³²⁶ W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006) 389.

³²⁷ *Harun* Article 58 decision (n128); *Laurent Gbagbo* Article 58 decision (n125).

³²⁸ Warrant of Arrest for Abdallah Banda Abakaer Nourain, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, TCIV, ICC, 11 September 2014 §22 ('*Nourain* arrest warrant').

believe that the person committed a crime within the jurisdiction of the Court. After the confirmation of the charges, the continuing existence of suspicion is simply assumed.³²⁹

For the issuance of an arrest warrant, other conditions are required by Article 58:

The arrest of the person has to appear necessary (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

The AC confirmed that these three conditions are 'in the alternative', and consequently, that the fulfillment of one of them is sufficient to negate the need to address the remaining conditions.³³⁰ These criteria for assessing the necessity of the arrest correspond to those identified by IHRL. The AC stipulated that the appreciation of these criteria 'ought to be made based on the specific circumstances of the case'.³³¹

³²⁹ Decision reviewing the "Decision on the application for the interim release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, TCI, ICC, 9 October 2007 §9; *Ngudjolo* interim release decision of 19 November 2008 (n128) §12; Second Review of the Decision on the conditions of Detention of Germain Katanga, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 12 December 2008 §9.

³³⁰ *Lubanga* interim release judgment of 13 February 2007 (n155) §139.

³³¹ Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014 ('*Mangenda* interim release judgment of 11 July 2014'); Judgment on the appeal of Mr Fidele Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Requete urgente de la Defense sollicitant la mise en liberte provisoire de monsieur Fidele Babala Wandu'", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014 ('*Babala* interim release judgment of 11 July 2014'); Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014 ('*Kilolo* interim release judgment of 11 July 2014').

The use of the word ‘necessary’ implies that the choice for an arrest or for a summons to appear is supposed to be made in light of the fact that ‘pre-trial detention is not the general rule, but (...) is the exception, and shall only be resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) of the Statute are met’.³³² The arrest needs to ‘appear’ necessary. Difficulties arise with this word ‘appears’ since the ICC provisions offer no further guidance on when an arrest appears necessary. The AC interprets this term as referring to the mere possibility of a ground for detention being realized. For example, ‘in relation to the apparent necessity of arrest and, in this context, the continued detention of the suspect’, the AC noted that ‘the question revolves around the possibility, not the inevitability, of a future occurrence’,³³³ because the risk of witness interference³³⁴ or the risk of flight³³⁵ necessarily involves an element of prediction. Contrary to the *ad hoc* tribunal, ‘the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention lies with the Prosecution’.³³⁶

This necessity should be justified during the whole proceedings or the accused should be provisionally released.³³⁷ Contrary to the *ad hoc* tribunals, Article 60 also stipulates that release can be granted in case of detention for an unreasonable period prior to trial due to inexcusable delay by the prosecutor. The detention taken into account is that which is part of ‘the process of bringing [the accused] to justice for the crimes that form the subject-matter of the proceedings before the Court’,³³⁸ so that prior detention for other offences is not taken into consideration. The AC expressly stated that the sanction for this inexcusable delay was the release of the detainee ‘even if a detainee is appropriately detained’.³³⁹ Nonetheless, Article 60(4) does not

³³² *Katanga* interim release decision of 18 March 2008 (n122); Second Decision on Bosco Ntaganda’s Interim Release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 17 March 2014 §24 (‘*Ntaganda* interim release decision of 17 March 2014’).

³³³ Decision on the ‘defence request for interim release’, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, PTCI, ICC, 19 May 2011 §39 (‘*Mbarushimana* interim release decision of 19 May 2011’).

³³⁴ Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 27 September 2011 (‘*Bemba* interim release decision of 27 September 2011’).

³³⁵ *Mbarushimana* interim release decision of 19 May 2011 (n333) §40.

³³⁶ *Katanga* interim release decision of 18 March 2008 (n122).

³³⁷ Article 60 of the ICC Statute.

³³⁸ *Lubanga* interim release judgment of 13 February 2007 (n155) §121.

³³⁹ *Lubanga* interim release judgment of 13 February 2007 (n155) §120.

require this sanction to be automatic since it only stipulates that ‘the Court shall consider releasing the person, with or without conditions’.

The AC recognizes similar criteria as those developed by IHRL to assess the reasonableness of the duration of the detention: the complexity of the proceedings and distinct merits of the case.³⁴⁰ Contrary to the ICC regime, IHRL does not make the release depend on an inexcusable delay by the prosecution.³⁴¹ Indeed, it does not change anything for the detainee who is responsible for the delay.³⁴² Nonetheless, PTCII stated that

the fact that the duration of the detention of the Suspects is not due to the Prosecutor’s inexcusable delay does not relieve the Chamber of its ‘distinct and independent obligation ... to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of the Statute’, which obligation is a corollary of the fundamental right of an accused to a fair and expeditious trial.³⁴³

The AC confirmed that reasoning stating that, despite the terms of Article 60(4) of the ICC Statute being unequivocal, ‘a Chamber may also determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, in its decision pursuant to article 60(2) of the Statute’ but that ‘this determination requires finding that the condition under article 58(1)(a) is met and balancing the risks under article 58(1)(b) of the Statute that are found to be met against the duration of detention, “taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole”’.³⁴⁴

³⁴⁰ *Lubanga* interim release judgment of 13 February 2007 (n155) §123.

³⁴¹ Sluiter (n323) 464.

³⁴² Doran (n9) 734.

³⁴³ Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, AC, ICC, 21 October 2014 (‘*Bemba’s close aids* interim release decision of 21 October 2014’).

³⁴⁴ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled “Decision on ‘Mr Bemba’s Request for Provisional Release’”, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, AC, ICC, 29 May 2015 §23 (‘*Bemba’s close aids* interim release judgment of 29 May 2015’).

During the appeal proceedings, Article 81 of the ICC Statute states that the detention should be the rule except in a case where the convicted has already been detained longer than his sentence.³⁴⁵ In case of acquittal at first instance, it provides for the release save in exceptional circumstances and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal.

Conditions may be added to the release. The examination of these conditions by the judges is discretionary and their imposition is thus subject to the will of the judges. Conditional release is possible in two situations:

- (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and
- (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release.³⁴⁶

The AC held that, in granting conditional release, it was ‘necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which [the accused] would be released and whether that State would be able to enforce the conditions imposed by the Court’,³⁴⁷ since release was only possible if specific conditions were imposed.

³⁴⁵ Art. 81 of the ICC Statute : 3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

³⁴⁶ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on applications for provisional release”, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 12 September 2011 §55.

³⁴⁷ 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,

However, the AC specified that ‘if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber’.³⁴⁸ It added that, ‘depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State’s observations are insufficient to enable the Chamber to make an informed decision’.³⁴⁹ The AC confirmed later this decision by stating that:

a Chamber’s obligations to specify conditions and, if necessary, seek additional information regarding conditions of release was only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the Chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.³⁵⁰

Rule 119 lists non-exhaustively the following conditions:

- (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;

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 2 December 2009 §2 (*Bemba* interim release judgment of 2 December 2009).

³⁴⁸ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on applications for provisional release”, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 19 August 2011 §1 (*Bemba* interim release judgment of 19 August 2011); Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 15 December 2011 (*Bemba* interim release judgment of 15 December 2011).

³⁴⁹ *Bemba* interim release judgment of 19 August 2011 (n348) §2; *Bemba* interim release judgment of 15 December 2011 (n348).

³⁵⁰ *Bemba* interim release judgment of 15 December 2011 (n348).

- (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.

It stems from these considerations that, regarding arrest and detention, the regime of provisional release seems to be in conformity with the right to liberty as defined in section 3. On the one hand, the possibility of interim release is expressly stated in the Statute. On the other hand, the need to demonstrate the necessity of the arrest and the possibility of conditional release – with the nuance that the examination of the relevance of this possibility is amenable to the discretionary power of the judge – imply the exceptional character of the detention and an obligation for justification. In addition, the grounds for detention, namely the suspicion criterion, the risk of flight, the risk of prejudice to the administration of justice and the risk of committing new offences, correspond to those identified in section 3.4.3. The sanction of release in case of unreasonably long detention confirms that the case has to be conducted with special diligence.

4.1.2.2. Procedure of control

The person subject to a warrant of arrest may apply for interim release in the custodial state pending surrender,³⁵¹ or before the PTC.³⁵² The controlling authorities being the PTC, the control is thus done by a judge who should therefore be considered as independent and thus meeting the conditions of IHRL. A decision on interim release may be appealed by either party within five days.³⁵³ The AC ‘will not review the findings of the (...) Chamber de novo, instead it will intervene in the findings of the (...) Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision’.³⁵⁴ In determining whether the

³⁵¹ Article 59 of the Rome Statute. As explained *supra*, this thesis is exclusively dealing with this second possibility. See El Zeidy (n323) 448-465; Sluiter (n323) 467-474; Hartwig (n323) 297-298.

³⁵² Article 60 of the ICC Statute.

³⁵³ Article 82 of the ICC Statute.

³⁵⁴ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled “Decision on ‘Defence Urgent Motion for Provisional Release’”, *Prosecutor v. Jean-Pierre*

the TC has misappreciated facts in a decision on interim release, the AC will ‘defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention’.³⁵⁵

If the conditions set forth in Article 58 are met, according to Article 60 of the Rome Statute, ‘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’. The judge is thus supposed to have the power of release. The use of ‘shall’ makes clear that this decision is not of a discretionary nature.³⁵⁶ It must be noted that this use of ‘shall’ marks a huge difference as compared with the *ad hoc* tribunals where the expression ‘may’ was used, implying a very broad power of discretion for the judges.³⁵⁷

It follows from the terms of Article 60(1) that the first review of detention will only be triggered by an application of the accused.³⁵⁸ Once the first application is made, Article 60(3) stipulates that ‘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’. The RPE specify that ‘periodically’ means at least every 120 days.³⁵⁹ This automatic review does not preclude the defence from its ‘right to submit its application at any time, no matter the proximity between the date of the previous review and the date of filing a new application’,³⁶⁰ but, in that case, the Chamber may verify if it is appropriate to conduct this review.³⁶¹ If so, the 120-day period starts running anew from the date of the issuance of this decision.³⁶² This regular control is in conformity with IHRL. Nonetheless, the review becomes

Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 20 May 2015 §17 (‘*Bemba* interim release judgment of 20 May 2015’).

³⁵⁵ *Bemba* interim release judgment of 20 May 2015 (n354) §18.

³⁵⁶ *Lubanga* interim release judgment of 13 February 2007 (n155) §134.

³⁵⁷ Davidson (n8) 58-59; S. Starygin, ‘Judicial Discretion in ECCC Decisions on Pre-trial Detention against the Backdrop of the Case-law of the International Criminal Tribunals’ (2011)11(2) *International Criminal Law Review* 321-322.

³⁵⁸ *Lubanga* interim release judgment of 13 February 2007 (n155) §120.

³⁵⁹ Rule 118 of the RPE.

³⁶⁰ *Bemba* interim release decision of 14 April 2009 (n57) §31-32.

³⁶¹ *Bemba* interim release decision of 14 April 2009 (n57) §31-32.

³⁶² *Bemba* interim release decision of 14 April 2009 (n57) §31-32.

automatic only once triggered by an application. This may seem in contradiction with IHRL but it may be explained by the fact that the first control of the detention is supposed to be done by the state that arrested the accused.³⁶³ For this reason, the requirement of promptness needs to be verified at the level of the arresting state. Even if the accused never applies for interim release, the Chamber may also conduct a *proprio motu* review of the detention despite the fact that it is not expressly provided for by the Statute or the Rules. The Chamber granted itself this power because ‘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”’, so that this power ‘is a necessary tool to properly perform its functions as the ultimate guarantor of the rights of the Defence’.³⁶⁴

It must be noted that, if Article 60 only refers to the PTC, TCIII held that ‘under Article 61(11) of the Statute, the [TC] “may exercise any function of the [PTC] that is relevant and capable of application” in the trial proceedings’, and considered it ‘appropriate, in fairness to the accused, to review his detention under Articles 58(1) and 60 of the Statute and Rule 118(2) of the Rules during the entirety of the pre-trial proceedings before the Court’.³⁶⁵ In addition, even if Article 60, by its terms, concerns only the period prior to the commencement of trial, it was ruled that ‘the commencement of trial does not extinguish the accused’s right to request that the Chamber review its previous ruling(s) on detention’,³⁶⁶ but that it extinguishes the automatic review required every 120 days.

³⁶³ See Article 59 of the ICC Statute.

³⁶⁴ *Katanga* interim release decision of 18 March 2008 (n122).

³⁶⁵ Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 28 July 2010 §30.

³⁶⁶ *Bemba* interim release decision of 16 August 2011 (n171) §46. The Chamber comes to this conclusion because: ‘45. Both Article 60(3) and Rule 118(2) provide that the Pre-Trial Chamber may review its ruling on the release or detention of the person “at any time on the request of the Prosecutor or the person” (emphasis added). Article 61(11) of the Statute provides that the Trial Chamber “may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in th[e trial] proceedings”. 46. Because Article 60(3) and Rule 118(2) employ the words “at any time” and because Article 61(11)’s grant of authority to the Trial Chamber does not specifically exclude the review of previous detention rulings, it follows that Article 60(3) of the Statute permits (i) the accused to apply for provisional release during trial; and (ii) the Trial Chamber to consider such an application when made.’

If the first review provided for by Article 60(1) controls whether the conditions set forth in Article 58 are met, Article 60(3) stipulates that the subsequent reviews may lead to a modification of the previous ruling only if the Chamber ‘is satisfied that changed circumstances so require’. This requirement of ‘changed circumstances’ ‘imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary’.³⁶⁷ It lies on the prosecution to ‘show that there has been no change in those circumstances’³⁶⁸. If ‘the [PTC or TC] finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention’.³⁶⁹ It must be noted that the ICC judge examines whether there was a change of circumstances for the grounds of detention under article 58(1)(b); however, the judge does not examine whether these change of circumstances include the fact that the person did not commit a crime within the jurisdiction of the Court in the first place.³⁷⁰

Before exercising its control of the detention of an accused, Regulation 51 requires that the Chamber ‘shall seek observations from the host State and from the State to which the person seeks to be released’.³⁷¹

In addition, Article 47 of the Headquarters Agreement of the ICC³⁷² stipulates that it is the duty of the host state to facilitate the transfer and the departure of the person released. The Agreement does not, however, provide for the possibility of release in the Netherlands.

Furthermore, according to Rule 119 (3) of the RPE, before imposing or amending any conditions restricting the liberty of a person whom the Chamber is considering releasing from

³⁶⁷ *Bemba* interim release judgment of 2 December 2009 (n347) §1.

³⁶⁸ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 19 November 2010 §51 (*Bemba* interim release judgment of 19 November 2010).

³⁶⁹ Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 12 March 2013.

³⁷⁰ Decision on the “Defence Request for the Interim Release of Dominic Ongwen”, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, PTCII, ICC, 27 November 2015 §§13-14.

³⁷¹ Regulations of the Court, ICC-BD/01-01-04, 17-28 May 2004.

³⁷² Headquarters Agreement Between the International Criminal Court and the Host State, ICC – BD/04-01-08, 1st March 2008

custody, the PTC is required to seek the views of, among others, ‘victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed’. IHRL is silent as to whether it is fair or not for the victims to be heard regarding the freedom of a suspect. The fairness of this intervention is beyond the scope of this study and is related to the more general debate regarding the principle of equality of arms, namely whether this principle is respected when an accused has to face two opponents, the prosecution and the victims.³⁷³ So far, the judges have never sustained an argument against the release of an accused that was only raised by the victims and not also by the prosecution.

It stems from these considerations that the judicial procedure meets the requirements of the right to liberty as defined before. In fact, it is conducted by a judge, and therefore by someone independent, who is supposed to have the power of release. If admittedly the first review depends on the application of the accused and is thus not automatic, the ICC arrogated itself the power to review it *proprio motu*. The control of the detention then happens regularly and it rests on the prosecution to demonstrate that the detention is still necessary.

4.2. Conclusion

This analysis demonstrates that the regime of interim release appears to fulfil the requirement of the right to liberty identified in section 3 and that it does not suffer any lacunae. Consequently, the ICC would indirectly be bound by the right to liberty due to a combination of Article 21(1)(a) and 21(3). It means that, while ruling on interim release requests, its judges would need to apply and interpret this regime in conformity with this right as long as it is internationally recognized. It also means that this right of the accused ought to be taken into account by the registry in its role of judicial support and of responsible of external relations and the presidency in its role of the work of the registry and of maintaining relations with states and other entities. The role of the registry and of the presidency to ensure the respect of liberty is not without consequences as it will be demonstrated in part II.

³⁷³ See M. Damaska, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’ (2010-2011)36 North Carolina journal of international law and commercial regulation 373-374; Davidson (n8) 27; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 64-66.

It seems thus that, even if the right to liberty is not explicitly expressed in the ICC provisions, the drafters of the ICC rules indirectly paid attention to it. Nonetheless, the rare declarations related to detention in the *travaux préparatoires* demonstrate that the need to respect the right to liberty did not seem obvious for everyone.³⁷⁴ For instance, the delegation from Hungary clearly stated that ‘we have doubts as to the advisability of allowing perpetrators of crimes as grave as those regulated by the statute to avoid custody in return for bail once prior arrest has been made’ and that ‘it is especially worth considering whether this opportunity given to the defendant would not endanger the success of the trial’.³⁷⁵ For the Nordic countries, ‘such procuring of the release of a charged individual is a procedure which most likely would not be realistic for this tribunal, considering the magnitude of the crimes in question’.³⁷⁶ Similarly, for the United States, if it was normal to provide for the possibility of interim release, ‘given the nature of the offences the court may hear, consideration of both the risk of flight and of danger would seem appropriate and would frequently result in a decision not to grant release’.³⁷⁷

On the contrary, the International Law Commission in its draft statute for the ICC ‘did not see fit to depart from the principle that liberty should be the rule, despite the gravity of the

³⁷⁴ Apparently, according to Judge Wald, it was not obvious for the ICTY either. Indeed, ‘when the judges first considered pre-trial release, some thought there should be no mention of it in the Rules at all. They anticipated no immediate problem with bringing suspects to trial quickly. Also, some judges thought that war crimes were akin to murder or other crimes carrying sentences of death or life imprisonment, crimes for which most judicial systems would not allow bail anyway. But judges who wanted the Tribunal’s rules to be in conformity with the European Convention on Human Rights, as well as non-governmental advocacy groups like the Lawyers Committee on Human Rights and Amnesty International, urged that the possibility of release be incorporated into the Rules.’ (P. Wald and J. Martinez, ‘Provisional Release at the ICTY : a Work in Progress’ in R. May and others (eds.) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Brill, 2000) 232-233).

³⁷⁵ ICC- A/CN.4/458 and Add.1-8 Observations of Governments on the report of the Working Group on a draft statute for an international criminal court. Extract from the Yearbook of the International Law Commission:- 1994 vol. II(1) 46 §38.

³⁷⁶ ICC- A/CN.4/458 and Add.1-8 Observations of Governments on the report of the Working Group on a draft statute for an international criminal court. Extract from the Yearbook of the International Law Commission:- 1994 vol. II(1) 64 §38.

³⁷⁷ ICC- A/CN.4/458 and Add.1-8 Observations of Governments on the report of the Working Group on a draft statute for an international criminal court. Extract from the Yearbook of the International Law Commission:- 1994 vol. II(1) 87 §75.

crimes falling within the competence of the future court'.³⁷⁸ If its proposition was not sustained, there was though clearly an improvement between the first draft text of Article 60 as proposed in 1997 and the actual one. In 1997, the proposition was that 'the person shall be detained unless the [PTC] is satisfied that the person, if released, will appear for trial, will not obstruct or endanger the investigation or the Court's proceedings[, or will not continue to commit crimes within the jurisdiction of the Court]'.³⁷⁹ There had thus been an improvement in light of the right to liberty since the expression 'unless' demonstrates a preference for detention whereas the actual expression 'if it is satisfied that' is more orientated in favour of release.

Be that as it may, the reality is that so far none of the accused charged with international crimes has been granted interim release despite the recurring statement that 'pre-trial detention is not the general rule, but it is the exception, and shall only be resorted to when the [PTC] is satisfied that the conditions set forth in article 58 (1) of the Statute are met'.³⁸⁰ The interpretation in practice of the conditions of Article 58 thus needs to be examined for us to be able to conclude positively or negatively on the ICC's respect for the right to liberty.

5. Compliance of the ICC practice with the right to liberty

5.1. Case law regarding interim release

The case law of the ICC regarding interim release is examined briefly in this chapter. Only the elements relevant for this analysis are mentioned.

³⁷⁸ A-M. La Rosa, 'A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial' (1997) 321 *International Review of the Red Cross* 5; ILC, 'Draft statute of an international criminal court', Forty-Six session (1994) UN Doc A/49/10 §§23-209; ILC (n59) §25.

³⁷⁹ M. C. Bassiouni, *The Legislative History of the International Criminal Court Statute* (Transnational Publishers, 2005) 434.

³⁸⁰ *Katanga* interim release decision of 18 March 2008 (n122); *Ntaganda* interim release decision of 17 March 2014 (n332) §24.

5.1.1. The Democratic Republic Congo cases

5.1.1.1. The Lubanga case

On 10 February 2006, PTCI granted the prosecution's application to issue an arrest warrant against Thomas Lubanga, president of the UPC (*Union des Patriotes Congolais*).³⁸¹ The reasons were the following: his concerns expressed publicly about the investigation of the situation in Democratic Republic of the Congo (DRC) and the prospect of being prosecuted by the ICC; his national and international contacts that could allow him to attempt at least to evade an appearance before the Court for trial, and his interference with witnesses during previous trials. He was transferred to the ICC on 16 March 2006.

His applications for interim release were always rejected, the judges mostly sustaining the same reasons as those stated in the arrest warrant and adding the gravity of the crimes, his knowledge of the names of the witnesses and the volatile character of the situation in DRC. The reasonableness of the length of the detention was always assessed but considered reasonable given the complexity of the proceedings and the fact that the case was not dormant.³⁸²

It must be noted that, following his first application for interim release, the Court ordered Lubanga, pursuant to regulation 51 of the Regulations of the Court, to indicate the state to which he sought to be released.³⁸³ Lubanga then expressed the wish to be freed in Belgium or in Great

³⁸¹ *Lubanga* arrest warrant (n123) §§100-102.

³⁸² Order on the application for release, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 29 May 2006; *Lubanga* interim release decision of 18 October 2006 (n128); *Lubanga* interim release judgment of 13 February 2007 (n155); Review of the "Decision on the application for the interim release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, 14 February 2007; Second review of the "Decision on the application for the interim release of Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 11 June 2007; Decision reviewing the "Decision on the application for the interim release of Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, TCI, ICC, 9 October 2007; Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118-2, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, TCI, ICC, 31 January 2008; Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, TCI, ICC, 29 May 2008.

³⁸³ Order on the application for release, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 29 May 2006.

Britain.³⁸⁴ Nonetheless, in the end, the observations of these states were not required by the judge.

The trial of Lubanga started on 26 January 2009. He never applied again for interim release. On 14 March 2012, he was convicted of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003.³⁸⁵ On 10 July 2012, he was sentenced to a total period of 14 years of imprisonment.

5.1.1.2. The Katanga case

Germain Katanga was the commander of the *Force de résistance patriotique en Ituri* (Patriotic Resistance Force in Ituri, FRPI). On 6 July 2007, PTCI granted the prosecution's request to issue a warrant of arrest for him.³⁸⁶ It considered that his arrest was necessary because he was already detained and because, according to the prosecution's application, he also had the means to obstruct or endanger the investigation. In this regard, the prosecution had indicated that he had the opportunity, *inter alia*, to influence potential witnesses or to arrange false testimonies. The prosecution also reported that investigations by MONUC into the crimes allegedly committed had already been obstructed by members of the FRPI. He was transferred to the ICC on 17 October 2007.

On 18 March 2008, in absence of any application from Katanga, PTCI decided that the circumstances warranted it carrying out a *proprio motu* review to determine whether the conditions for the pre-trial detention of Katanga continued to be met.³⁸⁷ On 1 April 2008, Katanga's lawyers announced they were instructed by Katanga not to pursue an application for interim release.³⁸⁸

³⁸⁴ Submissions relative to the Order of 29.5.2006, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, PTCI, ICC, 31 May 2006.

³⁸⁵ Judgment, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, TCI, ICC, 14 March 2012.

³⁸⁶ Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, PTCI, ICC, 6 July 2007.

³⁸⁷ *Katanga* interim release decision of 18 March 2008 (n122).

³⁸⁸ Defence observations relative to Germain Katanga's pre-trial detention, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 1 April 2008.

Despite this statement, on 21 April 2008, PTCI examined the legality of his pre-trial detention and found that the circumstances had not changed since the arrest warrant.³⁸⁹ In the following decisions, in addition to the reasons listed in the arrest warrant, the judge insisted on the gravity of the crimes, the knowledge of the names of the witnesses and the volatile character of the situation in DRC. The length of his detention was also considered as reasonable.³⁹⁰ Katanga never applied for interim release during his trial.

It must be noted that, following an invitation by the Court to formulate observations regarding the potential interim release of Katanga, the Netherlands answered, on 27 February 2008, that it was ‘under no obligation to accept the entry into its territory of any person granted interim release by the [ICC]’, and that it would ‘not accept that silence on the part of the Defence as to the State to which the person seeks to be released would, by default, imply a release to the host State’.³⁹¹ On 16 April 2009, the Chamber refused to order the registry to engage in new negotiations with the Netherlands regarding this point of view.³⁹²

³⁸⁹ Decision on the conditions of the pre-trial detention of Germain Katanga, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 21 April 2008.

³⁹⁰ Review of the “decision on the conditions of the pre-trial detention of Germain Katanga”, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 18 August 2008; Second Review of the Decision on the conditions of Detention of Germain Katanga, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 12 December 2008; Troisième examen de la décision sur les conditions du maintien en détention de Germain Katanga, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 16 April 2009 (“Katanga interim release decision of 16 April 2009”); Fourth 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, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 21 July 2009; 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, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 20 November 2009.

³⁹¹ The Netherlands’ observations, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 27 February 2008 (“The Netherlands for Ngudjolo observations of 27 February 2008”).

³⁹² *Katanga* interim release decision of 16 April 2009 (n390).

Katanga was found guilty on 7 March 2014 of murder, attacking a civilian population, destruction of property and pillaging³⁹³ and was sentenced on 23 May 2014 to 12 years imprisonment.³⁹⁴

5.1.1.3. The Ngudjolo case

Mathieu Ngudjolo Chui was the former leader of the *Front des nationalistes et intégrationnistes*, (National Integrationist Front, FNI). PTCI issued an arrest warrant against him on 6 July 2007 because, ‘by virtue of his current position as a Colonel of the Forces Armées de la République Démocratique du Congo (FARDC) in Bunia and as the advisor to the Operational Zone Commander in the Ituri district, Mathieu Ngudjolo is able to make use of “the services” of former FNI and FRPI members who have integrated into the ranks of FARDC, and that he might use his connections and the means at his disposal in order to flee’,³⁹⁵ and because ‘the men under Mathieu Ngudjolo’s control have threatened witnesses in the past, both with regard to the ongoing investigation by the Prosecutor of Court and to a domestic proceeding before the national Congolese judicial authorities’.³⁹⁶ He was arrested on 6 February 2008.

As for Lubanga and Katanga, the judges upheld the same grounds as those in the arrest warrant for refusing interim release in Belgium, in France or in the United Kingdom (UK). Likewise, to justify their decisions, they referred to the gravity of the crimes, the knowledge of the names of the witnesses and the volatile character of the situation in DRC. The length of his detention was also considered as reasonable.³⁹⁷ It must be noted that Belgium, France, the UK

³⁹³ Jugement rendu en application de l'article 74 du Statut, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, TCII, ICC, 7 March 2014.

³⁹⁴ Décision relative à la peine (article 76 du Statut), *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, TCII, ICC, 23 May 2014.

³⁹⁵ Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, PTCI, ICC, 6 July 2007 §64.

³⁹⁶ Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, PTCI, ICC, 6 July 2007 §67.

³⁹⁷ Decision on the application for interim release of Mathieu Ngudjolo Chui, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 27 March 2008; Review of the decision on the application for interim release of Mathieu Ngudjolo Chui, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 23 July 2008; *Ngudjolo* interim release decision of 19 November 2008 (n128) §13; Third review of the decision on the application

and the Netherlands had refused to accept him on their soil, namely because of the absence of his links with these countries.³⁹⁸

The trial of Katanga and Ngudjolo started on 24 November 2009 and no applications for provisional release were ever filed. Ngudjolo was acquitted and subsequently released on 21 December 2012.³⁹⁹ This acquittal was confirmed by the AC on 7 April 2015.⁴⁰⁰ On 11 May 2015, after the refusal of his asylum application, he was returned to the DRC.⁴⁰¹

5.1.1.4. The Ntaganda case

According to the arrest warrant delivered against him, Bosco Ntaganda is the former alleged deputy chief of the General Staff of the FPLC and the alleged chief of staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu. On 22 August 2006, PTCl issued a warrant of arrest against him,⁴⁰² because he was escaping the criminal proceedings instituted against him in the DRC and was currently fighting and because he could be in a position to obstruct or endanger the investigation by threatening potential witnesses. The

for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 17 March 2009; Fourth review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 10 July 2009 §10; Fifth review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 4 November 2009.

³⁹⁸ Observations of States, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 22, 25, 27, 28 February 2008.

³⁹⁹ Judgment pursuant to article 74 of the Statute, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, TCII, ICC, 18 December 2012.

⁴⁰⁰ Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, AC, ICC, 7 April 2015.

⁴⁰¹ Human Rights Watch, 'First ICC Acquitted Defendant Returned to DR Congo' (11 May 2015), available at <https://www.hrw.org/news/2015/05/11/first-icc-acquitted-defendant-returned-dr-congo> (last accessed 4 January 2016).

⁴⁰² Warrant of arrest, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCl, ICC, 22 August 2006.

warrant of arrest was unsealed on 28 April 2008. PTCI added new counts on 13 July 2012.⁴⁰³ On 22 March 2013, Bosco Ntaganda voluntarily surrendered to the Court.

So far, his applications for interim release have been rejected. In its decision of the 18 November 2013, PTCII, referring to the two first decisions of PTCI, considered the conditions for detention to be fulfilled. It was not convinced by the argument raised by the defence regarding his voluntary surrender since ‘the evidence or material available before the Single Judge suggests that Mr. Ntaganda’s voluntary surrender was prompted by the likelihood of him being killed or by pressure imposed on him by the Rwandan Government’. It also recalled that ‘the charges or counts Mr. Ntaganda is facing are numerous and of such gravity that they might result in an overall lengthy sentence’ and that ‘these two factors if considered together may make it likely that Mr. Ntaganda will abscond, should the opportunity arise’. It also noted that ‘Mr. Ntaganda managed to move around undisturbed since 2006 until the date of his surrender in March 2013, despite the existence of a travel ban’ and that ‘the fact that Mr. Ntaganda is used to the practice of crossing borders to different countries makes it likely that he will attempt to repeat the same practice within the Schengen area’. It added that ‘the available information also suggests that Mr. Ntaganda has the financial means to abscond, if the opportunity arises’. Regarding the risk of obstructing investigation, it argued that, given his local influence and his knowledge of the names of some witnesses, this requirement was fulfilled. PTCII finally concluded that, due to the unwillingness of the Netherlands to accept him, it could not examine the application for conditional release.⁴⁰⁴ In the latter decisions, the absence of change of circumstances was also cited.⁴⁰⁵

⁴⁰³ Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 13 July 2012.

⁴⁰⁴ Decision on the Defence’s Application for Interim Release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 18 November 2013.

⁴⁰⁵ Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled “Decision on the Defence’s Application for Interim Release”, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, AC, ICC, 5 March 2014 §24; *Ntaganda* interim release decision of 17 March 2014 (n332); Third Decision on Bosco Ntaganda’s Interim Release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 17 July 2014; Fourth decision on Mr Ntaganda’s interim release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, TCVI, ICC, 31 October 2014; Fifth decision on Mr Ntaganda’s interim release, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, TCVI, ICC, 26 February 2015.

The charges were confirmed against Ntaganda on 9 June 2015.⁴⁰⁶

5.1.1.5. The Mbarushimana case

Callixte Mbarushimana was the alleged executive secretary of the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FCA, FDLR). At the time of the prosecution’s application to issue an arrest of warrant, he lived in Paris and held a French residency permit valid until 30 December 2013. On 28 September 2010, PTCI granted the prosecution’s application to issue an arrest of warrant against Mbarushimana.⁴⁰⁷ It found his arrest was necessary given his possibility of travelling freely in the Schengen area of the European Union, his international support network that could enable him to flee by providing financial support, his capacity through members of the FDLR to interfere with the prosecutor’s investigation by fostering an atmosphere of intimidation against FDLR victims and ICC witnesses or potential witnesses and his participation in current crimes. He was arrested on 11 October 2010. The arrest warrant was unsealed the same day.

His applications for interim release were subsequently rejected on the basis of the same grounds as the arrest warrant. PTCI also referred to the gravity of the crimes, the disclosure of evidence and to ‘the evidence of Mr Mbarushimana contemplating intimidating witnesses in the German proceedings and the evidence of him having in his possession documents obtained through leakage’.⁴⁰⁸ PTCI also found his detention necessary to prevent him from committing new crimes because of (i) the mode of liability attributed to Mbarushimana, which ‘does not require his physical presence at the scene of the crime’; (ii) the fact that the situation in Eastern DRC, where the FDLR is still active, remained volatile, and (iii) Mbarushimana’s information technology experience and his ability to have internet and telephone access in ways which cannot be easily monitored or controlled. The length of his detention was also considered to be reasonable.⁴⁰⁹ It must be noted that France did not oppose his release on its soil.⁴¹⁰

⁴⁰⁶ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, PTCII, ICC, 9 June 2015.

⁴⁰⁷ Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, PTCI, ICC, 28 September 2010.

⁴⁰⁸ *Mbarushimana* interim release decision of 19 May 2011 (n333) §65.

⁴⁰⁹ See Judgment on the appeal of Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘defence request for interim release’”, *Prosecutor v. Callixte Mbarushimana*, Case No.

On 16 December 2011, PTCI decided to decline to confirm the charges against Mbarushimana so that his release was ordered.⁴¹¹

5.1.1.6. The Mudacumura case

The arrest warrant issued against Sylvestre Mudacumura presents him as the alleged supreme commander of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR). On 13 July 2012, PTCII granted the prosecution's application to issue a warrant of arrest against him because he faced serious charges, allegedly lived in a remote area in the North Kivu Province of the DRC and had access to an international support network which was capable of assisting his evasion from the Court's jurisdiction. Other reasons were the sophisticated means of acquiring information he had at his disposal in the area of the eastern DRC where he was located and the necessity to prevent him from committing new crimes through his control over the FDLR which appeared to remain militarily active in the Kivus after September 2010.⁴¹² He is still on the run.

5.1.2. The Uganda cases

Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen are all said to be senior LRA (Lord's Resistance Army) commanders. On 8 July 2005, PTCII issued arrest warrants against them. It found that their arrests appeared necessary since 'the LRA has been in existence for the past 18 years; and that the LRA commanders are allegedly inclined to launch retaliatory strikes, thus creating a risk for victims and witnesses who have spoken with or provided evidence to the Office of the prosecutor' and since 'there is therefore a likelihood that

ICC-01/04-01/10, AC, ICC, 14 July 2011; Decision on "second defence request for interim release", *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, PTCI, ICC, 28 July 2011; *Mbarushimana* interim release decision of 16 September 2011 (n123).

⁴¹⁰ *Mbarushimana* interim release decision of 19 May 2011 (n333) §31; *Mbarushimana* interim release decision of 16 September 2011 (n123).

⁴¹¹ Decision on the confirmation of charges, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, PTCI, ICC, 16 December 2011.

⁴¹² Decision on the Prosecutor's Application under Article 58, *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, PTCII, ICC, 13 July 2012.

failure to arrest [them] will result in the continuation of crimes of the kind described in the Prosecutor's application'.⁴¹³

On 16 January 2015, Ongwen was surrendered by Central African Republic (CAR) to the ICC. Regarding his first application for interim release, PTCII observed that he 'evaded arrest for more than nine years after the Court's warrant for his arrest, of which he appears to have been aware, was made public on 13 October 2005' and that 'this demonstrates both his ability and willingness to abscond'. PTCII also noted the gravity of the intended charges and the very long prison sentence that he might face in case of conviction, which 'constitutes a strong possible incentive to abscond, increasing the risk of flight'. In addition, PTCII observed a risk of obstructing or endangering the investigation or the court proceedings and a risk of pressure over witnesses. PTCII added that the observations of Belgium were not needed because 'the identified risks exist independently of the question which State Dominic Ongwen is requested to be released to and irrespective of any possible observations from such State'.⁴¹⁴

5.1.3. The Central African Republic cases

5.1.3.1. The Bemba case

Jean-Pierre Bemba Gombo was the leader of the *Mouvement de Libération du Congo* (MLC) considered as having helped the national armed forces of Ange-Félix Patassé, the then president of the CAR in his combat against a rebel movement led by François Bozizé, former Chief-of-Staff of the Central African armed forces. As president of the MLC, Bemba was a politician in the DRC. He was one of the four vice-presidents in the transitional government of the DRC from 17 July 2003 to December 2006. In January 2007, he won a Senate seat. He is considered as one of the richest men in the DRC.

⁴¹³ Warrant of Arrest for Vincent Otti, *Situation in Uganda*, ICC-02/04-01/05, PTCII, ICC, 8 July 2005; Warrant of Arrest for Okot Odhiambo, *Situation in Uganda*, ICC-02/04-01/05, PTCII, ICC, 8 July 2005; Warrant of Arrest for Dominic Ongwen, *Situation in Uganda*, ICC-02/04-01/05, PTCII, ICC, 8 July 2005; Warrant of Arrest for Raska Lukwiya, *Situation in Uganda*, ICC-02/04-01/05, PTCII, ICC, 8 July 2005; Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05, PTCII, ICC, 27 September 2005.

⁴¹⁴ Decision on the "Defence Request for the Interim Release of Dominic Ongwen", *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, PTCII, ICC, 27 November 2015 §16-25.

Bemba was arrested by the Belgian authorities on 24 May 2008 on a sealed arrest warrant issued by the ICC the day before. PTCIII granted the request of the prosecutor because there were reasonable grounds to believe Bemba was responsible for crimes within its jurisdiction committed in CAR and because his arrest appeared necessary to ensure his appearance at trial and to ensure that he did not obstruct or endanger the investigation or the court proceedings.⁴¹⁵ PTCIII agreed with the prosecutor that these risks were demonstrated by the past and present political position of Bemba, by his international contacts, by his financial and professional background and by the availability of his network and financial resources.⁴¹⁶ PTCIII added that many victims and witnesses were destitute and were particularly vulnerable since Bemba could find them easily given their place of residence.⁴¹⁷ PTCIII also concluded that, as president of the MLC, he could still use his power to put pressure on witnesses and that, given his past behaviour, he would do so.⁴¹⁸

In his first application for release, Bemba mentioned his wish to be released in Belgium to stay with his family, or alternatively under the protection of the Portuguese authorities in his residence in Portugal or, as second alternative, in Switzerland.⁴¹⁹ The same grounds referred to in the arrest warrant were still considered relevant to warranting the refusal of his applications. In its first decision, PTCIII added that Bemba did not bring any relevant arguments to overturn its decision regarding the risk of obstruction of the proceedings.⁴²⁰ Given the complexity of the case, the length of his detention was also considered to remain reasonable.⁴²¹ The same conclusion was reached by PTCII on 16 December 2008 and on 14 April 2009.⁴²² In this last decision, it also took into consideration that, according to the observations received from Portugal and Belgium, none of these countries seemed willing to accept him if conditionally released and that they offered no guarantees that would ensure his appearance at trial.⁴²³

⁴¹⁵ *Bemba* Article 58 decision (n128).

⁴¹⁶ *Bemba* Article 58 decision (n128) §87.

⁴¹⁷ *Bemba* Article 58 decision (n128) §88.

⁴¹⁸ *Bemba* Article 58 decision (n128) §89.

⁴¹⁹ Application for interim release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCII, ICC, 23 July 2008.

⁴²⁰ *Bemba* interim release decision of 21 August 2008 (n125) §59.

⁴²¹ *Bemba* interim release decision of 21 August 2008 (n125) §55-59.

⁴²² Decision on application for interim release, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCII, ICC, 16 December 2008; *Bemba* interim release decision of 14 April 2009 (n57) §45.

⁴²³ *Bemba* interim release decision of 14 April 2009 (n57) §48.

Nonetheless, on 4 July 2009, PTCII authorized Bemba's transfer to Belgium for a duration of 24 hours on 8 July 2009 in order to pay respect to his deceased father given the exceptional humanitarian circumstances.⁴²⁴ It must be mentioned that Belgium did not oppose this request, that one condition was 24-hour police surveillance, and that Bemba was responsible for the costs of the entire process.

On 14 August 2009, ruling on the application for interim release of Bemba, PTCII expressed the need to have further observations from the states where Bemba was seeking release, namely Belgium, Portugal, France, Germany, Italy and South Africa, and from the host state, namely the Netherlands, because the implementation of its release decision would depend on the set of conditions to be imposed on Bemba and the state to which he was to be released.⁴²⁵ To reach this conclusion, it examined whether the circumstances had changed and found they had. Despite the fact that Bemba maintained his political and professional position, that he continued to benefit from international contacts and ties and that he still faced a lengthy sentence, he showed good behaviour in detention, did not interfere with the proceedings and fully cooperated while he went to attend his father's funeral. PTCII accepted Bemba's 'bona fide intention to appear at trial' and his statement regarding his political career plans and his promise that he would not set aside those past 'years of sacrifice' and be a fugitive. It also noted his strong family ties.⁴²⁶ It added that it seemed unlikely that his release would endanger witnesses or victims or lead to the obstruction or endangerment of the investigation or the court proceedings because of the absence of concrete evidence presented by the prosecution or by the victims and because of his exemplary behaviour.⁴²⁷ Nonetheless, following the appeal of the prosecution, the AC found that PTCII misappreciated and disregarded relevant facts in ruling that the entirety of factors before it reflected a 'substantial change of circumstances' since the issuance of the Decision of 14 April 2009.⁴²⁸ Bemba was thus not released and his following applications were rejected for absence of change of circumstances.⁴²⁹

⁴²⁴ Decision on the Defence's urgent request concerning Mr. Jean-Pierre Bemba's attendance of his father's funeral, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, PTCII, ICC, 4 July 2009.

⁴²⁵ *Bemba* interim release decision of 14 August 2009 (n124).

⁴²⁶ *Bemba* interim release decision of 14 August 2009 (n124) §§57-69.

⁴²⁷ *Bemba* interim release decision of 14 August 2009 (n124) §§72-76.

⁴²⁸ *Bemba* interim release judgment of 2 December 2009 (n347) §87.

⁴²⁹ Décision relative au réexamen de la détention de Jean-Pierre Bemba Gombo conformément à la Règle 118(2) du Règlement de Procédure et de preuve, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 1 April 2010; Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the

The funeral of Bemba's stepmother was considered as an exceptional circumstance that justified the Chamber exercising its inherent power for humanitarian reasons, pursuant to Article 64 of the Statute.⁴³⁰ His request for release was granted but limited to 24 hours in Belgium under constant surveillance.

On 16 August 2011, TCIII held that the only new circumstance was that a state, whose name was confidential, had agreed to accept Bemba on its territory in case of release.⁴³¹ Nonetheless, the Chamber did not consider this new circumstance as sufficient since the letter of the state and its equally succinct submission conveyed little more than a general willingness to accept the accused into its territory and did not specify which of Rule 119(l)'s conditions it would be able to implement.⁴³² TCIII also denied Bemba's request to travel to the DRC to complete his electoral registration.⁴³³ However, the AC directed the TCIII to reconsider Bemba's request for interim release because 'if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber'.⁴³⁴

Following this decision, TCIII did not, however, look for further information since the concerned state had sent two new letters stating which conditions it was able or willing to impose.⁴³⁵ In answer to those, TCIII first reiterated the four grounds upon which it based its previous decision to conclude that Bemba's detention was necessary to ensure his appearance at trial. These are namely, the final dismissal of the defence's challenge to the admissibility of the case, the commencement of the trial, the gravity of the charges confirmed against the accused, the potential substantial sentence in case of conviction and the financial and material support from which the accused benefits. TCIII was of the opinion that these grounds remained

Rules of Procedure and Evidence, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 28 July 2010.

⁴³⁰ Decision on the defence request for Mr Jean-Pierre Bemba to attend his stepmother's funeral, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 12 January 2011 §13.

⁴³¹ *Bemba* interim release decision of 16 August 2011 (n171) §43.

⁴³² *Bemba* interim release decision of 16 August 2011 (n171) §59.

⁴³³ *Bemba* interim release decision of 16 August 2011 (n171) §72.

⁴³⁴ *Bemba* interim release judgment of 19 August 2011 (n348) §1.

⁴³⁵ *Bemba* interim release decision of 27 September 2011 (n334).

unchanged.⁴³⁶ It added that the accused's trial was ongoing, which created an obligation for him to attend hearings regularly, that the personal undertakings were not sufficient to reverse its reasoning and that it was concerned by the alleged incidents of witness interference from whoever they came.⁴³⁷ It concluded that the proposed provisional release would meaningfully increase the accused's ability to interfere with witnesses or to cause others to do so; and that the measures that the concerned state was willing to implement would not mitigate that risk to an acceptable degree.⁴³⁸ The AC confirmed this decision.⁴³⁹

New letters from the concerned state where Bemba sought release for a recession period were not considered as bringing a change in the circumstances since, if they provided some new details, they did not address the issue of the flight risk or the factors upon which the Chamber's September 2011 Decision was based.⁴⁴⁰ The AC agreed with this view and confirmed that the mentions in the letters that ten police officers would be sufficient to prevent Bemba from absconding was not a change in circumstances.⁴⁴¹

On 5 December 2014, Bemba filed a new request for provisional release. Nonetheless, TCIII found that there were no changed circumstances regarding the risk of flight and that the confirmation of charges in the *case against Bemba, Kilolo, Mangenda, Babala and Arido* demonstrates the risk of interference with the administration of justice. TCIII also refused to consider conditional release because it found no conditions could mitigate these risks so that there were no need to consult with Belgium and Portugal, the two states mentioned by Bemba in his application.⁴⁴² The appeal against this decision was rejected.⁴⁴³

⁴³⁶ *Bemba* interim release decision of 27 September 2011 (n334) §§22-23.

⁴³⁷ *Bemba* interim release decision of 27 September 2011 (n334) §§23-31.

⁴³⁸ *Bemba* interim release decision of 27 September 2011 (n334) §41.

⁴³⁹ *Bemba* interim release judgment of 15 December 2011 (n348).

⁴⁴⁰ Decision on the 'Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo', *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 3 January 2012.

⁴⁴¹ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'", *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, AC, ICC, 5 March 2012.

⁴⁴² Decision on "Defence Urgent Motion for Provisional Release", *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 23 December 2014.

⁴⁴³ *Bemba* interim release judgment of 20 May 2015 (n354).

On 21 March 2016, TCIII declared Bemba guilty of war crimes and crimes against humanity.⁴⁴⁴

5.1.3.2. The case against Bemba, Kilolo, Mangenda, Babala and Arido

On 20 November 2013, warrants of arrest were issued against Bemba, his lawyers, Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo, and two of his close friends, Fidèle Babala Wandu and Narcisse Arido, because they were considered as allegedly criminally responsible for several offences against the administration of justice, including presenting evidence that the party knows to be false or forged to the Court and corruptly influencing a witness to provide false testimony in the *Bemba case*.⁴⁴⁵

It must be noted that, according to Hall, Article 58 ‘does not apply to offences against the administration of justice under article 70’.⁴⁴⁶ He does not provide though any further information about this conclusion whereas Article 58 stipulates that it applies when a crime within the jurisdiction of the court is committed which is the case for the offences against the administration of justice. In any case, this opinion is apparently not shared by the ICC either since the AC explicitly ruled that ‘articles 58 and 60 of the Statute are applicable to offences charged under article 70 of the Statute’.⁴⁴⁷

Arrest warrants were issued against Bemba’s close aids because the gravity of the offences⁴⁴⁸ and their possibility to travel freely and to benefit from Bemba’s network

⁴⁴⁴ Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 21 March 2016.

⁴⁴⁵ Warrants of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 28 November 2013.

⁴⁴⁶ C. K. Hall, ‘Article 58’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1136.

⁴⁴⁷ *Mangenda* interim release judgment of 11 July 2014 (n331) §23; *Babala* interim release judgment of 11 July 2014 (n331) §17; *Kilolo* interim release judgment of 11 July 2014 (n331) §24.

⁴⁴⁸ They were said to be ‘of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake. They may not only threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer, but also ultimately undermine the public trust in the

demonstrated a risk of flight. It was also said that the offences with which they were charged demonstrated a risk to the administration of justice and of committing new offences.⁴⁴⁹

In March 2014, PTCII confirmed the pertinence of these elements for Magenda, Babala and Kilolo. It added, for each of them, that ‘it is difficult to conceive of measures which might effectively counteract the risks associated with the suspect’s communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks’.⁴⁵⁰ Their appeals were rejected.⁴⁵¹

administration of justice and the judiciary. Such seriousness is only enhanced by the fact that this effect is bound to be even more significant and strong when committed by highly educated individuals, particularly when their professional mission is to serve, rather than disrupt, justice.’ (Decision on the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 14 March 2014 §23 (‘Kilolo interim release decision of 14 March 2014’); Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu”, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 14 March 2014 §16 (‘Babala interim release decision of 14 March 2014’); Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 17 March 2014 §25 (‘Mangenda interim release decision of 17 March 2014’)).

It must be noted that the fact that the single judge nearly equated the crimes of article 70 with the core crimes was criticized by the Appeals Chamber. Nonetheless, the Appeals Chamber found that the single judge made a good motivation for its statement. (*Mangenda* interim release judgment of 11 July 2014 (n331) §1; *Babala* interim release judgment of 11 July 2014 (n331) §1; *Kilolo* interim release judgment of 11 July 2014 (n331) §1). For Judges Usacka and Kourula, this equivalence should have led to a reversal of the decision since ‘this error of the Pre-Trial Chamber taints the entire Impugned Decision. (See their dissenting opinions).

⁴⁴⁹ Warrants of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 20 November 2013 §§21-23.

⁴⁵⁰ *Kilolo* interim release decision of 14 March 2014 (n448) §43; *Babala* interim release decision of 14 March 2014 (n448) §36; *Mangenda* interim release decision of 17 March 2014 (n448) §41.

⁴⁵¹ *Mangenda* interim release judgment of 11 July 2014 (n331); *Babala* interim release judgment of 11 July 2014 (n331); *Kilolo* interim release judgment of 11 July 2014 (n331).

It is important to note that, regarding Magenda, neither the Netherlands nor the UK was willing to accept him on its soil for a potential interim release.⁴⁵² Regarding Kilolo,

[t]he Belgian authorities [his state of nationality] took a very cautious approach, noting inter alia the following: a. neither the Statute, nor the Rules provide for ‘une solution adequate en cas de nécessité d’une réponse à donner dans l’extrême urgence à une situation de violation flagrante des conditions de la libération provisoire’; b. the absence of a framework agreement between the Court and Belgium as to conditional release might make it impossible for the Belgian authorities to implement some of the measures which might be ordered by the Chamber, such as ‘la mise sous écoute de l’intéressé’.⁴⁵³

The Congolese authorities, regarding their national Balaba, stated as follows:

Au cas où, sur décision de la Cour, l’intéressé rentrait en République Démocratique du Congo, il ne sera pas aisé pour les autorités de l’empêcher de poursuivre la commission des faits lui imputés, notamment la subornation des témoins, infraction qui peut se réaliser en toute clandestinité.

The Congolese authorities also raised the risk of retaliation against the people who denounced him.⁴⁵⁴

⁴⁵² *Mangenda* interim release decision of 17 March 2014 (n448) §42: Moreover, the Single Judge notes that no availability to accept Jean-Jacques Mangenda on their territory in the event of his release, with or without conditions, has been shown by either the Netherlands or the United Kingdom, that is the State to which he requests to be released. The Dutch authorities stated that “[t]here are at present no conditions under which the Netherlands would be in a position to accept the interim release of Mr Mangenda onto its territory”. The British authorities stated that the fact that Mr Mangenda is suspected of offences against the administration of justice allegedly committed in connection with the case *The Prosecutor v. Jean-Pierre Bemba* “will be taken into account by the competent UK authorities when considering any application for entry clearance or leave to enter the UK (notwithstanding any pre-existing for of entry clearance Mr Mangenda currently holds)”. The Single Judge finds that this statement can hardly be read as signaling willingness and availability on the part of the United Kingdom to accept the suspect in the event that he were to be released.’

⁴⁵³ *Kilolo* interim release decision of 14 March 2014 (n448) §45.

⁴⁵⁴ *Babala* interim release decision of 14 March 2014 (n448) §28.

On 10 June 2014, Arido filed a request for interim release.⁴⁵⁵ On 12 June 2014, PTCII requested observations from France where he had filed an application for asylum before being arrested.⁴⁵⁶ On 24 July 2014, PTCII found that Arido still presented a risk of flight given the possibility that he could benefit from Bemba's network. It was not convinced by the fact that his application for asylum in France would relieve Arido of any interest to leave the country. It also confirmed the risk of obstructing or endangering the court proceedings and of committing new crimes. Regarding the conditional release request, it found that 'it is difficult to conceive of measures which might effectively counteract the risks identified in this decision' and noted that 'no availability to accept Narcisse Arido on their territory in the event of his release, with or without conditions, has been shown by either the Netherlands or France, that is the State to which Narcisse Arido requested to be released'.⁴⁵⁷

On 13 June 2014, PTCII requested Mangenda, Kilolo and Babala to submit observations on their detention.⁴⁵⁸ In answer to this, given the refusal of the DRC to accept him, Babala requested to be put at the disposal of the focus point of the ICC or the MONUC.⁴⁵⁹ Nonetheless, PTCII took the view that 'no circumstances have intervened since the 14 March 2014 Decision suitable to weaken or otherwise impact the assessment made therein as to the persisting existence of reasonable grounds to believe that the requirements set forth under article 58(1) of the Statute,

⁴⁵⁵ Narcisse Arido's Request for Interim Release filed on 10 June 2014, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 17 June 2014.

⁴⁵⁶ Decision requesting observations on the "Narcisse Arido's request for interim release", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 12 June 2014.

⁴⁵⁷ Decision on "Narcisse Arido's request for interim release", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 24 July 2014.

⁴⁵⁸ Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 13 June 2014.

⁴⁵⁹ Observations de la Défense de monsieur Fidèle Babala Wandu à "Order requesting observations for the purposes of the periodic review of the state of the detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 30 June 2014.

and, in particular, the risks listed in paragraph (1)(b) thereof, are still outstanding'.⁴⁶⁰ On 4 July 2014, following the observations of Mangenda and Kilolo, PTCII requested to be provided with the text of the Agreement on interim release concluded by Belgium, as well as with the views of the competent authorities of Belgium.⁴⁶¹ Belgium replied that it would be easy for the accused to leave the country and that it could not legally monitor their communications.⁴⁶² PTCII found that, in the complete absence of a system of monitoring of communications and in the presence of the risk of interference with the administration of justice, 'conditional release to the territory of Belgium is not only unwarranted, but also practically unfeasible'.⁴⁶³ Therefore, except for the conclusion of the agreement with Belgium, for both Mangenda and Kilolo, PTCII concluded that there was no change of circumstances.⁴⁶⁴

On 26 September 2014, on its own initiative, PTCII ordered the Netherlands, the DRC, Belgium, France and the UK to submit their observations on the possible conditional release of the suspects to their territories and their ability to enforce the conditions restricting liberty listed in Rule 119(1) of the RPE.⁴⁶⁵ In fact, it found that 'the duration of the state of detention of the suspects makes it necessary for the Chamber to proceed *proprio motu* without delay to the review

⁴⁶⁰ Decision on the first review of Fidèle Babala Wandu's detention pursuant to article 60(3) of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 4 July 2014.

⁴⁶¹ Decision requesting the Kingdom of Belgium to provide its views for the purposes of the review of Aimé Kilolo Musamba's and Jean-Jacques Mangenda's detention pursuant to article 60(3) of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 4 July 2014.

⁴⁶² Decision on the first review of Jean-Jacques Mangenda Kabongo's detention pursuant to article 60(3) of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 5 August 2014 §32 ('Mangenda interim release decision of 5 August 2014'); Decision on the first review of Aimé Kilolo Musamba's detention pursuant to article 60(3) of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 5 August 2014 §21 ('Kilolo interim release decision of 5 August 2014').

⁴⁶³ *Mangenda* interim release decision of 5 August 2014 (n462) §34; *Kilolo* interim release decision of 5 August 2014 (n462) §22.

⁴⁶⁴ *Mangenda* interim release decision of 5 August 2014 (n462); *Kilolo* interim release decision of 5 August 2014 (n462).

⁴⁶⁵ Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 26 September 2014.

of such of detention, in particular in light of the statutory penalties applicable to the offences at stake in these proceedings and of the paramount need to ensure that the duration of pre-trial detention shall not be unreasonable'. It also ordered Babala to indicate an alternative state where he would seek to be released, in the event that the DRC was to reiterate its unwillingness to accept him on its territory. Babala replied to this request by saying he would not want to be freed anywhere else.⁴⁶⁶

On 21 October 2014,⁴⁶⁷ PTCII ordered the release of Kilolo in Belgium, of Mangenda in the UK where his family resides, of Babala in the DRC and of Arido in France because these countries are the countries where they sought to be released and for which they have a right to stay, either because it is their country of origin⁴⁶⁸ or because they hold a residence permit.⁴⁶⁹ PTCII conditioned their release to the signature of a document stating their engagement to appear when summoned and to the indication of their address. It found that, 'since no additional conditions are imposed to the release, there is no need for the Chamber to further consult with the relevant States, whether in writing or by way of a hearing'. All the states' observations are confidential and the decision does not enable us to understand whether these states agreed with the release or whether PTCII was of the opinion that their agreement was irrelevant given the lack of conditions.⁴⁷⁰

⁴⁶⁶ Réponse de la Défense à la « Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court », *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 26 September 2014.

⁴⁶⁷ *Bemba's close aids* interim release decision of 21 October 2014 (n343).

⁴⁶⁸ Kilolo and Babala.

⁴⁶⁹ Mangenda and Arido.

⁴⁷⁰ Transmission of the observations submitted by the Belgian, Dutch, French, Congolese and British authorities on the "Decision requesting observations from States for the purpose of the review of the detention of the suspects pursuant to regulation 51", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 10 October 2014; Transmission of the observations submitted by the Dutch and French authorities on the "Order to consult with the authorities of the Kingdom of the Netherlands and French Republic", *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 21 October 2014.

PTCII found that Article 60(4) of the Statute, which provides for the release of the defendant in case of unreasonable length of detention, made it necessary to order their release. It considered

the advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has by now been acquired in the record, all of which – contrary to what stated by the Prosecutor – also result in reducing the risks that these proceedings or the investigations might be obstructed or endangered, that the alleged crimes be continued or related offences be committed [and that] the reasonableness of the duration of the detention has to be balanced *inter alia* against the statutory penalties applicable to the offences at stake in these proceedings and that, accordingly, the further extension of the period of the pre-trial detention would result in making its duration disproportionate.

On 22 October 2014, the registry informed PTCII that the UK had revoked the visa held by Mangenda with immediate effect.⁴⁷¹ The UK explained this revocation ‘on the grounds that a change of circumstances since the entry of clearance was issued had removed the basis of his claim to be admitted to the United Kingdom’, without further explanation. After confidential negotiations, the UK finally accepted that Mangenda entered its territory on 22 December 2014.⁴⁷²

On 23 January 2015, PTCII granted Bemba’s request for provisional release for this proceeding but he was not materially freed since he remained in detention for his personal case. It found that the same reasoning regarding the length of detention for this proceeding should be applicable to Bemba.⁴⁷³

⁴⁷¹ Urgent Submission of the Authorities of the United Kingdom of Great Britain and Northern Ireland, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 22 October 2014.

⁴⁷² Request for Compensation for Unlawful Detention, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, Presidency, ICC, 1 May 2015 §15.

⁴⁷³ Decision on “Mr Bemba’s Request for Provisional Release”, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 23 January 2015.

Nonetheless, on 29 May 2015, following the prosecution’s appeal against the decision of 21 October 2014 releasing the accused, the AC found, mainly, that,

it is not apparent from the face of the Impugned Decision that a proper risk assessment under article 60(3) of the Statute was undertaken. First, unlike in the previous seven decisions on detention rendered in this case under articles 60(2) or 60(3) of the Statute, the suspects were not assessed as individuals, but were dealt with as a group. There was no individual consideration of their specific circumstances or whether those circumstances had changed from the previous decision(s). (...) Second, the [AC] is of the view that the divergence between the previous decisions to detain each suspect and the brief finding in the Impugned Decision that the risks under article 58(1)(b) of the Statute no longer necessitated detention or were reduced suggests, in the absence of any explanation, that no proper risk assessment was undertaken. (...) The [AC] considers that these findings are unclear in light of their divergence from findings made in the previous decisions, as well as the fact that the [PTC] did not explain the manner in which the facts underlying those previous findings had changed. (...) Moreover, without a proper assessment of the risks, it is unclear on what basis the [PTC] reached its conclusion that the imposition of one condition was sufficient to mitigate those risks. The [PTC] therefore erred in law in its review under article 60(3) of the Statute.⁴⁷⁴

Despite these findings, the accused were not re-arrested ‘given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the [AC], and the length of time that has passed since their release’.⁴⁷⁵

Similarly, regarding Bemba, the AC found that it ‘erred in not carrying out a proper determination of the risks set out in article 58(1)(b) of the Statute, which is also required for an article 60(2) assessment’. They noted that ‘the Impugned Decision does not contain any analysis of these risks, or any reference to this provision’.⁴⁷⁶

⁴⁷⁴ *Bemba’s close aids* interim release judgment of 29 May 2015 (n344) §§47-55.

⁴⁷⁵ *Bemba’s close aids* interim release judgment of 29 May 2015 (n344) §57.

⁴⁷⁶ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled “Decision on ‘Mr Bemba’s Request for Provisional Release’”, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo*

5.1.4. The Darfur cases

5.1.4.1. The Ahmad Harun and the Ali Kushayb case

Ahmad Harun is the former minister of state for the Interior of the Government of Sudan and the current minister of state for Humanitarian Affairs of Sudan. Ali Kushayb is the alleged leader of the Militia/*Janjaweed*. Despite the initial request by the prosecution, PTCI refused to issue summonses against them because Kushayb was already detained by the Sudanese authorities and it was not convinced of their will to cooperate alleged by the prosecution. It added that there were proofs that Harun might have concealed evidence in a bid to protect the government's counter-insurgency policy.⁴⁷⁷ Neither of the two men is yet in the hands of the ICC.

5.1.4.2. The Al Bashir case

Omar Al Bashir has been the president of the Republic of Sudan since 16 October 1993. On 4 March 2009, PTCI granted the prosecution's application for an arrest warrant given 'the absolute lack of cooperation' from the Government of Sudan, his position of attempting to obstruct proceedings and possibly to threaten witnesses and the need to prevent him from committing further crimes.⁴⁷⁸ He has not yet been arrested.

5.1.4.3. The Abu Garda case

Bahar Idriss Abu Garda is the chairman and general coordinator of Military Operations of the United Resistance Front. On 7 May 2009, PTCI granted the prosecution's request to issue a summons to appear for him since, 'according to the Prosecutor, Abu Garda has expressed his willingness to appear before the Court'.⁴⁷⁹ On 8 February 2010, PTCI refused to confirm the

Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 29 May 2015 §27.

⁴⁷⁷ *Harun* Article 58 decision (n128).

⁴⁷⁸ *Al Bashir* arrest warrant (n57).

⁴⁷⁹ Summons to Appear for Bahr Idriss Abu Garda, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, PTCI, ICC, 7 May 2009.

charges against Abu Garda.⁴⁸⁰ On 23 April 2010, PTCI issued a decision rejecting the prosecutor's application to appeal the decision declining to confirm the charges.⁴⁸¹

5.1.4.4. The Nourain and Jamus case

Abdalla Banda Abakaer Nourain is the commander-in-chief of the Justice and Equality Mouvement Collective-Leadership. Saleh Mohammed Jerbo Jamus was the former chief of staff of SLA-Unity, currently integrated into the Justice and Equality Movement. On 27 August 2009, PTCI granted the prosecution's request to issue summonses for them to appear since the prosecutor alleged it would be sufficient.⁴⁸²

Proceedings against Jamus were terminated by TCIV on 4 October 2013 after it received evidence pointing towards his death.⁴⁸³ On 11 September 2014, an arrest warrant was issued against Nourain because his trial was due to start in November 2014. TCIV decided that an arrest warrant was necessary because the absence of cooperation of Sudan would impede the accused from surrendering voluntarily. It recalled that 'the jurisprudence of the Court suggests that the summons to appear is intended for individuals that are not only personally willing to appear on a voluntary basis but are also in a position to do so'.⁴⁸⁴ Nourain's appeal against this decision was rejected.⁴⁸⁵

5.1.4.5. The Hussein case

Abdel Raheem Muhammad Hussein is the current minister of National Defence and former minister of the Interior and former Sudanese president's Special Representative in Darfur.

⁴⁸⁰ Decision on the Confirmation of Charges, *Prosecutor v. Babar Idriss Abu Garda*, ICC-02/05-02/09, PTCI, ICC, 8 February 2010.

⁴⁸¹ Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", *Prosecutor v. Babar Idriss Abu Garda*, ICC-02/05-02/09, PTCI, ICC, 23 April 2010.

⁴⁸² Second Decision on the Prosecutor's Application under Article 58, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, PTCI, ICC, 11 September 2014.

⁴⁸³ Available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050309/Pages/icc02050309.aspx (last accessed 8 April 2015)

⁴⁸⁴ *Nourain* arrest warrant (n328) §22.

⁴⁸⁵ Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, AC, ICC, 3 March 2015.

On 1 March 2012, PTCI granted the prosecution's request to issue a warrant of arrest for him given the history of non-cooperation by the Republic of Sudan and the gravity of the crimes he was alleged to have committed. It added that there was a risk that Hussein might 'use his position of power and influence to obstruct or endanger any investigation into the alleged crimes thereby preventing examination into any role he may have played'.⁴⁸⁶ However, PTCI found that the prosecution failed to bring any evidence supporting its claim that the arrest of Hussein was necessary to prevent him from committing new crimes.

5.1.5. The Côte d'Ivoire cases

5.1.5.1. The Laurent Gbagbo case

Laurent Gbagbo was the president of Côte d'Ivoire from 2000 until his arrest in April 2011. On 25 October 2011, the prosecution submitted to PTCIII an application for the issuance of a warrant for his arrest. Such warrant appeared necessary because he was already detained, because he had the political support and economic resources to abscond and because forces close to him had probably obstructed investigations by the UN and the media as regard to serious crimes.⁴⁸⁷ PTCIII added that 'given the fact that Mr Gbagbo has many supporters who have access to weapons, and bearing in mind that he appears to continue to consider that he remains the President of Côte d'Ivoire, there is a real likelihood that he will resort to violence if released'.⁴⁸⁸

These elements, in addition to the gravity of the crimes, were kept as grounds to reject Gbagbo's following applications for interim release.⁴⁸⁹ A state, whose name is confidential,⁴⁹⁰ had

⁴⁸⁶ Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein, *Prosecutor v. Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, PTCI, ICC, 1 March 2012.

⁴⁸⁷ *Laurent Gbagbo* Article 58 decision (n125) §86.

⁴⁸⁸ *Laurent Gbagbo* Article 58 decision (n125) §86.

⁴⁸⁹ Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo', *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 13 July 2012 §57; Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 12 November 2012; Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 18 January 2013 §36; Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 12 March 2013; Third decision on the review of

agreed to accept Gbagbo. Yet, PTCI stated that there was no condition short of detention that would be sufficient to mitigate the mentioned risks.⁴⁹¹ Regarding the argument that his health condition should warrant his release, it was found that ‘the necessary treatment to improve the physical and psychological condition of Mr Gbagbo may be provided in the Netherlands, either at the Detention centre of the Court or elsewhere in the country, as may be appropriate’ so that there were ‘no medical reasons that would justify the conditional release of Mr. Gbagbo’.⁴⁹² In this regard, the AC stated that:

Medical reasons can play a role in decisions on interim release in at least two ways. First, the medical condition of a detained person may have an effect on the risks under article 58 (1) (b) of the Statute, potentially negating those risks. Second, the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions.⁴⁹³

On 11 November 2013, PTCI recognized that the improved situation in Côte d’Ivoire was a new fact. It noted that ‘the security situation in Côte d’Ivoire seems to be improving and that reconciliatory efforts suggest a reduced level of tension between the “Government and the supporters of Mr Gbagbo”’ so that the detention was no longer justified by a risk of recidivism. Nevertheless, the Chamber found that the other grounds were still justified. The same conclusion was held on 12 March 2014, on 11 July 2014, on 11 November 2014, on 11 March 2015, on 8 July 2015, on 8 September 2015 and on 2 November 2015.⁴⁹⁴

Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 11 July 2013; Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, AC, ICC, 29 October 2013.

⁴⁹⁰ It seems to be Uganda. Indeed they forgot to retrieve it in the decision of 19 July 2013.

⁴⁹¹ Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 13 July 2012 §74.

⁴⁹² Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 18 January 2013 §36.

⁴⁹³ *Laurent Gbagbo* interim release judgment of 26 October 2012 (n57); Fourth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 11 November 2013.

⁴⁹⁴ Fifth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 12 March 2014; Sixth decision on the review of

On 21 October 2014, Gbagbo filed an urgent request to attend his mother's funeral. Nonetheless, on 29 October 2014, this request was rejected. The Chamber admitted this request did concern humanitarian circumstances but refused it for confidential reasons. It added that it was 'not persuaded in the circumstances that any set of specific conditions can sufficiently mitigate the security and logistical concerns identified by Côte d'Ivoire, the Registry, the Prosecution and the Legal Representative of victims'.⁴⁹⁵

5.1.5.2. The Simone Gbagbo case

Simone Gbagbo is Laurent Gbagbo's spouse. On 12 March 2012, PTCIII granted the prosecutor's application to issue an arrest warrant against her. It found her arrest was necessary because she was already detained, because 'she appears to have the necessary political contacts as well as the economic resources to abscond', because 'the evidence further indicates that pro-Gbagbo forces have previously concealed crimes committed by Mr Gbagbo's inner circle, including Ms Gbagbo' and because, 'given that during the post-election violence Ms Gbagbo declared her intention to fight until the end, and in light of her political connections, there is a real possibility that she will continue to commit the crimes that are the subject of this decision, if released'.⁴⁹⁶ Côte d'Ivoire still refuses to hand her over to the ICC.⁴⁹⁷

Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 11 July 2014; Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, TCI, ICC, 11 November 2014; Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, TCI, ICC, 11 March 2015; Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, TCI, ICC, 8 July 2015; Judgment on the appel of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/11, AC, ICC, 8 September 2015; Tenth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, *Prosecutor v. Laurent Gbagbo and v. Charles Blé Goudé*, Case No. ICC-02/11-01/11, TCI, ICC, 2 November 2015.

⁴⁹⁵ Decision on the urgent request of the Defence for Mr Gbagbo to attend his mother's funeral, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, TCI, ICC, 29 October 2014.

⁴⁹⁶ Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, PTCIII, ICC, 12 March 2012 §§43-44.

5.1.5.3. *The Blé case*

Charles Blé was minister of Youth. PTCIII concluded for the necessity of his arrest because he was escaping an arrest warrant for economic crimes issued by Côte d'Ivoire and because, given his control over approximately 20,000 pro-Gbagbo combatants who had fled to Ghana and given his declaration against the ICC, there was 'a real possibility that Mr Blé Goudé may use his resources to obstruct or endanger these proceedings before the ICC proceedings or to commit further crimes within the jurisdiction of the Court'.⁴⁹⁸

He has been in the custody of the ICC since 22 March 2014 and no application for interim release (at least non-confidential) was ever filed.⁴⁹⁹

5.1.6. *The Kenya cases*

Regarding the post-election violence in Kenya in 2007–08, on 8 March 2011, PTCII agreed to the request of the prosecution to issue summons to appear for Henry Kiprono Kosgey, William Ruto and Joshua Arap Sang since such summons would be sufficient to ensure their appearance before the Court.⁵⁰⁰ On 23 January 2012, PTCII confirmed the charges against Ruto and Sang but not against Kosgey.⁵⁰¹ Regarding the same violence, on 8 March 2011, PTCII agreed to the request of the prosecution to issue summonses to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali since such summonses were

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https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110112/Pages/index.aspx

⁴⁹⁸ Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé, *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11, PTCIII, ICC, 6 January 2012.

⁴⁹⁹ https://www.icc-cpi.int/EN_Menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc-02_11-01_15/Pages/default.aspx

⁵⁰⁰ Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, PTCII, ICC, 8 March 2011.

⁵⁰¹ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 2 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, PTCII, ICC, 3 January 2012.

found to be sufficient to ensure their appearance before the Court.⁵⁰² On 23 January 2012, PTCII confirmed the charges against Muthaura and Kenyatta but not against Ali.⁵⁰³ On 13 March 2015, the charges against Kenyatta were also withdrawn.⁵⁰⁴ Their trials are still ongoing.

On 2 August 2013, the ICC issued an arrest warrant against Walter Osapiri Barasa for three counts of offences against the administration of justice consisting in corruptly influencing, or attempting corruptly to influence three ICC witnesses. The reasons are so far still confidential. He has not yet been arrested.

5.1.7. The Libya cases

PTCI charged Muammar Gaddafi, the former leader of Libya, Saif Al-Islam Gaddafi and Abdullah Al-Senussi with murder and persecution as crimes against humanity. On 27 June 2011, PTCI granted the prosecutor's request and issued three arrest warrants against them because they challenged the legitimacy of UN Security Council Resolution 1970 which confers jurisdiction of the Court in this case and because their position of power and their public pronouncements suggested that they would not appear for trial unless compelled to do so by arrest. It added that they had also been engaged in an operation to cover up and obstruct the investigation of the crimes committed by their subordinates and that their arrest was necessary to prevent them from continuing the commission of crimes within the jurisdiction of the Court.⁵⁰⁵ In the meantime, Muammar Gaddafi was killed and Libya still refuses to hand his son over to the ICC.⁵⁰⁶

⁵⁰² Decision on the Prosecutor's Application for Summonses to Appear for Francis Kiri Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *Prosecutor v. Uburu Muigai Kenyatta*, ICC-01/09-02/11, PTCII, ICC, 8 March 2011.

⁵⁰³ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Uburu Muigai Kenyatta*, ICC-01/09-02/11, PTCII, ICC, 23 January 2012.

⁵⁰⁴ Decision on the withdrawal of charges against Mr Kenyatta, *Prosecutor v. Uburu Muigai Kenyatta*, ICC-01/09-02/11, TCV, ICC, 13 March 2015.

⁵⁰⁵ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11, PTCI, ICC, 27 June 2011.

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https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx

5.2. Lessons from this case law

As explained in sub-section 4.1.2.1, the prosecutor has the choice to apply either for an arrest warrant or a summons to appear. A summons to appear is used when such summons would be sufficient to ensure the person's appearance. The prosecutor chose this option for all the accused charged with international crimes in the Kenya situation,⁵⁰⁷ and for all the accused in the Darfur situation who were not members of the government.⁵⁰⁸ Unfortunately, he did not give any explanation as to why he decided to do so. Apparently, the prosecutor would have negotiated with them before choosing to apply for a summons to appear. The only conclusion is that they all appeared when summoned. These cases are not relevant for the interim release issue as such since they are not detained. However, it shows that those accused of such horrific crimes do not necessarily have to be detained.

If no reason is needed to apply for the issuance of a summons to appear, on the other hand, specific reasons have to be given for the issuance of an arrest warrant. As seen in section 4, Article 58 stipulates that:

The arrest of the person has to appear necessary (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) 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.

It must be recalled that when the accused is already detained,⁵⁰⁹ or when the government of the country refuse to surrender him or her,⁵¹⁰ the ICC considers that the only option is to deliver an arrest warrant. Nonetheless, even in such a case, the ICC has examined whether the other criteria are fulfilled.⁵¹¹ The only exception is the case of Nourain where it restrained itself to

⁵⁰⁷ Kiprono Kosgey, Ruto, Arap Sang, Muthaura, Kenyatta, Ali.

⁵⁰⁸ Abu Garda, Abdalla Banda Abakaer Nourain, Saleh Mohammed Jerbo Jamus.

⁵⁰⁹ *Harun* Article 58 decision (n128); *Laurent Gbagbo* Article 58 decision (n125); Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, PTCIII, ICC, 12 March 2012 §§43-44.

⁵¹⁰ *Nourain* arrest warrant (n328) §22.

⁵¹¹ Katanga, Laurent Gbagbo, Simone Gbagbo.

examining the first criterion.⁵¹² The reason is probably because this arrest warrant was only issued because of the lack of cooperation of Sudan. TCIV specifically highlighted that should he ‘nonetheless appear voluntarily before the Court, the Chamber will take the voluntary appearance into consideration and revisit accordingly the conditions of his stay in the Netherlands during trial’.⁵¹³

Regarding the first ground required to apply for an arrest warrant, namely the need to ensure the person’s appearance at trial, it can be concluded that ‘personal circumstances of the suspect such as the suspect’s education, professional or social status’ need to be taken into account.⁵¹⁴ The necessity to ensure the person’s appearance could stem from one of these four factors: the expression of defiance regarding the ICC,⁵¹⁵ the existence of national or international contacts available or willing to help the accused to abscond,⁵¹⁶ the years of escape⁵¹⁷ or the influence that the accused may exert due to his political position.⁵¹⁸ The second ground, namely the need to ensure that the person does not obstruct or endanger the investigation or the court proceedings, is fulfilled in case of proof of previous experience of interference with witnesses by the accused,⁵¹⁹ or by his close relatives and friends,⁵²⁰ or of the capacity for such interference.⁵²¹ The third ground, namely the need to prevent the person from continuing to commit crimes, was found to be valid in view of the crimes committed by the accused or by his supporters,⁵²² the risk of violence due to the accused’s supporters,⁵²³ or the support or justification of this violence by the accused.⁵²⁴

⁵¹² *Nourain* arrest warrant (n328) §22-§24.

⁵¹³ *Nourain* arrest warrant (n328) §24.

⁵¹⁴ *Mangenda* interim release judgment of 11 July 2014 (n331); *Babala* interim release judgment of 11 July 2014 (n331); *Kilolo* interim release judgment of 11 July 2014 (n331).

⁵¹⁵ Lubanga, Simone Gbagbo, Blé, Libya situation.

⁵¹⁶ Lubanga, Ngudjolo, Mbarushimana, Mudacumura, Bemba, Laurent Gbagbo, Simone Gbagbo, Ntaganda.

⁵¹⁷ Ntaganda, Ongwen.

⁵¹⁸ Bemba, Libya situation.

⁵¹⁹ Lubanga, Ongwen, Darfur situation, Libya situation.

⁵²⁰ Ngudjolo, Katanga, Laurent Gbagbo Simone Gbagbo, Libya situation.

⁵²¹ Katanga, Mbarushimana, Uganda situation, Bemba, Darfur situation.

⁵²² Mbarushimana, Mudacumura, Uganda situation, Libya situation.

⁵²³ Laurent Gbagbo.

⁵²⁴ Simone Gbagbo.

Once the defendant is arrested and detained, the judge has to control whether this detention is still necessary. This necessity is assessed with the same criteria as for the necessity of arrest with the exception that the judges give more detail of their reasoning. One reason for this is because they need to answer the arguments raised by the defendants. However, some differences need to be mentioned. Regarding the risk of flight, it is interesting to note that, contrary to the decisions on application for an arrest warrant,⁵²⁵ all the judges mention that the gravity of the charges and the likely long length of the sentence are elements that have to be taken into account.⁵²⁶ They all stress that this argument is even more relevant once the charges have been confirmed.⁵²⁷ In addition, all the judges mention that the disclosure of witnesses' or victims' names enhances the risk of interference with the administration of justice.⁵²⁸ They also consider relevant the interference made by supporters of the accused, even if not ordered by him,⁵²⁹ the access to complete unmonitored communications with the outside world,⁵³⁰ and the volatile character of the situation where the crimes were committed.⁵³¹ The volatile character of the situation and the experience with technology and the capacity to use it without being monitored have also been found relevant for the assessment of the criteria related to the commission of new crimes.⁵³²

5.3. Compliance of the ICC case law with HR standards

As seen in section 4, the ICC provisions are in conformity with the right to liberty as defined before. In fact, they provide for the possibility of interim release. In addition, the 'necessity' criterion of Article 58 implies the exceptional character of the detention, the burden of proof on the prosecution and the obligation of motivation. It was also shown that the judicial procedure as provided for in the Statute meets the requirements of the right to liberty as defined before. The fact that Blé has never seen the legality of his detention reviewed because he never filed an application for interim release does not prevent the procedure from being in conformity

⁵²⁵ Except for Mudacumura and Darfur situation.

⁵²⁶ Lubanga, Katanga, Ngudjolo, Mbarushimana, Bemba, Laurent Gbagbo.

⁵²⁷ Lubanga, Katanga, Ngudjolo, Bemba.

⁵²⁸ Lubanga, Katanga, Ngudjolo, Mbarushimana, Bemba.

⁵²⁹ Lubanga, Katanga, Ngudjolo, Mbarushimana, Laurent Gbagbo, Bemba.

⁵³⁰ Lubanga.

⁵³¹ Lubanga, Katanga, Ngudjolo.

⁵³² Mbarushimana.

since he is not a vulnerable person, such as a handicapped person, who does not know his rights, as demonstrated by his other requests.

Nonetheless, is this framework applied by the judges in conformity with the right to liberty as internationally recognized? At first sight, it seems to be roughly the case. Indeed, the exceptional character of detention and the burden of proof are regularly restated by the judges. The necessity of detention is appreciated in light of the conditions stipulated by IHRL and the reasonable character of the length of detention is controlled during each review. These four affirmations will be deepened further in order to verify whether this apparent human rights friendly attitude by the ICC judges does not hide another reality.

5.3.1. The exceptional character of pre-trial detention and detention pending trial

The first affirmation is related to the fact that all international human rights regimes recognize that pre-conviction detention is acceptable as an exception to the right to liberty, but that its use should be exceptional. The ICC also agrees that ‘when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule’,⁵³³ and, by referring to IACtHR’s case law, that ‘pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes’.⁵³⁴ Furthermore, when a state willing to accept the accused is found, as in the *Bemba* and in the *Gbagbo* cases, the ICC judges examine alternatives to detention. Nevertheless, it is difficult to assess them since they have never been used. The ICC adopts the extensive interpretation of the presumption of innocence since it considers it plays a role in the determination of the necessity of the pre-conviction detention.⁵³⁵ Be that as it may, the reality is that no accused person charged with international crimes has ever been released, so that these statements do not seem to have a real impact in practice. Nonetheless, at the same time, the obligation to respect the right to liberty does not imply an automatic release since exceptions to the principle are accepted.

⁵³³ *Bemba* interim release decision of 14 April 2009 (n57) §36.

See also *Babala* interim release judgment of 11 July 2014 (n331).

⁵³⁴ *Bemba* interim release decision of 14 August 2009 (n124) §38.

⁵³⁵ *Bemba* interim release decision of 14 August 2009 (n124) §37; *Mbarushimana* interim release decision of 19 May 2011 (n333) §33.

5.3.2. The burden of proof

The second affirmation concerns the fact that, in theory, the ICC agrees with the ECtHR and the HRC that the burden of proof rests on the prosecution to demonstrate that the detention is or remains necessary.⁵³⁶ The obligation to give reasons for the decisions was recalled by the AC who sanctioned the insufficient explanation regarding the fulfilment of some criteria.⁵³⁷ Nonetheless, despite these statements, Hartwig rightly noticed that:

When it comes to decisions pursuant to Art. 60 (2) ICCSt, the Chambers' approach corresponds to a reversal of the burden of proof. Here, the [PTCs] constantly refer to the decision on the issuance of a warrant of arrest, without examining the requirements of Art. 58(1) ICCSt anew. Rather, the detained person is put in a situation where he or she has to rebut the existence of facts warranting detention. This constitutes a reversal of the burden of proof.⁵³⁸

Furthermore, the expression 'changed circumstances' is interpreted quite restrictively since the time is not considered as such circumstance. Yet, as argued by Golubok, 'time is a very relevant circumstance, and it is always changing, by definition'.⁵³⁹ He argues his point by referring to the ECtHR's case law according to which, 'for example, risk of threatening witnesses, even if proven, will no longer justify continued detention when witnesses have already been heard or when it becomes clear that their testimony is no longer necessary'.⁵⁴⁰ Admittedly, the decision regarding Bemba's close aids is a step in the right direction in this regard but it does not concern accused charged with international crimes and it was reversed on appeal.⁵⁴¹ It stems from these

⁵³⁶ *Katanga* interim release decision of 18 March 2008 (n122).

⁵³⁷ *Lubanga* interim release judgment of 13 February 2007 (n155) §136; Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber 1 on the Application of the Appellant for Interim Release, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 9 June 2008 §26.

⁵³⁸ Hartwig (n323) 305;

See also C. Deprez, 'La mise en liberté avant jugement dans la pratique de la Cour pénale internationale : une rupture avec l'héritage des tribunaux ad hoc ?' in D. Bernard and D. Scalia, *Vingt ans de justice internationale pénale* (La Charte, 2014) 161.

⁵³⁹ Golubok (n1) 306-307.

⁵⁴⁰ Golubok (n1) 306-307.

⁵⁴¹ *Bemba's close aids* interim release decision of 21 October 2014 (n343).

considerations that, in order to respect the right to liberty in practice also, an effort should be made regarding the burden of proof so that it really rests on the prosecution.⁵⁴²

5.3.3. The criteria justifying pre-conviction detention

The third affirmation is related to the ICC judges' practice of reference to the same criteria as those recognized by IHRL to justify detention on remand. The first condition, namely the existence of 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court', meets at least in theory the 'reasonable suspicion' standard set by the ECHR. For example, PTCI referred to this standard while examining whether there were reasonable grounds to believe Lubanga had committed the crimes he was charged with.⁵⁴³ It is obviously impossible to verify if this suspicion matches the reality since it depends on factual elements that have yet to be determined.⁵⁴⁴

The criteria required by the ICC for demonstrating the necessity of the arrest or the detention also correspond to those retained by human rights practice. However, some differences exist in their interpretation, among others regarding the role played by the expected sentence deduced by the gravity of the charges. Indeed, as seen in sub-section 3.4.3., for the ECtHR, the danger of flight necessarily diminishes as the detention continues because the balance of the sentence that the person concerned may expect to have to serve is reduced.⁵⁴⁵ On the contrary, for the ICC, this risk is enhanced once the charges have been confirmed because the accused is then aware of all the evidence existing against him or her.⁵⁴⁶ This difference of interpretation can play a role since the accused has no impact on the perceived gravity of the charges and the expected sentence. In response to the argument that this element applies to any suspect before the Court so that it amounts to an irrebuttable presumption, the AC held that 'what is important

⁵⁴² Deprez (n538) 161.

⁵⁴³ *Lubanga* arrest warrant (n123) §11;

See also *Harun* Article 58 decision (n128) §28.

⁵⁴⁴ See M. Ramsden and C. Chung, "Reasonable Grounds to Believe' An Unreasonably Unclear Evidentiary Threshold in the ICC Statute' (2015)13(3) *Journal of International Criminal Justice* 555-577.

⁵⁴⁵ ECtHR, Judgment, *Neumeister v. Austria* (App. No. 1936/63), 27 June 1968 §10; ECtHR, Judgment, *Matznetter v. Austria* (App. No. 2178/64), 10 November 1969 §11.

⁵⁴⁶ Fifth review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 4 November 2009 §12.

is whether a given factor exists in respect of the particular detained person' and that 'whether charges may be similarly serious in respect of some or all other suspects who are brought before the Court is irrelevant because even if this were the case, this does not detract from the fact that the charges against [the accused] are serious'.⁵⁴⁷

The same difference exists regarding the second criterion. Whereas the ECtHR and the IACtHR consider that the risk of prejudice to the administration of justice continues to exist only as long as the evidence has not been collected or the witnesses heard,⁵⁴⁸ the ICC does not make this distinction. To the contrary, the ICC rather implies that the mere knowledge of the identities of the witnesses is sufficient to demonstrate this risk. Nonetheless, a good step was again taken by PTCII in the *Bemba's close aids case*.⁵⁴⁹

Regarding the third criterion, namely the risk of recidivism, the ICC case law is in conformity with the ECtHR's case law stating that the danger has to be plausible and the detention appropriate, in light of the circumstances of the case and in particular the past history and the personality of the person concerned.⁵⁵⁰ It must be noted that in the *Gbagbo case* the judge admitted that, once the situation in Côte d'Ivoire had been stabilized, this risk had disappeared.⁵⁵¹

Despite this apparent respect for the criteria required for an exception to the right to liberty, I cannot help but question the logic of the ICC regarding its interpretation of the criteria that could justify provisional release. Indeed, as held by Sarygin, an accused has nearly no influence on the prongs retained by the ICC judges,⁵⁵² especially regarding the fact that the names of the witnesses have been disclosed to him. The disclosure of the witnesses' or victims' identities is part of the trial process, even a guarantee of fair trial for each accused,⁵⁵³ and, as the ICTY held,

⁵⁴⁷ *Laurent Gbagbo* interim release judgment of 26 October 2012 (n57) §54.

⁵⁴⁸ ECtHR, Judgment, *Letellier v. France* (App. No. 12369/86), 26 June 1991 §39 ; ECHR, *I. A. v. France*, 23 September 1998 §110; ECtHR, Judgment, *Mamedova v. Russia* (App. No. 7064/05), 1 June 2006 §79; IACmHR, *Bronstein and Al. v. Argentina* (Case No. 11.205), 11 March 1997 §35.

⁵⁴⁹ *Bemba's close aids* interim release decision of 21 October 2014 (n343).

⁵⁵⁰ ECtHR, *Clooth v. Belgium* (App. No. 49/1990/240/311), 27 November 1991 §40.

⁵⁵¹ Fourth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, PTCI, ICC, 11 November 2013.

⁵⁵² Sarygin (n357) 347-348.

⁵⁵³ Admittedly there is some controversy regarding anonymity of witnesses.

It is a strange logic employed by the prosecution – that, once it has complied with its obligation (...) to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release because his mere ability to exert pressure upon them is heightened.⁵⁵⁴

Likewise, the accused does not exercise any influence on the volatile character of the situation in his or her country of origin, another criterion sustained by the ICC to justify the necessity of the detention.⁵⁵⁵ Similarly, if a Chamber takes account of the risk of interference with witnesses or victims because of the actions of the accused's supporters, as in the *Gbagbo case*, then the accused does not necessarily even play a role in it and, be that as it may, his or her provisional release will, in most circumstances, have little impact on whether or not such interference occurs.⁵⁵⁶ Therefore, is the ICC really sincere in its claim to respect the right to liberty?

Admittedly, the ICC went never as far as the Extraordinary Chambers in the Courts of Cambodia (ECCC)⁵⁵⁷ and the SCSL⁵⁵⁸ in this respect. Indeed, in contrast with the ICC, these two tribunals recognize as acceptable grounds for detention the risk to the security of the accused and the risk to public order.⁵⁵⁹ Obviously, the accused is powerless regarding the fact that the acts alleged against him or her 'are of a gravity such that, 30 years after their commission, they

⁵⁵⁴ Decision on Motion by Radoslav Brdanin for Provisional Release, *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36, TCII, ICTY, 25 July 2000 §§19-20 ('*Brdanin* provisional release decision of 25 July 2000').

⁵⁵⁵ Lubanga, Katanga, Ngudjolo.

⁵⁵⁶ G. McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in G. Boas (ed.), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff, 2003) 228.

⁵⁵⁷ So far, only one accused, Thirith IENG, was 'provisionally' released because she was considered to be unfit for trial. It must be noted that the Prosecution did not oppose to her release but that it wanted that strict conditions were imposed on her. Nonetheless, this is different than interim release since there will not be any trial.

See A. Appazov, 'Analysis of Decisions on Interim Release at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' in A. Klip and S. Freeland (eds.), *Annotated Leading Cases of International Criminal Tribunals (Vol. 43)* (Intersentia, 2015).

⁵⁵⁸ No accused was ever provisionally released.

⁵⁵⁹ See C. L. Davidson, 'May It Please the Crowd? – The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants', (2011) available at http://works.bepress.com/caroline_davidson/2/ (last accessed 21 March 2015) 16-19.

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'.⁵⁶⁰ Similarly, the SCSL refused an application for provisional release, among others, because the release of the accused 'could well undermine his own safety and, indeed, his appearance for trial'.⁵⁶¹ The ICC has never used these criteria which relate to matters over which the accused would really have no control.

In a nutshell, with some discrepancies regarding the effect to give to some steps of the trial, it seems that the ICC judges correctly interpret the criteria of Article 58 in light of the right to liberty.

5.3.4. The release in case of unreasonable length of detention

The fourth affirmation relates to the duty of the ICC to release the accused in case of unreasonable delay. As seen in sub-section 4.1.2.1., in conformity with the right to liberty, Article 60 of the ICC Statute lays down that release can be granted in case of detention for an unreasonable period prior to trial due to inexcusable delay by the prosecutor. However, IHRL does not distinguish who is responsible for the delay.⁵⁶² The reason is that, for the accused, it does not matter who is responsible for it.⁵⁶³ Admittedly, as observed in sub-section 4.1.2.1., the ICC does not seem to feel constrained by the terms of the Statute and accepts that other circumstances would cause the inexcusable delay.⁵⁶⁴

⁵⁶⁰ Order of provisional detention, *Prosecutor v. Guek Eav Kaing*, Case No. 002, OCOIJ, ECCC, 31 July 2007; Order of provisional detention, *Prosecutor v. Chea Nuon*, Case No. 002, OCOIJ, ECCC, 19 September 2007; Provisional Detention Order, *Prosecutor v. Thirit Ieng*, Case No. 002, OCOIJ, ECCC, 14 November 2007; Provisional Detention Order, *Prosecutor v. Sary Ieng*, Case No. 002, OCOIJ, ECCC, 14 November 2007; Provisional Detention Order, *Prosecutor v. Samphan Khieu*, Case No. 002, OCOIJ, ECCC, 19 November 2007; Order on extension of provisional detention of Ieng Sary, *Prosecutor v. Sary Ieng*, Case No. 002, OCOIJ, ECCC, 10 November 2009.

⁵⁶¹ Decision on the motion by Morris Kallon for bail, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-PT, TC, SCSL, 23 February 2004 §44.

⁵⁶² ECtHR, Judgment, *Muller v. France* (App. 21802/93), 17 March 1997 §48; ECtHR, Judgment, *Punzelt v. the Czech Republic* (App. No. 31315/96), 25 April 2000 §78.

⁵⁶³ Rearick (n9) 587; K. A. A. Khan, 'Article 60' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1167.

⁵⁶⁴ *Bemba's close aids* interim release decision of 21 October 2014 (n343).

So far, in none of the cases of persons charged with international crimes has the ICC found that the detention was unreasonably long.

While examining whether the length of the detention is still reasonable, the ICC judges refer to the case law of human rights institutions. An example is the following extract from a decision of PTCI containing numerous such references.

Considering that since pre-trial detention cannot be extended to an unreasonable degree (European Court of Human Rights, *Wemhoff v. Germany* judgment of 27 June 1968, Application No. 2122/64, “As to the Law”, para. 5); that reasonableness cannot be assessed *in abstracto* but depends on the particular features of each case (See European Court of Human Rights, *Stögmüller v. Austria* judgment of 1 November 1969, Application No. 1602/62, “As to the Law”, para. 4 or European Court of Human Rights, *W. v. Switzerland* judgment of 26 January 1993, Application No.14379/88, para. 30.); and that to assess the reasonableness of the detention, it is particularly important to assess the complexity of the case (European Court of Human Rights, *Van der Tang v. Spain* judgment of 13 July 1995, Application No.19382/92, para. 75);

(...)

Considering that the case before the Court is complex, particularly because the vast majority of the evidence is abroad (Inter-American Commission on Human Rights, *Guy Malary v. Haiti*, Case No. 11.335, Report No. 78/02, 27 December 2002, para. 64) and that the volume of evidence supporting the prosecution is huge (European Court of Human Rights, *Contrada v. Italy* judgment of 24 August 1998, paras. 66 and 67; Inter-American Court of Human Rights, *Genie Lacayo v. Nicaragua*, Judgment of 29 January 1997, Series C No. 30, para. 78).⁵⁶⁵

Since reasonableness cannot be assessed *in abstracto* but depends on the particular features of each case, it is difficult to determine whether the length of detention in a case before the ICC violates IHRL.⁵⁶⁶ Indeed, as held by the AC, ‘[i]nterim release and the issue of the reasonableness of the period of detention are fact intensive and case specific’.⁵⁶⁷ What is crucial is that the judges must regularly control the reasonableness of the length of detention, which they do.

⁵⁶⁵ *Lubanga* interim release decision of 18 October 2006 (n128).

⁵⁶⁶ See Doswald-Beck (n273) 293-294.

⁵⁶⁷ *Bemba’s close aids* interim release judgment of 29 May 2015 (n344) §45.

To give an example of a case similar to those tried by the ICC, the ECtHR was satisfied that a substantial risk of the applicant's absconding persisted throughout his detention since the applicant, who had been extradited from Lebanon to Germany for the purposes of criminal proceedings in the context of international terrorism, had neither a fixed dwelling nor social ties in Germany.⁵⁶⁸ In this case, the ECtHR found that the length of the applicant's detention – six years – was reasonable given that it involved a particularly complex investigation and trial concerning serious offences of international terrorism. In order to examine the diligence of the German authorities, the ECtHR took into consideration the special features of the case, including the potential life sentence, the great number of witnesses and the fact that the crime occurred outside of Germany. These features could be said to characterize all the cases before the ICC. Similarly, in three early cases of the former European Commission on Human Rights related to charges of war crimes and crimes against humanity, lengthy periods of pre-conviction detention of over six years were considered as reasonable because of the difficulties of investigation and of trial of such cases, particularly because of the historical nature of the charges, the number of accused, the complex contextual elements, the number of witnesses and the fact that many of these witnesses as well as a portion of the evidence were located abroad.⁵⁶⁹ Besides, a study of the length of detention before the ICTY and the SCSL, whose proceedings are of similar length to the ICC, suggests that 'the actual pace of proceedings is less dramatic from a comparative perspective than conventional wisdom suggests, and that international cases are only "modestly slower" than complex cases in domestic settings'.⁵⁷⁰ It seems therefore that the length of detentions before the ICC is not necessarily unreasonable.

5.3.5. Conclusion

It stems from these considerations that the ICC judges respect more or less the right to liberty. In fact, it recognizes the exceptional character of detention and the obligation to assess

⁵⁶⁸ ECtHR, Judgment, *Chraïdi v. Germany* (App. No. 65655/01), 26 October 2006 §40.

⁵⁶⁹ ECmHR, Decision, *X. v. Federal Republic of Germany* (App. No. 920/60), 19 December 1961 §§2-3; ECmHR, Decision, *W.R. v. Federal Republic of Germany* (App. No. 3376/67), 4 February 1969 §§ 14-15; ECmHR, Opinion, *Jentzsch v. Federal Republic of Germany* (App. No. 2604/65), 30 November 1970 §163.

⁵⁷⁰ See also M. Harmon, 'The pre-trial process at the ICTY as a means of ensuring expeditious trials: a potential unrealized?' (2007)5(2) *Journal of International Criminal Justice* 383; C. Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012)25(2) *Leiden Journal of International Law* 263; Meernik (n5) 276-287.

alternatives or to issue a summons to appear when possible. In addition, the ICC judges always control the reasonableness of the length of detention. Regarding the burden of proof and the influence of the disclosure of evidence and the expected sentence, though there are some efforts still to be made, the criteria used correspond in general to those required in the context of IHRL.

Nonetheless, it is quite striking that, whereas the ICC recognizes that detention is supposed to be the exception, none of the detained accused charged with international crimes has ever been released. Why is this so? Would it mean that human rights are only respected in theory? Or would it mean that it is just impossible to respect them in practice? Is it really realistic to think that, as the erstwhile European Commission on Human Rights held, an applicant is not debarred from the protection of his or her right to liberty by reason of the fact that he or she had been charged with war crimes and crimes against humanity?⁵⁷¹ Or to think that, as one TC of the ICTY once argued, ‘no distinction can be drawn between persons facing criminal procedures in their home country or on an international level’?⁵⁷²

The instinctive answer to these questions is that it is obvious that the ICC works in a different context than a state so that the bar should not be put as high. In fact, there is one aspect of the procedure of interim release before the ICC which is not regulated as such by IHRL because this issue does not arise at the national level: the need to find a state. The AC stipulated that a state that is willing and able to receive the accused must be identified before an order for interim release can be made.⁵⁷³ Consequently, it means, as noticed by Golubok, that ‘the ICC, as matters stand now, lacks effective power to release’.⁵⁷⁴ Power to release is, however, a requirement of IHRL for the judicial authority that controls the detention. This reliance is admitted by the ICC, which recognizes that it

exercises its functions and powers on the territories of States Parties and as such is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are

⁵⁷¹ ECmHR, Opinion, *Jentzsch v. Federal Republic of Germany* (App. No. 2604/65), 30 November 1970.

⁵⁷² Decision on Request for Provisional Release of Accused Jokic, *Prosecutor v. Vidoje Blagojevic, Dragan Obrenovic, Dragan Jokic*, Case No. IT-02-53-PT, TCH, ICTY, 28 March 2002 §15.

⁵⁷³ *Bemba* interim release judgment of 2 December 2009 (n347) §106.

⁵⁷⁴ Golubok (n1) 308;

See also Sluiter (n12) 265.

enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective⁵⁷⁵ (...) since it lacks the direct means to re-arrest a suspect/accused if he/she has absconded.⁵⁷⁶

It must be noted that, despite this awareness, the ICC judges still examine applications for provisional release even when the accused presents no guarantees from a state, which raises some issues. In fact, it is obvious that the risk of flight, of interference with the administration of justice or of recidivism varies depending on the location of the accused. Nevertheless, it does not seem to bother the ICC that examines these risks only *in abstracto*. As Fairlie held, it would be more honest to recognize its incapacity to assess the risks in the absence of a state.⁵⁷⁷ Indeed, it seems hypocritical and a poor front to hide a potential violation of human rights.

Given these considerations, before trying to give any more detailed answers to the questions whether the ICC is able to respect the right to liberty, it is important to examine the debate on the pertinence of the reference to human rights while keeping in mind that Article 21(3) of the ICC Statute imposes this reference.

6. Conclusion: Is this reference to human rights pertinent and desirable?

6.1. Schools of thought regarding the pertinence of the reference to human rights

The objective of this thesis is to determine the respect for the right to liberty by the ICC and its ability to respect this right as prescribed by IHRL. This question arises because, as demonstrated in section 1, human rights are applicable to the ICC amongst others through Article 21(3) of its Statute. Nonetheless, what if the ICC is unable to apply a specific right? Regarding the right to liberty in particular, could it not be argued, as PTCII held in reference to the *non-refoulement* principle,⁵⁷⁸ that the ICC cannot apply it because ‘only a State which possesses territory is actually able to apply’ this rule?

⁵⁷⁵ *Bemba* interim release judgment of 2 December 2009 (n347) §107.

⁵⁷⁶ *Bemba* interim release decision of 14 April 2009 (n57) §49.

⁵⁷⁷ Fairlie (n9) 1166.

⁵⁷⁸ *Katanga and Ngudjolo Amicus Curiae* decision (n121) §64.

Two different, but quite similar, schools of thought are present in the literature in relation to the need for an international criminal tribunal to respect IHRL. According to the first school, the reference to human rights as such is inappropriate whereas the second school of thought pleads for such a reference alongside an adaptation of IHRL befitting the specificities of the context in which international criminal tribunals operate. In this thesis I discuss the pertinence, at least regarding the right to liberty, of these two schools of thought and propose a third line of argument. In fact, I question the reality of the specific context that would, according to the first two schools, require an adaptation of IHRL and advocate for an application of IHRL as such.

It is important to note that, in the case of the right to liberty, the issue of application of IHRL is not an issue of conflict as such, at least as it is understood by the International Law Commission in its Report on Fragmentation of International Law. This Report rests on a 'wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem'.⁵⁷⁹ In this case, the procedural rules of international criminal law suggest the same way of dealing with interim release as IHRL but this way is not necessarily pertinent due to the specific context in which international criminal procedural law has to be applied. Consequently, the methods of resolution of conflict as suggested by the International Law Commission Report on Fragmentation of International Law,⁵⁸⁰ or the alternative method proposed by Michaels and Pauwelyn,⁵⁸¹ are not taken into account. The only relevant notion of this debate on fragmentation of international law is that of 'self-contained regime', described as a branch of international law handled by specific rules and techniques of interpretation and administration.⁵⁸² This notion is interesting because international and internationalized tribunals have sometimes been qualified as such regimes,⁵⁸³ which amounts to allowing them to be 'full masters of their human rights regime, with a freedom either to keep it impenetrable to the authority of the human rights case law and even the language of the human rights conventions or to leave the door ajar if the circumstances of the tribunal or the case before it favour that'.⁵⁸⁴ This

⁵⁷⁹ ILC (n59) §25.

⁵⁸⁰ ILC (n59).

⁵⁸¹R. Michaels and J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2011-2012)22 *Duke Journal Comparative and International Law* 349-376.

⁵⁸²ILC (n59); B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006)17(3) *European Journal of International Law* 483-529.

⁵⁸³P. L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000)11(3) *European Journal of International Law* 573; ILC (n59) §§65-99.

⁵⁸⁴ Vasiliev (n67).

qualification as self-contained regimes is partially recognized in the first of the two schools of thought because of the specificities of their context. The third approach aims to demonstrate that these specificities can be challenged, which implies that the ICC has to respect its human rights obligations as prescribed by Article 21(3) of the ICC Statute.

The first approach pleads for the definition of a new framework to define ‘an international procedural “identity” based on the specificity of international tribunals’.⁵⁸⁵ The idea is that ‘international criminal tribunals should not feel obliged to “shoot themselves in the foot” by too rigidly adhering to principles [IHRL] developed for application in other contexts’.⁵⁸⁶ In this vein, for Damaska,

some departures by international criminal tribunals from domestic standards of fairness can be justified, given their sui generis goals, the complexity and the atrocity of crimes they process, and the innate weaknesses of these tribunals. And while it is true that only the defendant has the right to fair trial, the determination of what this right entails does not exclude consideration of the needs generated by the distinctive environment of international criminal justice, including consideration of the interest of other procedural participants affected by this environment.⁵⁸⁷

Damaska argues that this continuous reference to human rights is superfluous because it would not necessarily infringe its legitimacy if the tribunal does not necessarily respect human rights perfectly. He adds that, on the contrary, an overly strict respect of human rights could also damage its legitimacy.⁵⁸⁸ He illustrates this view by examining the perception of the exclusionary rule:

The idea that the criminal defendant has a fairness based claim to the automatic rejection of all illegally obtained evidence does not agree with ordinary perception of justice. Ordinary people tend to believe that such evidence should be used, at least in

⁵⁸⁵ F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’ (2009)14 *UCLA Journal of International Law Foreign Affairs* 42.

⁵⁸⁶ Mégret (n585) 67.

⁵⁸⁷ Damaska (n373) 380.

⁵⁸⁸ Damaska (n373) 386-387; M. Damaska, ‘Reflections on Fairness in International Criminal Justice’ (2012)10 *Journal of International Criminal Justice* 619.

prosecutions of serious crime, and that the appropriate reaction to the wrongful manner of acquisition is to punish those responsible for it. Even if a few exclusionary rules of this genre encounter a measure of sympathy, stretching them to their full logical potential is not likely to be met with approval.⁵⁸⁹

Mégret adopts a similar view and illustrates it with the example of the presumption of favour in release:

While the principle should be one of conditional liberation, it is also well understood that release from custody can be limited on valid grounds such as the threat of absconding and risks to witnesses. Internationally, these concerns translate in a particularly stark fashion. There is, for example, a long history of suspects escaping detention and going into hiding. The difficulties faced by tribunals in apprehending the accused are often daunting. Moreover, the very presence of persons suspected of committing international crimes on the streets may create concerns for public order (not to mention the security of the accused themselves) that would not normally arise for most ordinary crimes. This suggests the risk of letting suspects free, pending trial, will often be too great in light of the stakes. Moreover, the international environment implies the interest of ‘host states’ should be taken into account – a factor which would obviously be irrelevant domestically. Hence, factors relating to the accused or victims are relevant, as are factors dealing with the public order of the society in which the individual would be released. Note that the tribunals have not gone so far as to explicitly overturn the presumption against freedom; however, the *de facto* circumstances of the international trial have in effect turned the presumption upside down.⁵⁹⁰

Consequently, for Mégret, the reference to IHRL is inadequate in this case. Like Damaska, he argues that the focus must not only be on the accused but also on the other stakeholders of the international criminal proceedings, namely the victims, the prosecution and society as a whole.⁵⁹¹ For the same reasons, Weisbord and Smith plead for a new normative theory of international criminal procedure, which would focus on the absence of a state

⁵⁸⁹ Damaska (n373) 386.

⁵⁹⁰ Mégret (n585) 65.

⁵⁹¹ Damaska (n373) 380.

apparatus accompanying international tribunals.⁵⁹² In addition to the problem due to the specific environment, the other problem of the continuous reference to human rights according to this approach is the fact that ‘international human rights will in most cases be under-determinative of the issues at stake’.⁵⁹³ For Mégret, ‘human rights law only sets a broad framework’.⁵⁹⁴

If these scholars argue in favour of a new normative framework, they do not reject the idea that IHRL should be respected. Indeed, Mégret argues that his attempt to redefine this framework by using the notion of ‘becoming international’ is ‘an attempt to develop a procedure that is uniquely suited to the reality and the values of the tribunals’ international nature while simultaneously drawing from domestic traditions and seeking to respect the right to a fair trial’.⁵⁹⁵ In other words, these scholars plead for the definition of a new normative framework where the expression ‘human rights’ would be banned but where human rights, although not referred to as such, would be applied when the context in which the tribunals operate allows for their application. It is merely because of this rejection of the expression ‘human rights’ and of their focus on all the stakeholders that they distinguish themselves from the second approach. This distinction between these two approaches is thus quite thin. The problem with this approach is that, as demonstrated in section 1, IHRL is applicable to the ICC and the ICC Statute itself refers to it, so that its pertinence cannot simply be denied.

The second approach does not drop the focus on the accused and the reference to IHRL but pleads for its adaptation to the specific context of the international criminal tribunals. As held by Dimitrijevic and Milanovic, it is the idea that ‘distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal justice’.⁵⁹⁶ Similarly, for Soares, ‘there is an undeniable mutual influence between human rights law and international criminal law’ but ‘what

⁵⁹² N. Weisbord and M. A. Smith, ‘The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure’ (2011) *North Carolina Journal of International Law and Commercial Regulation* 273.

⁵⁹³ Mégret (n585) 51;

See also E. Oluwatoyin Okebukola, ‘A Universal Procedural Framework for War Crimes Tribunals’ (2012)14 *International Community Law Review* 95.

⁵⁹⁴ Mégret (n585) 65.

⁵⁹⁵ Mégret (n585) 58-59.

⁵⁹⁶ V. Dimitrijevic and M. Milanovic, ‘Human Rights before International Criminal Courts’ in J. Grimheden and R. Ring (eds.), *Human Rights Law: From Dissemination to Application: Essays in Honour of Goran Melander* (Martinus Nijhoff, 2006) 150.

they import from each other needs to undergo a maturation process'.⁵⁹⁷ This vision is shared by most scholars,⁵⁹⁸ even by the proponents of the first approach while waiting for the adoption of a new framework. For this school of thought, this adaptation is possible because human rights are provided for in broad terms and allow for a margin of appreciation.⁵⁹⁹ It is important to note that this translation would not necessarily entail a reduction in the rights of the accused. On the contrary, Vasiliev argues in favour of the application of the highest standards.⁶⁰⁰ In other words, this approach does not necessarily support the view that each international criminal tribunal should form a self-contained regime with its own regime of human rights depending on its context. They argue that the international criminal tribunal should address IHRL, apply it when possible and justify a possible departure from its prescriptions.⁶⁰¹ The adaptation of human rights they argue for would accept, for example, witness anonymity and additional requirements for provisional release.

This approach seems to be the most convincing one, legally and logically. On the one hand, Article 21(3) of the ICC Statute imposes such respect for human rights. On the other hand, the specific context in which the ICC operates cannot be negated as such. Besides, it does not necessarily contradict the intention of the drafters of the ICC rules. It cannot be contested that IHRL leaves a margin of appreciation to states as regards its application so that the adaptation of a human right to the specific context of the international criminal tribunal could arise in this margin of appreciation. In addition, as TCII argued, 'when they created the Court and decided that it would sit in The Hague, the States Parties were fully mindful of the consequences this

⁵⁹⁷ Soares (n89) 181.

⁵⁹⁸ C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (Nov. 2001)87(7) *Virginia Law Review* 1394; Cassese (n53) 26-30 and 49, 208; McIntyre (n556) 194; G. Boas and T.L.H. McCormack, 'Learning the Lessons of the Milošević Trial' (2006)9 *Yearbook of International Humanitarian Law* 70-71; R. Pati, 'Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?' in T. Kruesmann (ed.), *ICTY: Towards a Fair Trial?* (Neuer Wissenschaftlicher Verlag, 2008) 184; Fedorova, Verhoeven, Wouters (n8) 11; Vasiliev (n36) 67; Deprez (n59) 723; J. D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (CUP, 2012) 132.

⁵⁹⁹ Vasiliev (n67); J. Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' 'Unique Context' and the Flexibility of the European Court of Human Rights' Case Law' (2015)84 *Nordic Journal of International Law* 407, 415-416.

⁶⁰⁰ See also DeFrancia (n598) 1384.

⁶⁰¹ Sluiter (n113) 938, 940; Nicholls (n113) 287; Gradoni (n47) 855; Vasiliev (n67); Sheppard (n79) 69; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 90; Geneuss (n599) 424-426.

would entail for the accused brought before the Court and considered that they were not infringing their fundamental rights'.⁶⁰² This imperfect transposition of IHRL to international criminal proceedings should thus be accepted since it could be seen as the only way of maintaining the influence of this law. As Cohen suggested, in order to keep the influence of human rights, 'the key to the success (...) has been a willingness to accept the imperfect translation from human rights to other areas, to accept that the careful constructions of human rights bodies will be misunderstood, misapplied, and mutated by other bodies, tribunals, and courts'.⁶⁰³ Nonetheless, as Cohen also correctly asked, 'Why shouldn't human rights law demand fidelity to the specific rules it has developed?'⁶⁰⁴

This question reflects the point of view of the third approach, the one I have adopted in this thesis. This approach questions two assumptions on which the two first approaches rest: the fact that IHRL remains under-developed and underdetermined, at least regarding its approach to interim release, and the alleged specific context in which international criminal tribunals work. This third approach is justified because, as Sluiter noted, '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'.⁶⁰⁵ Admittedly, he added that 'while this offers certain safeguards, a too rigid stance on this matter should be rejected'.⁶⁰⁶ Nonetheless, the ICC Statute, which rests on states' consent, does not mention any mutation that 'internationally recognized human rights' would have to undergo before being applied by the judges. In addition, as will be seen later, states cannot delegate to an international organization a power they do not possess, namely that of violating human rights.⁶⁰⁷ Therefore, a strict application of IHRL should legally be preferred. Another logic underlying this approach is that there is no reason why an accused should not benefit from the same human rights he or she would be supposed to benefit from at a national level. In addition, as held by Davidson, 'one should reject a gravity-based model of human rights protection that is antithetical to the administration of justice' because, *inter alia*, 'the gravity of a

⁶⁰² Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 11 March 2009.

⁶⁰³ H. G. Cohen, 'From Fragmentation to Constitutionalization', (2012) *Scholarly Works. Paper* 854, available at http://digitalcommons.law.uga.edu/fac_artchop/854 (last accessed 21 March 2015) 392.

⁶⁰⁴ Cohen (n603) 392.

⁶⁰⁵ Sluiter (n323) 463.

⁶⁰⁶ Sluiter (n323) 463.

⁶⁰⁷ See Part 1.1.

crime ought to be reflected when sentencing, not when determining the extent of human rights protection during trial'.⁶⁰⁸

In contrast to the two other schools of thought, this approach adopts a more active attitude regarding the issue of the application of human rights to international criminal tribunals. Indeed, it cannot be contested that the persons detained by the ICC are accused of having committed horrific crimes or that the Court depends on states' cooperation. Nonetheless, instead of accepting these facts as justifying a framework other than that of IHRL, as argued by the first approach, or instead of proposing that IHRL be adapted and modified, as argued by the second approach, the third approach suggests that the gist is whether this difference of context really necessitates such adaptation and if so, whether this context could not be modified, by, *inter alia*, using IHRL.

This third approach could be considered coterminous with the second one. Nevertheless, it is important to distinguish this approach from the two others because, at least regarding interim release, the third school of thought demonstrates that the fundamentals of the two other approaches can be contested. On the one hand, as seen above, the principles of the right to liberty governing interim release are not necessarily underdetermined. Admittedly, it is the case regarding the determination of the reasonableness of the length of the detention. Nonetheless, regarding the presumption in favour of release, the burden of proof, the demonstration of the continuous necessity of detention and the conditions justifying provisional release, IHRL is clear. On the other hand, many accused have been provisionally released before the ICTY whereas this tribunal is operating in a context similar to that of the ICC which questions the pertinence of the argument of the specific context for the implementation of the interim release regime. It is beyond the scope of this thesis to examine whether the basis of the two first approaches could be contested for each human right before each international criminal tribunal. This thesis intends only to demonstrate that this third approach might substitute the first two, at least regarding the application of the right to liberty to the ICC, and that the two fundamentals of the first two schools should not therefore be taken for granted for the application of other human rights.

To reach this objective, the practice of the other tribunals regarding interim release of persons accused of international crimes and the specificity of the context in which the ICC

⁶⁰⁸ Davidson (n78) 77.

operates will first be examined. Secondly, the potential mechanisms existing to work on this context will be identified. However, the potential consequences the ICC could face in case of lack of strict respect of IHRL are first outlined.

6.2. Consequences for the ICC in case of lack of strict respect of international human rights law

The respect of human rights by the ICC is important for two reasons: first, the framers of the ICC Statute made clear, by inserting Article 21(3), that the ICC had to respect IHRL. Secondly, a lack of respect of human rights could prevent future cooperation by states, notably regarding future surrender of accused persons. Admittedly the ICC cooperation regime does not provide that a state can refuse to surrender an accused because his/her rights would be violated by the ICC. In fact, it only recognizes potential grounds for refusal in case of competing requests for surrender,⁶⁰⁹ or in case of inconsistency with the obligation of the state under international law with respect to the state or diplomatic immunity of a person.⁶¹⁰ Nonetheless, to surrender a person to a Court where the state knows that his or her human rights will not be respected could engage the responsibility of the state according to IHRL. This is the reasoning argued by Jenks regarding the surrender by a state of an accused to the Special Tribunal for Lebanon (STL) where the accused had been tried *in absentia*.⁶¹¹

The rationale for this argument is that, as some authors note, certain human rights occupy a hierarchically superior position among the norms of international law. The hierarchical nature of international legal norms can be implicitly inferred by Article 103 of the UN Charter. Moreover, such a conceptualization can be corroborated by the *erga omnes* character of many human rights norms.⁶¹² As argued by De Schutter:

These doctrines imply that, when confronted with a choice between two conflicting international obligations – one imposed under [IHRL], the other resulting from a decision adopted by an international organization to which the State has transferred certain powers

⁶⁰⁹ Article 90 of the ICC Statute.

⁶¹⁰ Article 98 of the ICC Statute.

⁶¹¹ C. Jenks, 'Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009)33(1) *Fordham International Law Journal* 75-76.

⁶¹² See Stapleton (n38) 546; Shelton (n38) 307; Knoops (n38) 17; De Schutter (n38) 61; Vidmar (n38) 13-41.

which this organization may exercise by adopting decisions binding upon its Member States – a State is not only allowed to set aside the latter obligation in order to comply with the former: it is obliged, under international law, to recognize such primacy of human rights obligations.⁶¹³

These doctrines have been put into practice in extradition cases by the ECtHR and the HRC. In these cases, the courts held that the execution of an extradition decision could lead to the culpability of the extraditing state because of the prohibition of torture and of inhumane and degrading treatment.⁶¹⁴

What about the right to liberty? As stated by Gradoni, ‘the test [of the HRC] is set out in general terms’ and ‘in principle, it covers any individual right protected by the Covenant’.⁶¹⁵ He also notes that the HRC has used ‘may’ so that ‘the finding that an infringement of an individual’s right as a foreseeable consequence of his extradition or expulsion does not of itself warrant the conclusion that the state which removes that individual from its territory acts in breach of the Covenant’.⁶¹⁶ In addition, if the ECtHR admitted that ‘it cannot be ruled out that an issue might exceptionally arise under Article 6 of the Convention [the right to a fair trial] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country’,⁶¹⁷ Safferling rightly noticed that this language ‘is remarkably cautious’.⁶¹⁸ As developed by Judges Bratza, Bonello and Hedigan in the *Mamatkulov and Askarov case*, the qualifying term ‘flagrant’ was meant ‘to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself’.⁶¹⁹ In the *Al-Moayad case*, the ECtHR specified that:

⁶¹³ De Schutter (n36) 96-97.

⁶¹⁴ ECtHR, Judgment, *Soering v. the United Kingdom* (App. No. 14038/88), 7 July 1989 §91; HRC, *Kindler v. Canada* (Comm. No. 470/1991), CCPR/C/48/D/470/1991, 30 July 1993 6.2.

⁶¹⁵ L. Gradoni, ‘You will receive a fair trial elsewhere’ *The Ad Hoc International Criminal Tribunals Acting as Human Rights Jurisdictions* (2007)54 (1) *Netherlands International Law Review* 1-49.

⁶¹⁶ Gradoni (n615) 1-49.

⁶¹⁷ ECtHR, Decision, *Al Moayad v Germany* (App. No. 35865/03), 20 February 2007 §100.

⁶¹⁸ C. Safferling, *International Criminal Procedure* (OUP, 2012) 159.

⁶¹⁹ As cited in Gradoni (n615) 1-49.

A flagrant denial of justice undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release (...) Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person is detained in a foreign country, must be considered a flagrant denial of a fair trial within the meaning of Article 6 §§1 and 3c.⁶²⁰

Even if no reasons would justify that these findings would not apply to a case regarding the surrender of an accused to the ICC,⁶²¹ it is doubtful that the risk of the violation of the right to liberty in case of the absence of real possibility of interim release would reach the threshold required by these human rights institutions. It must be kept in mind that, in this case, it only concerns a risk of violation since a willing state could still be found by the accused, as in the *Bemba* or *Gbagbo* cases. It does not seem thus to reach the threshold set up by the ECtHR of a flagrant denial of justice. It is thus very unlikely that a state would refuse to surrender an accused, at least with sincerity, because of this risk of violation.

Furthermore, another obstacle to this ground for refusal for surrender may be the non-inquiry rule, well known in extradition procedure. Indeed, this rule ‘prevents a judicial inquiry into the fairness of the judicial procedures and the penal conditions in the requesting state’,⁶²² or in this case the ICC. This is demonstrated by the *Ntakirutimana case* before the ICTR. In this case, the accused objected to his transfer from the United States to the ICTR because of the risk of a violation of his guarantee of a fair trial before the ICTR. His request was rejected because of the rule of non-inquiry.⁶²³

It is interesting to note that, after a thorough analysis of the case law of national jurisdictions, Aspremont and Brölmann concluded that, ‘even when the opportunity arose, there

⁶²⁰ ECtHR, Decision, *Al Moayad v Germany* (App. No. 35865/03), 20 February 2007 §101;

H. van der Wilt, ‘On the Hierarchy between Extradition and Human Rights’ in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (OUP, 2012) 159.

⁶²¹ G. Sluiter, ‘The Surrender of War Criminals to the International Criminal Court’ (2003)25 *Loyola of Los Angeles International & Comparative Law Review* 645.

⁶²² Sluiter (n621) 646-647.

⁶²³ Sluiter (n621) 646-647.

only are a few cases in which domestic courts have actually reviewed the acts of an international criminal tribunal. And when it happened, domestic judges did it with the tip of the toe.⁶²⁴ They noted the ‘reluctance to possibly engage the responsibility of the State, which after all remains bound by a general international duty to cooperate with the international tribunal concerned. Non-compliance with the international obligation to cooperate usually prompts the use of compliance mechanisms, a prospect to which judges generally show reservation’.⁶²⁵ This reluctance is shared by the ECtHR as demonstrated in the *Naletilic case*. In this case challenging an extradition to the ICTY, the ECtHR 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’ but that ‘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’, without commenting any further.⁶²⁶ For Sluiter, this non-inquiry rule should not be applied to proceedings for surrender to the ICC because of the absence of international supervisory mechanisms for human rights, because of the need for the ICC to still demonstrate that it respects human rights and because of the findings in the *Soering case*.⁶²⁷

It follows from these considerations that it is highly unlikely that a state would refuse to surrender an accused because of the risk of violation of his or her right to liberty. Nonetheless, the absence of consequences for the ICC in case of failure to respect this right in no way changes the fact that Article 21(3) of the ICC Statute still obliges the ICC to respect it.

⁶²⁴ J. d’Aspremont and C. Brölmann, ‘Challenging International Criminal Tribunals before Domestic Courts’ in A. Reinisch, *Challenges of Acts of International Organizations before National Courts* (OUP, 2010) 111-136.

⁶²⁵ d’Aspremont and Brölmann (n624) 111-136.

⁶²⁶ ECtHR, Decision, *Mladen Naletilic v. Croatia* (App. No. 51891/99), 4 May 2000 §1.b.

⁶²⁷ Sluiter (n621) 646-647;

Same sense, see Geneuss (n599) 423.

PART. II. THE ABILITY OF THE ICC TO RESPECT THE RIGHT TO LIBERTY

1. Is the ICC *sui generis*? Comparison with other tribunals

As seen in part I, according to some authors, the specificity of the context in which the ICC operates implies that Article 21(3) of the ICC Statute cannot be applied literally because the right to liberty, as an internationally recognized human right, would need to be adapted. They believe that this adaptation of the right to liberty would be justified considering the gravity of the offences the ICC deals with and the lack of a state apparatus. In order to see whether this adaptation is really necessary, the practice of the ICTY and of the ICTR will be examined. Indeed, these two other truly international tribunals act in the same environment as the ICC: they deal with similar crimes and they cannot rely on a state apparatus either since they are not located where the atrocities were committed. By contrast, the other international(ized) criminal tribunals, like the SCSL, the ECCC, the STL or the Special Panel for Serious Crimes in East Timor (SPSC), either apply national criminal law or have their seat in the concerned state. Their practice will thus only be mentioned when it is relevant for the ICC.

The interest of this section is to examine the impact of the gravity of the crimes and of the absence of state apparatus on provisional release issues in the case law of the *ad hoc* tribunals. This examination does not equate to an evaluation of the respect of the right to liberty by these tribunals since they are not governed by the same applicable law as the ICC and consequently they are not necessarily bound by the same right to liberty as the ICC. The purpose of this section is not to conduct an exhaustive analysis of this case law either, since the legal regime of provisional release is not identical to that of the ICC. For example, the ICTY's case law regarding the need to demonstrate sufficiently compelling humanitarian grounds to be released has no relevance for the ICC since it is linked to a mechanism that does not exist in the ICC, namely the possibility of applying for a motion for acquittal provided by Rule 98bis of the ICTY RPE.⁶²⁸ The

⁶²⁸ See Wald and Martinez (n374) 229-242; M. DeFranck, 'Provisional Release: Current Practice, a Dissenting Voice and the Case for a Rule Change' (2002)80 *Texas Law Review* 1429-1464; V. Tochilovsky, *Jurisprudence of the International Criminal Court and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijoff, 2007) 597-648; Gaynor (n42) 183-207; C. A. Müller, 'The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals' (2008)3 *International Criminal Law Review* 589-626; Fairlie (n9) 1101-1178; Davidson (n8) 34-52; N. Fauveau

interest of the *ad hoc* tribunals' case law thus lies especially in its practical aspects as their practical situation is similar to that of the ICC.

The ICTY's practice will be studied in more depth than that of the ICTR not only because the ICTR has been confronted with much fewer applications but also because the motivation of its few decisions is much less full. Furthermore, the ICTY's practice is more interesting for the study of the ability of the ICC to respect the right to liberty due to the large number of accused who were conditionally provisionally released before the beginning of their trial.

1.1. The ICTY: proof of the lack of a specific context?

Before examining the ICTY's practice as such, its legal regime of provisional release needs to be generally described since it differs from that of the ICC.

1.1.1. The ICTY's procedure

According to Article 19 of the ICTY Statute, upon confirmation of an indictment, the judge may, at the request of the prosecutor, issue orders and warrants for the arrest, detention, surrender or transfer of persons.⁶²⁹ By contrast to the ICC, detention is thus the only option, as there is no procedure for a summons to appear.⁶³⁰ Neither the Statute nor the RPE lists conditions for the issuance of an arrest warrant. It is only provided that the TC may order an arrest warrant upon confirmation of the indictment.⁶³¹ An indictment is confirmed following the

and P. Moriceau, 'La détention et la mise en liberté provisoire devant les juridictions internationales' (2011) *Recueil Dalloz* 1368; A. Trotter, 'Innocence, Liberty and Provisional Release at the ICTY: A Post-Mortem of 'Compelling Humanitarian Grounds' in Context' (2012)2 *Human Rights Law Review* 353-374; Sznajder (n9) 108-144; K. Zeegers, 'Provisional Release before the Ad Hoc Tribunals' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323468 (last accessed 14 February 2016) 4-7; A-L. Vaurs-Chaumette, 'Provisional Release in International Criminal Proceedings: The Limits of the Influence of Human Rights Law' in N. Weiss and J-M. Thouvenin (eds.), *The influence of Human Rights on International Law* (Springer, 2015) 131-144.

⁶²⁹ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended)*, 25 May 1993

⁶³⁰ Schabas (n326) 389.

⁶³¹ Article 19 of the ICTY Statute.

presentation by the prosecutor of a *prima facie* case,⁶³² in other words, a credible case which would, if not contradicted by the defence, provide a sufficient basis to convict the accused of the charges.⁶³³ Once transferred to the ICTY, the accused may apply for provisional release. Contrary to the ICC, the legality or the necessity of the detention is not automatically reviewed.

Provisional release is ruled by Rule 65 of the RPE. Rule 65 applies to provisional release issues arising during the course of trial, just as it applies during pre-trial and pre-appeal proceedings.⁶³⁴ The latest version of Rule 65 stipulates that:

Once detained, an accused may not be released except upon an order of a Chamber. Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgment by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released will not pose a danger to any victims, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release. The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including 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.⁶³⁵

Akin to the ICC, the ICTY judge must thus assess the risk of flight and of prejudice to the administration of justice. Nonetheless, a difference lies in the fact that the expression ‘may not be released except’ clearly presents the detention as the rule and the release as the exception. The use of ‘may’ also implies that, in contrast to the ICC regime, the judge has a discretionary power to refuse the release, even when the conditions for provisional release are met.⁶³⁶

Before November 1999, this discretionary power was reinforced by the need for the accused to prove, in addition to the other conditions, the existence of ‘exceptional circumstances’

⁶³² Article 19 of the ICTY Statute.

⁶³³ Hartwig (n323) 294.

⁶³⁴ *Milutinovic* provisional release decision of 14 December 2006 (n165).

⁶³⁵ Version of October 2011.

⁶³⁶ For a criticism, see Davidson (n8) 34-52; Starygin (n357) 315-35 ; Trotter (n628) 353-374.

that would justify the release.⁶³⁷ This requirement and the shifting of the burden of proof to the accused were ‘justified by the extreme gravity of the offences (...) charged and the unique circumstances under which the International Tribunal operates’.⁶³⁸ This gravity was considered as ‘self-evident’ since the ICTY ‘only has subject-matter jurisdiction over serious violations of international humanitarian law’,⁶³⁹ and the unique circumstances as ‘readily apparent’ because the ICTY was ‘not in possession of any form of mechanism, such as a police force, that could exercise control over the accused, nor does it have any control over the area in which the accused would reside if released’ so that it was ‘forced to rely on the cooperation of national governments or entities, some of which have so far failed to surrender suspects upon request’.⁶⁴⁰ This requirement was suppressed in November 1999 allegedly because of the length of the pre-trial proceedings and the number of detainees in custody.⁶⁴¹ Nevertheless, despite this amendment, the burden of proof continues to weigh on the accused. According to the ICTY, this is justified because ‘there is nothing in customary international law to prevent the placing of such a burden in circumstances where an accused is charged with serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk’.⁶⁴²

Rule 65 also provides for the host country and the state to which the accused seeks to be released the opportunity to be heard. This is only required in the case of a potential provisional

⁶³⁷ Rule 65 of the ICTY RPE (Feb 1994): (B) Release may be ordered by a Trial Chamber only in exceptional circumstances, and only if it satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

Rule 65 ICTYRPE (Nov. 1999): (B) Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

⁶³⁸ Decision on motion for provisional release filed by the accused Zejnil Delalic, *Prosecutor v. Mucic et al.*, Case No. IT-96-21, TC, ICTY, 25 September 1996 §18 (*Delalic* provisional release decision of 25 September 1996’).

⁶³⁹ *Delalic* provisional release decision of 25 September 1996 (n638) §19.

⁶⁴⁰ *Delalic* provisional release decision of 25 September 1996 (n638) §19.

⁶⁴¹ G. Boas, ‘Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court’ (2001)12(2) *Criminal Law Forum* 170;

According to Judge Wald, the two deaths in the unit detention and the depressive effect of long pre-trial detention also played a role (Wald and Martinez (n374) 233). Judge Robinson also advanced as a reason, the need to bring Rule 65 in line with human rights law (Fairlie (n9); Müller (n628); Sznajder (n9) 116).

⁶⁴² Decision on Momcilo Krajisnik’s notice of motion for provisional release, *Prosecutor v. Momcilo Krajisnic*, Case No. IT-00-39, TC, ICTY, 8 October 2001.

release and not in the case of a negative decision.⁶⁴³ This condition is considered to be fulfilled when the host country – the Netherlands – has been informed of the applicant’s motion and has had adequate time to file submissions.⁶⁴⁴

From these considerations can be inferred some salient differences between the legal regime of the ICTY and that of the ICC. These are: the possibility of summons to appear before the ICC; the absence of discretionary power for the ICC judges; and the imposition, before the ICC, of the burden of proof on the prosecution. At first sight, the ICC legal regime appears thus more human rights friendly than that of the ICTY.⁶⁴⁵ Nonetheless, closer analysis of the ICTY’s practice seems to contradict this conclusion.

1.1.2. The ICTY’s practice

1.1.2.1. Numbers

Before the amendment of 1999, only four out of 38 accused were granted provisional release and only for a few days:⁶⁴⁶ Djordje Djukic⁶⁴⁷ and Milan Simic⁶⁴⁸ both for medical reasons, Mario Cerkez⁶⁴⁹ for visiting his father when he was in a critical condition, and Drago Josipovic⁶⁵⁰ for attending the funeral of his father. In addition, Blaskic could benefit from house arrest, which, however, differs from provisional release as it is still a detention.⁶⁵¹ This experience of

⁶⁴³ Decision on defence motion of Ljube Boskoski for provisional release, *Prosecutor v. Boskoski*, Case No. IT-04-82-PT, TC, ICTY, 18 July 2005 §29; Decision on interlocutory appeal from Trial Chamber decision granting Nebojsa Pavkovic’s provisional release, *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, AC, ICTY, 1 November 2005 §12.

⁶⁴⁴ Decision on interlocutory appeal from Trial Chamber decision denying Savo Todovic’s application for provisional release, *Prosecutor v. Todovic*, Case No. IT-97-25/1, TC, ICTY, 7 October 2005.

⁶⁴⁵ See also Vours-Chaumette (n628) 137.

⁶⁴⁶ See Doran (n9) 719.

⁶⁴⁷ Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, *Prosecutor v. Dorde Dukic*, Case No. 1T-96-20-T, TC, ICTY, 24 April 1996.

⁶⁴⁸ Decision on Provisional Release of the Accused, *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, TC, ICTY, 26 March 1998.

⁶⁴⁹ Order on Motion of the Accused Mario Cerkez for Provisional Release, *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2, TC, ICTY, 14 September 1999.

⁶⁵⁰ Decision on the Motion of Defense Counsel for Drago Josipovic, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, TC, ICTY, 6 May 1999.

⁶⁵¹ Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of Tihomir Blaskic,

house arrest has never been renewed. The reasons would be that, ‘with a growing number of accused detained on remand, it became increasingly difficult, in the light of the principle of equality in treatment, to single out certain individuals for privileged treatment’ and that ‘the host state was quite reluctant to cooperate in further house arrests due to the cost and security issues’.⁶⁵²

Nonetheless, since the amendment of 1999, more than 40 accused have been granted conditional provisional release. Such release was ordered until the start of the trial,⁶⁵³ or limited to specific events such as the funeral of a family member,⁶⁵⁴ the memorial of a deceased family member,⁶⁵⁵ or the visit to an ill family member.⁶⁵⁶ The accused have always been recalled from release for the start of their trial.⁶⁵⁷ After the beginning of their trial, some accused have been

Prosecutor v. Blaskic, Case No. IT-95-14, President, ICTY, 3 April 1996.

⁶⁵² de Meester, Pitcher, Rastan and Sluiter (n322) 323.

⁶⁵³ Decision on Miroslav Tadic’s application for provisional release, *Prosecutor v. Simic et al.*, Case No. IT-95-9, TC, ICTY, 4 April 2000; Decision on Milan Simic’s application for provisional release *Prosecutor v. Simic et al.*, Case No. IT-95-9, TC, ICTY, 29 May 2000.

⁶⁵⁴ Decision on provisional release, *Prosecutor v. Hadzhasanovic & Kubura*, Case No. IT-01-47, TC, ICTY, 18 January 2004: funeral of his brother; Decision pursuant to Rule 65 granting Mrksic’s request to attend his mother’s funeral, *Prosecutor v. Mrksic et al.*, Case No. IT-95-13/1, TC, ICTY, 30 January 2004; Decision on Pandurevic’s request for provisional release on compassionate grounds, *Prosecutor v. Popovic et al.*, Case No. IT-05-88, TC, ICTY, 11 December 2007.

⁶⁵⁵ Decision on defendant Dusan Fustar’s emergency motion seeking a temporary provisional release to attend the 40-day memorial of his father’s death, *Prosecutor v. Mejacic et al.*, Case No. IT-02-65, TC, ICTY, 11 July 2003; Decision on motion of Blagoje Simic pursuant to Rule 65(I) for provisional release for a fixed period to attend memorial services for his father, *Prosecutor v. Simic et al.*, Case No. IT-95-9, TC, ICTY, 21 October 2004; Decision on defence request for provisional release of Stanislav Galic, *Prosecutor v. Stanislav Galic*, Case No. IT-98-29, TC, ICTY, 23 March 2005; Decision granting provisional release to Haradin Bala to attend his daughter’s memorial service, *Prosecutor v. Limaj et al.*, Case No. IT-03-66, TC, ICTY, 20 April 2006.

⁶⁵⁶ Decision on Ojdanic motion for temporary provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 4 July 2007.

⁶⁵⁷ Eg: Order terminating the provisional release of Miroslav Kvocka, *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1, TC, ICTY, 9 February 2005; Order terminating the provisional release of Beqa Beqaj, *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66, TCI, ICTY, 7 April 2005; Order scheduling a start of trial and terminating provisional release, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90, TCI, ICTY, 6 February 2008; Order terminating the provisional release of Veselin Sljivancanin, *Prosecutor v. Mrksic et al.*, Case No. IT-95-13/1, TC, ICTY, 9 April 2009.

released during the tribunal's recess,⁶⁵⁸ whereas this opportunity has been refused to others.⁶⁵⁹ To give an example, in April 2006, among the 40 accused persons awaiting trial at the Tribunal, 17 were detained and 23 others were on provisional release in various parts of the former Yugoslavia.⁶⁶⁰

These releases arose not only because of the suppression of the 'exceptional circumstances' criterion but also because 'the quality of co-operation with the Tribunal, particularly from Croatia and Serbia, but also from entities in Bosnia drawing support from Croatia and Serbia, began to improve'.⁶⁶¹

These provisional releases have always⁶⁶² been granted under specific conditions, such as providing an address, staying in a specific city or village, surrendering the passport, reporting regularly to a police station, consenting to unannounced visits, not having contact with victims or witnesses or interfering with evidence, not discussing the case, cooperating with the Tribunal and complying with any requirements of the authorities.⁶⁶³

⁶⁵⁸ Eg: Decision on joint motion for temporary provisional release during summer recess, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 1 June 2006; Decision on motions for provisional release during the winter judicial recess, *Prosecutor v. Popovic et al.*, Case No. IT-05-88, TCII, ICTY, 7 December 2007; Decision on Mr. Perisic's motion for provisional release during the Court's winter recess, *Prosecutor v. Perisic*, Case No. IT-04-81, TC, ICTY, 17 December 2008; Decision on Mr. Perisic's motion for provisional release during the easter Court recess, *Prosecutor v. Perisic*, Case No. IT-04-81, TC, ICTY, 6 April 2009; Decision on Slobodan Praljak's motion for provisional release (2009 summer judicial recess) of 18 May 2009, *Prosecutor v. Prlic et al.*, Case No. IT-04-74, TCIII, ICTY, 25 May 2009; Decision on Simatovic defence motion requesting provisional release during the winter court recess, *Prosecutor v. Stanasic & Simatovic*, Case No. IT-03-69, TCIII, ICTY, 14 December 2009; Decision granting Mico Stanasic's motion for provisional release during the court summer recess, *Prosecutor v. Stanasic & Zupljanin*, Case No. IT-08-91, TCII, ICTY, 16 July 2010.

⁶⁵⁹ *Milutinovic* provisional release decision of 14 December 2006 (n165); Decision denying Mico Stanasic's motion for provisional release during the court summer recess, *Prosecutor v. Stanasic & Zupljanin*, Case No. IT-08-91, TCII, ICTY, 29 June 2011.

⁶⁶⁰ Gaynor (n42) 185.

⁶⁶¹ Gaynor (n42) 185.

⁶⁶² Except: Order on the Provisional Release of the Accused *Proprio Motu*, *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, TCIII, ICTY, 6 November 2014.

⁶⁶³ Eg: Decision on request for pre-trial provisional release, *Prosecutor v. Halilovic*, Case No. IT-01-48, TC, ICTY, 13 December 2001; Order on Miodrag Jokic's motion for provisional release, *Prosecutor v. Jokic*, Case No. IT-01-42/1, TC, ICTY, 20 February 2002; Decision on provisional release, *Prosecutor v. Stanasic & Simatovic*, Case No. IT-03-69, TCIII, ICTY, 28 July 2004 ('*Stanasic* provisional release decision of 28 July 2004'); Decision on defence request for

It follows from these considerations that, despite the fact that the legal regime of provisional release in the ICTY appears more severe than that of the ICC, the ICTY does not hesitate to use its power to release some accused. The gravity of the offences and the lack of state apparatus seem thus, at first sight, not to be insurmountable barriers for the ICTY to grant provisional release. Why would it be different for the ICC? Before answering this question, it is important to study the ICTY's case law more thoroughly in order to understand the reasoning of the ICTY judges.

1.1.2.2. ICTY's case law

According to the ICTY, to decide upon a provisional release inquiry, the following factors are relevant: the gravity of the offences, the potential sentence, the circumstances of the accused's surrender, the degree of cooperation provided by the authorities of the state to which the accused seeks to be released, the guarantees offered by those authorities, any personal guarantees offered by the accused, the accused's degree of co-operation with the prosecution and the indications of a previous interference with the administration of justice.⁶⁶⁴ In addition, the health condition and considerations regarding treatment of ill detainees can also play a role.⁶⁶⁵

It follows from an analysis of the case law that the first two factors, namely the gravity of the crimes with which the accused is charged and the perspective of a long sentence, are considered as evident since the ICTY 'only has subject-matter jurisdiction over serious violations of international humanitarian law'.⁶⁶⁶ Nonetheless, these two criteria alone are not considered as sufficient to maintain the detention.

provisional release, *Prosecutor v. Delic*, Case No. IT-04-83, TC, ICTY, 6 May 2005; Order of provisional release for Mladen Markac, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90, PTC, ICTY, 9 February 2007.

⁶⁶⁴ *Stanisic* provisional release decision of 28 July 2004 (n663); Decision on fourth application for provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 14 April 2005; Decision on defence request for provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 14 April 2005; Decision on provisional release, *Prosecutor v. Stanisic & Simatovic*, Case No. IT-03-69, TCH, ICTY, 26 May 2008 §39.

⁶⁶⁵ Decision on provisional release, *Prosecutor v. Stanisic & Simatovic*, Case No. IT-03-69, TCH, ICTY, 26 May 2008 §40;

Gaynor (n42) 202-203.

⁶⁶⁶ *Delalic* provisional release decision of 25 September 1996 (n638) §19.

Among the other factors taken into consideration, the circumstances of the surrender are decisive, especially to assess the risk of flight of the accused. The importance of this is demonstrated by the fact that provisional release was granted in virtually all the cases where the accused voluntarily surrendered.⁶⁶⁷ It must be noted that, when the accused has been arrested under a sealed indictment, this has served as a neutral factor, i.e. it has not exerted any adverse influence on the risk of flight.⁶⁶⁸

Other crucial factors are the degree of cooperation and the guarantees provided by the authorities of the state to which the accused seeks to be released. It was held that, even if, in theory, Rule 65 ‘places no obligation upon an accused applying for provisional release to provide guarantees from a State as a prerequisite to obtaining provisional release’, ‘such a guarantee, if deemed credible, may carry considerable weight in support of such an application’.⁶⁶⁹ Besides, the UN Secretary-General’s October 2000 report to the General Assembly expressly stated that ‘in those cases in which no guarantee is given by the relevant state, a release will not be granted’.⁶⁷⁰ In practice, no accused has ever been released without such guarantees.⁶⁷¹ Nonetheless, such guarantees are not necessarily sufficient to be granted provisional release. For example, despite the guarantees from Russia for Slobodan Milosevic, the Chamber was not satisfied that, if released, he would return for the continuation of his trial, since he was in the latter stages of a very lengthy trial, in which he was charged with many serious crimes, and at the end of which he might face the possibility of life imprisonment.⁶⁷²

⁶⁶⁷ DeFranck (n628) 1432-34;

Eg.: Decision granting provisional release to Amir Kubura, *Prosecutor v. Hadzihasanovic & Kubura*, Case No. IT-01-47, TC, ICTY, 19 December 2001; Decision granting provisional release to Enver Hadzihasanovic, *Prosecutor v. Hadzihasanovic & Kubura*, Case No. IT-01-47, TC, ICTY, 19 December 2001; Order on motion for provisional release, *Prosecutor v. Ademi & Norac*, Case No. IT-04-78, TC, ICTY, 20 February 2002; Decision concerning motion for provisional release of Radijove Miletic, *Prosecutor v. Popovic et al.*, Case No. IT-05-88, TCII, ICTY, 19 July 2005.

⁶⁶⁸ DeFranck (n628) 1432-34;

Eg., *Brdanin* provisional release decision of 25 July 2000 (n554); Decision on Momcilo Krajisnic’s Notice of Motion for Provisional release, *Prosecutor v. Momcilo Krajisnic*, Case No. IT-00-39, TC, ICTY, 8 October 2001 §20-21; Decision on provisional release of Haradin Bala, *Prosecutor v. Limaj et al.*, Case No. IT-03-66, TC, ICTY, 16 September 2003.

⁶⁶⁹ Decision on interlocutory appeal against trial chamber’s decisions granting provisional release, *Prosecutor v. Popovic et al.*, Case No. IT-05-88, TCII, ICTY, 19 October 2005.

⁶⁷⁰ Fairlie (n9) 1165.

⁶⁷¹ Fairlie (n9) 1165.

⁶⁷² Decision on assigned counsel request for provisional release, *Prosecutor v. Milosevic, Slobodan*, Case No. IT-02-54, TC, ICTY, 23 February 2006.

These guarantees are used to compensate the lack ‘of any form of mechanism, such as a police force, which could exercise control over the accused’ or of ‘any control over the area in which the accused would reside if released’.⁶⁷³ These guarantees must thus be reliable. The weight given to these guarantees depends on the degree to which that government has previously cooperated with the ICTY.⁶⁷⁴ For example, the guarantees provided by the ‘government’ of the Republic of Srpska started to be taken into consideration only when this ‘government’ began to demonstrate compliance with court orders.⁶⁷⁵ To determine this degree of cooperation, the judge examines, in each case, ‘what would occur if the relevant authority were obliged under its guarantee to arrest the accused person seeking provisional release in that case’.⁶⁷⁶ The judge also takes into consideration the position of the accused since it can impact on the state’s ‘willingness and readiness’ to ensure the appearance of the accused at trial.⁶⁷⁷ The assessment of the reliability of the guarantees provided is important as conditions are also imposed on the state. For example, the state has to undertake to ensure the personal security and safety of the accused, to submit a written report every fixed term as to the presence of the accused and his or her compliance with the terms of his or her conditional release and to detain the accused immediately should he or she breach any of these terms.⁶⁷⁸

⁶⁷³ *Delalic* provisional release decision of 25 September 1996 (n638) §19.

⁶⁷⁴ *Stanisic* provisional release decision of 28 July 2004 (n663); Decision on fourth application for provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 14 April 2005; Decision on defence request for provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 14 April 2005; DeFranck (n628) 1435-1436; Gaynor (n42) 193-194.

⁶⁷⁵ Rearick (n9) 592; Gaynor (n42) 193-194.

⁶⁷⁶ *Stanisic* provisional release decision of 28 July 2004 (n663); Decision on Appeal Against Refusal to Grant Provisional Release, *Prosecutor v. Mrksic et al.*, Case No. IT-95-13/1, TC, ICTY, 8 October 2002 §9; Müller (n628) 605-606.

⁶⁷⁷ Decision on provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 30 October 2002; *Stanisic* provisional release decision of 28 July 2004 (n663); Müller (n628) 605-606; Gaynor (n42) 194.

⁶⁷⁸ Eg: Decision granting provisional release to Amir Kubura, *Prosecutor v. Hadzibasanovic & Kubura*, Case No. IT-01-47, TC, ICTY, 19 December 2001; Decision on applications for provisional release, *Prosecutor v. Sainovic et al.*, Case No. IT-05-87, TC, ICTY, 26 June 2002; Decision on interlocutory appeal against Trial Chamber’s decision denying provisional release, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90, AC, ICTY, 2 December 2004; Decision on Momcilo Perisic’s motion for provisional release, *Prosecutor v. Perisic*, Case No. IT-04-81, TC, ICTY, 9 June 2005; Order of provisional release for Mladen Markac, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90, TCI, ICTY, 9 February 2007.

The last factor to be taken into consideration by the judge is previous behaviour of the accused persons including their interference with the administration of justice. It is interesting to note that, to determine the existence of this risk, the ICTY requires real evidence. By contrast, as seen before, the ICC considers that the knowledge of the names of the witnesses may be sufficient as such to conclude the existence of this risk. The ICTY prosecutor tried to create a similar presumption but the TC rejected the idea that ‘the heightened ability to interfere with victims and witnesses, by itself, suggests that he [the accused] will pose a danger to them’.⁶⁷⁹ Similarly, the ICTY does not accept that the ‘mere possibility – that the willingness of witnesses to testify would be affected by an accused’s provisional release – would be a sufficient basis for refusing that provisional release’ since ‘it is for the prosecution to reassure its own witnesses’.⁶⁸⁰ Nonetheless, in one case, the ICTY recognized that, ‘although a general fear of intimidation and threatening of witnesses cannot in itself constitute a ground for denying provisional release, the volatile situation in Kosovo makes the possibility that such incidents might occur so vivid that it calls for specific caution when deciding on provisional release’.⁶⁸¹

1.1.3. Conclusion

The foregoing considerations suggest that, despite the fact that the ICTY has struggled with the same issues as the ICC, namely the gravity of the offences and the absence of a state apparatus, and that the ICTY’s legal regime has appeared less respectful of IHRL, the ICTY has nevertheless granted conditional provisional release to many accused. Apparently, the ICTY did not consider that the gravity of the crimes committed by the accused was sufficient to justify their continuing detention. Furthermore, it compensated its lack of state apparatus by guarantees from the state where the accused sought to be released. It is interesting to note that, so far, all the conditionally and provisionally released accused have returned to appear in court when requested. Are the gravity of the offences and the lack of state apparatus therefore real excuses for the ICC not to fully respect the right to liberty? What could explain this difference of practice?

A first difference could be that, contrary to the former practice of the ICTY, the ICC arrest warrants of nearly all the accused currently in detention have been issued under seal. The

⁶⁷⁹ *Brdanin* provisional release decision of 25 July 2000 (n554) §§19-20.

⁶⁸⁰ *Brdanin* provisional release decision of 25 July 2000 (n554) §§19-20.

⁶⁸¹ Decision on Lahi Brahimaj’s motion for provisional release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84, TCII, ICTY, 3 November 2005.

arrest warrants are unsealed only once the accused is arrested.⁶⁸² Exceptions are the cases of Ntaganda and Ongwen whose arrest warrants were unsealed prior to their ‘surrender’. Due to these sealed arrest warrants, these accused did not have the chance to show their willingness to surrender whereas it could be, as seen through the ICTY practice, a crucial element to appreciate the risk of flight. Some of the accused tried to demonstrate *a posteriori* this willingness but their arguments were not considered as sufficiently convincing.⁶⁸³ It falls outside the scope of this thesis to examine the adequacy of the prosecutor’s policy regarding the issuance of a sealed arrest warrant.⁶⁸⁴

The real success of the ICTY provisional release regime seems to lie in the capacity of its accused to present reliable states guarantees. This capacity of the ICTY accused to provide such guarantees is another factor explaining the difference of practice with the ICC. Before exploring the elements that could influence this capacity, it is interesting to examine the ICTR’s practice. Indeed, the ICTR operates in a context similar to that of the ICC and, contrary to its European counterpart, the ICTR has never provisionally released any accused, most likely because of this lack of guarantees.

1.2. The ICTR: confirmation of the specific context?

The ICTR legal regime regarding provisional release is nearly identical to that of the ICTY since the ICTR adopted the same amendments of Rule 65, except for the criterion of sufficiently compelling humanitarian grounds. Nonetheless, despite this similarity, the ICTR is yet to provisionally release any of its accused.⁶⁸⁵ In addition, contrary to the ICTY, the ICTR did not feel compelled to substantiate its decisions beyond observing the non-existence of exceptional circumstances,⁶⁸⁶ or the absence of any states guarantees.⁶⁸⁷ Another difference is that, probably

⁶⁸² Available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx (last accessed 8 April 2015).

⁶⁸³ Ngudjolo, Mbarushimana, Bemba.

⁶⁸⁴ See C. Ryngaert, ‘The International Prosecutor: Arrest and Detention’ (2009) 24 *Working Paper*, Leuven Centre for Global Governance Studies, 24-25.

⁶⁸⁵ See Rearick (n9) 577-595.

⁶⁸⁶ Decision on the defence motion for the provisional release of the accused, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, TCII, ICTR, 21 February 2001; Decision on the defense’s motion for provisional release pursuant to Rule 65 of the Rules, *Prosecutor v. Jérôme-Clément Bicamumpaka*, Case No. ICTR-99-50-T, TCII, ICTR, 25 July 2001;

because of the ICTR's strict case law and the absence of states willing to provide any guarantees, there have not been many applications for release so that the ICTR case law regarding provisional release is very scarce.⁶⁸⁸

Until the suppression of the 'exceptional circumstances' criterion in May 2003, all applications were rejected on the sole ground of non-existence of such circumstances. For instance, a serious illness was not considered as such circumstance since the ICTR could arrange for the administration of adequate medical treatment.⁶⁸⁹ It was also ruled that five years of detention did not amount to exceptional circumstances.⁶⁹⁰

The suppression of the 'exceptional circumstances' criterion did not improve the situation. Indeed, the inability to find a state willing to accept the provisionally released accused person on its soil became the new criterion used to reject applications. This criterion was recognized as an essential condition:

The Defence must provide at least *prima facie* evidence that the country in question agrees or would agree to accept the Accused on its territory, and that the country will guarantee the Accused's return to the Tribunal at such times as the Chamber may order.⁶⁹¹

Decision on the defence motion for release, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, TCIII, ICTR, 12 July 2002.

⁶⁸⁷ Decision on Nsengimana's motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, *Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-I, TCII, ICTR, 11 July 2005.

⁶⁸⁸ I could find only 39 decisions for 161 accused.

⁶⁸⁹ Decision on the Request Filed by the Defense for Provisional Release of Georges Rutaganda, *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, TC, ICTR, 7 February 1997; Decision on the defense's motion for provisional release pursuant to Rule 65 of the Rules, *Prosecutor v. Jérôme-Clément Bicamumpaka*, Case No. ICTR-99-50-T, TCII, ICTR, 25 July 2001;

Rearick (n9) 585.

⁶⁹⁰ Decision on the defence motion for the provisional release of the accused, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, TCII, ICTR, 21 February 2001; Decision on the defence motion for release, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, TCIII, ICTR, 12 July 2002.

⁶⁹¹ Decision on defence motion to fix a date for the commencement of the trial of Father Emmanuel Rukundo or, in the alternative, to request his provisional release, *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-I, TCIII, ICTR, 18 August 2003 §22.

Consequently, without state guarantees, the ICTR contented to note, for example, that ‘in the absence of appropriate submissions from Austria and France and no submissions from Tanzania, the Chamber finds that the defence has failed to fulfil the first requirement that would allow it to order the provisional release of the Accused’ and that ‘since the Defence has failed to fulfil the first of the cumulative requirements under rule 65(B), the Chamber does not find it necessary to consider the other requirements’.⁶⁹² At least, as noticed by Fairlie, by limiting itself to reference to the lack of state guarantee, ‘the jurisprudence of the ICTR appears more honest than its Yugoslav counterpart’.⁶⁹³

This lack of capacity of the accused to provide guarantees might be explained by the fact that Rwanda was not an acceptable option due to the risk of being prosecuted there or of being submitted to torture or degrading or inhumane treatment.⁶⁹⁴ None of the accused has ever tried to be released there. Regarding Tanzania, the only indication that it was ever contacted for the potential provisional release of an accused is the paragraph of a decision stating that ‘the Republic of Tanzania advises that it is unable to host the Accused as requested’.⁶⁹⁵ Otherwise, it seems that no other state has ever been heard or even contacted by the ICTR.

In a nutshell, the ICTR justifies the fact that none of its accused has ever been provisionally released because of its lack of state apparatus and the absence of any state guarantees which might compensate for this lack. Contrary to the ICTY, it is not possible to examine its arguments further given the lack of motivation of its decisions.

1.3. Lessons that can be learnt from the practice of the ICTY and ICTR

Why this difference of practice between two international tribunals working in, *a priori*, the same environment, sharing the same procedure and dealing with the same kind of crimes?

⁶⁹² Decision on Nsengimana’s motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, *Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-I, TCII, ICTR, 11 July 2005 §§18-19.

⁶⁹³ Fairlie (n9) 1166.

⁶⁹⁴ Rearick (n9) 592; B. Henry, ‘The Acquitted Accused, a Forgotten Party at the ICTR’ (2005)12 *New England Journal of International and Comparative Law* 82; Heller (n2) 665, 672-673; B. Holà and J. van Wijk, ‘Life after Conviction at International Criminal Tribunals. An Empirical Overview’ (2014)12 *Journal of International Criminal Justice* 131.

⁶⁹⁵ Decision on defence motion for provisional release, *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, TCIII, ICTR, 17 December 2008 §7.

The ICTY's practice demonstrates that provisional release can be implemented with success when a trustworthy state presents guarantees in favour of the accused. On the other hand, the ICTR's practice seems to show that, without any guarantees of states, it cannot be implemented. The ICTR's practice also highlights the fact that states are not necessarily willing to accept provisionally released accused persons on their soil. It is important to stress that the countries of origin of the accused before the ICTY were willing to host them during their provisional release and to submit guarantees for them. By contrast, no state seemed to be willing to accept the accused of the ICTR, even after their acquittal.⁶⁹⁶

Two lessons can thus be learned from the practice of the *ad hoc* tribunals regarding the potential need to adapt the right to liberty given the issue of the gravity of the crimes and the lack of state apparatus. On the one hand, the ICTY practice demonstrates that the first issue related to the gravity of the offences is not necessarily a real one. On the other hand, the need to find a cooperative state to compensate for the lack of state apparatus is confirmed.

1.3.1. The first lesson: the issue of the gravity of crimes

The gravity of the crimes with which the accused before the ICC are charged is uncontested. Indeed, akin to the ICTY, the ICC could argue that 'the gravity of the offences with which persons accused before the International Tribunal are charged is self-evident' since it 'only has subject-matter jurisdiction over serious violations of international humanitarian law'.⁶⁹⁷ Nonetheless, like the ICTY, the ICC could reach the conclusion that, since 'the [ICC]'s full name stated explicitly that it presided exclusively over "serious" crimes' and since Article 60 'nonetheless provided for provisional release of the accused, that provisional release was clearly meant to apply in the Tribunal's specific context'.⁶⁹⁸ Indeed, the states parties to the ICC agreed to Article 21(3) and the possibility of provisional release while being aware that it would apply to persons accused of international crimes. Article 58 of the ICC Statute even provides for the possibility of a summons to appear without arrest. The fact that the accused before the ICC are charged with horrific crimes does not of itself justify an adaptation of the right to liberty.

⁶⁹⁶ Heller (n2) 664.

⁶⁹⁷ *Delalić* provisional release decision of 25 September 1996 (n638) §19.

⁶⁹⁸ Sznajder (n9).

To be fair, the ICC does not only focus on the gravity of the crimes to justify the necessity of the detention. It thus seems that, as for the ICTY, the ICC does not accept this criterion as one that could justify as such a deviation from the right to liberty. It mostly refers to it because the gravity of crimes has a role to play in the appreciation of the risks linked to provisional release. Indeed, as seen before, the risk of flight is assessed among others in light of the length of the expected sentence. The danger of the accused regarding the risk of interference with the witnesses or the risk of recidivism is also examined together with the gravity of the offences in mind. The gravity of the crimes may have an impact on the complexity of the investigation and therefore on the appreciation of the reasonableness of the length of the detention. These roles are also recognized by in the context of IHRL.⁶⁹⁹ Therefore, contrary to what some scholars think,⁷⁰⁰ what the practice of the ICTY demonstrates is that the fact that an accused is charged with international crimes is not a real obstacle for a strict application of the right to liberty as internationally recognized. No adaptation of IHRL is thus needed for this reason.

It must be noted that the SPSC also provisionally released some accused.⁷⁰¹ Likewise, some accused charged with similar horrific crimes were also provisionally released before national jurisdictions: Tomo Mihajlovic (Serb), Dominik Ilijasic (Croat) or Edin Hakanovic (Bosnian) before the Zenica Cantonal Court,⁷⁰² the *Matonovic case* (11 Serb defendants) before the Banja Luka District Court,⁷⁰³ Papon before the French Court of Bordeaux,⁷⁰⁴ or the six Belgo-rwandans still awaiting their trial.⁷⁰⁵ Admittedly, these situations are not really comparable with that of the ICC since these jurisdictions have at their disposal a state apparatus and apply national law.

⁶⁹⁹ see part I.

⁷⁰⁰ Mégret (n585) 65.

⁷⁰¹ de Meester, Pitcher, Rastan and Sluiter (n322) 336.

⁷⁰² OSCE, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina. Progress and Obstacles' (March 2005) available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf (last accessed 8 April 2015) 58.

⁷⁰³ OSCE (n702) 58.

⁷⁰⁴ A. Chemin, 'Une décision exceptionnelle qui bouleverse la jurisprudence', *Le Monde* (12 October 1997). Admittedly he fled in Switzerland and was arrested 3 days later.

⁷⁰⁵ 'Génocide au Rwanda: l'impunité perd du terrain' *Le Vif* (6 April 2013) available at <http://www.levif.be/actualite/international/genocide-au-rwanda-l-impunite-perd-du-terrain/article-normal-77267.html> (last accessed 8 April 2015).

Nevertheless, they illustrate the fact that the gravity of the crimes is not necessarily an obstacle to the provisional release of an accused and does not prevent a strict respect of the right to liberty.

It stems from these considerations that there is no need to adapt the right of the liberty because of the gravity of the crimes the accused are charged with. The gravity of the crimes is sufficiently taken into account by the right to liberty through the interpretation of the criteria justifying detention. Consequently, were there a need for an adaptation of the right to liberty, it would be because of the necessity to find a state that would implement the potential interim release.

1.3.2. The second lesson: the need for state guarantees

The second lesson revealed by the practice of the ICTY and ICTR is that guarantees of a state willing to accept a provisionally released accused on its soil are a condition *sine qua non* for an effective provisional release regime. This need was also recognized by the AC in the *Bemba case* when it stated that ‘a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release’.⁷⁰⁶

Regarding the identification of such a ‘State willing and able’, the ICTY’s practice reveals the success of the choice of the state of origin when the accused still benefits from official support in his or her country. On the other hand, the ICTR’s practice reveals that, when the accused come from the losing side of the conflict, they would not want to go back there or the state would not want them on its territory.

The practice of the SCSL is interesting in this respect. Indeed, in this case, the question of finding a state did not really arise since the Court was based in the same country where the crimes were committed and since nearly all the accused came from Sierra Leone. The exception was Charles Taylor who came from Liberia but, if he ever applied for provisional release, the applications and the decisions were confidential. The provisional release regime before the SCSL was similar to that of the ICTR.⁷⁰⁷ Like the ICTR, the SCSL has never granted provisional release

⁷⁰⁶ *Bemba* interim release judgment of 2 December 2009 (n347) §36.

⁷⁰⁷ Article 14 of the SCSL Statute stipulates that ‘the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court’.

to any accused.⁷⁰⁸ All of its decisions offer the same explanation, namely the context in which it operates:

In this early stage of its development, the courts with jurisdiction to try persons accused of international crimes have few enforcement powers or procedures to ensure that indictees attend for trial: there is no international police-force, and co-operation between States in respect to the return of fugitives is inadequate. In Sierra Leone, attention must be paid by both the tribunal and the parties to the reality on the ground, such as the overall security situation and the lack of police facilities to enforce or monitor conditions of bail.⁷⁰⁹

Interestingly, the Court referred to its context without noting that, in any case, implementing a provisional release in Sierra Leone would not have been feasible because the Sierra Leone government had declared its inability to implement it with the same common observations it gave in each case. Its position was that bail should not be granted given the ‘grave consequences for the security situation in Sierra Leone’ in such case and ‘the impossibility for its authorities to ensure that the Accused remains under house arrest in their custody’ or ‘to prevent the Accused from fleeing or hiding’. The government then stressed ‘its current lack of police and military capacities in remote areas of the country and generally in the whole of the territory, as well as its lack of financial resources to be able to respond to the requirements that could be imposed by such a release’.⁷¹⁰ These arguments of the Sierra Leone government are thus interesting to demonstrate the importance of finding a state both ‘able’ and ‘willing’. This practice of the SCSL confirms thus the previous findings according to which there must be a state both willing and able to accept the accused on its soil in order to implement provisional release.

The SCSL RPE were adopted in July 2002, namely a few months before the suppression of the ‘exceptional circumstances’ requirement by the ICTR ; the SCSL suppressed it in October 2003 so that this requirement was never examined in any decision on provisional release.

⁷⁰⁸ See M. C. Nicol-Wilson, ‘The realization of the right to bail in the Special Court for Sierra Leone: Problems and prospects’ (2007)7 *African Human Rights Law Journal* 516.

⁷⁰⁹ *Norman* bail decision (n166) §31.

⁷¹⁰ Decision on the motion by Morris Kallon for bail, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-PT, TC, SCSL, 23 February 2004 §13; Decision on application of Issa Sesay for provisional release, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-PT, TC, SCSL, 31 March 2004; *Norman* bail decision (n166).

1.4. Conclusion: Is there really a specific context justifying tuning the standard of the right to liberty?

In the first part, we have seen how some authors argue that it is illusory that the right to liberty may be applied as such by the ICC because of the gravity of the offences with which it deals and of the lack of state apparatus at its disposal. However, the ICTY's practice demonstrates that the gravity of the offences is not a veritable obstacle to an application as such of the right to liberty. It has been confirmed by the SPSC practice and the practice of some national jurisdictions. In addition, it has been demonstrated that, where an able and willing state is found, provisional release might be implemented. Since this need to find an able and willing state is not addressed by the case-law of IHRL, it might bolster some scholars' argument advocating for an adaptation of the right to liberty to particular circumstances of international criminal proceedings. Nonetheless, if an able and willing state would enable the ICC to respect the right to liberty, should not a solution be to find such state willing to present such guarantees? As pointed earlier, the presidency and the registry also have to respect the right to liberty and they have a role to play in finding such able and willing state.

Before examining the potential solutions, it is important to insist that the right to liberty would not provide for the automatic release of each accused that could present such guarantees. Indeed, the absence of the risks of flight, of interference with the administration of justice and of recidivism would still need to be demonstrated. For example, the ICC was not necessarily wrong to conclude, in the *Bemba case*, that the guarantees presented by a state whose name remains confidential were insufficient mostly because, regarding the risk of flight, the measures were not designed to prevent the accused from absconding but rather to monitor his physical location and to determine whether he complied with the conditions imposed by the ICC.⁷¹¹ By the same token, the ICC rightly noted that the state could not appropriately monitor the calls made to Bemba and his visits since the state would not know the sensitive issues in the case, like the identities of the protected witnesses.⁷¹²

This example illustrates again that the ICC is able to respect the right to liberty when an able and willing state is found. Indeed, the judge appreciated the alternatives to detention, namely

⁷¹¹ *Bemba* interim release decision of 27 September 2011 (n334) §41.

⁷¹² *Bemba* interim release decision of 27 September 2011 (n334) §41.

the release of Bemba in this state, and, had the risks been sufficiently mitigated by these guarantees, would have had a real power of release. This attitude is thus conform to the one prescribed by the right to liberty as internationally recognized. It demonstrates that the ICC is able to respect IHRL when an able and willing state is found so that an adaptation of IHRL is not needed.

When state guarantees are provided, whether the ICC acts in conformity to the requirement of the right to liberty becomes a practical issue. It thus cannot be solved by this thesis. Indeed, it is beyond the scope of this thesis to assess *in concreto* the respect by the ICC of the right to liberty since the necessity of the detention can only result from a case-by-case analysis and has to be appreciated in light of all the factual elements of the case.⁷¹³ The same issues arise regarding the appreciation by the ICC of the willingness and the ability of a state since one does not have all the evidence for factual elements to assess them *in concreto*. By contrast, the mechanisms to find a state to host an accused on its soil can be explored. This is the purpose of the following section.

2. The issue of finding a state to host provisionally released detainees

Before examining the existing mechanisms to find a state, it is necessary to understand the reasons for refusal of the states to answer positively to a request of the ICC or of the accused. These reasons demonstrate that other factors play a role in the interim release context. Nonetheless, as stated in the introduction, these factors do not prevent that legal obligations exist and are thus outside of the scope of this analysis.

2.1. Positions of the states regarding requests for provisional release on their soil

So far, only Bemba and Gbagbo have been able to present guarantees, and these were from states whose names remain confidential. No information could thus have been found as to how these states were contacted and about the conditions of their intervention. In addition, the content of the observations from the Netherlands, Belgium, France, the UK and the DRC

⁷¹³ ECtHR, Judgment, Case of Bernobic v. Croatia (App. No. 57180/09), 21 June 2011 §77.

Mangenda interim release judgment of 11 July 2014 (n331); *Babala* interim release judgment of 11 July 2014 (n331); *Kilolo* interim release judgment of 11 July 2014 (n331).

provided upon requests by the ICC is not always accessible. Observations requested by the ICC from other states, if ever provided, were totally confidential.

The analysis of the available observations reveals that all these observations start with the fact that the state has no say regarding the decision of interim release as such. Usually, they all raise the same kind of arguments for their refusal to host the accused:

- the absence of links of the accused with their country;⁷¹⁴
- the need for the accused to demonstrate the possession of sufficient material and economical resources;⁷¹⁵
- the need to respect the procedure regarding a visa;⁷¹⁶
- the absence of procedure available to arrest the accused;⁷¹⁷
- the inability to impede the recidivism.⁷¹⁸

These states thus raise issues linked to the implementation of the interim release as such. In order to examine the validity of such arguments, it is interesting to deepen the arguments of two states key to this issue: Belgium and the Netherlands. The former is a central actor for this issue because several accused have wanted to be released on its soil, because it is within easy reach of the ICC and because it is so far the only state that signed an agreement with the ICC to implement interim release on its soil. The Netherlands is another key actor because it is the host state and therefore the only state that could implement an interim release during the trial as such.

⁷¹⁴ The United Kingdom for Ngudjolo, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 22 February 2008 ('The United Kingdom for Ngudjolo observations of 22 February 2008'); France for Ngudjolo, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 25 February 2008 ('France for Ngudjolo observations of 25 February 2008'); Belgium for Ngudjolo, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 28 February 2008 ('Belgium for Ngudjolo observations of 28 February 2008').

⁷¹⁵ France for Ngudjolo observations of 25 February 2008 (n714); Belgium for Ngudjolo observations of 28 February 2008 (n714).

⁷¹⁶ The United Kingdom for Ngudjolo observations of 22 February 2008 (n714); Belgium for Ngudjolo observations of 28 February 2008 (n714); *Mangenda* interim release decision of 17 March 2014 (n448) §42.

⁷¹⁷ France for Ngudjolo observations of 25 February 2008 (n714); *Kilolo* interim release decision of 14 March 2014 (n448) §45.

⁷¹⁸ *Babala* interim release decision of 14 March 2014 (n448) §28.

2.1.1. Belgium's arguments

In March 2014, Belgium and the ICC signed an agreement regarding, among others, the potential implementation of interim release of accused persons ordered by the ICC on Belgian territory.⁷¹⁹ The agreement as such is confidential but the Belgian law implementing it provides for practical elements such as the legal recognition of an interim release ordered by the ICC,⁷²⁰ and the possibility to arrest the accused in case of the violation of the conditions provided for by the ICC.⁷²¹ According to its *travaux préparatoires*, one of the reasons justifying the conclusion of this agreement was the fact that a concrete possibility for an accused to benefit from interim release was essential to secure both fair trial and the right to liberty. It is also added that all costs would be borne by the ICC or by the accused himself.⁷²² It is important to keep in mind that, as noted by the ICC,

the Agreement, far from witnessing to an unconditional availability and willingness on the part of the Kingdom of Belgium to accept that detainees from the Court be released on its territory or, even less, establishing an obligation on their part to do so, makes such acceptance explicitly conditional upon an assessment to be made 'au cas-par-cas' on the basis of the specific appreciation that the Belgian authorities may make of a given case.⁷²³

So far, Belgium has provided observations in the *Ngudjolo case*, in the *Bemba case* and in its related case. Those provided in the two first cases are examined separately since they dated from before the signature of the agreement.⁷²⁴

The first argument concerns the fact that the stay of Ngudjolo and Bemba on the territory would be illegal which is an offence under Belgian law. Belgium was thus afraid that the

⁷¹⁹ Loi modifiant la loi du 29 mars 2004 concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux (26 March 2014) MB 1 April 2014.

⁷²⁰ Article 20bis §1.

⁷²¹ Article 20 bis §2.

⁷²² Projet de loi modifiant la loi du 29 mars 2004 concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux (17 Januari 2014) DOC 533299/001 available at <http://www.senate.be/www/?Mival=dossier&LEG=3&NR=478&LANG=fr> (last accessed 8 April 2015).

⁷²³ *Mangenda* interim release decision of 17 March 2014 (n448) § 32.

⁷²⁴ Belgium for Ngudjolo observations of 28 February 2008 (n714); *Bemba* interim release decision of 14 April 2009 (n57); *Bemba* interim release decision of 16 August 2011 (n171).

accused would apply for asylum in order to have a temporary authorization to stay, which would put Belgium in an uncomfortable situation. No further explanation is given as to why this situation would be uncomfortable. This reference to an ‘uncomfortable situation’ is a bit puzzling since the interim release would have been ordered by the ICC so that the ICC would not consider this situation as ‘uncomfortable’. In addition, it is important to keep in mind that the accused would be provisionally released only if the ICC had judged that the risk of flight was inexistent. Be that as it may, the irregular situation of the accused seems to be a false problem since the Belgian authorities could have decided, under Article 9 of the law of 15 December 1980,⁷²⁵ to grant the accused a temporary authorization to stay.

The second argument concerns the fact that a criminal complaint could be filed against the accused so that, according to the Belgian legislation, Belgium would have no other choice than to prosecute him. Therefore, according to Belgium, a problem of conflict of jurisdiction would arise with the ICC and, on top of that, the Belgian arrest warrant would deprive the accused of his or her liberty. Nonetheless, this argument does not take into account the fact that the federal prosecutor is not forced to prosecute a case when it would be in the interest of the good administration of justice that the case is brought before an international jurisdiction, which would already be the case.⁷²⁶

The third argument raised by Belgium is the potential risk to the public order and the need for protection for the accused given the importance of the Congolese community in Belgium. It further stipulates that the measures of protection could restrict the liberty of the accused and be costly.

The fourth argument concerns the impact of the presence of the accused, the impact of their potential flight on Belgium’s international relations and the risk of degradation of their contact with the Congolese authorities and the following risks for Belgium’s interests and for those of the Belgians living in the Great Lakes region.

Needless to say, these arguments are only based on risks, and they are not necessarily verified in practice so that it would only require a change of political will to tackle these issues. It

⁷²⁵Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement du territoire (15 December 1980) *MB* 31 December 1980.

⁷²⁶Loi contenant le titre préliminaire du Code de procédure pénale (17 avril 1978) *MB* 25 April 1978, Art. 10.

is interesting to note that the agreement does not deal with any of these arguments. A new political will might be inferred from the signature of the agreement, however; the *travaux préparatoires* seem to imply this.

Nonetheless, despite the conclusion of this agreement, in the *Bemba's close aids case*, Belgium again provided negative observations. The reasons justifying them for both Mangenda and Kilolo, a Belgian national, were:

- The fact that the accused could easily flee Belgium given its configuration and the presence of the airport near their residence;⁷²⁷
- The fact that Belgium could not avoid a risk of recidivism since it would not be able to legally monitor the accused's conversation or intercept their mail since those measures could only be legally ordered in case of perpetration of new crimes which would justify the detention of the accused.⁷²⁸

Yet, it must be noted once again that the ICC would have already ruled out a risk of flight and of recidivism so that these seem to be more excuses than real reasons.

Unfortunately, the observations given before the release of Kilolo are confidential.⁷²⁹

2.1.2. The Netherlands' arguments

Even if the situation could improve thanks to the new agreement with Belgium, the issue remains that, as for the ICTY, if the Netherlands continues to oppose any interim release on its territory, accused persons will have no other choice than to remain in detention during their trial whereas IHRL does not distinguish between pre-trial detention and detention pending trial. As noted by Schomburg, 'it is bizarre, to say the least, that those provisionally released have to be

⁷²⁷ *Mangenda* interim release decision of 17 March 2014 (n448) §32; *Kilolo* interim release decision of 5 August 2014 (n462) §21.

⁷²⁸ *Mangenda* interim release decision of 17 March 2014 (n448) §32; *Kilolo* interim release decision of 5 August 2014 (n462) §21.

⁷²⁹ Transmission of the observations submitted by the Belgian, Dutch, French, Congolese and British authorities on the Decision requesting observations from States for the purpose of the review of the detention of the suspects pursuant to regulation 51, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 10 October 2014.

sent back for some weeks to their home countries. Upon return, absent any flight risk or any other reason warranting ongoing pre-trial detention, they have nevertheless to be incarcerated in the UN detention unit'.⁷³⁰ Given the similarity of the arguments raised by the Netherlands before the ICTY and the ICC, those raised before the ICTY are also examined.

The issue first arose in the *Dukic case* in 1996.⁷³¹ In this case, the delegate of the Netherlands summarized the situation this way:

If the person is released by the Tribunal then the Dutch law would apply in that case and in that situation (...) he becomes a foreigner without an authorization to stay in the Netherlands. For the Netherlands authority it would mean that the person should leave the country by virtue of that law, because there is no legal title any longer for him to stay in the Netherlands.⁷³²

Interestingly, the judge was quite surprised and noted:

Suppose that tomorrow we had a case where there was an accused whose detention was no longer absolutely necessary but who should and had to remain available to the Prosecutor, and that the Trial Chamber would hear you speak, would take a decision requiring bail and a certain kind of summons requiring the person to remain under house detention how could the host country not assume its obligations then? (...) I think this is because the possibility of provisional release within the host state is a real one, otherwise one would not release conditionally somebody saying that we will send that person to France or to another country. I think that the 65(B) refers to provisional release in the country where that person is; not in another country. Perhaps that is not the correct interpretation.⁷³³

⁷³⁰ Schomburg (n317) 916.

⁷³¹ Decision rejecting the application to withdraw the indictment and order for provisional release, *Prosecutor v. Dukic*, Case No. IT-96-20, TC, ICTY, 24 April 1996.

⁷³² Transcript, *Prosecutor v. Dukic*, Case No. IT-96-20, TC, ICTY, 24 April 1996.

⁷³³ Transcript, *Prosecutor v. Dukic*, Case No. IT-96-20, TC, ICTY, 24 April 1996.

Despite the accurate remark of the judge, the Netherlands has never changed its standpoint, either for the ICTY⁷³⁴ or for the ICC.⁷³⁵ The Netherlands also argued that no obligation to accept the entry into its territory of any person granted interim release by the ICC was ‘foreseen by the statute of the [ICC], or by the Headquarters Agreement’.⁷³⁶ It is important to stress that the ICC seems to have given up trying to change the position of the Netherlands. Indeed, following an application by Katanga to find a solution with the Netherlands, the ICC contented to note that the negotiations, which started in 2008 with the registry, had failed and that there was no sign of a change in the situation.⁷³⁷

The position of the Netherlands is thus only one of principle. In contrast to Belgium, it does not raise any substantive arguments. Admittedly the reason could be that the accused do not apply for provisional release in the Netherlands so that the Netherlands ‘will not accept that silence on the part of the Defence as to the State to which the person seeks to be released would, by default, imply a release to the host State’.⁷³⁸ It must be noted that, among the so-called Dutch universal jurisdiction cases, provisional release was never granted⁷³⁹ except to a Dutch businessman.⁷⁴⁰

2.2. Conclusion

This analysis reveals that states are usually not keen to accept provisionally released accused, even if they are their own nationals, on their soil. The arguments they raise to justify their refusal could easily be addressed by granting a temporary authorization to stay or by

⁷³⁴ *Delalic* provisional release decision of 25 September 1996 (n638).

⁷³⁵ The Netherlands for Ngudjolo observations of 27 February 2008 (n391); *Kilolo* interim release decision of 14 March 2014 (n448) §44; *Mangenda* interim release decision of 17 March 2014 (n448) §42.

⁷³⁶ The Netherlands for Ngudjolo observations of 27 February 2008 (n391).

⁷³⁷ *Katanga* interim release decision of 16 April 2009 (n390).

⁷³⁸ The Netherlands for Ngudjolo observations of 27 February 2008 (n391).

⁷³⁹ E.g. Nzapali, Mpambara, Heshamuddin, Abbibulah, Khad-e-Nezami (acquitted), Van Aanrat (W. Ferdinandusse, ‘The Dutch Experience’ in M. C. Bassiouni (ed.) *International Criminal Law. Volume III International Enforcement* (Transnational Publishers, 2008) 385-397, E. Van Der Borght, ‘Prosecution of International Crimes in The Netherlands: An Analysis of Recent Case Law’, (2007) 18 *Criminal Law Forum* 87-136).

⁷⁴⁰ Kouwenhoven was freed after 2 years of detention pending his appeals proceedings after he was convicted to 8 years for breaking the UN arms embargo against Liberia because there were some delays in the investigation in Liberia (Decision of 19 March 2007, Gerechtshof 's-Gravenhage, Kort Geding, 22-004337).

adopting new laws, such as one that would provide for monitoring of the conversations of the accused. Since these arguments do not raise real legal hurdles, they demonstrate a certain bad faith or lack of will from states. Not all states demonstrate such lack of will. For example, Bemba and Gbagbo could find a state that was willing but not able. Unfortunately, this state (or states) has not been identified and no explanation is given as to the reasons for its willingness to present guarantees. The ICTY's practice seems to indicate that, when an accused is supported by the government of his or her state of origin, this state will be keen to present guarantees for him or her. The problems are that, as revealed by the practice of the ICTR or the SCSL, the state of origin is not always willing and the accused would not necessarily want to go back there. Heller confirms this hypothesis by stressing the issues faced for the relocation of persons acquitted by the ICTR.⁷⁴¹

Release to the state of origin will most likely not be an option before the ICC. Indeed, since the ICC only has jurisdiction when a state is either unwilling or unable to prosecute the accused, were guarantees by the states of origin provided, the judge would not grant them much credit. For example, as noted by Rearick, 'because of the ICC's complementarity regime, smaller, poorer countries with less established legal systems are likely to be the first experiments presented before the permanent court',⁷⁴² so that, even if the states of origin were willing to host the accused, they would be qualified as unable. Furthermore, Bekou and Cryer rightly held that 'it is unrealistic to expect that a State which has proved unwilling will in fact cooperate with an ICC request to collect evidence, to arrest and surrender an accused and generally to cooperate in accordance with the Statute'.⁷⁴³ In addition, if the state is able but unwilling, it will probably be because, as before the ICTR, the accused is not welcome in that country so that he or she would not want to go back there. Therefore, the mechanisms that are going to be addressed in the next section start from the premise that the state of origin is not an option.

⁷⁴¹ Heller (n2) 675;

See also J. Van Wijk, 'When international criminal justice collides with principles of international protection: assessing the consequences of ICC witnesses seeking asylum, defendants being acquitted, and convicted being released' (2013)26(1) *Leiden Journal of International Law* 185-186.

⁷⁴² Rearick (n9) 594.

⁷⁴³ O. Bekou and R. Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007)56 *International and Comparative Law Quarterly* 63.

3. Obligations of the ICC to prevent a violation of the right to liberty

As seen before, the states could, if they wanted, overcome the juridical or practical hurdles that, according to them, would prevent the implementation of provisional release on their soil. Some refusing states would thus be unwilling rather than truly unable. The solution is thus to work on this willingness since they agreed to their human rights obligations. The states that are truly unable are left aside from this study because it is beyond its scope to suggest mechanisms that could help, for example, to strengthen the police force and the legal system of each potential country.

For this analysis, it is important to keep in mind that the combination of Article 21(1)(a) and Article 21(3) requires the ICC to respect the right to liberty and therefore to act on its capacity to do so. Nonetheless, it is important to note that it is not an obligation of result but an obligation of conduct, namely an obligation that requires the ICC to use its ‘best efforts’ to reach the relevant result without ‘guaranteeing’ that the result will actually be achieved.⁷⁴⁴

The first step for the ICC is thus to identify states that are able and then to devise solutions that could help to encourage the willingness of these states. So far, none of these solutions has ever been tried regarding the provisional release of an accused so that their practicability has not yet been tested. In this analysis, the role that the presidency and the registry can play to devise solutions is also taking into account since, as shown before, they are also indirectly bound to respect the right to liberty.

3.1. Identification of able states

It was demonstrated in the previous section that the state of origin would not really be an option for the accused. The problem is then to choose another state, but which one? Except for the recent case of the agreement with Belgium, no indication exists in the ICC legal regime. In fact, the only rules linked to this issue are Regulations 51 and Article 47 of the Headquarters Agreement of the ICC. These provisions only provide, on the one hand, that, before exercising

⁷⁴⁴ P. Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999)10(2) *European Journal of International Law* 379; J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2005) 140.

its control of the detention of an accused, the Chamber shall seek observations from the host state and from the state to which the person seeks to be released, and, on the other hand, that it is the duty of the host state to facilitate the transfer and the departure of the person released. The practice of other tribunals is not more helpful since, even if the possibility of finding a foreign state to implement a provisional release was not excluded by their legal provisions, they have not dealt with this issue.

So far, before the ICC, it has always been the accused persons who have come up with the names of potential states. Sometimes their choices (when the identity of the state is disclosed) could be explained by their links with these countries, but sometimes no indication was given about the choices made. The second step has then been that either the accused directly presents the guarantees of the state to the judge or the registry, upon order of the judge, contacts the host state and the states mentioned in the application. It thus seems that it is incumbent on the accused to find a willing state.

The problem is that an accused has no indication regarding which names to propose because he or she would not necessarily know which states are both able and willing. The ICC through its registry should thus make this assessment.⁷⁴⁵ The registry has indeed to offer counsel support and is responsible for external relations.⁷⁴⁶ I even argue that the ICC is under a duty to do so. In fact, as seen before, in order to be able to respect the right to liberty, the ICC needs to have at its disposal willing and able states, hence, due to the effectiveness principle, it has an obligation to look for them.

How could the ICC fulfil this obligation? By holding negotiations. Admittedly the extent to which this obligation is fulfilled by the ICC is difficult to assess due to the confidentiality of the negotiations. A step in the right direction is the conclusion of the agreement with Belgium. Nonetheless, so far, it is an isolated case. Unfortunately, nothing is provided for in the Statute regarding the hosting of accused on interim release. Davidson rightly noted that the tribunals ‘should actively seek to make arrangements with the host country to allow international defendants on their territories outside of detention, preferably before the tribunals agree to set up

⁷⁴⁵ See M. Dubuisson, A-A. Bertrand and N. Schauder, ‘Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 565-584

⁷⁴⁶ E.g. : Rule 20 RPE, Rule 176 RPE.

shop there’ and that ‘the tribunals should also make arrangements in advance on the supervision of released defendants’.⁷⁴⁷ This obligation for the registry could also be inferred from Rule 185(1), which provides that:

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 (...), the charges have not been confirmed (...), 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* (...).⁷⁴⁸

Admittedly, this rule does not mention the case of an accused who is provisionally released. Nevertheless, Article 21(3) of the ICC Statute requires a parallel to be made and for attempts by the Court to make such arrangements. The registry was ordered by the ICC to make such arrangements following the acquittal of Ngudjolo.⁷⁴⁹

It is interesting to note that Article 103(1) of the ICC Statute provides that the ICC has to find states where its sentences can be enforced:

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
- (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
- (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court’s designation.

⁷⁴⁷ Davidson (n8) 66.

⁷⁴⁸ Emphasis added.

⁷⁴⁹ Decision on Mr Ngudjolo’s request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 12 June 2013.

Article 103 also stipulates that:

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2.

In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Even if it is not expressly envisaged by the Statute, the presidency and the registry could arrange to hold negotiations with a view to setting up a similar list of states available for the enforcement of interim release. To choose the most appropriate state from this list, the registry could then use the same criteria as proposed in Rule 201, namely the principle of equitable geographical distribution, the need to afford each state on the list an opportunity to receive sentenced persons, the number of sentenced persons already received by that state and other states of enforcement and any other relevant factors. Strijards rightly notes, regarding Article 103, that other relevant factors could be the wealth of the concerned state – given the costs of implementing the conditions of the interim release – or the capacity of the state to implement those conditions foreseen by the ICC.⁷⁵⁰ The creation of such a list may seem idealistic but it has actually worked for the enforcement of sentences.⁷⁵¹ Furthermore, the arrangement concluded with Belgium illustrates that it is possible for the ICC to respect this obligation. Admittedly, as shown with Belgium, despite the existence of an arrangement, a state could still use unconvincing arguments in order to refuse to provide guarantees.

Be that as it may, given the obligation of conduct stemming from Article 21(3) of the ICC Statute, the ICC through the presidency and the registry should make every effort to find able and willing states by concluding separate agreements with such states and/or by setting up a list of them.

⁷⁵⁰ G. A. M. Strijards, 'Article 103' O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1653.

⁷⁵¹ Austria, Belgium, UK, Finland, Serbia, Colombia and Finland.

3.2. Contact with the states

In addition to the obligation to identify able and willing states for interim release, the registry also ought to help the accused to enter into contact with the identified states. Article 20 of the RPE confirms this obligation since it provides that the registry has ‘Responsibilities relating to the rights of the defence’. As Bemba argued, ‘help and assistance from the Registry in the present matter [to find an able and willing state] is clearly one of the functions required to ensure the principle of a fair trial, the list in paragraph 1 of rule 20 being non-exhaustive’.⁷⁵² He rightly argued that since he was unable to liaise directly with government organs or with the UN, the registry’s assistance in this regard was essential.⁷⁵³ Nevertheless, his request was not properly considered as it had not been filed in the correct way.⁷⁵⁴ It is interesting to note that, unlike the ICC, before the STL, the Defence Office is empowered to seek state cooperation on behalf of the defence.⁷⁵⁵

The respect of this obligation by the ICC judges is mixed. Indeed, in the *Katanga case*, the judge did not validate the position that the registry had no obligation to try to change the mind of the host state regarding its standpoint towards provisional release.⁷⁵⁶ In addition, in the *Bemba case*, the Court rejected Bemba’s request to seek observations from two states regarding a potential provisional release into their respective territories. The judge estimated that Bemba must ‘first submit a legally and factually substantiated request for provisional release’,⁷⁵⁷ and this, despite the fact that, without knowing in which state he could be released, it was difficult for Bemba to raise new arguments for a request for interim release. It is interesting to note that, in this case, Bemba had first tried to write to one of the states but that this state replied that only an official request from the Chamber, pursuant to Rule 119 of the RPE, would enable it to give its

⁷⁵² *Bemba* interim release judgment of 19 November 2010 (n368) §62.

⁷⁵³ *Bemba* interim release judgment of 19 November 2010 (n368) §62.

⁷⁵⁴ *Bemba* interim release judgment of 19 November 2010 (n368) §69: The Appeals Chamber agrees with the submissions of the Prosecutor that Mr Bemba has failed to identify how the alleged error of the Trial Chamber in addressing the Request for Assistance from the Registry could have had an impact on the Trial Chamber’s decision to maintain Mr Bemba’s detention.

⁷⁵⁵ M. Gillet and M. Schuster, ‘The Special Tribunal for Lebanon swiftly adopts its Rules of Procedure and Evidence’ (2009)7(5) *Journal of International Criminal Justice* 891.

⁷⁵⁶ *Katanga* interim release decision of 16 April 2009 (n390).

⁷⁵⁷ Decision on defence request for observations regarding the potential provisional release of Mr Jean-Pierre Bemba, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 11 June 2014.

observations on any potential period of provisional release. Bemba then tried to ask for the help of the registry but the registry advised him to approach the TC directly.⁷⁵⁸ This advice shows that the registry was not expecting this result from the Chamber.

In contrast, in the *Bemba's close aids case*, the judge found it appropriate, on his own initiative, to know the views of the DRC, of France and of Belgium before pronouncing on a potential implementation of provisional release.⁷⁵⁹ This difference of attitude with that held in the *Bemba case* may be due to the fact that, unlike his co-accused in this case, Bemba's trial had already started so that there was no longer an automatic control of his detention. Nonetheless, in answer to the request of Babala's defence requesting the Court to order the DRC to explain the reasons for its refusal to host him on its territory,⁷⁶⁰ the Court considered that 'there is no appropriate legal basis for the Court (...) to engage in a debate with a State as to the reasons underlying its position as regards the release of one of its citizens and that, accordingly, the relief sought by Fidèle Babala by means of his Request should be pursued before the competent and appropriate authorities of the Democratic Republic of the Congo'.⁷⁶¹

⁷⁵⁸ Defence Request to Trial Chamber to request [REDACTED] and [REDACTED] for their submissions regarding the potential provisional release of Mr Jean-Pierre Bemba, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 9 June 2014.

⁷⁵⁹ Décision sur la « Requête de la Défense sollicitant de la Chambre préliminaire II une nouvelle et urgente approche des autorités congolaises compétentes en vue d'obtenir une position précise et non-équivoque relativement à l'accueil de M. Fidèle Babala », *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 5 June 2014; Decision requesting the Kingdom of Belgium to provide its views for the purposes of the review of Aimé Kilolo Musamba's and Jean-Jacques Mangenda's detention pursuant to article 60(3) of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 4 July 2014.

⁷⁶⁰ Requête URGENTE de la Défense sollicitant de la Chambre préliminaire l'approche des autorités compétentes de la République Démocratique du Congo aux fins de connaître les motivations juridiques du refus de l'application à M. Fidèle Babala Wandu des dispositions constitutionnelles et législatives en vigueur relativement à son accueil dans son pays en cas de libération provisoire, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 15 September 2014.

⁷⁶¹ Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13, PTCII, ICC, 26 September 2014.

It is interesting to note that the ICTY does not adopt such a passive attitude. Indeed, on 13 June 2013, following the disqualification of Judge Harhoff and the subsequent appointment of Judge Niang and the potential delay it would cause, TCIII invited, on its own initiative, the parties, among others the Netherlands and Serbia, to make submissions on the potential provisional release of the accused Seselj, knowing he had been in detention since 24 February 2003 and had already served the whole prison sentence handed down to him for contempt.⁷⁶² Nonetheless, on 14 July 2014, this process of finding states' guarantees was stopped since the accused expressed that he would not be subject to any conditions other than not leaving Serbia so that no guarantees from Serbia were needed.⁷⁶³

3.3. Conclusion

It follows from these considerations that, in order to respect its obligation, the ICC should improve the assistance it offers to accused persons to identify states able and willing to take them on interim release and then to enter into contact with them in order to respect its obligation of conduct stemming from the combination of Article 21(1)(a) and Article 21(3). Indeed, so far, only the agreement with Belgium can be cited as an illustration of the fulfilment of its obligation to identify an able and willing state. In addition, the ICC considered itself bound to contact states only in particular cases of a request for interim release whereas the search for state cooperation should be continuous.

The problem is that the obligations imposed on the ICC to identify able and willing states and to play the intermediary with them are limited to the extent that states agree to negotiate and to cooperate with the ICC. Nonetheless, as demonstrated, the ICC is obliged to try every means possible to secure for this possibility. It should thus be examined to what extent it could use its cooperation regime to persuade the states to become willing. This issue is the topic of the next section.

⁷⁶² Order inviting the parties to make submissions on possibile (sic) provisional release of the accused *proprio motu*, *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, TCIII, ICTY, 13 June 2014.

He was then released without conditions: Order on the Provisional Release of the Accused *Proprio Motu*, *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, TCIII, ICTY, 6 November 2014.

⁷⁶³ Order terminating the process for provisional release of the accused *proprio motu*, *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, TCIII, ICTY, 14 July 2014.

4. The binding means at the disposal of the ICC: the cooperation regime

As set out above, the ICC, through the presidency and the registry, has an obligation to identify states able and willing to host accused persons on interim release and to enable the accused to enter into contact with them. These obligations entail the obligation of holding negotiations in order to try to persuade the states to become willing and of establishing communication channels with them. Besides this possibility of negotiation at the disposal of the ICC, could it use its cooperation regime to persuade, or even force, the states to become willing? In order to answer this question, the duties of the states under the ICC cooperation regime and the recourses at the disposal of the ICC in case of violation of these duties will thus be examined with a specific focus on the Netherlands since it has a specific regime given its position as the host state and since it is the only one that could make interim release pending trial effective. This question is related to the ability of the ICC to use its cooperation regime and not to the opportunity for the ICC to do so. This distinction is important because, as it has widely been demonstrated in the literature, the decisions of the ICC and its organs are also influenced by extra-legal factors, such as, for example, their desire to attract cooperations from states for matter they would judge more important or to use their budget for other purposes.⁷⁶⁴ As held by Ciampi, ‘the limits of the ICC cooperation regime lie in the political realities and policy choices of the

⁷⁶⁴ See V. Peskin, *International Justice and the Balkans* (CUP, 2008); V. Peskin, ‘Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan’ (2009)31 *Human Rights Quarterly* 655-691; S. C. Roach, ‘How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy’ (2013)19 *Global Governance* 507-523; Bosco (n33); Peskin (n33) 122-125, P. K. Kambale, ‘A story of missed opportunities: the role of the International Criminal Court in the Democratic Republic of Congo’ in C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015) 171-197; M. Kersten, ‘Between justice and politics: the ICC’s intervention in Libya’ in C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015) 456-479; A-A. Bertrand and N. Schauder, ‘Practical Cooperation Challenge Faced by the Registry of the International Criminal Court’ in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 152-184; A. Ciampi, ‘Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court’ in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 7-57; T. Parker, ‘Pollyannas Need Not Apply: International Justice is, to a Certain Extent, Political Justice’ in R. H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill, 2016) 445-452; L. Smith-van Lin, ‘Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases’ in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 114-151.

Court, rather than in the legal regime designed by the ICC Statute⁷⁶⁵. Nonetheless, as stated in the introduction, the goal of this analysis is to examine the legal obligations of the ICC and its capacity to respect them and not to argue why, the ICC does not and/or should not respect them.

It must be mentioned that the case of the non-party states to the ICC Statute is not envisaged separately. Indeed, according to Article 87 of the ICC Statute, they are submitted to the cooperation regime only if they refer their situation to the ICC and if so, to the same extent as states parties,⁷⁶⁶ so that the present findings would apply to them indiscriminately. They could also be submitted to the cooperation regime if they conclude an agreement with the ICC. In that case, the obligations of cooperation would depend on the content of the agreement so that the obligation would require a case-by-case analysis. The same conclusion applies to the obligation of cooperation for the non-party states to the ICC Statute when a situation has been referred by the Security Council since it will depend on the content of the Security Council resolution.⁷⁶⁷

⁷⁶⁵ Ciampi (n764) 7

⁷⁶⁶ Article 87§5(a): The Court may invite any State non party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State non 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.

⁷⁶⁷ See H-P. Kaul and C. Kreb, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999)2 *Yearbook of International Humanitarian Law* 158-160; Sluiter (n621) 612-616; R. Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008)21(2) *Leiden Journal of International Law* 432-434; G. Sluiter, 'Cooperation of States with International Criminal Tribunals' in A. Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, 2009); F. Mégret, 'In Search of the 'Vertical': Towards an Institutional Theory of International Criminal Justice's Core' in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2010) 178-224; M. Caianiello, 'Models of Judicial Cooperation with Ad Hoc Tribunals and with the Permanent International Criminal Court in Europe' in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings* (Springer, 2013) 114-115; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 96-98, 114-116.

4.1. The obligations of states under the ICC cooperation regime

The cooperation regime of the ICC is qualified as a weak vertical cooperation regime.⁷⁶⁸ It is vertical because there is no mutual assistance requirement.⁷⁶⁹ It is weak because the states have the possibility to refuse to cooperate in some cases⁷⁷⁰ and because it is binding only on states parties, on states that have referred their situation to the ICC, on states that have concluded an agreement with it and on non-party states when the Security Council referral foresees it.⁷⁷¹ The term ‘weak’ is also used in comparison to the cooperation regime of the *ad hoc* tribunals who benefit from an obligation of cooperation on all UN member states and from the SC’s support.⁷⁷² But what is the scope of the cooperation regime?

As seen before, in the *Bemba case*, PTCII solicited, by asking for further observations, the cooperation of the states where Bemba was seeking release, namely Belgium, Portugal, France, Germany, Italy and South Africa, and from the host state.⁷⁷³ It justified its request by referring to Article 86 of the ICC Statute, or the general obligation of cooperation, and to Article 88 of the ICC Statute, or the general obligation to provide for procedure under national law. Nonetheless, its judgment was quashed in appeal because, before ordering Bemba’s interim release, PTCII should have first designated a state able and willing to accept the accused. The AC does not refer to the cooperation regime in its decision, which led Sluiter to regret that the AC did ‘not consider assistance in the protection of the right to liberty to fall within the ambit of the ICC’s cooperation regime’.⁷⁷⁴ Nonetheless, the AC did not explicitly reject this conception. Whether PTCII was correct to refer to Articles 86 and 88 is thus left open. This thesis will demonstrate that PTCII was right.

Indeed, Article 86 of the ICC Statute provides for a general obligation to cooperate. It is the first provision of Part IX of the ICC Statute that regulates the cooperation regime and has

⁷⁶⁸ Kaul and Kreb (n767) 158-160; Sluiter (n621) 612-616; Rastan (n767) 432-434; Sluiter (n767); Mégret (n767) 178-224; Caianiello (n767) 114-115; Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 96-98, 114-116.

⁷⁶⁹ Caianiello (n767) 115-116.

⁷⁷⁰ Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 97.

⁷⁷¹ See Caianiello (n767) 115-116.

⁷⁷² Caianiello (n767) 115-116.

⁷⁷³ *Bemba* interim release decision of 14 August 2009 (n124).

⁷⁷⁴ Sluiter (n12) 248-268.

thus to be considered as an ‘overarching interpretive guideline’.⁷⁷⁵ It provides that ‘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’. The other provisions of Part IX then detail the different aspects of this general obligation. For example, Article 89 regulates the procedure regarding surrender of persons to the Court and Article 92 the provisional arrest procedure. Article 93 then lists the other forms of cooperation. None of them concerns an obligation to accept a provisionally released accused. As Sluiter puts it, ‘it is disturbing that none of the above complex questions of moving individuals involved in ICC proceedings to a state has been properly anticipated in the Statute or secondary sources of ICC law’.⁷⁷⁶

Nonetheless, as just explained, Article 86 refers to the whole Statute and, therefore, also to provisions regarding interim release. In addition, Article 93(1)(l) stipulates that:

1. 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:

(...)

(l) 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.

It could be argued that hosting a provisionally released accused would be part of ‘facilitating the investigation and prosecution of crimes’. Article 21(3) and the principle of effectiveness require indeed this interpretation to avoid violation of a human right. This is also Sluiter’s opinion.⁷⁷⁷ In addition, as El Zeldy argues, referring to the ICJ advisory opinion on the *Reparation case*,⁷⁷⁸ ‘the ICC “must be deemed” to have implied powers to rule on any violation

⁷⁷⁵ Gradoni, Lewis, Mégret, Nouwen, David Ohlin, Reisinger-Coracini and Zappalà (n12) 97;

See also C. Kreb and K. Prost, ‘Article 93’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1515.

⁷⁷⁶ G. Sluiter, ‘Shared Responsibility in International Criminal Justice. The ICC and Asylum’ (2012)10 *Journal of International Criminal Justice* 664-665.

⁷⁷⁷ Sluiter (n12) 248-268.

⁷⁷⁸ El Zeidy (n323) 458.

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’.⁷⁷⁹ This reasoning could be applied to the finding of an able and willing state since the regime of interim release can only be effective if such a state is found. Nonetheless, this second ground is more fragile than the reference to Article 21(3) since the doctrine of inherent power is not applicable when such power infringes upon the sovereign rights of a state.⁷⁸⁰ Yet the imposition of an obligation of cooperation regarding the hosting of a provisionally released accused might be considered as such.

Consequently, in light of Article 21(3), it can be assumed that the ICC has the right and the duty, at least, to transmit such a request on the basis of Article 87 that provides for the submission of requests to States Parties for all forms of cooperation. Article 87 is thus ‘a central provision [that] must be read together with articles 86, 89 and 93: The Court is empowered to make requests for cooperation to States Parties (article 87) and the States Parties are obliged to cooperate fully (article 86) and specifically by complying with requests for surrender (article 89) and other forms of assistance (article 93).’⁷⁸¹

The obligation to answer positively to this request is less straightforward. The first basis to refuse a request from the Court on the basis of Article 93(1)(l) could be if it were in the interests of national security.⁷⁸² This exception only concerns the production of documents and does thus not apply to requests regarding the interim release of an accused. The second ground of refusal could be the fact that it is prohibited by the law of the requested State Party.⁷⁸³ It should be noted that the ICC could not rely on Article 88 of the ICC Statute which states that ‘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’ since this assistance for interim

⁷⁷⁹ El Zeidy (n323) 458.

⁷⁸⁰ J.C. Ochoa, ‘The Settlement of Disputes Concerning States Arising From the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Effective and Independent ICC’ (2007)7 *International Criminal Law Review* 14-15.

⁷⁸¹ C. Kreb and K. Prost, ‘Article 86’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1519.

⁷⁸² Article 93 §4: In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

⁷⁸³ Kreb and Prost (n775) 1572.

release is not specified in this Part. Krieb and Prost confirm that ‘the word “specified” was deliberately chosen to include all of the measures detailed in the Part, excluding those which are not particularized, such as the additional assistance provided for in article 93 para. 1(1)’.⁷⁸⁴ The obligation to answer positively is even less sure than the relocation programme for witnesses and the regime of enforcement of sentences is not obligatory. At the same time, these two programmes do not concern ‘assistance in relation to investigations or prosecutions’ so that they should not necessarily be put in comparison.

In a nutshell, in case of lack of cooperation of states with such negotiations, according to Article 87 and Article 93(1)(l) of the ICC Statute, the ICC may formally request a state to accept a provisionally released accused and, according to Article 86 and Article 93(1)(l), the state can only refuse if it is prohibited by its law from doing so. Article 21(3) of the ICC Statute and the principle of effectiveness require this interpretation to be strict. Therefore, the ICC should not accept the absence of procedure as sufficient because ‘it is not an absence of procedure for the particular measure which can form the basis of refusal’ but ‘an actual prohibition at law’.⁷⁸⁵ Yet, the arguments of states to refuse the implementation of interim release on their soil were related to an absence of procedure rather than to a real interdiction. Article 21(3) requires though that the ICC react regarding this violation of the cooperation rules. But what are the recourses provided by the ICC cooperation regime that the ICC could use in case of a violation by the states of their obligations?

Article 87(7) of the ICC Statute stipulates:

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.

⁷⁸⁴ C. Krieb and K. Prost, ‘Article 88’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1534.

⁷⁸⁵ Krieb and Prost (n775) 1581.

A finding ‘constitutes the formal establishment of the existence of an internationally wrongful act of the non-cooperating State’.⁷⁸⁶ Nevertheless, before the making of such finding, if the state contests the legality of the request for cooperation, Article 93(3) provides for consultations between the Court and the state concerned in order to find a solution.⁷⁸⁷ In addition, according to Article 97, ‘where a State Party receives a request under this Part 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’. According to Article 119 of the ICC Statute, the Court will have the last word on this. Indeed, Article 119(1) of the ICC Statute provides that ‘any dispute concerning the judicial functions of the court shall be settled by the decision of the court’.⁷⁸⁸ As noted by Sluiter, ‘any questions concerning the cooperation with, and legal assistance to, the ICC are part of the “judicial functions of the court”’ and ‘Party states conceded to the ultimate interpretation of the extent of the duty to cooperate when they ratified the Statutes and accepted Article 119, in particular’.⁷⁸⁹

Two recourses thus exist at the disposal of the ICC if it wants to meet up its legal obligations: the consultations with the state and, in case of persistent refusal of cooperation, a finding of non-compliance to the Assembly of States Parties or to the Security Council. The situation is then in the hands of these two organs which could decide measures such as suspension of membership, economic sanctions etc.

⁷⁸⁶ *Kreb and Prost* (n781) 1530.

⁷⁸⁷ Article 93§3: Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

⁷⁸⁸ Article 119: 1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties.

The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

See *Ochoa* (n780).

⁷⁸⁹ *Sluiter* (n621) 614-615.

4.2. Specificity of the Netherlands

As seen in sub-section 2.1.2., the ICC will never be able to truly respect the right to liberty without the cooperation of the Netherlands. Indeed, it is the only state that would allow the ICC to act in conformity with the right to liberty during all the trial proceedings because it is the only state appropriate to host accused persons while their presence is required during the trial hearings. As the host state, its regime of cooperation is different from that of the other states since there are specific provisions in the Headquarters Agreement. This agreement details the rules governing the relationships between the ICC and the Netherlands as the host state. Only the provisions related to the present topic are examined.

In the Headquarters Agreement, there is one provision regarding interim release but it concerns an accused person who is provisionally released but not released on the soil of the Netherlands. Article 47 provides that ‘the host State shall facilitate the transfer of persons granted interim release into a State other than the host State’ and that ‘the host State shall facilitate the re-entry into the host State of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court’. It is the only provision on this issue, there is not even one for an accused who is summoned. These are thus some shortcomings of the ICTY legal regime that were not resolved by the ICC and this despite the fact that Zappalà had strongly emphasized them:

Many problems were caused by the host country’s fierce opposition to an accused being released on bail in its territory. This is an element that should be addressed in the future in the relationship between the Tribunals and the host country. Moreover, it should be made very clear to the Netherlands, especially with a view to the actual establishment of the permanent Court, that *it is a part of the duties of the host country to have an open attitude towards the possibility of releasing the accused on its territory*. In addition, it may be suggested that the opportunity for release of defendants pending trial should be taken into account and possibly explicitly mentioned in the headquarters agreement between the Court and the host State. The unwillingness of the host country to assume the responsibility of the accused’s security does not seem to be a valid justification for withholding release to an accused who would otherwise be entitled to it.⁷⁹⁰ (emphasis added)

⁷⁹⁰ S. Zappalà, *Human Rights in International Criminal Proceedings* (OUP, 2003) 115;

As Strijards put it, it would be the price to pay for having the undeniable privilege of hosting the legal capital of the world.⁷⁹¹ This opinion seems to be shared by Sluiter, at least regarding the acceptance of detained asylum seekers.⁷⁹²

As noted earlier, the arguments employed by the Netherlands in its refusal to host any provisionally released accused are: the absence of obligations in the Headquarters Agreement and the fact that the stay of the accused would be illegal. Nonetheless, regarding the first argument, on the one hand, according to Article 86 and Article 93(1)(l) of the ICC Statute, the Netherlands has a general obligation to cooperate with the ICC in relation to investigations or prosecutions except if it is prohibited in its law. On the other hand, Article 47 of the Headquarters Agreement provides that ‘the host State shall facilitate the re-entry in the host State of persons granted interim release and *their short-term stay* in the host State for any purpose related to proceedings before the Court’.⁷⁹³ In addition, the second argument seems to be contradicted by the fact that Article 29 of the Headquarters Agreement could also be used to grant an authorization to stay to the accused. This article concerns other persons – victims, witnesses, experts, counsel – required to be present at the seat of the Court. It provides for privileges, immunities and facilities when the person has a document certifying that his or her presence is required at the seat of the Court and specifying a time period during which such presence is necessary.⁷⁹⁴ Article 38 adds that these

See also Schomburg (n317) 916.

⁷⁹¹ Strijards (n750) 1653.

⁷⁹² Sluiter (n776) 664.

⁷⁹³ Emphasis added by the author.

⁷⁹⁴ Article 29: 1. Other persons required to be present at the seat of the Court shall, to the extent necessary for their presence at the seat of the Court, be accorded the privileges, immunities and facilities provided for in article 27 of this Agreement, subject to production of the document referred to in paragraph 2 of this article.

2. Persons referred to in this article shall be provided by the Court with a document certifying that their presence is required at the seat of the Court and specifying a time period during which such presence is necessary. Such document shall be withdrawn prior to its expiry if their presence at the seat of the Court is no longer required.

3. The privileges, immunities and facilities referred to in paragraph 1 of this article shall cease to apply after fifteen consecutive days following the date on which the presence of such other person concerned is no longer required by the Court, provided that such other person had an opportunity to leave the host State during that period.

4. Persons referred to in this article who are nationals or permanent residents of the host State shall enjoy no privileges, immunities and facilities, except, to the extent necessary for their presence at the seat of the Court, immunity from legal process in respect of words spoken or written and all acts performed by them in the course of their presence at the seat of the Court.

persons will have the right of unimpeded entry into, exit from and movement within the host state, as appropriate and for the purposes of the Court, with the condition that the host state may take the measures necessary to prevent violations of its public order or to protect the safety of the person concerned.⁷⁹⁵ Nothing would thus impede the application of these provisions to the accused, even if the *travaux préparatoires* rather suggest that it was more intended for his or her family members.⁷⁹⁶ Consequently, the Netherlands does not raise a real legal hurdle.

Next to the Headquarters Agreement, the Netherlands adopted a specific law regarding cooperation with the ICC. It does not contain any specific provision on interim release, even in the chapter that provides for forms of assistance set out in Article 93 of the ICC Statute.⁷⁹⁷ The possibility of an interim release on the soil of the Netherlands did not even arise during the debate regarding the adoption of this law. Yet, interestingly, a long debate took place around the question of access to Dutch asylum procedures for ICC suspects and witnesses and the consequences for the human rights obligations of the Netherlands.⁷⁹⁸ The government concluded this debate by saying that a witness not in detention might apply for asylum in the same way as anyone else. Another conclusion was reached for witnesses in detention because, according to the

Such immunity shall continue to be accorded even after their presence at the seat of the Court is no longer required.

5. Persons referred to in this article shall not be subjected by the host State to any measures which may affect their presence before the Court.

⁷⁹⁵ Article 38 of the Headquarters Agreement: 1. All persons referred to in articles 24, 26, 27, 28 and 29 of this Agreement, as notified as such by the Registrar to the host State, shall have the right of unimpeded entry into, exit from and, subject to paragraph 3 of this article, movement within the host State, as appropriate and for the purposes of the Court.

2. Visas, where required, shall be granted free of charge and as promptly as possible. The same facilities shall be accorded to persons accompanying witnesses and victims, who have been notified as such by the Registrar to the host State.

3. The host State may attach such conditions or restrictions to the visa as may be necessary to prevent violations of its public order or to protect the safety of the person concerned.

4. Before applying paragraph 3 of this article, the host State will seek observations from the Court.

Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314), Art. 87.

⁷⁹⁶ Memorie van toelichting, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314): de laatstgenoemde categorie kan worden gedacht aan familieleden van voorlopig gehechten bij het Strafhof, aan welke personen het Strafhof toestemming heeft gegeven om hun gedetineerde familielid te bezoeken.

⁷⁹⁷ Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314) Art. 45-54;

G. Sluiter, 'Implementation of the ICC Statute in the Dutch Legal Order' (2004)2 *Journal of International Criminal Justice* 158-178.

⁷⁹⁸ Sluiter (n776) 667.

government, they would not be in the jurisdiction of the Netherlands so that they could only ask for special authorization to stay.⁷⁹⁹ It must be noted that, as seen in section 5.1.1., a Dutch judge did not agree with this analysis. It is striking that the eventuality of interim release or of an accused summoned did not arise since, as illustrated in sub-section 2.1.2., the problem of provisional release had already occurred with the ICTY.

Admittedly, the law regarding cooperation with the ICC provides that Dutch law is not applicable to the persons detained by the ICC.⁸⁰⁰ According to the *travaux préparatoires*, this provision makes clear that the applications for release have to be dealt by the ICC judge and not by a Dutch court. The Dutch Ministry of Justice maintained that this transfer of power was legal in light of the ECtHR's case law since the ICC offers guarantees of impartiality and independence,⁸⁰¹ and since the ICC is not likely to breach human rights.⁸⁰² The government also noted that state responsibility only arises in exceptional cases in which there is a flagrant and gross violation of the ECHR.⁸⁰³

It follows from these considerations that, despite the fact that the geographical position of the Netherlands would require that specific measures were taken regarding a potential interim release on its soil, nothing was expressly provided so that the regime of cooperation concerning the Netherlands does not differ from that of the other states in this matter. Nonetheless, at the same time, in reality, some provisions could be used that would allow for the implementation of interim release.

4.3. Conclusion

The preceding analysis shows that, to prevent a violation of the right to liberty, the ICC has an obligation to identify states that are able and willing and to facilitate the contact between

⁷⁹⁹ See Memorie van toelichting, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314); Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314);

H. Bevers, N. Blokker and J. Roording, 'The Netherlands and the International Criminal Court: On Statute Obligations and Hospitality' (2003)16(1) *Leiden Journal of International Law* 152-153.

⁸⁰⁰ Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314), Art. 88.

⁸⁰¹ Memorie van toelichting, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314); Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314).

⁸⁰² Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314).

⁸⁰³ Bevers, Blokker and Roording (n799) 152-155.

them and the accused. It can do so through informal negotiations, like it did with Belgium, or through requests for cooperation. In case of unjustifiable refusal of a state that is otherwise able, the ICC should use the recourses at its disposal by its cooperation regime, notably the holding of consultations and the making of a finding to the ASP or the SC.

So far, the ICC has contented itself to request observations without requesting cooperation to implement a potential provisional release. In the *Bemba case*, PTCII took a step in the right direction by formally request the cooperation of states for this purpose,⁸⁰⁴ but it was quashed on appeal because, before ordering Bemba's interim release, the judge should have first designated a state able and willing to accept the accused. Nonetheless, this ruling does not prevent the fact that, as just seen, the ICC cooperation regime allowed the judge to request cooperation in that matter. It was even an obligation given Article 21(3) of the ICC Statute.

Nonetheless, as shown above, in practice, the ICC does not respect its obligations, so that it is important to see whether the accused is powerless in such a situation. In the following, it will be ascertained whether or not the accused could seek reparation for this violation directly by means of domestic proceedings or of referral to a human rights body, or through a state acting on his/her behalf, by means of diplomatic protection, or by invoking an *erga omnes* action. Indeed, if so far the analysis has focused on the obligation of the ICC and of its members states to respect the right to liberty of the accused because of its statute, it must not be forgotten that, as demonstrated, this right to liberty is also a general principle of law and recognized in several human rights conventions binding upon states. Consequently, the accused could try to act against the refusing state because of its violation of the right to liberty which the state is supposed to respect due to its domestic legal obligations, independently of its obligation stemming from the ICC Statute.

5. The means at the disposal of the accused

The case is the following: an accused detained by the ICC not presenting *in abstracto* any risk of flight, of interference with justice or of recidivism but without possibility of interim release because of the absence of a state able and willing to present guarantees. The right of liberty of the accused is thus violated not only by the ICC in case it did not use all the means in

⁸⁰⁴ *Bemba* interim release decision of 14 August 2009 (n124).

its possession to identify the willingness of states but also by all the refusing able states. This was, for example, the case for Magenda since the UK cancelled his visa although the ICC had ordered his provisional release.⁸⁰⁵

The responsible actors of this violation would thus be the ICC and the refusing states that are able. But how could the accused invoke their liability? As held before, the refusing state is also bound as such by the right to liberty, regardless of its obligations as a member state of the ICC, so that the accused could try to raise its responsibility through the means provided by IHRL. In fact, in order to seek reparation of this violation, the accused has the choice to take his or her case before domestic jurisdictions and/or human rights bodies or to try to find a state acting on his/her behalf willing to intercede for him or her. By doing so, he or she would be confronted with several hurdles which will be examined below.

5.1. Direct means: domestic jurisdictions and/or human rights institutions

The accused has the possibility to seek reparation of the violation of his or her right against the refusing state by initiating proceedings within the jurisdiction of that state. In case of rejection of his or her request, the accused could eventually refer his or her case to one of the human rights supervisory mechanisms. The mechanisms available will thus depend on the defendant state. It could be the HRC, the ECtHR, the IAmCHR, the AfCmHPR or the AfCtHPR depending on whether the state recognized their jurisdiction. If the accused also wants to complain about the ICC, he or she could direct his or her action against the ICC in the Netherlands, invoking the fact that the violation occurred on Dutch territory, and then refer the case to the supervisory human rights bodies of the Netherlands. The accused would need to act through a state since the ICC is not party to any human rights instruments. The issue of the responsibility of the ICC as such – because it would have a distinct obligation to respect the right to liberty rather than the one stemming from its Statute so that the accused could use mechanisms of international law – is beyond the scope of this thesis given its limited space and the current debate regarding responsibility of international organizations in international law.⁸⁰⁶ For these reasons, I made the choice to focus on IHRL mechanisms. Be that as it may, all these choices will confront the accused with several hurdles regarding jurisdiction and immunity.

⁸⁰⁵ See Part I, section 5.1.3.2.

⁸⁰⁶ ILC, 'Introductory note, Articles on the Responsibility of International Organizations', (9 December 2011) available at http://legal.un.org/avl/pdf/ha/ario/ario_e.pdf (last access 23 July 2015).

So far, only the ECtHR has handled such applications.⁸⁰⁷ This section will thus focus on the ECtHR's case law. It must be noted that the ECtHR did not apply the same reasoning in each case in the sense that it rejected Milosevic's application against the Netherlands and the ICTY on the ground that Milosevic had failed to exhaust all internal remedies since he had withdrawn his appeal against the decision of a Dutch judge who had declined jurisdiction.⁸⁰⁸ By contrast, in the *Blagojevic case*,⁸⁰⁹ and in the *Galic case*,⁸¹⁰ the ECtHR ruled first on its lack of jurisdiction *ratione materiae* and *ratione personae* and then decided that it was thus not necessary to examine any other questions going to the admissibility or merits of the application, including whether the applicant has exhausted any effective domestic remedies available to him.

Before analysing the means at the disposal of the accused further, it is interesting to present the case of witnesses detained by the ICC because it illustrates these entire issues even if the circumstances are quite different since it does not concern the interim release of an accused.

5.1.1. The case of detained witnesses before the ICC

On 27 March 2011, Djokaba Lambi Longo was transferred from detention in the DRC into the custody of the ICC to give evidence at Lubanga's trial as a defence witness. He was transferred to the Court pursuant to Article 93(7) of the Statute. This article provides that the transferred person shall remain in custody and that when the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested state, in this case the DRC. On 7 April 2011, Djokaba finished his testimony. On 1 June 2011, he lodged an asylum request with the Netherlands authorities. The Immigration and Naturalization Service ruled that, since the applicant was not within the jurisdiction of the Netherlands, it was not possible for him to request asylum. Nevertheless, they accepted to treat his request as one for protection to be

⁸⁰⁷ From the ECtHR's arrest in the *Galic case*, it seems that Galic also tried before the HRC (ECtHR, Decision, *Stanislav Galic v. the Netherlands* (App. No. 22617/07), 9 June 2009 §17). Nonetheless, according to this arrest, the HRC stated that it 'cannot examine petitions alleging violations of the International Covenant on Civil and Political Rights (ICCPR) unless the State is also a party to the Optional Protocol (OP). – Italy [filled in by hand] – is not a State party to the Optional Protocol'. It is not explained why Galic chose to complain about Italy. The case could not be found in the HRC's database.

⁸⁰⁸ ECtHR, Decision, *Slobodan Milosevic v. the Netherlands* (App. No. 77631/01), 19 March 2002.

⁸⁰⁹ ECtHR, Decision, *Vidoje Blagojevic v. the Netherlands* (App. No. 49032/07), 9 June 2009 §48.

⁸¹⁰ ECtHR, Decision, *Stanislav Galic v. the Netherlands* (App. No. 22617/07), 9 June 2009 §50.

considered in light of the prohibition of *refoulement* flowing from the 1951 Convention relating to the Status of Refugees and Article 3 of the ECHR.

On 1 June 2011, Djokaba asked the ICC to order ‘special measures’ pursuant to Rule 88(1) of the ICC RPE in the form of a stay of his removal to the DRC. On 9 June 2011, TCI granted this request, holding that it could not apply Article 93(7)(b) in consistence with internationally recognized human rights, as required by Article 21(3) of the Statute.⁸¹¹ It found that an immediate return to the DRC would deprive the witness of his fundamental right to an effective remedy because of his pending application for protection and that this return would force the Netherlands to violate the witness’s rights to invoke the *non-refoulement* principle.

Despite this judgment, the Netherlands did not accept his release. It is interesting to reproduce its reasons extensively:

The witness has been temporarily transferred in custody from the [DRC] to the [ICC] pursuant to an agreement between them under Article 93§7 of the Statute. Under this agreement the witness shall remain in custody and shall be returned to the [DRC] when the purposes of the transfer have been fulfilled. This agreement was concluded between the [ICC] and the [DRC] to facilitate the prosecutions undertaken by the [ICC]. The Netherlands fails to understand how an obligation to accept undocumented or illegal foreigners into its territory would follow from a bilateral agreement to which it is not a party. The Court does not have the authority under the Statute or the Headquarters Agreement to transfer the witness to the Netherlands, nor does it have the authority to impose such a transfer upon the Host State. Neither, as it was acknowledged by the [ICC], is the Netherlands obligated to accept the transfer of the witness into its control.

In this regard the Netherlands would also note that under the current circumstances it lacks jurisdiction to keep the witness in custody throughout the consideration of his asylum application.⁸¹²

Following an application by Djokaba to be granted release, TCI stated that it ‘discharged its obligations under Article 21(3) of the Statute and it is now for the Host State, to whom the

⁸¹¹ *Katanga and Ngudjolo Amicus Curiae* decision (n121) §73.

⁸¹² Note verbale du 26 August 2011 as cited in ECtHR, Decision, Bède Djokaba Lambi Longa v. the Netherlands (App. 33917/12), 9 October 2012 §22 (*‘Djokaba ECtHR decision’*).

asylum application is directed, to decide whether it is necessary to intervene in order to take control of the witness [i.e., the applicant] until such time as the application and any appellate phase in those proceedings are determined’.⁸¹³

Djokaba’s attempts to secure his release with the Dutch tribunals also failed because the judges considered that Dutch law did not apply to deprivation of liberty undergone on the orders of the ICC.⁸¹⁴ Djokaba then lodged an application before the ECtHR, arguing the unlawfulness of his detention. He claimed that the Congolese title for his detention, such as it was, had expired on 2 July 2007 and had not been renewed, that the ICC had no legal ground to keep him detained after he had given evidence, and that the Netherlands authorities had never even claimed that there was a basis for his detention in their domestic law. He also alleged a violation of Article 13 of the ECHR since he had not had any effective remedy in the domestic legal system by which to challenge the legality of his detention and since, at the same time, there was no procedure within the ICC attended by adequate safeguards. In the meantime, he withdrew his asylum request before the Dutch authorities.⁸¹⁵

Despite this withdrawal, the ECtHR considered that it should not strike the application out of its list.⁸¹⁶ Nonetheless, the ECtHR declared it inadmissible because it would lack jurisdiction. Unfortunately, the exact grounds on which the Court rejected the application are not clear. It divided its reasoning into three parts to respond to each of Djokaba’s arguments regarding its alleged jurisdiction.

The first pillar of Djokaba’s arguments was that he was in the jurisdiction of the Netherlands since he was detained on its territory, his continued detention by the ICC lacked any basis in law and his continued detention was the direct and unequivocal result of acts and omissions imputable to the Netherlands. The ECtHR failed to answer the last part of this argument and contented itself to refer to its case law according to which ‘the fact that the applicant is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the “jurisdiction” of the Netherlands as that expression is to be understood for the purposes of Article 1 of the

⁸¹³ In *Djokaba* ECtHR decision (n812) §§16-18.

⁸¹⁴ Raad van State, 201111623/1/V3 §§2.1.6-2.1.7.

⁸¹⁵ *Djokaba* ECtHR decision (n812) §31.

⁸¹⁶ *Djokaba* ECtHR decision (n812) §59.

Convention'.⁸¹⁷ It added that 'the legal ground for his detention remains the arrangement entered into between the [ICC] and the authorities of the [DRC]'.⁸¹⁸ It must be noted that, unlike a detained witness, an accused is detained on the basis of an arrest warrant and not of an external arrangement.

Djokaba's second argument was that, even if the ECtHR found that he was detained under the authority of the ICC, the level of human rights protection offered by the ICC was insufficient for his needs as there was nothing in the rules governing the functioning of the ICC that covered his unique situation of detention. The ECtHR ruled that it was not the case since the ICC had powers under Rules 87 and 88 of its RPE to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated.⁸¹⁹ Again, this reasoning could not apply to a detained accused.

The third argument was that the Netherlands had accepted jurisdiction when it agreed to consider his request for asylum. The ECtHR failed to see any connection with the fact that the Netherlands should then review the legality of his detention since: member states have the right to control the entry, residence and expulsion of aliens; since the right to political asylum is not contained in either the Convention or its Protocols; since the Convention does not guarantee, as such, any right to enter, reside or remain in a state of which one is not a national; and since states are, in principle, under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory. This reasoning of the Court is not applicable to a detained accused since he or she would not be on the territory of the Netherlands because of immigration proceedings.

If, so far, the *Djokaba case* is the only case regarding the ICC brought before the ECtHR, three other detained witnesses in the *Katanga case* were in a similar situation.⁸²⁰ Besides, the ECtHR also referred to these cases in its *Djokaba* decision. The difference with the *Djokaba case* is

⁸¹⁷ *Djokaba* ECtHR decision (n812) 73.

⁸¹⁸ *Djokaba* ECtHR decision (n812) §75.

⁸¹⁹ *Djokaba* ECtHR decision (n812) §79.

⁸²⁰ D. Yabasun and M. Holvoet, 'Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility' (2013)13 *International Criminal Law Review* 727-747; E. Irving, 'The Relationship between the International Criminal Court and its Host State: Impact on Human Rights' (2014)27(2) *Leiden Journal of International Law* 479-493.

that these three other witnesses contested the fact that they were not entitled to apply for asylum and that their asylum application should be considered as a request for protection in light of the prohibition of *refoulement*. On 28 December 2011, the Regional Court dismissed the argument of the Minister for Immigration and Asylum that the Aliens Act 2000 was inapplicable to the applicants' asylum requests and ordered the minister to give a decision on the witnesses' asylum requests within six months.⁸²¹ This decision was not appealed.⁸²² As held by Sluiter, the District Court decision 'appears to take the view that Dutch law is fully applicable to individuals present on Dutch territory, unless there is a clear legal basis denying such applicability or when applicability of Dutch law would interfere with the proper functioning of the ICC'.⁸²³ In June 2012, the Minister for Immigration and Asylum refused asylum to two of them. The appeals against these decisions were rejected.⁸²⁴ For health reasons, no notice was given in the third case. The procedure before the ICC followed a similar path as that of *Djokaba*.⁸²⁵ Applications were also made to a Dutch judge in order to examine their detention. Nonetheless, their applications were refused on the ground that a Dutch judge was not competent to review the legality of the detention because Article 88 of the Dutch Cooperation Act with the ICC stipulates that the Dutch legislation is not applicable to the detention measures executed by the ICC in the Netherlands.⁸²⁶ However, in its decision of 26 September 2012, a civil judge in The Hague, acting on an interlocutory basis, ordered the Dutch State to declare to the ICC that it was willing to take over custody of the witnesses within four weeks of the date of delivery of this judgment. The judge found the witnesses were in a dead-end situation since for what they wished to achieve no other judicial remedy offering adequate guarantees was available, the ICC being not able to

⁸²¹ In *Djokaba* ECtHR decision (n812) §34.

T. de Boer and M. Zieck, 'ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State' (2015) *International Journal of Refugee Law* 11.

⁸²² Sluiter (n776) 674.

⁸²³ See Sluiter (n776) 673.

Same sense, de Boer and Zieck (n821) 12.

⁸²⁴ Raad van State, 201405219/1/V1.

⁸²⁵ Decision on the security situation of three detained witnesses in relation to their testimony before the Court (Art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with Article 93(l)(j) of the Statute, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 22 June 2011; Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 24 August 2011.

⁸²⁶ Raad van State, 201111623/1/V3.

release them and the witnesses not being able to submit an application for judicial review of the detention by the competent Dutch body. In the opinion of The Hague Court, ‘this means that the detention of the witnesses has consequently been illegal since 24 August 2011, which is the responsibility of the Dutch authorities since neither the ICC nor the DRC authorities were capable of remedying the detention situation of the witnesses’.⁸²⁷ Nonetheless, the Dutch authorities won their appeal against this decision given the decision of the ECtHR in the *Djokaba case*.⁸²⁸

On 20 January 2014, the AC of the ICC directed the ICC Registrar to return them to the DRC’s custody, after consultation with the Dutch authorities, in order to provide them with the opportunity to take any steps it determines to be necessary in respect of the pending asylum applications of the three witnesses. The Chamber considered that the ICC’s authority to detain individuals was limited to situations where the detention was related to judicial proceedings before the Court and that the ICC could not serve as an administrative detention unit for asylum seekers or persons otherwise involved in judicial proceedings with the host state or any other state.⁸²⁹ On 4 June 2014, they were transferred to the custody of the Netherlands,⁸³⁰ and on 7 July 2014, they were sent back to DRC.⁸³¹ Their cases are pending before the ECtHR.⁸³²

Contrary to *Djokaba*, these witnesses were thus in proper asylum proceedings and succeeded in some requests before a Dutch judge so that, if a Dutch judge seemed to consider

⁸²⁷ Rechtbank ‘s-Gravenhage, Kort Geding, 424426 §§ 2.1.-2.2.

⁸²⁸ Irving (n820) 16.

⁸²⁹ Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, *Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui*, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 20 January 2014.

⁸³⁰ http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1010.aspx (last accessed 20 August 2015).

⁸³¹ ‘Congolese ICC witnesses’ asylum bid in Netherlands fails’, *AFP*, 7 July 2014 available at <http://www.africareview.com/News/ICC-Congolese-witnesses-asylum-bid-in-Netherlands-fails/-/979180/2374900/-/ay2l0tz/-/index.html> (last accessed 8 April 2015); ‘ICC witnesses returned to DRC after asylum request rejected’, *Global Justice* (6 August 2014) available at <https://ciccglobjustice.wordpress.com/2014/08/06/icc-witnesses-returned-to-drc-after-asylum-request-rejected/> (last accessed 8 April 2015).

⁸³² de Boer and Zieck (n821) 19.

they were in his/her jurisdiction, could the ECtHR reach a different opinion than in the *Djokaba case*?

These cases are interesting because they are enlightening for the reasoning of the Dutch tribunals and of the ECtHR. Both courts have found that they cannot review the detention of the witnesses because they are not in their jurisdiction. But could not another reasoning been devised for the accused detained by the ICC? Would not the ECtHR have reacted differently for the other detained witnesses since the Netherlands agreed to review their asylum application? In any case, to avoid the application of the same reasoning, the accused should demonstrate that he or she is under the jurisdiction of the state concerned and/or that the ICC cannot invoke its immunity.

5.1.2. Is the accused under the jurisdiction of the refusing state?

This thesis thus focuses on a case where no able state is willing to host the accused and where the ICC does not contest this refusal. Admittedly, it can be argued that the violation of the right to liberty is only committed by the ICC since it is the ICC that ultimately refuses to free the accused and does not act to secure an effective power of release. Nonetheless, by refusing to host the accused and by refusing to negotiate or to cooperate about this issue, the able states leave the ICC powerless and contribute without any doubt to this violation. This situation is covered by Article 59 of the Draft Articles on the responsibility of international organizations. This article provides for the responsibility of a state that directs and controls an international organization in the commission of an internationally wrongful act if the state does so with knowledge of the circumstances of the internationally wrongful act; and if the act would be internationally wrongful if committed by that state. It can be argued that the refusing state is directing and controlling the ICC in the commission of its violation of the right to liberty of the accused since the ICC is dependent on its acceptance, since the state cannot ignore the consequences of its refusal and since it would itself violate the right to liberty if it deprived the accused detained on its territory of the possibility of a provisional release. Consequently, both the refusing state and the ICC may be held responsible for their violation of the right to liberty. This is called shared responsibility.⁸³³

⁸³³ M. Tondini, 'The 'Italian Job': How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States', in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 178-179; C. Ahlborn, 'To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States',

The fact that there might be several refusing states does not alter this conclusion. Indeed, Article 48 of the Draft Articles on the responsibility of international organizations provides that, when there are several responsible states, their responsibility is not reduced by the fact that one or more other states are also responsible for the same act.⁸³⁴ Nevertheless, these considerations relate to the attribution of responsibility and the accused must first demonstrate that he or she is under the jurisdiction of the refusing state.

It must be noted that this case has to be distinguished from cases where an organ of a state is put at the disposal of an international organization, for instance, in the *Behrami case*,⁸³⁵ which concerns the responsibility of France for the acts of a multinational brigade of KFOR led by France in Kosovo. This situation is ruled by Article 7 of the Draft Articles on the responsibility of international organizations and differs from the present case since, in this case, the refusing state did not put any organ/territory at the disposal of the ICC.

The accused could thus invoke the responsibility of the refusing states. Nonetheless, as shown by the detained witnesses cases, the issue of jurisdiction will arise. Indeed, whereas the accused would be detained by the ICC, could it be argued that the accused is under the jurisdiction of the refusing states?

(2013)26 28 *SHARES Research Paper*, ACIL, available at <http://www.sharesproject.nl/publication/to-share-or-not-to-share-the-allocation-of-responsibility-between-international-organizations-and-their-member-states/> (last accessed 21 March 2015); M. Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013)4(2) *Journal of International Dispute Settlement* 361-383.

⁸³⁴ Article 48: Responsibility of an international organization and one or more States or international organizations:
1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act. 2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation. 3. Paragraphs 1 and 2: (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered; (b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

⁸³⁵ ECtHR, Decision, *Agim Behrami and Bekir Behrami v. France, Germany and Norway* (App. No. 71412/01), 2 May 2007.

5.1.2.1. Direct responsibility of the refusing state through its effective control/due to its act of refusal?

If we take the Netherlands as the refusing state, the ECtHR has already several times held that:

The Court cannot find the sole fact that the ICTY has its seat and premises in The Hague sufficient ground to attribute the matters complained of to the Kingdom of the Netherlands. In arriving at that conclusion the Court has had regard to the particular context in which the question arises before it. The Court stresses that the present case involves an international tribunal established by the UN Security Council, an international organisation founded on the principle of respect for fundamental human rights and that moreover the basic legal provisions governing that tribunal's organisation and procedure are purposely designed to provide those indicted before it with all appropriate guarantees.⁸³⁶

The same reasoning was transposed to the ICC in the *Djokaba case*.⁸³⁷ The ECtHR added that:

The applicant was brought to the Netherlands as a defence witness in a criminal trial pending before the [ICC]. He was already detained in his country of origin and remains in the custody of the [ICC]. The fact that the applicant is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the 'jurisdiction' of the Netherlands as that expression is to be understood for the purposes of Article 1 of the Convention.⁸³⁸

Nonetheless, in this case, both the Dutch jurisdictions and the ECtHR ruled that Djokaba was not in the Dutch jurisdiction since 'the legal ground for his detention remains the

⁸³⁶ ECtHR, Decision, *Vidoje Blagojevic v. the Netherlands* (App. No. 49032/07), 9 June 2009 §40; ECtHR, Decision, *Stanislav Galic v. the Netherlands* (App. No. 22617/07), 9 June 2009 §46; *Djokaba* ECtHR decision (n812) §71.

⁸³⁷ *Djokaba* ECtHR decision (n812) §71.

⁸³⁸ *Djokaba* ECtHR decision (n812) §73.

arrangement entered into between the [ICC] and the authorities of the [DRC]'.⁸³⁹ Is this reasoning applicable to the accused? The legal ground for their detention is the arrest warrant issued by the ICC so why would the Netherlands or other refusing states have jurisdiction? On the basis of ECtHR case law, the refusing state would probably argue that the accused are detained under an ICC arrest warrant on Dutch territory so that they could not be in the jurisdiction of other states. The Netherlands would also sustain that, since the Headquarters Agreement provides that the Dutch law is not applicable to the persons detained by the ICC, they could not be under their jurisdiction either. But what could the accused argue?

The problem with the ECtHR is that it does not necessarily ask the right questions. As Milanovic and Papic point out regarding the *Behrami case*, 'the question presented both in *Behrami* and *Saramati* was not whether Resolution 1244 was violated but whether the ECHR was violated (...) whether or not KFOR had the duty under Resolution 1244 to de-mine areas that NATO itself saturated with cluster bombs is not the point',⁸⁴⁰ whereas these were the issues on which the ECtHR focused. According to them, 'the issue is whether France had the obligation to do so under the ECHR, in the same way as France would undoubtedly have had such a positive obligation to secure human rights, namely the right to life, of persons within its own territory if, say, a fighter aircraft dropped a few cluster bombs on a vineyard in Champagne'.⁸⁴¹ This reasoning can be applied to the *Djokaba case* as well. In this case, while the ECtHR contented itself to argue that there was no legal vacuum since 'the legal ground for his detention remains the arrangement entered into between the [ICC] and the authorities of the [DRC]' and since the ICC was waiting to send him back to the DRC,⁸⁴² it clearly failed to examine why the ICC was not able to send him back, namely the fact that the Netherlands was still examining his application for asylum. It thus failed to examine the issue that the continuing detention of Djokaba resulted from an act of the Netherlands and therefore that the Netherlands might have had an indirect but effective control on the detention which could be a sign of jurisdiction.

⁸³⁹ *Djokaba* ECtHR decision (n812) §75.

⁸⁴⁰ S. C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer, 2010) 148-149 (as cited in M. Milanovic and T. Papic, 'As bad as it gets: the European Court of Human Rights's *Behrami* and *Saramati* decision and general international law' (2009)58 *International Comparative Law Quarterly* 275).

⁸⁴¹ Grover (n840) 148-149 (as cited in Milanovic and Papic (n840) 275).

⁸⁴² *Djokaba* ECtHR decision (n812) §75.

Indeed, for the HRC, jurisdiction ‘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’.⁸⁴³ This jurisdiction would thus derive from control.⁸⁴⁴ Could it be argued that the refusing state exercises effective control regarding the right to liberty of the accused? Admittedly the case law in which this position is adopted concerned mostly cases of occupation and is thus linked to a territory.⁸⁴⁵ This is what Milanovic calls ‘the spatial model of jurisdiction – a state possesses jurisdiction whenever it has effective overall control of an area’.⁸⁴⁶ This model could not be applied to our case since there is no such control of a territory. In addition, the control ‘should be exercised over a large number of interdependent stakes, and not one time only and over a single matter only’.⁸⁴⁷

Nonetheless, the accused could invoke the benefit of ‘the personal model of jurisdiction – a state has jurisdiction whenever it exercises authority or control over an individual’.⁸⁴⁸ It could be argued that it is the case given the consequence of the refusal of a state to provide guarantees for his or her interim release. This principle was applied in cases of extra-territorial arrest and detention,⁸⁴⁹ of preventing asylum seekers entering the territory,⁸⁵⁰ and of attacks on a foreign territory.⁸⁵¹ It must be noted that, while dealing with cases of responsibility of a state for acts

⁸⁴³ UNHRC, ‘General Comment 31’ (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 §10.

⁸⁴⁴ De Schutter (n38) 132; S. Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012)25(4) *Leiden Journal of International Law* 872; A. Conte, ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’ (2013) *Journal of Conflict and Security Law* 4-5;

See also ECtHR, Judgment, *Cyprus v. Turkey* (App. No. 25781/94), 10 May 2001 §78 in De Schutter (n38) 133.

⁸⁴⁵ De Schutter (n38) 133.

⁸⁴⁶ M. Milanovic, ‘*Al-Skeini* and *Al-Jedda* in Strasbourg’ (2012)23(1) *European Journal of International Law* 122
Same view: Besson (n844) 874-876.

⁸⁴⁷ Besson (n844) 872.

⁸⁴⁸ UNHRC, ‘General Comment 31’ (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13;
Milanovic (n846) 122.

⁸⁴⁹ HRC, *Sergio Euben Lopez Burgos v. Uruguay* (Comm. No. 52/79), UN Supp. No/ 40 (A/36/40), 29 July 1981 §176; IACmHR, *Coard v. United States* (Case No 109/9), 29 September 1999; ECtHR, Judgment, *Öcalan v. Turkey* (App. No. 46221/99), 12 May 2005.

⁸⁵⁰ IACmHR, *The Haitian Centre for Human Rights et al. v. United States* (Case No. 10.675), 13 March 1997.

⁸⁵¹ ECtHR, Decision, *Bankovic et al. v. Belgium et al.* (App. No. 52207/99), 12 December 2001; ECtHR, Judgment, *Issa and others v. Turkey* (App. No. 31821/96), 16 November 2004; ECtHR, Judgment, *Al-Skeini and others v. the United Kingdom* (App. No. 55721/07), 7 July 2011.

committed during an armed attack, the ECtHR has been more cautious because this view could extend considerably the jurisdiction of the states.⁸⁵² For example, in its recent *Al-Skeini case*, which concerns five Iraqis allegedly killed by British troops on patrol in UK-occupied Basra and one Iraqi arrested and then killed in a UK detention facility, the ECtHR seems to have combined both criteria. As Milanovic presents it, ‘the Court applied a personal model of jurisdiction to the killing of all six applicants, but it did so only exceptionally, because the UK exercised public powers in Iraq’.⁸⁵³ Similarly, in the *Jaloud v the Netherlands case*, the ECtHR recognized Dutch jurisdiction over persons passing through the checkpoint in Iraq given the control of the checkpoint by the Netherlands.⁸⁵⁴

The problem with that personal model of jurisdiction is that, if, in theory, the accused could invoke it, it would most likely be rejected because the situations are not really comparable. Indeed, the ICC accused have not been abducted in a foreign country and then subsequently detained by the refusing state nor have they been bombed or caught under fire by its armed forces. Objectively, ‘the authority or control’ that the refusing state would have over the accused is not comparable. In addition, as held by Judges Spielmann and Raimondi, attribution is distinct from jurisdiction.⁸⁵⁵ Adopting such an extended interpretation would, as feared by the ECtHR Judge Nubberger, lead to ‘a real danger of the whole house being flooded’.⁸⁵⁶ Indeed, this could have consequences for numerous states since, as seen before, the state of origin is not a real option. In addition, the difference with all these cases is the intervention of an international organization, the ICC, in the equation. Indeed, if such case was ever brought to a human rights supervisory body, the state would most likely answer that it does not have jurisdiction because the accused is under the jurisdiction of the ICC.

⁸⁵² De Schutter (n38) 147; A. Nubberger, ‘The Concept of ‘Jurisdiction’ in the Jurisprudence of the European Court of Human Rights’ (2012)65 *Current Legal Problems* 241-268.

See also Milanovic (n846); Conte (n844) 1-26.

⁸⁵³ Milanovic (n846) 130.

⁸⁵⁴ ECtHR, Judgment, *Jaloud v. the Netherlands* (App. No. 47708/08), 20 November 2014 §152.

⁸⁵⁵ ECtHR, Judgment, *Jaloud v. the Netherlands* (App. No. 47708/08), 20 November 2014 §152, concurring opinion of Judge Spielmann, joined by Judge Raimondi.

⁸⁵⁶ Nubberger (n852) 242.

Consequently, invoking the responsibility of the state just because of its refusal would probably fail because of the lack of jurisdiction. Nonetheless, would the application also fail if the responsibility of the state were invoked because of the transfer of the power to the ICC?

5.1.2.2. Jurisdiction of the state because of the transfer of power

Another exception to the territorial jurisdiction admitted by the ECtHR is the recognition that:

Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights [so that] it would be incompatible with the purpose and object of the Convention (...) if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.⁸⁵⁷

No other human rights supervisory body has yet pronounced on a similar issue.

The idea is that, ‘if the Convention does not (...) prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity, (...) the State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention’ and that ‘State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’. By ‘equivalent’, the Court clarified that it meant ‘comparable’ and not ‘identical’.⁸⁵⁸ It continued by saying that:

⁸⁵⁷ ECtHR, Judgment, *Matthews v. the United Kingdom* (App. No. 24833/94), 21 January 1999 §32; ECtHR, Judgment, *Waite and Kennedy v. Germany* (App. No. 26083/94), 18 February 1999 §67.

⁸⁵⁸ *Djokaba* ECtHR decision (n812) §76.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.⁸⁵⁹

In other words, a transfer of competence to an international organization is acceptable for the ECtHR only if an equivalent protection of human rights is provided by the organization.⁸⁶⁰ This protection must be persistent. Indeed, 'Member States appear to be required to screen the [international organization]'s human rights performance continuously. They are not absolved from responsibility upon acceding to an [international organization] which only at the time of accession provided sufficient human rights guarantees. Instead, any deterioration of human rights protection obliges them to bring pressure to bear on the [international organization] so that it changes its ways'.⁸⁶¹ It is not clear whether the ECtHR requires an act of the state to trigger its responsibility.⁸⁶² In the present case, the action could be the refusal of a state to host a provisionally released accused.

So far, the ECtHR has never found a state responsible for the act of an organization because it has always ruled that there was an equivalent mechanism.⁸⁶³ It must be noted that, in the cases against the UN, the ECtHR has always attributed the contested act to the UN and held that the member state was not involved. It found, for example, that only the signature of the

⁸⁵⁹ *Djokaba* ECtHR decision (n812) §76.

⁸⁶⁰ ECmHR, *M & Co. v. Germany* (App. No. 13258/77), 9 February 1990 in Milanovic (n39) 113.

⁸⁶¹ C. Ryngaert, 'The Responsibility of Member States in connection with Acts of International Organizations: Assessing the Recent Case Law of the European Court of Human Rights' (2011)60 *International & Comparative Law Quarterly* 997-1017;

See also T. Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010)10(3) *Human Rights Law Review* 529-545.

⁸⁶² Lock (n861) 531-536;

See also De Schutter (n36) 77-86; Ryngaert (n861) 997-1017.

⁸⁶³ Ryngaert (n861) 997-1017.

Headquarters Agreement by the Netherlands with the ICTY could not lead to the responsibility of the Netherlands for ICTY's acts.⁸⁶⁴ Nonetheless, in this case, in addition to the signature, there would also be the act of refusal.

The detained witness Djokaba tried to plead this lack of equivalent mechanism regarding his illegal detention. Nonetheless, the ECtHR found that the ICC had powers under Rules 87 and 88 of its RPE to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated.⁸⁶⁵ The ECtHR did not thus exclude the possibility of the responsibility of the Netherlands. These findings of the ECtHR in the *Djokaba case* cannot be transposed to this case since these rules are not applicable to the accused. As the ICC held in the *Katanga case*, 'les témoins détenus ne sont pas des suspects relevant de la compétence de la Cour et ne peuvent donc pas invoquer les garanties qui leur sont applicables notamment en matière de réexamen de leur détention'.⁸⁶⁶

In this case, the absence of an equivalent mechanism and the presence of a structural deficit could be argued against the refusing state. On the one hand, if the ICC does not assume its obligation to find a state able and to force it to be willing, the accused has no legal ways to act against it so that it does not have access to an equivalent mechanism regarding the violation of his or her right to liberty. On the other hand, a structural deficit exists because there is nothing foreseen about such cases in the ICC legal provisions. Therefore, the refusing state should have accepted the request in order to avoid this violation of the right of the accused. At the same time, it could be argued that there is an equivalent mechanism since the detention of the accused is regularly reviewed and since, if an able and willing state is found, the right to liberty of the accused could be respected. Similarly, it could be argued that no structural deficit would exist since there could be a chance of interim release if an able state is found as in the *Bemba case*. This position is supported by Henquet. According to him, since an accused can move before the judges of the ICC to seek redress for an alleged violation of his rights, the states negotiating the ICC Statute decided to make the Court competent to safeguard these rights and established an

⁸⁶⁴ Ryngaert (n861) 997-1017.

⁸⁶⁵ *Djokaba* ECtHR decision (n812) §79.

⁸⁶⁶ Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, TCII, ICC, 1 October 2013 §35.

equivalent mechanism.⁸⁶⁷ Nevertheless, since the effectiveness of this mechanism depends on the will of states, it should not be considered as equivalent.

The issue of the consequences for the Netherlands in case of violation by the ICC of its human rights obligations arose in the parliamentary debates related to the signature of the ICC Statute.⁸⁶⁸ The Dutch politicians concluded that such situation would be very unlikely and that the findings of the *Naletilic case* in which the ECtHR found that the ICTY presented all the necessary human rights safeguards could apply to the ICC as well.⁸⁶⁹ The Dutch Minister of Justice added that, should such a situation arise, it would have consequences not only for the Netherlands but also for each member state that is also member of the ECHR.⁸⁷⁰

As shown by the ECtHR's case law, a position similar to the Dutch one is more likely to prevail. Indeed, as argued by Ryngaert, the ECtHR has been more than cautious not to pierce the veil of the international organizations too much and is thus more prone to conclude as to the existence of an equivalent mechanism.⁸⁷¹ In the present case, the accused has access to a judge, controlled by an appeals chamber, that reviews regularly his or her detention and that would have, in theory, the power to force a state to cooperate. The issue only arises when, as in this theoretical case, the judge does not use this power and no able and willing state is found.

In order to determine whether this control by the judge is supposed to be an equivalent mechanism, the case law of the ECtHR regarding Article 13 of the ECHR, namely the right to an effective remedy, is enlightening. Indeed, it is stipulated that 'the effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.'⁸⁷² As seen before, the issue of the cooperation of states may be addressed before the ICC judge and the judge may require

⁸⁶⁷ T. Henquet, 'International Organisations in The Netherlands: Immunity from the Jurisdiction of the Dutch Courts' (2010)57(2) *Netherlands International Law Review* 267-301.

⁸⁶⁸ Memorie van toelichting, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314); Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314).

⁸⁶⁹ Memorie van toelichting, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314); Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314).

⁸⁷⁰ Nota naar aanleiding van het verslag, Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314).

⁸⁷¹ Ryngaert (n861) 1017.

⁸⁷² ECtHR, Judgment, Kudla v. Poland (App. No. 30210/96), 26 October 2000 §157.

observations or could require the active cooperation of the state. The issue is when it does not do so. Article 13 also requires the remedy to be effective. The ECtHR is clear about the fact that:

The ‘effectiveness’ of a ‘remedy’ within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the ‘authority’ referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.⁸⁷³

It cannot really be contested that the control of the detention of the accused by the ICC judge fulfils these requirements and that the issue is rather the outcome of the remedy, namely the way the judge decides to exercise his or her power to coerce a state to cooperate. In that case, it would mean that the ECtHR would have to control the appropriateness of the action of the judge, which it is not its role. Consequently, it is likely that an accused’s application would ultimately fail because of the lack of jurisdiction of the refusing state. In addition, this control of the ICC action leads to another issue, that of immunity. What if the accused is actually directing his or her request against the ICC and using the refusing state also as a means to have access to a human rights supervisory organ?

5.1.3. Could the ICC hide behind its immunity?

In that case, independently of the issue of jurisdiction, the refusing state used to reach the ICC could invoke the immunity of the ICC guaranteed by Article 48 of the ICC Statute. This is among others illustrated by the *Blagojevic case* and the *Galic case* in which the ECtHR held that:

The United Nations is an intergovernmental international organisation with a legal personality separate from that of its member states and is not itself a Contracting Party

⁸⁷³ ECtHR, Judgment, *Silver and others v. the United Kingdom* (App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7113/75, 7136/75), 25 March 1983 §113; ECtHR, *Chahal v. the United Kingdom* (App. No. 22414/93), 15 November 1996 §145; ECtHR, Judgment, *Kudla v. Poland* (App. No. 30210/96), 26 October 2000 §157.

(...). Plainly, therefore, the Court lacks jurisdiction *ratione personae* to examine complaints directed against the ICTY itself or against the United Nations as a respondent.⁸⁷⁴

Like the UN, the ICC has a legal personality separate from that of its member states,⁸⁷⁵ and is not a member of the ECHR.

The fact that the ICC enjoys immunities in its member states is not *per se* against the right to a fair trial. Indeed, as held by the ECtHR, ‘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’.⁸⁷⁶ Nonetheless, according to the ECtHR, the state can hide behind this immunity only when the applicants have available to them reasonable alternative means to protect effectively their rights under the Convention.⁸⁷⁷ The issue is thus again that of the existence of an equivalent mechanism, which, as seen before, may be argued to exist.

5.1.4. Conclusion

It stems from these considerations that, if the accused wants to contest directly the fact that no able state is willing to host him or her during his or her interim release and the fact that the ICC does not do anything about it, he or she is not likely to find any support from the national jurisdictions or their human rights supervisory mechanisms. Indeed, on the one hand, it will be difficult for the accused to assert directly the jurisdiction of the refusing state because it is quite doubtful that the refusing state exercises an effective authority and control on the accused. On the other hand, if the accused wanted to trigger the responsibility of the refusing state through its membership of the ICC, the ECtHR will probably say that the ICC has an equivalent mechanism to assess this kind of claim so that the state or the ICC cannot be held responsible.

⁸⁷⁴ ECtHR, Decision, Vidoje Blagojevic v. the Netherlands (App. No. 49032/07), 9 June 2009 §36; ECtHR, Decision, Stanislav Galic v. the Netherlands (App. No. 22617/07), 9 June 2009 §28.

⁸⁷⁵ Article 4 of the ICC Statute.

⁸⁷⁶ ECtHR, Decision, Stichting Mother of Srebrenica and Others v. the Netherlands (App. No. 65542/12), 11 June 2013 §53.

⁸⁷⁷ ECtHR, Judgment, Waite and Kennedy v. Germany (App. No. 26083/94), 18 February 1999.

Admittedly, the positions of human rights mechanisms other than the ECtHR are not known but the same principles would probably be applied since they are close to the regime of international responsibility.⁸⁷⁸

Nonetheless, if the accused cannot directly find relief for the violation of his or her right to liberty because no state would accept to act as host during his or her interim release, he or she could still try to find a state willing to intercede for him or her near the ICC or the refusing state. This option is examined in the next section.

5.2. Indirect means: through a state acting on his/her behalf

The accused could seek reparation for the violation of his or her right to liberty by finding a state that would embrace his or her cause. The first issue is obviously to find such state as an accused cannot force a state to intercede in his or her favour. Therefore, the state must be willing. The difficulty in finding such state is that, *a priori*, if the state cared, it would be willing to accept the accused on its territory. Nonetheless, that does not mean that the willing state would necessarily be able to accept the accused. The obvious choice would be the state of origin. Nonetheless, as seen in section 2, other states could also be envisaged. This state willing but unable could try to act in favour of the accused through two means, the diplomatic protection or an action *erga omnes partes*.

If the state of origin is willing to side with the accused, it could act through diplomatic protection. Article 1 of the Draft Articles on Diplomatic Protection provides that, for the purposes of the draft articles, diplomatic protection consists of the invocation by a state, through diplomatic action or other means or peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility. As held by Shaw, ‘such diplomatic protection is not a right of the national concerned, but a right of the state which it may or may not choose to exercise’ so that the natural or legal person has no remedy if the state refuses to act.⁸⁷⁹ The prerequisites for diplomatic protection are an

⁸⁷⁸ Acquaviva (n47) 614; McCorquodale (n36) 153-154; De Schutter (n36) 77-79; Ryngaert (n861) 1015-1016.

⁸⁷⁹ Shaw (n44) 811;

international wrong, an exhaustion of the domestic remedies if they are effective and a link of nationality.⁸⁸⁰ In this case, these prerequisites would be fulfilled since the refusal of the state leads to a violation of the right to liberty of the accused by the ICC, since the domestic remedies would not be effective given the absence of jurisdiction and since it is the state of origin that would act. Diplomatic protection could indeed be used for the protection of human rights. In fact, in the *Diallo case*, the ICJ established that:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.⁸⁸¹

Diplomatic protection ‘includes, in a broad sense, consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, a retort, severance of diplomatic relations, and economic pressures’.⁸⁸² Regarding the ICC, these means would be useless since the protecting state could not pressure a judge to take action against a state. The only thing it could do is act through *amicus curiae* briefs to suggest the ICC should use its cooperation regime to force the refusing state.⁸⁸³ By contrast, regarding the refusing state, the protecting state could choose all these means subject to their legality in international law. Their effectiveness would then depend on the case. Interestingly, Kujit, a Dutch national, initiated action in a Dutch jurisdiction to force the Netherlands to issue in his favour guarantees addressed to Thailand so that he could be provisionally released while waiting for his trial for drug-trafficking to start. Since he was in pre-trial detention for six years, he also requested that the Netherlands do everything to obtain

See also S. Tho Pesch, ‘The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law’ in N. Weiss and J-M. Thouvenin (eds.), *The influence of Human Rights on International Law* (Springer, 2015) 56.

⁸⁸⁰ ILC, ‘Draft articles on Diplomatic Protection, Fifty-Eight session, (2006) UN Doc A/61/10 Art. 1;

C. Forcese, ‘The Capacity to Protect: Diplomatic Protection in the ‘War on Terror’ (2006)17(2) *European Journal of International Law* 369-394.

⁸⁸¹ ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections, Judgment) (2007) ICJ Rep §39.

See also A. Mills, ‘Rethinking Jurisdiction in International Law’, (2014) *British Yearbook of International Law* 202-204.

⁸⁸² Shaw (n44) 809.

⁸⁸³ S. D. Murphy, ‘Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, (1999) 93(1) *American Journal of International Law* 79.

redress from the Thai government for the violation of his human rights. The Dutch court rejected the application because it found the Dutch government unable to dictate to the Thai government how to treat its prisoners. Nonetheless, the court concluded that it expects the Dutch government to continue to make an effort to assist the applicant and to take all possible measures to secure the release of the applicant as soon as possible.⁸⁸⁴ It implies that there would be an obligation at least to try without probably effective results. Could the accused hope for something more from a protecting state than trying? Could he or she, for example, hope for judicial proceedings?

Indeed, only judicial and arbitral proceedings could lead to an obligation of the refusing state to change its stance. The issue with the use of such proceedings is that they would be submitted to the acceptance of jurisdiction of the refusing state.⁸⁸⁵ For example, regarding the ICJ, there are no compromissory clauses in any human rights treaty protecting the right to liberty so that the two states should consent. Admittedly, the HRC as well as the three regional human rights mechanisms accept inter-state complaints when both states agree to this possibility. Nonetheless, provided that both the protecting and the refusing states agreed to these mechanisms, it would still be needed to demonstrate that the accused is under the jurisdiction of the refusing state and, as seen in section 5.1.2.2., it is probably going to fail.

Diplomatic protection would thus not be very satisfactory if the refusing state is not willing to negotiate with the protecting state since, *a fortiori*, it would not be willing to accept the jurisdiction of the ICJ or of an arbitral tribunal either. Nonetheless, such support from the state of origin would not hurt.

But if the state of origin is not willing to help, could another state act on the behalf of the accused?⁸⁸⁶ Obviously, no legal ground would prevent any state from trying to negotiate. The issue is rather whether any state would have the right to initiate legal proceedings. It could not do so under the umbrella of diplomatic protection since it is only available for the state of nationality of the accused. Nonetheless, it could do it under the umbrella of the rights *erga omnes*. Indeed, if

⁸⁸⁴ Rechtbank Kuijt, Kort Geding, KG 03/137 §92.8.

⁸⁸⁵ Tho Pesch (n879) 59.

⁸⁸⁶ For more information: C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, 2005) 127-128; A. Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*' (2007)56 *International and Comparative Law Quarterly* 553-581.

the protecting state is part of one of the four human rights treaties protecting the right to liberty and if both states accept the jurisdiction of the ICJ in case of the ICCPR or of the regional human rights mechanisms in case of the other conventions, according to some authors, it could act on the basis of a right *erga omnes partes*. According to them, in this case, each state party has a legal interest to see the treaty respected.⁸⁸⁷ Besides, the human rights regional mechanisms provide for the possibility to file a complaint against another state even if they are not directly injured. Nonetheless, it is still controversial for the ICCPR. In the *Barcelona Traction case*, the ICJ explicitly held that ‘on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought.’⁸⁸⁸ In any case, independently of this admissibility issue due to the lack of nationality link between the accused and the protecting state and independently of the requirement of consent for the jurisdiction of the body, the accused would probably again not be found to be in the jurisdiction of the refusing state.

If neither the protecting state nor the refusing party is party to one of these conventions, to bring the case before the ICJ, the protecting state should demonstrate that the right to liberty is a right *erga omnes*, so that its legal interest to act for the accused who is not one of its nationals could be established. In addition, both states should accept the ICJ’s jurisdiction. It is important to stress that the ‘question of legal interest and standing, even if it concerns a peremptory norm, should however not be confounded with the question of the availability of a judicial forum: having a legal interest in a certain matter does not imply access to a certain judicial forum’.⁸⁸⁹ As Tams argued, the fact that ‘all States have standing to institute ICJ proceedings in response to *erga omnes* breaches cannot overcome the necessity of States’ consent to the relevant dispute settlement mechanism’.⁸⁹⁰ Even then, the issue would be that Article 48 of the Articles on State Responsibility provides that there should be a serious breach of peremptory norms for any state

⁸⁸⁷ E. Milano, ‘Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?’ (2004)35 *Netherlands Yearbook of International Law* 116-118; Tams (n886) 127-128; Vermeer-Künzli (n886) 575.

⁸⁸⁸ ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited (Merits)* (1970) ICJ Rep. 1 §91. In Milano (n887) 116-118.

⁸⁸⁹ Vermeer-Künzli (n886) 569-570.

⁸⁹⁰ Milano (n887) 116-118;

See also De Schutter (n38) 90-92.

to act when it is not injured. Yet, the violation of the right to liberty regarding provisional release could not be considered as a serious breach. It is beyond the scope of this thesis to deepen the use of rights *erga omnes*,⁸⁹¹ since, in any case, this thesis does not deal with serious breaches of peremptory norms but the possibility to use them is interesting to be mentioned.

It stems from these considerations that, could the accused find a protecting state willing to intercede for him or her and capable of it because of the nationality link, or of the adherence to human rights supervisory mechanisms, the issue of jurisdiction would still arise to trigger a judicial proceeding. Nonetheless, it could be very helpful for an accused to have a state interceding for him or her.

5.3. Conclusion

What matters for the accused to find remedies for the violation of his or her right to liberty is thus to demonstrate the jurisdiction of the refusing state and/or find a state willing to intercede for him or her. Even if it seems from this legal analysis that states have not consented to such jurisdiction, it is still important to keep in mind remedies available within the framework of human rights law. Consent of states can indeed evolve. Condemning existing mechanisms of human rights for being ineffective without having at first recourse of them will not help evolution of IHRL. Some remedies available in the context of IHRL may provide guidance for the negotiations. It may well be that because of such human rights remedies, other states think twice before refusing a request from the ICC to admit an accused provisionally released on their soil.

Such request of the accused could also help the ICC to reflect on the issue and provide a remedy to the accused. An option could be a reduction of sentence. This was the path chosen by the ICTR in order to remedy the violation of the right of fair trial committed against Barayagwiza or Kajelijeli.⁸⁹² It was also done in the *Gatete case*. In this case, the AC of the ICTR held that ‘the

⁸⁹¹ See T. Meron, ‘On a Hierarchy of International Human Rights’ (1986)80(1) *American Journal of International Law* 10-11; K. Teraya, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001)12(5) *European Journal of International Law* 932; E. Brown Weiss, ‘Invoking State Responsibility in the Twenty-first Century’ (2002)96 *American Journal of International Law* 804; Milano (n887) 106; Tams (n886) 127-128; Forcese (n880) 392; Vermeer-Künzli (n886) 554-555.

⁸⁹² Acquaviva (n47) 626-629;

protracted delay and resulting prolonged pre-trial detention of more than seven years violated Gatete's right to be tried without undue delay and constituted prejudice per se' and that 'a reduction of the sentence of life imprisonment to a term of 40 years' imprisonment was the appropriate remedy'.⁸⁹³ Nonetheless, as Naymark puts it, 'it is difficult to impose a practically meaningful remedy when the accused is convicted on charges infinitely more serious than those carrying maximum sentences in domestic criminal law schemes. Where is the practical remedy in sentencing an accused found to be responsible for the deaths of 500,000 people as if he had only been responsible for the deaths of 100,000 people, for example?'⁸⁹⁴ And what if the accused is in the end acquitted? Another possibility could be financial compensation. This right is indeed recognized for persons unlawfully detained by Articles 9(5) and 14(6) of the ICCPR, Article 3 of the seventh Protocol of the ECtHR or Article 10 of the AmCHR. The ICC also recognized this right but only in case of a miscarriage of justice.⁸⁹⁵ A stay of proceedings could be another remedy but, according to the ICC, a permanent stay could lead to the release of the accused only if a fair trial becomes impossible, which is not the case.⁸⁹⁶

These remedies could be incentives for states to cooperate. Nonetheless, given the gravity of the charges, it could be also risky, especially if the accused is then convicted. It could have an opposite effect by upsetting states, which could adversely impact on cooperation, as demonstrated by the *Barayagwiza case*,⁸⁹⁷ or by upsetting the international community because, for example, compensation should primarily go to the victims.

Judgment, *Prosecutor v. Barayagwiza*, Case No. ICTR 97-19-AR72, TC, ICTR, 31 March 2000 §74; Judgment, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, TCII, ICTR, 23 May 2005 §§197–255.

⁸⁹³ Judgment, *Jean-Baptiste Gatete v. Prosecutor*, Case No. ICTR-00-61-A, AC, ICTR, 9 October 2012 §§23, 29, 44, 45.

⁸⁹⁴ D. Naymark, 'Violations of Rights of the Accused at International Criminal Tribunals: the Problems of Remedy' (2008)4(2) *Journal of International Law and International Relations* 3-5.

⁸⁹⁵ Article 85;

S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' (2002)96(3) *American Journal of International Law* 628-646; J. D. Michels, 'Compensating Acquitted Defendants For Detention Before International Criminal Courts' (2010)8(2) *Journal of International Criminal Justice* 407-424; de Meester, Pitcher, Rastan and Sluiter (n322) 366.

⁸⁹⁶ de Meester, Pitcher, Rastan and Sluiter (n322) 365.

⁸⁹⁷ Judgment, *Prosecutor v. Barayagwiza*, Case No. ICTR 97-19-AR72, TC, ICTR, 31 March 2000.

6. Conclusion: is this an issue of ability or an issue of willingness?

As seen in the first part of this thesis, if the obligation of the ICC to respect the right to liberty regarding the applications for interim release clearly stems from the combination of Articles 21(1)(a) and 21(3) of the ICC Statute, some scholars have voiced some doubts regarding the pertinence of the requirement of a strict respect of the right to liberty as foreseen in IHRL. The rationales given on this score have been two-fold: the gravity of the crimes the ICC is dealing with; and the specific context in which the ICC is operating. It has been demonstrated, however, that, contrary to this impression, these two elements are not an hurdle for a strict application when an able and willing state was found. The practice of the ICTY was illustrative to corroborate this conclusion.

The study has turned then to the analysis of the issues linked to the obtaining of state guarantees. The first analysis focused on the difficulty of finding voluntary states willing to accept provisionally released accused. The second part of the analysis shows that, despite its obligations to find such states and to enable the accused to contact them, the ICC was rather passive on this matter. It has been demonstrated that the ICC could nonetheless make use of its cooperation regime in case of lack of positive answer to its efforts of identification and contact. It has also been shown that the accused had at his or her disposal several mechanisms to try to force the ICC to respect its obligations and to try to force a refusing state not to violate its obligation to respect the right to liberty stemming from the IHRL instruments by which it would be bound. Nonetheless, it can be concluded that these mechanisms, whether triggered directly by the accused or by a state acting on his/her behalf, are unlikely to lead to a judgment of condemnation of the ICC or of the refusing state, namely because of an issue of jurisdiction and/or of immunity. Acting through a protecting state is even less satisfactory in that, independently of the difficulty of finding such state willing to trigger diplomatic protection or an action *erga omnes partes*, it would also have to show its legal capacity to act in name of the accused.

Consequently, this analysis demonstrates that, since the ICC would actually be able to respect the right to liberty as prescribed by its legal regime and since it has, contrary to the accused, different effective means at its disposal, ie. negotiations and requests for cooperation to reach this ability, the low number of willing states seems rather an issue of unwillingness by the ICC than one of inability. Admittedly, the states are also at fault when they raise unconvincing arguments to refuse an accused on their soil. Nonetheless, when the ICC accepts these

arguments, the ramification is that it may be considered unwilling and unable to respect one of the requirements derived from its own Statute.

CONCLUSION

In this thesis I have endeavoured to answer the research question: Does the ICC have the legal obligation to respect the right to liberty and, if so, does it have the capacity to do so? I deemed a positivist approach to be most appropriate and most convincing for the analysis of this question. With the use of a formalist method, it was demonstrated that the ICC has a legal obligation to respect the right to liberty when ruling on issues of interim release from detention. Indeed, the ICC Statute, more precisely Articles 58 and 60, provides for a regime of interim release that does not suffer any lacunae. Therefore, according to Article 21(3) of the ICC Statute, these provisions, which protect indirectly the right to liberty of the accused, must be interpreted and applied in conformity with this right as internationally recognized. Although the application of IHRL through Article 21(3) is not contested as such, given its *a priori* clear phrasing, it was shown that the expression ‘internationally recognized’ was actually far from clear, and furthermore that the ICC judges have not resolved this issue. In fact, the judges’ use of IHRL in the Court’s decisions cannot be rationalized since it is not always coherent and since no legal justification for such use is given. From their practice, it can only be concluded that IHRL is applicable in general without any indication regarding the content of IHRL. This lack of legal reasoning is to be regretted since, as held by Cassese regarding the practice of the *ad hoc* tribunals, a clear standpoint of the ICC judges regarding the law applicable to them is ‘necessary not only for reasons of *legal rigour*, but also to satisfy the fundamental requirements of the *principle of fair trial*’. If the reasoning of the judges is not foreseeable, ‘the defence is deprived of the means to reasonably anticipate the judges’ conclusions’.⁸⁹⁸ This is the reason why in this thesis I have found it necessary to explain clearly the interpretation of Article 21(3) adopted for its analysis.

The standard of the right to liberty, as internationally recognized and as required by Article 21(3), can be ascertained through the use of general principles of law, which, notwithstanding the point of view of many authors, are more adequate than the other sources of international law provided by Article 38 of the ICJ Statute. In fact, I took the stance that the trend of many scholars to adapt the definition of customary international law so that it would be an appropriate source for IHRL is unnecessary, and even undesirable, given the general principle of law as existing source of international law. It has been revealed that the minority trend,

⁸⁹⁸ Cassese (n53) 20.

represented among others by Simma,⁸⁹⁹ Meron⁹⁰⁰ and De Schutter⁹⁰¹, rightly advocates for the use of such a source for establishing IHRL. I argued that there is no need to rely upon Article 38 of the Statute of the ICJ to identify the law applicable to the ICC, on the ground that the Rome Statute itself provides for the applicable law under Article 21. Even so, it is submitted that it is still necessary to invoke Article 38 in order to ascertain the normative content and standards of the right to liberty, on the basis that Article 21(3) itself makes a reference to ‘internationally recognized human rights’. Such an ‘external’ reference to the general source of international law shows in turn that the ICC legal regime is not self-sufficient, much less self-contained. This may explain why some scholars, when analysing the application of IHRL to the ICC, invoke both Article 38 of the Statute of the ICJ and Article 21(3) of the ICC Statute in order to rationalise the application of IHRL to international criminal proceedings.⁹⁰² Nonetheless, since, as demonstrated, Article 21 of the ICC Statute is *lex specialis* in relation to Article 38 of the ICJ Statute, such a proposed combined use of those provisions on sources of law is confusing. It is submitted that a distinction should be made between the law applicable to the ICC pursuant to Article 21 of the ICC Statute on the one hand, and the applicable law under Article 38 of the ICJ Statute which can be ascertained by way of reference to this provision by Article 21(3), on the other. It must be noted, however, that this combination could be useful if the accused aims to demonstrate a breach of an international obligation in order to trigger the responsibility of the ICC in international law. This argument could not be explored in this thesis since, as explained in Part II, section 5, its scope had to be limited to IHRL mechanisms.

It has been submitted that the right to liberty, as internationally recognized, should be defined as admitting the possibility to detain someone who has allegedly committed an offence but as requiring it to be provided for by law and to be strictly necessary since the presumption is in favour of release. The necessity of the detention has to be assessed in light of potential alternative measures and in light of a potential risk of flight, of prejudicing the administration of justice and of committing new offences. These grounds need to be expressly demonstrated by the detaining authorities. In addition, these authorities must ensure a procedure to control automatically and regularly the necessity of the detention. This control must be carried out promptly by an independent authority with the power to order the release of the detainee. Finally,

⁸⁹⁹ Simma and Alston (n39) 107.

⁹⁰⁰ Hannum (n209) 351.

⁹⁰¹ De Schutter (n36) 51-128.

⁹⁰² Eg. : Gradoni (n47) 854; Deprez (n52) 280.

the procedure must be conducted with special diligence; where it is not, the accused must be released. The fact that a *ius commune* could be reached through the different human rights conventions and their interpretative mechanisms demonstrates that, if, as once held by Brownlie,⁹⁰³ IHRL appears to be fragmented, this is not necessarily the case for every right.

With this definition of the right to liberty, the ICC regime regarding interim release has been studied and it is concluded that the regime of interim release appears to fulfil the requirement of the right to liberty as previously defined. The analysis of the case law demonstrates in addition that the application of this regime by the ICC judges is also roughly in conformity with this right. The use of ‘roughly’ is due to the fact that, although the ICC judges recognize both the exceptional character of detention and the obligation to assess alternatives or to issue a summons to appear when possible, and although they always control the reasonableness of the length of detention and interpret the criteria justifying detention in light of the right to liberty, there are still some efforts to be made regarding the burden of proof and the influence of the disclosure of evidence and the expected sentence.

Despite these findings of apparent respect of the right to liberty, I considered that the legal analysis in this thesis also required an examination of whether the practice of the ICC proves it to be capable of respecting that right. Indeed, this issue has been raised as none of the individuals charged with international crimes has ever been released and by the criticisms of the majority of scholars regarding the requirement for international criminal tribunals to respect IHRL. For these scholars,⁹⁰⁴ in a nutshell, the fact that IHRL was originally intended for states means that it cannot be applied as such to international criminal tribunals because of the gravity of the crimes that they are dealing with, and of the specific context in which they operate. This thesis has demonstrated that such a strict application has in reality been possible, at least regarding the right to liberty, since these elements do not constitute genuine hurdles for such application. Indeed, the numerous conditional provisional releases before the ICTY speak for themselves. The analysis of the practice of the ICTY has demonstrated that these hurdles could be cleared, among others, by states guarantees. Yet, the practice of the ICTR has shown that obtaining such guarantees was not so straightforward. This finding was corroborated by the

⁹⁰³ Brownlie (n44) 554 (see n182).

⁹⁰⁴ See Part I, section 6.

analysis of the arguments raised by some states, especially Belgium and the Netherlands, in their observations to the ICC.

Going further, this study has also found that the combination of Article 21(1)(a) and Article 21(3) of the ICC Statute has led to an obligation of conduct imposed on the ICC to obtain these states' guarantees. In fact only then would it be entitled to claim it truly respects the right to liberty even though, in the end, the states' guarantees do not give rise to the release of the accused. The respect of the right to liberty lies in the *possibility* of release, not necessarily in the actual release. It has been argued that the ICC, through the presidency and the registry, is under an obligation, through negotiations, to identify eligible states and to enable the accused to contact them. The record of the ICC's compliance with this obligation is difficult to assess since the only real tangible result so far is the agreement concluded with Belgium. It was then contended that, where the results of these negotiations prove inconclusive because of the unwillingness of the states, in order to meet its obligations, the ICC should exercise the power to persuade them to show willingness to accept the accused through the use of its cooperation regime. The ICC has never gone that far, however. I acknowledge that my analysis is not corroborated by any other scholarly studies, the reason being that, to my knowledge, this thesis is the first to analyse the obligations of the ICC stemming from the right to liberty. Nonetheless, the use of a formalist method implies that all of the reasoning is legally based, and that, save for a different valid interpretation, this reasoning is tangible. As held by Simma and Paulus, 'only when linked to formal sources recognized as binding by the international community does law serve the decision maker in the search for a balance between idealism and realism, common values and ideological neutrality, apology and utopia.'⁹⁰⁵ If, as stated in the introduction, the study of the extra-legal factors influencing the requests for cooperation of the ICC and the reaction of the states to the requests is outside the scope of this legal analysis, it would be interesting to deepen further this issue with regard to interim release.

Admittedly, those obligations incumbent upon the ICC and the obligations incumbent upon the member states stem from the obligations built into the ICC regime as such. Still, it has also been demonstrated that, independently of these obligations and their membership of the ICC, because the member states are also bound by the right to liberty recognised in the context of IHRL, the accused has the possibility to trigger the mechanisms of IHRL in seeking

⁹⁰⁵ Simma and Paulus (n13) 308.

reparations for the violation of his or her right to liberty. These mechanisms are, mainly, the opening of a procedure, after the exhaustion of internal remedies, before a human rights supervisory body that would sanction the actions of the refusing state and the finding of a protecting state that would try to influence the refusing state through informal means such as negotiations or through the triggering of judicial proceedings. Nonetheless, it has been shown that judicial proceedings are not a real option since the accused would need to prove that the act of refusal or the transfer of power to the ICC would bring him or her under the jurisdiction of the refusing state and therefore under the jurisdiction of the judicial body which is, as the matter now stands, rather unlikely to succeed. The immunity of the ICC may also be one reason preventing the review of its acts.

This conclusion as to the lack of effective mechanisms at the disposal of the accused raises the more general issue of enforcement of IHRL when an international organization is in play. In fact, it is well-known that it is difficult to raise the responsibility of an international organization in IHRL.⁹⁰⁶ So far, cases regarding international criminal tribunals have only been brought before the ECtHR. The situation is left with scope of evolution in this context. In addition, this thesis has demonstrated that, as a matter of law, the reasoning of the ECtHR regarding the detained witness may not be the same for an accused of the ICC. This thesis has also examined other possibilities to draw on, where the conditions are appropriate, such as diplomatic protection or the intercession of a protecting state. Moreover, although it is beyond the scope of this thesis to deepen the topic of the responsibility of an international organization in international law, I am of the opinion that that avenue should be further explored, and that it might turn out to be useful in ensuring respect of the right to liberty of the accused before the ICC.

The main values of this analysis are twofold. On the one hand, and in contrast to the interpretations offered by the ICC judges, it provides clear legal reasoning regarding the applicability of IHRL and a definition of the right to liberty illustrating the possibility of finding a *ius commune* in IHRL. On the other hand, it deconstructs the growing point of view shared by numerous scholars according to which IHRL cannot apply as such to international criminal proceedings. Indeed, it has been demonstrated that, at least for the right to liberty, it can be strictly applied so that, as for other human rights, it would be also useful to question this

⁹⁰⁶ Ryngaert (n861) 1017.

assumption. It has also been shown that the fact that the ICC and its member states have proven unwilling to accept such strict application does not reduce their legal obligation to respect the rights they have committed themselves to upholding. Indeed, the ICC has a legal obligation to act, and the application of IHRL to international criminal proceedings comes with the crucial implication that its enforcement mechanisms can be applied and that independently of the likely result, they could at least be activated. It is important to stress that, before the ICC, there is already one acquittal after 22 months of pre-trial detention⁹⁰⁷ and 38 months of detention pending trial and one case of declining to confirm the charges after 14 months in detention without compensation.⁹⁰⁸ Therefore, I would advocate, in concordance with the ‘international expert framework on international criminal procedure law’, that the obligation to respect the right to liberty should be inserted into the ICC rules since ‘it would serve to demonstrate the [ICC]’s strong adherence to this right and also function as a safety net in case there are gaps in the [ICC]’s positive law’.⁹⁰⁹

In conclusion, if this analysis corroborates the statement of the then Judge Tulkens that ‘issues of “détentions préventives” are among the most problematic ones in so far as application of human rights in international criminal proceedings is concerned’,⁹¹⁰ it also demonstrates that this situation is not hopeless since legal instruments exist to address it.

⁹⁰⁷ See *Ngudjolo case*.

⁹⁰⁸ See *Mbarushimana case*.

⁹⁰⁹ de Meester, Pitcher, Rastan and Sluiter (n322) 349.

⁹¹⁰ Speaking in her personal capacity (as cited in Golubok (n1) 297).

BIBLIOGRAPHY

1. Legal instruments

1.1. Treaties

- Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 15 UNCTAD 355 (ICJ Statute)
- Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222 (ECHR)
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (Vienna Convention)
- American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (AmCHR)
- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (AfCHPR)
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3 (ICC Statute).

1.2. UN documents

1.2.1. Security Council

- UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended)*, 25 May 1993
- UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as amended)*, 8 November 1994

1.2.2. General Assembly

- UN General Assembly Res 40/34 (29 November 1985) UN Doc A/RES/40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- UN General Assembly Res 43/173 (9 December 1988) UN Doc A/RES/43/173 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- UN General Assembly Res 60/147 (16 December 2005) UN Doc A/RES/60/147 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

1.2.3. International Law Commission

- ILC, 'Draft statute of an international criminal court', Forty-Six session (1994) UN Doc A/49/10
- ILC, 'Draft articles on Diplomatic Protection, Fifty-Eight session, (2006) UN Doc A/61/10
- ILC, 'Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law', Fifty-Eight session, (1 May – 9 June and 3 July – 11 August 2006) UN Doc A/CN.4/L.682, 34-65.
- ILC, 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation', Sixty-Fifth session, (6 May – 7 June and 8 July – 9 August 2013) UN Doc A/68/10
- ILC, 'Third report on identification of customary international law', Sixty-Seventh session, (4 May – 5 June and 6 July – 7 August 2015) UN Doc A/CN.4/682

1.2.4. Human Rights Committee

- UNHRC, 'General Comment 31' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13
- UNHRC, 'General Comment 33' (5 November 2008) UN Doc CCPR/C/GC/33
- UNHRC, 'General Comment 35' (16 December 2014) UN Doc CCPR/C/GC/35

1.3. Other international organisations' documents

1.3.1. International Criminal Court

- Rules of Procedure and Evidence, ICC-ASP/1/3, 3-10 September 2002
- Regulations of the Court, ICC-BD/01-01-04, 17-28 May 2004
- Headquarters Agreement Between the International Criminal Court and the Host State, ICC – BD/04-01-08, 1st March 2008

1.3.2. African Commission on Human and Peoples' Rights

- AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)

1.3.3. Council of Europe

- Council of Europe Recommendation (CoE) Rec (2006)2 on the European Prison Rules (11 January 2006)
- Council of Europe Recommendation (CoE) Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (27 September 2006)

1.4. Domestic instruments

1.4.1. Belgium

- Loi modifiant la loi du 29 mars 2004 concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux (26 March 2014) MB 1 April 2014
- Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement du territoire (15 December 1980) MB 31 December 1980
- Loi contenant le titre préliminaire du Code de procédure pénale (17 avril 1978) MB 25 April 1878

1.4.2. The Netherlands

- Uitvoeringswet Internationaal Strafhof (20 June 2002, Stb. 2002, 314)

2. Cases

2.1. International Court of Justice and Permanent Court of International Justice

- PCIJ, Question of Jaworzina, (Advisory Opinion) (1923) CPIJ, Series B, No. 8, 37, Commentaries
- ICJ, Cases Concerning North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Merits) (1969) ICJ Rep 4
- ICJ, Case concerning the Barcelona Traction, Light and Power Company, Limited (Merits) (1970) ICJ Rep. 1
- ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) (1980) ICJ Rep 73
- ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits) (1986) ICJ Rep 14
- ICJ, Cases on South-West Africa, Second Phase (Ethiopia v. South Africa, Liberia v. South Africa) (Merits, dissenting Opinion of Judge Tanaka) (1996) ICJ Rep 6
- ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections, Judgment) (2007) ICJ Rep 582
- ICJ, The Whaling Case (Australia v. Japan, New Zealand Intervening) (Merits) (2014) ICJ Rep 148

2.2. Human Rights Committee

- HRC, Sergio Euben Lopez Burgos v. Uruguay (Comm. No. 52/79), UN Supp. No/ 40 (A/36/40), 29 July 1981
- HRC, Van Alphen v. The Netherlands (Comm. No. 305/1988), CCPR/C/39/D/305/1988), 23 July 1990
- HRC, W.B.E. v. The Netherlands (Comm. No. 432/1990), CCPR/C/46/D/432/1990, 23 October 1992

- HRC, *Kindler v. Canada* (Comm. No. 470/1991), CCPR/C/48/D/470/1991, 30 July 1993
- HRC, *Kulomin v Hungary* (Comm. No. 591/1992), CCPR/C/50/D/521/1992, 22 March 1996
- HRC, *Hill v. Spain* (Comm. No. 526/1993), CCPR/C/59/D/526/1993, 2 April 1997
- HRC, *A vs. Australia* (Comm. No. 560/1993), CCPR/C/59/D/560/1993, 3 April 1997
- HRC, *McLawrence v. Jamaica* (Comm. No. 702/1996), CCPR/C/60/D/702/1996, 18 July 1997
- HRC, *Cagas v. Philippines* (Comm. No. 788/1997), CCPR/C/73/D/788/1997, 31 January 2002
- HRC, *Kurbanov v. Tajikistan* (Comm. No. 1096/2002), CCPR/C/79/D/1096/2002, 6 November 2003
- HRC, *Morais v. Angola* (Comm. No. 1128/2002), CCPR/C/83/D/1128/2002, 25 March 2005
- HRC, *A. Smantser v. Belarus* (Comm. No. 1178/2003), CCPR/C/94/D/1178/2003, 23 October 2008
- HRC, *Eligio Cedeno v. Bolivarian Republic of Venezuela* (Comm. No. 1940/2010), CCPR/C/106/D/1940/2010, 4 December 2012
- HRC, *Zhanna Kovsh (Abramova) v. Belarus* (Comm. No. 1787/2008), CCPR/C/107/D/1787/2008, 27 March 2013
- HRC, *O. Pichugina v. Belarus* (Comm. No. n°1592/2007), CCPR/C/108/D/1592/2007, 17 July 2013

2.3. European Court of Human Rights and European Commission of Human Rights

- ECmHR, Decision, *X. v. Federal Republic of Germany* (App. No. 920/60), 19 December 1961
- ECtHR, Judgment, *Wemhoff v. Germany* (App. No. 2122/64), 27 June 1968
- ECtHR, Judgment, *Neumeister v. Austria* (App. No. 1936/63), 27 June 1968
- ECmHR, Decision, *W.R. v. Federal Republic of Germany* (App. No. 3376/67), 4 February 1969
- ECtHR, Judgment, *Matznetter v. Austria* (App. No. 2178/64), 10 November 1969
- ECtHR, Judgment, *Stögmüller v. Austria* (App. No. 1602/62), 10 November 1969
- ECmHR, Opinion, *Jentsch v. Federal Republic of Germany* (App. No. 2604/65), 30 November 1970
- ECtHR, Judgment, *Marckx v. Belgium* (App. No. 6833/74), 13 June 1979
- ECtHR, Judgment, *Airey v. Ireland* (App. No. 6289/73), 9 October 1979
- ECtHR, Judgment, *Schiesser v. Switzerland* (App. No. 7710/76), 4 December 1979

- ECtHR, Judgment, *Artico v. Italy* (App. No. 6694/74), 13 May 1980
- ECtHR, Judgment, *Silver and others v. the United Kingdom* (App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7113/75, 7136/75), 25 March 1983
- ECtHR, Judgment, *De Jong, Baljet and Van den Brink v. the Netherlands* (App. Nos. 8805/79, 8896/79, 9242/81), 22 May 1984
- ECtHR, Judgment, *Soering v. the United Kingdom* (App. No. 14038/88), 7 July 1989
- ECtHR, Judgment, *Bezicheri v. Italy* (App. No. 11400/85), 25 October 1989
- ECmHR, *M & Co. v. Germany* (App. No. 13258/77), 9 February 1990
- ECtHR, Judgment, *B. v. Austria* (App. No. 8/1989/168/224), 23 February 1990
- ECtHR, Judgment, *Letellier v. France* (App. No. 12369/86), 26 June 1991
- ECtHR, *Clooth v. Belgium* (App. No. 49/1990/240/311), 27 November 1991
- ECtHR, Judgment, *W. v. Switzerland* (App. No. 14379/88), 26 January 1993
- ECtHR, *Chahal v. the United Kingdom* (App. No. 22414/93), 15 November 1996
- ECtHR, Judgment, *Muller v. France* (App. 21802/93), 17 March 1997
- ECtHR, Judgment, *I.A. v. France* (App. No. 1/1998/904/1116), 23 September 1998
- ECtHR, Judgment, *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), 28 October 1998
- ECtHR, Judgment, *Matthews v. the United Kingdom* (App. No. 24833/94), 21 January 1999
- ECtHR, Judgment, *Waite and Kennedy v. Germany* (App. No. 26083/94), 18 February 1999
- ECtHR, Judgment, *T.W. v. Malta* (App. No. 25644/94), 29 April 1999
- ECtHR, Judgment, *Caballero v. UK* (App. No. 32819/96), 8 February 2000
- ECtHR, Judgment, *Witold Litwa v. Poland* (App. No. 26629/95), 4 April 2000
- ECtHR, Judgment, *Labita v. Italy* (App. No. 26772/95), 6 April 2000
- ECtHR, Judgment, *Punzelt v. the Czech Republic* (App. No. 31315/96), 25 April 2000
- ECtHR, Decision, *Mladen Naletilic v. Croatia* (App. No. 51891/99), 4 May 2000
- ECtHR, Judgment, *Kudla v. Poland* (App. No. 30210/96), 26 October 2000
- ECtHR, Judgment, *Jablonski v. Poland* (App. No. 33492/96), 21 December 2000
- ECtHR, Judgment, *Cyprus c. Turkey* (App. No. 25781/94), 10 May 2001
- ECtHR, Judgment, *Ilijkov v. Bulgaria* (App. No. 33977/96), 26 July 2001
- ECtHR, Decision, *Bankovic et al. v. Belgium et al.* (App. No. 52207/99), 12 December 2001
- ECtHR, Decision, *Slobodan Milosevic v. the Netherlands* (App. No. 77631/01), 19 March 2002
- ECtHR, Judgment, *Smirnova v. Russia* (App. Nos. 46133/99 and 48183/99), 24 July 2003

- ECtHR, Judgment, Issa and others v. Turkey (App. No. 31821/96), 16 November 2004
- ECtHR, Judgment, Öcalan v. Turkey (App. No. 46221/99), 12 May 2005
- ECtHR, Judgment, Mamedova v. Russia (App. No. 7064/05), 1 June 2006
- ECtHR, Judgment, McKay v. The United Kingdom (App. No. 543/03), 3 October 2006
- ECtHR, Judgment, Chraidi v. Germany (App. No. 65655/01), 26 October 2006
- ECtHR, Decision, Al Moayad v Germany (App. No. 35865/03), 20 February 2007
- ECtHR, Castravet v. Moldavia (App. No. 23393/05), 13 March 2007
- ECtHR, Decision, Agim Behrami and Bekir Behrami v. France, Germany and Norway (App. No. 71412/01), 2 May 2007
- ECtHR, Judgment, Govorushko v. Russia (App. No. 42940/06), 25 October 2007
- ECtHR, Judgment, Demir and Baykara v. Turkey (App. No. 34503/97), 12 November 2008
- ECtHR, Judgment, Kauczor v. Poland (App. No. 45219/06), 3 February 2009
- ECtHR, Judgment, Bykov v. Russia (App. No. 4378/02), 10 March 2009
- ECtHR, Judgment, Aleksandr Makarov v. Russia (App. No. 15217/07), 12 March 2009
- ECtHR, Decision, Stanislav Galic v. the Netherlands (App. No. 22617/07), 9 June 2009
- ECtHR, Decision, Vidoje Blagojevic v. the Netherlands (App. No. 49032/07), 9 June 2009
- ECtHR, Judgment, Ivan Atanasov v. Bulgaria (App. No. 12853), 2 December 2010
- ECtHR, Judgment, Cudak v. Lithuania (App. No. 15869/02), 23 March 2010
- ECtHR, Judgment, Medvedyev and others v. France (App. No. 3394/03), 29 March 2010
- ECtHR, Judgment, Case of Bernobic v. Croatia (App. No. 57180/09), 21 June 2011
- ECtHR, Judgment, Al-Skeini and others v. the United Kingdom (App. No. 55721/07), 7 July 2011
- ECtHR, Decision, Bède Djokaba Lambi Longa v. the Netherlands (App. 33917/12), 9 October 2012
- ECtHR, Judgment, El-Masri v. The Former Yugoslav Republic of Macedonia (App. No. 39630/09), 13 December 2012
- ECtHR, Judgment, Sopin v. Russia (App. No. 57319/10), 18 December 2012
- ECtHR, Decision, Stichting Mother of Srebrenica and Others v. the Netherlands (App. No. 65542/12), 11 June 2013
- ECtHR, Judgment, Jaloud v. the Netherlands (App. No. 47708/08), 20 November 2014

2.4. Inter-American Court of Human Rights and Inter-American Commission on Human Rights

- IACmHR, *Giménez v. Argentina* (Case No. 11.245), 1 March 1996
- IACmHR, *Bronstein and Al. v. Argentina* (Case No. 11.205), 11 March 1997
- IACmHR, *The Haitian Centre for Human Rights et al. v. United States* (Case No. 10.675), 13 March 1997
- IACtHR, Judgment, *Loayza Tamayo v. Peru*, 17 September 1997
- IACtHR, Judgment, *Suarez Rosero v. Ecuador*, 17 November 1997
- IACmHR, *Coard v. United States* (Case No 109/9), 29 September 1999
- IACtHR, Judgment, *Constitutional court v. Peru*, 31 January 2001
- IACtHR, Judgment, *Ricardo Canese v. Paraguay*, 31 August 2004
- IACtHR, Judgment, *The «Juvenile Reeducation Institute» v. Paraguay*, 2 September 2004
- IACtHR, Judgment, *Yvon Neptune v. Haiti*, 6 May 2008
- IACtHR, Judgment, *Heliodoro Portugal v. Panama*, 12 August 2008
- IACtHR, Judgment, *Bayarri v. Argentina*, 30 October 2008

2.5. African Commission on Human and Peoples' Rights

- AfCmHR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, (Comm. No. 102/93), 1998
- AfCmHPR, *Article 19 v. Eritrea* (Comm. No. 275/2003), 16-30 May 2007
- AfCmHR, *Shumba v. Zimbabwe* (Comm. No. 288/2004), 2012
- AfCmHR, *Jawara v. Gambia* (Comm. Nos. 147/95 and 149/96), 2010
- AfCmHR, *Civil Liberties Organization (in respect of Nigeria Bar Association) v. Nigeria* (Comm. No. 101/93), 1995

2.6. International Criminal Court

2.6.1. The Uganda cases

- Warrant of Arrest for Vincent Otti, Situation in Uganda, ICC-02/04-01/05, PTCII, ICC, 8 July 2005

- Warrant of Arrest for Okot Odhiambo, Situation in Uganda, ICC-02/04-01/05, PTCII, ICC, 8 July 2005
- Warrant of Arrest for Dominic Ongwen, Situation in Uganda, ICC-02/04-01/05, PTCII, ICC, 8 July 2005
- Warrant of Arrest for Raska Lukwiya, Situation in Uganda, ICC-02/04-01/05, PTCII, ICC, 8 July 2005
- Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, Situation in Uganda, ICC-02/04-01/05, PTCII, ICC, 27 September 2005
- Decision on the « Defence Request for the Interim Release of Dominic Ongwen », Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, PTCII, ICC, 27 November 2015

2.6.2 Situation in the DRC

- Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, Situation in the DRC, ICC-01/04, PTCI, ICC, 17 January 2006
- Judgment on the Prosecutor's Application of Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Situation in the DRC, ICC-01/04, AC, ICC, 13 July 2006

2.6.3. The Lubanga case

- Decision on the Prosecutor's Application for a warrant of arrest, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 10 February 2006
- Order on the application for release, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 29 May 2006
- Submissions relative to the Order of 29.5.2006, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 31 May 2006
- Decision on the application for the interim release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 18 October 2006
- Decision on the Practices of Witness Familiarisation and Witness Proofing, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 8 November 2006

- Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, AC, ICC, 14 December 2006
- Decision on the Confirmation of Charges, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 27 January 2007
- 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”, dissenting opinion of Judge Pikis, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, AC, ICC, 13 February 2007
- Review of the “Decision on the application for the interim release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, 14 February 2007
- Second review of the “Decision on the application for the interim release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 11 June 2007
- Decision reviewing the “Decision on the application for the interim release of Thomas Lubanga Dyilo, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, TCI, ICC, 9 October 2007
- Decision regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 30 November 2007
- Decision on victims' participation, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 18 January 2008
- Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118-2, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, TCI, ICC, 31 January 2008
- Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, TCI, ICC, 29 May 2008
- Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, AC, ICC, 21 October 2008
- Decision on the applications by victims to participate in the proceedings, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, PTCI, ICC, 15 December 2008

- Judgment, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, TCI, ICC, 14 March 2012

2.6.4. The Katanga case

- Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, PTCI, ICC, 6 July 2007
- Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 10 March 2008
- Decision on the powers of the Pre-Trial Chamber to review proprio motu the pretrial detention of Germain Katanga, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 18 March 2008
- Defence observations relative to Germain Katanga's pre-trial detention, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 1 April 2008
- Decision on the conditions of the pre-trial detention of Germain Katanga, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 21 April 2008
- Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 13 May 2008
- Review of the “decision on the conditions of the pre-trial detention of Germain Katanga”, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 18 August 2008
- Second Review of the Decision on the conditions of Detention of Germain Katanga, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 12 December 2008
- Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 11 March 2009

- Troisième examen de la décision sur les conditions du maintien en détention de Germain Katanga, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 16 April 2009
- Fourth 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, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 21 July 2009
- 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, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 20 November 2009
- Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 20 November 2009 entitled “Decision on the motion of the defence for Germain Katanga for a declaration on unlawful detention and stay of proceedings”, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 19 July 2010
- Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 20 November 2009 entitled “Decision on the motion of the defence for Germain Katanga for a declaration on unlawful detention and stay of proceedings”, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 7 December 2010
- Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute), Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 9 June 2011
- Decision on the security situation of three detained witnesses in relation to their testimony before the Court (Art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with Article 93(l)(j) of the Statute, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 22 June 2011

- Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 24 August 2011
- Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, TCII, ICC, 14 March 2013
- Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, TCII, ICC, 1 October 2013
- Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 20 January 2014
- Jugement rendu en application de l'article 74 du Statut, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, TCII, ICC, 7 March 2014
- Décision relative à la peine (article 76 du Statut), Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, TCII, ICC, 23 May 2014

2.6.5. The Ngudjolo case

- The United Kingdom for Ngudjolo, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCl, ICC, 22 February 2008
- France for Ngudjolo, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCl, ICC, 25 February 2008
- The Netherland's observations, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 27 February 2008
- Observations of States, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 22, 25, 27, 28 February 2008
- Belgium for Ngudjolo, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCl, ICC, 28 February 2008

- Decision on the application for interim release of Mathieu Ngudjolo Chui, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 27 March 2008
- Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber 1 on the Application of the Appellant for Interim Release, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, AC, ICC, 9 June 2008
- Review of the decision on the application for interim release of Mathieu Ngudjolo Chui, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, PTCI, ICC, 23 July 2008
- Second review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 19 November 2008
- Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, Presidency, ICC, 10 March 2009
- Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 11 March 2009
- Third review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 17 March 2009
- Fourth review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 10 July 2009
- Fifth review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 4 November 2009

- Judgment pursuant to article 74 of the Statute, Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, TCII, ICC, 18 December 2012
- Decision on Mr Ngudjolo’s request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court, Prosecutor v. Germain Katanga and Prosecutor v. Mathieu Ngudjolo Chui, Cases No. ICC-01/04-01/07 and ICC-01/04-01/07, TCII, ICC, 12 June 2013
- Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, AC, ICC, 7 April 2015

2.6.6. The Ntaganda case

- Warrant of arrest, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, PTCl, ICC, 22 August 2006
- Decision on the Prosecutor’s Application under Article 58, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, PTCII, ICC, 13 July 2012
- Decision on the Defence’s Application for Interim Release, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, PTCII, ICC, 18 November 2013
- Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled “Decision on the Defence’s Application for Interim Release”, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, AC, ICC, 5 March 2014
- Second Decision on Bosco Ntaganda’s Interim Release, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, PTCII, ICC, 17 March 2014
- Third Decision on Bosco Ntaganda’s Interim Release, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, PTCII, ICC, 17 July 2014
- Fourth decision on Mr Ntaganda’s interim release, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, TCVI, ICC, 31 October 2014
- Fifth decision on Mr Ntaganda’s interim release, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, TCVI, ICC, 26 February 2015

2.6.7. The Mbarushimana case

- Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, PTCI, ICC, 28 September 2010
- Decision on the ‘defence request for interim release’, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, PTCI, ICC, 19 May 2011
- Judgment on the appeal of Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘defence request for interim release’”, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, AC, ICC, 14 July 2011
- Decision on “second defence request for interim release”, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, PTCI, ICC, 28 July 2011
- Review of detention and decision on the “third defence request for interim release”, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, PTCI, ICC, 16 September 2011
- Decision on the confirmation of charges, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, PTCI, ICC, 16 December 2011

2.6.8. The Mudacumura case

- Decision on the Prosecutor’s Application under Article 58, Prosecutor v. Sylvestre Mudacumura, Case No. ICC-01/04-01/12, PTCII, ICC, 13 July 2012

2.6.9. The Bemba case

- Décision relative à la Requête du Procureur aux fins de délivrance d’un mandat d’arrêt à l’encontre de Jean-Pierre Bemba Gombo, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCIII, ICC, 10 June 2008
- Application for interim release, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCII, ICC, 23 July 2008
- Decision on application for interim release, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCIII, ICC, 21 August 2008
- Fourth Decision on Victims’ Participation, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCIII, ICC, 12 December 2008

- Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 16 December 2008
- Decision on application for interim release, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCIII, ICC, 16 December 2008
- Decision on application for interim release, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCII, ICC, 14 April 2009
- Decision on the Defence’s urgent request concerning Mr. Jean-Pierre Bemba’s attendance of his father’s funeral, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCII, ICC, 4 July 2009
- Decision on the interim release of Jean-Pierre Bemba Gombo and convening hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, PTCII, ICC, 14 August 2009
- Judgment on the appeal of the prosecutor against Pre-Trial Chamber II’s “Decision on the interim release of Jean-Pierre Bemba Gombo and convening hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 2 December 2009
- Décision relative au réexamen de la détention de Jean-Pierre Bemba Gombo conformément à la Règle 118(2) du Règlement de Procédure et de preuve, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 1 April 2010
- Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 28 July 2010
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 19 November 2010
- Decision on the defence request for Mr Jean-Pierre Bemba to attend his stepmother’s funeral, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 12 January 2011

- Decision on applications for provisional release, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 16 August 2011
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on applications for provisional release”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 19 August 2011
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on applications for provisional release”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 12 September 2011
- Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 27 September 2011
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 15 December 2011
- Decision on the ‘Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 3 January 2012
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 5 March 2012
- Defence Request to Trial Chamber to request [REDACTED] and [REDACTED] for their submissions regarding the potential provisional release of Mr Jean-Pierre Bemba, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 9 June 2014
- Decision on defence request for observations regarding the potential provisional release of Mr Jean-Pierre Bemba, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 11 June 2014
- Decision on “Defence Urgent Motion for Provisional Release”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, TCIII, ICC, 23 December 2014
- Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled “Decision on ‘Defence Urgent Motion for Provisional

Release”, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, AC, ICC, 20 May 2015

- Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, TCIII, ICC, 21 March 2016.

2.6.10. The case against Bemba, Kilolo, Mangenda, Babala and Arido

- Warrants of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 20 November 2013
- Warrants of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 28 November 2013
- Decision on the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 14 March 2014
- Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 14 March 2014
- Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 17 March 2014
- Décision sur la “Requête de la Défense sollicitant de la Chambre préliminaire II une nouvelle et urgente approche des autorités congolaises compétentes en vue d'obtenir une position précise et non-équivoque relativement à l'accueil de M. Fidèle Babala”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 5 June 2014
- Decision requesting observations on the “Narcisse Arido’s request for interim release”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda

Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 12 June 2014

- Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 13 June 2014
- Narcisse Arido's Request for Interim Release filed on 10 June 2014, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 17 June 2014
- Observations de la Défense de monsieur Fidèle Babala Wandu à "Order requesting observations for the purposes of the periodic review of the state of the detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu", Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 30 June 2014
- Decision on the first review of Fidèle Babala Wandu's detention pursuant to article 60(3) of the Statute, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 4 July 2014
- Decision requesting the Kingdom of Belgium to provide its views for the purposes of the review of Aimé Kilolo Musamba's and Jean-Jacques Mangenda's detention pursuant to article 60(3) of the Statute, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 4 July 2014
- Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014
- Judgment on the appeal of Mr Fidele Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Requête urgente de la Defense sollicitant la mise en liberte provisoire de monsieur Fidele Babala Wandu'", Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014

- Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 11 July 2014
- Decision on “Narcisse Arido's request for interim release”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 24 July 2014
- Decision on the first review of Jean-Jacques Mangenda Kabongo's detention pursuant to article 60(3) of the Statute, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 5 August 2014
- Decision on the first review of Aimé Kilolo Musamba's detention pursuant to article 60(3) of the Statute, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 5 August 2014
- Requête URGENTE de la Défense sollicitant de la Chambre préliminaire l'approche des autorités compétentes de la République Démocratique du Congo aux fins de connaître les motivations juridiques du refus de l'application à M. Fidèle Babala Wandu des dispositions constitutionnelles et législatives en vigueur relativement à son accueil dans son pays en cas de mise en liberté provisoire, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 15 September 2014
- Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 26 September 2014
- Réponse de la Défense à la “Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 26 September 2014
- Transmission of the observations submitted by the Belgian, Dutch, French, Congolese and British authorities on the “Decision requesting observations from States for the purpose of the

review of the detention of the suspects pursuant to regulation 51”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 10 October 2014

- Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 21 October 2014
- Transmission of the observations submitted by the Dutch and French authorities on the “Order to consult with the authorities of the Kingdom of the Netherlands and French Republic”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 21 October 2014
- Urgent Submission of the Authorities of the United Kingdom of Great Britain and Northern Ireland, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 22 October 2014
- Decision on “Mr Bemba’s Request for Provisional Release”, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, PTCII, ICC, 23 January 2015
- Request for Compensation for Unlawful Detention, Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, Presidency, ICC, 1 May 2015
- Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on ‘Mr Bemba’s Request for Provisional Release’", Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, AC, ICC, 29 May 2015

2.6.11. The Ahmad Harun and the Ali Kushayb case

- Decision on the Prosecution Application under Article 58(7) of the Statute, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Case No. ICC-02/05-01/07, PTCl, ICC, 27 April 2007

- Decision on the Prosecution Application under Article 58(7) of the Statute, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Case No. ICC-02/05-01/07, PTCI, ICC, 27 September 2008

2.6.13. The Al Bashir case

- Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, PTCI, ICC, 4 March 2009
- Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, AC, ICC, 3 February 2010

2.6.14. The Abu Garda case

- Summons to Appear for Bahr Idriss Abu Garda, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, PTCI, ICC, 7 May 2009
- Decision on the Confirmation of Charges, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, PTCI, ICC, 8 February 2010
- Decision on the “Prosecution’s Application for Leave to Appeal the 'Decision on the Confirmation of Charges’”, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, PTCI, ICC, 23 April 2010

2.6.15. The Nourain and Jamus case

- Warrant of Arrest for Abdallah Banda Abakaer Nourain, Prosecutor v. Abdallah Banda Abakaer Nourain, Case No. ICC-02/05-03/09, TCIV, ICC, 11 September 2014
- Second Decision on the Prosecutor’s Application under Article 58, Prosecutor v. Abdallah Banda Abakaer Nourain, Case No. ICC-02/05-03/09, PTCI, ICC, 11 September 2014
- Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest, Prosecutor v. Abdallah Banda Abakaer Nourain, Case No. ICC-02/05-03/09, AC, ICC, 3 March 2015

2.6.16. The Hussein case

- Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein, Prosecutor v. Abdel Raheem Muhammad Hussein, ICC-02/05-01/12, PTCI, ICC, 1 March 2012

2.6.17. The Laurent Gbagbo case

- Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCIII, ICC, 30 November 2011
- Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 13 July 2012
- Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, AC, ICC, 26 October 2012
- Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 12 November 2012
- Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 18 January 2013
- Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 12 March 2013
- Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 11 July 2013
- Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute”, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, AC, ICC, 29 October 2013

- Fourth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 11 November 2013
- Fifth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 12 March 2014
- Sixth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, PTCI, ICC, 11 July 2014
- Decision on the urgent request of the Defence for Mr Gbagbo to attend his mother's funeral, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, TCI, ICC, 29 October 2014
- Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, TCI, ICC, 11 November 2014
- Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, TCI, ICC, 11 March 2015
- Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, TCI, ICC, 8 July 2015
- Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Case No. ICC-02/11-01/11, AC, ICC, 8 September 2015
- Tenth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, Prosecutor v. Laurent Gbagbo and v. Charles Blé Goudé, Case No. ICC-02/11-01/11, TCI, ICC, 2 November 2015

2.6.18. The Simone Gbagbo case

- Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, Prosecutor v. Simone Gbagbo, ICC-02/11-01/12, PTCIII, ICC, 12 March 2012

2.6.19. The Blé case

- Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé, Prosecutor v. Charles Blé Goudé, ICC-02/11-02/11, PTCIII, ICC, 6 January 2012

2.6.20. The Kenya cases

- Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, PTCII, ICC, 8 March 2011
- Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, PTCII, ICC, 8 March 2011
- Decision on variation of summons conditions, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, ICC-01/09-02/11, PTCII, ICC, 4 April 2011
- Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 2 Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, PTCII, ICC, 3 January 2012
- Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, PTCII, ICC, 23 January 2012
- Decision on the withdrawal of charges against Mr Kenyatta, Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, TCV, ICC, 13 March 2015

2.6.21. The Libya cases

- Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”, Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11, PTCI, ICC, 27 June 2011

2.7. International Criminal Tribunal for Former Yugoslavia

- Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of Tihomir Blaskic, Prosecutor v. Blaskic, Case No. IT-95-14, President, ICTY, 3 April 1996

- Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Prosecutor v. Dorde Dukic, Case No. 1T-96-20-T, TC, ICTY, 24 April 1996
- Transcript, Prosecutor v. Dukic, Case No. IT-96-20, TC, ICTY, 24 April 1996
- Decision on motion for provisional release filed by the accused Zejnil Delalic, Prosecutor v. Mucic et al., Case No. IT-96-21, TC, ICTY, 25 September 1996
- Decision on Provisional Release of the Accused, Prosecutor v. Simic et al., Case No. IT-95-9-PT, TC, ICTY, 26 March 1998
- Decision on the Motion of Defense Counsel for Drago Josipovic, Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, TC, ICTY, 6 May 1999
- Order on Motion of the Accused Mario Cerkez for Provisional Release, Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2, TC, ICTY, 14 September 1999
- Judgment, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, TC, ICTY, 14 January 2000
- Decision on Miroslav Tadic's application for provisional release, Prosecutor v. Simic et al., Case No. IT-95-9, TC, ICTY, 4 April 2000
- Decision on Milan Simic's application for provisional release Prosecutor v. Simic et al., Case No. IT-95-9, TC, ICTY, 29 May 2000
- Decision on Motion by Radsilav Brdanin for Provisional Release, Prosecutor v. Radoslav Brdanin and Momir Talic, Case No. IT-99-36, TCII, ICTY, 25 July 2000
- Decision on Momcilo Krajisnik's notice of motion for provisional release, Prosecutor v. Momcilo Krajisnic, Case No. IT-00-39, TC, ICTY, 8 October 2001
- Decision on request for pre-trial provisional release, Prosecutor v. Halilovic, Case No. IT-01-48, TC, ICTY, 13 December 2001
- Decision granting provisional release to Amir Kubura, Prosecutor v. Hadzihasanovic & Kubura, Case No. IT-01-47, TC, ICTY, 19 December 2001
- Decision granting provisional release to Enver Hadzihasanovic, Prosecutor v. Hadzhasanovic & Kubura, Case No. IT-01-47, TC, ICTY, 19 December 2001
- Order on motion for provisional release, Prosecutor v. Ademi & Norac, Case No. IT-04-78, TC, ICTY, 20 February 2002
- Order on Miodrag Jokic's motion for provisional release, Prosecutor v. Jokic, Case No. IT-01-42/1, TC, ICTY, 20 February 2002
- Decision on Request for Provisional Release of Accused Jokic, Prosecutor v. Vidoje Blagojevic, Dragan Obrenovic, Dragan Jokic, Case No. IT-02-53-PT, TCII, ICTY, 28 March 2002

- Decision on Provisional Release, Prosecutor v. Mrđa, Case No. IT-02-59-PT, TC, ICTY, 15 April 2002
- Decision on applications for provisional release, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 26 June 2002
- Decision on Appeal Against Refusal to Grant Provisional Release, Prosecutor v. Mrksic et al, Case No. IT-95-13/1, TC, ICTY, 8 October 2002
- Decision on provisional release, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 30 October 2002
- Decision on defendant Dusan Fustar's emergency motion seeking a temporary provisional release to attend the 40-day memorial of his father's death, Prosecutor v. Mejakic et al., Case No. IT-02-65, TC, ICTY, 11 July 2003
- Decision on provisional release of Haradin Bala, Prosecutor v. Limaj et al., Case No. IT-03-66, TC, ICTY, 16 September 2003
- Decision on provisional release, Prosecutor v. Hadzhasanovic & Kubura, Case No. IT-01-47, TC, ICTY, 18 January 2004
- Decision pursuant to Rule 65 granting Mrksic's request to attend his mother's funeral, Prosecutor v. Mrksic et al, Case No. IT-95-13/1, TC, ICTY, 30 January 2004
- Decision on provisional release, Prosecutor v. Stanistic & Simatovic, Case No. IT-03-69, TCIII, ICTY, 28 July 2004
- Decision on motion of Blagoje Simic pursuant to Rule 65(I) for provisional release for a fixed period to attend memorial services for his father, Prosecutor v. Simic et al., Case No. IT-95-9, TC, ICTY, 21 October 2004
- Decision on interlocutory appeal against Trial Chamber's decision denying provisional release, Prosecutor v. Gotovina et al., Case No. IT-06-90, AC, ICTY, 2 December 2004
- Order terminating the provisional release of Miroslav Kvočka, Prosecutor v. Kvočka et al, Case No. IT-98-30/1, TC, ICTY, 9 February 2005
- Decision on defence request for provisional release of Stanislav Galic, Prosecutor v. Stanislav Galic, Case No. IT-98-29, TC, ICTY, 23 March 2005
- Order terminating the provisional release of Beqa Beqaj, Prosecutor v. Beqa Beqaj, Case No. IT-03-66, TCI, ICTY, 7 April 2005
- Decision on fourth application for provisional release, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 14 April 2005

- Decision on defence request for provisional release, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 14 April 2005
- Decision on defence request for provisional release, Prosecutor v. Delic, Case No. IT-04-83, TC, ICTY, 6 May 2005
- Decision on Momcilo Perisic's motion for provisional release, Prosecutor v. Perisic, Case No. IT-04-81, TC, ICTY, 9 June 2005
- Decision concerning motion for provisional release of Radijove Miletic, Prosecutor v. Popovic et al., Case No. IT-05-88, TCII, ICTY, 19 July 2005
- Decision on provisional release, Prosecutor v. Stanisic & Simatovic, Case No. IT-03-69, TCIII, ICTY, 26 May 2008
- Decision on Slobodan Praljak's motion for provisional release (2009 summer judicial recess) of 18 May 2009, Prosecutor v. Prlic et al., Case No. IT-04-74, TCIII, ICTY, 25 May 2009
- Decision on defence motion of Ljube Boskoski for provisional release, Prosecutor v. Boskoski, Case No. IT-04-82-PT, TC, ICTY, 18 July 2005
- Decision on interlocutory appeal from Trial Chamber decision denying Savo Todovic's application for provisional release, Prosecutor v. Todovic, Case No. IT-97-25/1, TC, ICTY, 7 October 2005.
- Decision on interlocutory appeal against trial chamber's decisions granting provisional release, Prosecutor v. Popovic et al., Case No. IT-05-88, TCII, ICTY, 19 October 2005
- Decision on interlocutory appeal from Trial Chamber decision granting Nebojsa Pavkovic's provisional release, Prosecutor v. Milutinovic et al., Case No. IT-05-87, AC, ICTY, 1 November 2005
- Decision on Lahi Brahimaj's motion for provisional release, Prosecutor v. Haradinaj et al., Case No. IT-04-84, TCII, ICTY, 3 November 2005
- Decision on assigned counsel request for provisional release, Prosecutor v. Milosevic, Slobodan, Case No. IT-02-54, TC, ICTY, 23 February 2006
- Decision granting provisional release to Haradin Bala to attend his daughter's memorial service, Prosecutor v. Limaj et al., Case No. IT-03-66, TC, ICTY, 20 April 2006
- Decision on joint motion for temporary provisional release during summer recess, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 1 June 2006
- Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, Prosecutor v. Milutinovic et al., Case No. IT-05-87, AC, ICTY, 14 December 2006

- Order of provisional release for Mladen Markac, Prosecutor v. Gotovina et al., Case No. IT-06-90, PTC, ICTY, 9 February 2007
- Decision on Ojdanic motion for temporary provisional release, Prosecutor v. Sainovic et al., Case No. IT-05-87, TC, ICTY, 4 July 2007
- Decision on motions for provisional release during the winter judicial recess, Prosecutor v. Popovic et al., Case No. IT-05-88, TCII, ICTY, 7 December 2007
- Decision on Pandurevic's request for provisional release on compassionate grounds, Prosecutor v. Popovic et al, Case No. IT-05-88, TC, ICTY, 11 December 2007
- Order scheduling a start of trial and terminating provisional release, Prosecutor v. Gotovina et al., Case No. IT-06-90, TCI, ICTY, 6 February 2008
- Decision on Mr. Perisic's motion for provisional release during the Court's winter recess, Prosecutor v. Perisic, Case No. IT-04-81, TC, ICTY, 17 December 2008
- Decision on Mr. Perisic's motion for provisional release during the easter Court recess, Prosecutor v. Perisic, Case No. IT-04-81, TC, ICTY, 6 April 2009
- Order terminating the provisional release of Veselin Sljivancanin, Prosecutor v. Mrksic et al., Case No. IT-95-13/1, TC, ICTY, 9 April 2009
- Judgment, Partially Dissenting Opinion, Prosecutor v. Mile Mrksic and Veselin Sljivancanin, Case No. IT-95-13, AC, ICTY, 5 May 2009
- Decision on Simatovic defence motion requesting provisional release during the winter court recess, Prosecutor v. Stanistic & Simatovic, Case No. IT-03-69, TCIII, ICTY, 14 December 2009
- Decision granting Mico Stanistic's motion for provisional release during the court summer recess, Prosecutor v. Stanistic & Zupljanin, Case No. IT-08-91, TCII, ICTY, 16 July 2010
- Decision denying Mico Stanistic's motion for provisional release during the court summer recess, Prosecutor v. Stanistic & Zupljanin, Case No. IT-08-91, TCII, ICTY, 29 June 2011
- Order inviting the parties to make submissions on possibile (sic) provisional release of the accused proprio motu, Prosecutor v. Vojislav Seselj, Case No. IT-03-67, TCIII, ICTY, 13 June 2014
- Order terminating the process for provisional release of the accused proprio motu, Prosecutor v. Vojislav Seselj, Case No. IT-03-67, TCIII, ICTY, 14 July 2014
- Order on the Provisional Release of the Accused Proprio Motu, Prosecutor v. Vojislav Seselj, Case No. IT-03-67, TCIII, ICTY, 6 November 2014

2.8. International Criminal Tribunal for Rwanda

- Decision on the Request Filed by the Defense for Provisional Release of Georges Rutaganda, Prosecutor v. Georges Rutaganda, Case No. ICTR-96-3-T, TC, ICTR, 7 February 1997
- Judgment, Prosecutor v. Barayagwiza, Case No. ICTR 97-19-AR72, TC, ICTR, 31 March 2000
- Decision on the defence motion for the provisional release of the accused, Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, TCII, ICTR, 21 February 2001
- Decision on the defense's motion for provisional release pursuant to Rule 65 of the Rules, Prosecutor v. Jérôme-Clément Bicamumpaka, Case No. ICTR-99-50-T, TCII, ICTR, 25 July 2001
- Decision on the defence motion for release, Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, TCIII, ICTR, 12 July 2002
- Decision on defence motion to fix a date for the commencement of the trial of Father Emmanuel Rukundo or, in the alternative, to request his provisional release, Prosecutor v. Emmanuel Rukundo, Case No. ICTR-2001-70-I, TCIII, ICTR, 18 August 2003
- Judgment, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, TCII, ICTR, 23 May 2005
- Decision on Nsengimana's motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, Prosecutor v. Hormisdas Nsengimana, Case No. ICTR-01-69-I, TCII, ICTR, 11 July 2005
- Decision on defence motion for provisional release, Prosecutor v. Léonidas Nshogoza, Case No. ICTR-07-91-PT, TCIII, ICTR, 17 December 2008
- Judgment, Jean-Baptiste Gatete v. Prosecutor, Case No. ICTR-00-61-A, AC, ICTR, 9 October 2012

2.9. Special Court for Sierra Leone

- Decision on the motion by Morris Kallon for bail, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-PT, TC, SCSL, 23 February 2004,
- Decision on application of Issa Sesay for provisional release, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-PT, TC, SCSL, 31 March 2004
- Appeal against decision refusing bail, Prosecutor against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa, Case No. SCSL-04-14, AC, SCSL, 11 March 2005

2.10. Extraordinary Chambers in the Courts of Cambodia

- Order of provisional detention, Prosecutor v. Guek Eav Kaing, Case No. 002, OCOIJ, ECCC, 31 July 2007
- Order of provisional detention, Prosecutor v. Chea Nuon, Case No. 002, OCOIJ, ECCC, 19 September 2007
- Provisional Detention Order, Prosecutor v. Thirit Ieng, Case No. 002, OCOIJ, ECCC, 14 November 2007
- Provisional Detention Order, Prosecutor v. Sary Ieng, Case No. 002, OCOIJ, ECCC, 14 November 2007 Provisional Detention Order, Prosecutor v. Samphan Khieu, Case No. 002, OCOIJ, ECCC, 19 November 2007
- Order on extension of provisional detention of Ieng Sary, Prosecutor v. Sary Ieng, Case No. 002, OCOIJ, ECCC, 10 November 2009

2.11. Domestic cases: The Netherlands

- Raad van State, 201111623/1/V3
- Raad van State, 201405219/1/V1
- Rechtbank Kuijt, Kort Geding, KG 03/137
- Rechtbank 's-Gravenhage, Kort Geding, 424426
- Gerechtshof 's-Gravenhage, Kort Geding, 22-004337

3. Literature

- Acquaviva G., 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations' (2007)20(3) *Leiden Journal of International Law* 613-636
- Addo M., *The Legal Nature of International Human Rights* (Martinus Nijhoff, 2010)
- Akande D., 'Sources of International Criminal Law' in Cassese A. (ed.), *The Oxford Companion to International Criminal Justice* (OUP, 2009)
- Ahlborn C., 'To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States' (2013)28 *SHARES Research Paper* available at <http://www.sharesproject.nl/publication/to-share-or-not-to-share-the-allocation-of->

responsibility-between-international-organizations-and-their-member-states/ (last accessed 21 March 2015)

- Appazov A., 'Analysis of Decisions on Interim Release at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' in Klip A. and Freeland S. (eds.), *Annotated Leading Cases of International Criminal Tribunals* (Vol. 43) (Intersentia, 2015)
- Arai-Takahashi Y., 'Fair Trial Guarantees in Occupied Territory – The Interplay between International Humanitarian Law and Human Rights Law' in Arnold R. and Quénivet N., *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Martinus Nijhoff, 2008) 449-474
- Arai-Takahashi Y., *The Law of Occupation* (Brill, 2009)
- Arajärvi N., 'Is There a Need for a New Sources Theory in International Law? A Proposal for an Inclusive Positivist Model' (2012)106 *American Society International Law Proceedings* 370-373
- Ashworth A., 'Four threats to the presumption of innocence' (2006)10 *International Journal of Evidence and Proof* 241-279
- d'Aspremont J. and Brölmann C., 'Challenging International Criminal Tribunals before Domestic Courts' in Reinisch A., *Challenges of Acts of International Organizations before National Courts* (OUP, 2010) 111-136
- Bailey S., 'Article 21(3) of the Rome Statute: A Plea for Clarity' (2014)14 *International Criminal Law Review* 513-550
- Bassiouni M. C., 'A Functional Approach to "General Principles of International Law"' (1989-1990)11 *Michigan Journal of International Law* 768-818
- Bassiouni M. C., *The Legislative History of the International Criminal Court Statute* (Transnational Publishers, 2005)
- Bassiouni M. C., *Introduction to International Criminal Law* (Martinus Nijhoff 2013, 2nd Edition)
- Beckett J. A., 'Rebel Without a Cause? Martti Koskenniemi and the Critique Legal Project' (2006)7(12) *German Law Journal* 1045-1088
- Bekou O. and Cryer R., 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007)56 *International and Comparative Law Quarterly* 49-68
- Bekou O. and Birkett D. (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016)
- Beresford S., 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' (2002)96(3) *The American Journal of International Law* 628-646

- Bergsmo M., *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjom Eide* (Martinus Nijhoff, 2003)
- Bertrand A-A. and Schauder N., 'Practical Cooperation Challenge Faced by the Registry of the International Criminal Court' in Bekou O. and Birkett D. (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 152-184
- Besson S., 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012)25(4) *Leiden Journal of International Law* 857-884
- Bevers H., Blokker N. and Roording J., 'The Netherlands and the International Criminal Court: On Statute Obligations and Hospitality' (2003)16(1) *Leiden Journal of International Law* 135-156
- Bitti G., 'Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in Stahn C. and Sluiter G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 285-304
- Bjorge E., *The Evolutionary Interpretation of Treaties* (OUP, 2014)
- Boas G., 'Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court' (2001)12(2) *Criminal Law Forum* 137-165
- Boas G. and McCormack T.L.H., 'Learning the Lessons of the Milošević Trial' (2006)9 *Yearbook of International Humanitarian Law* 65-86
- Bodnar A., 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for Other States Than Those Which Were Party to the Proceedings' in Haecck Y. and Brems E. (eds.), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) 223-262
- Bosco D., *Rough Justice: the International Criminal Court in a World of Power Politics* (OUP, 2014)
- Brown Weiss E., 'Invoking State Responsibility in the Twenty-first Century' (2002)96 *American Journal of International Law* 798-816
- Brownlie I., *Principles of Public International Law* (OUP, 2008, 7th edition)
- Bufalini A., 'International Law in the Interpretation of the ICC Statute' (2015) *The Law and Practice of International Courts and Tribunals* 233-254
- Cabranes J., 'Customary International Law: What It Is and What It Is Not' (2011)22 *Duke Journal of Comparative and International Law* 143-152
- Caianiello M., 'Models of Judicial Cooperation with Ad Hoc Tribunals and with the Permanent International Criminal Court in Europe' in Ruggeri S. (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings* (Springer, 2013) 111-123

- Cassese A., 'The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks' in Bergsmo M. (ed.), *Human Rights for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff, 2003) 19-52
- Chatzivassiliou D., 'The guarantees of judicial control with respect to deprivation of liberty under Article 5 of the European Convention of human rights: An overview of the Strasbourg case-law' (2004)5(4) *ERA- Forum* 499-519
- Chaumont C. M., 'La signification du principe de spécialité des organisations internationales' in Baugniet J. (ed.), *Mélanges offerts à Henri Rolin. Problèmes de droit des gens* (Pedone, 1964)
- Chodosh H. E., 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1991)26 *Texas International Law Journal* 87-124
- Ciampi A., 'Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court' in Bekou O. and Birkett D. (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 7-57
- Clapham A., *Human Rights Obligations of Non-State Actors* (OUP, 2006)
- Cohen H. G., 'Finding International Law: Rethinking the Doctrine of Sources' (2007)93 *Iowa Law Review* 65-129
- Cohen H. G., 'From Fragmentation to Constitutionalization', (2012) *Scholarly Works. Paper* 854, available at http://digitalcommons.law.uga.edu/fac_artchop/854 (last accessed 21 March 2015)
- Conte A., 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) *Journal of Conflict and Security Law* 1-26
- Coomans F., Grünfeld F. and Kamminga M. T. (eds.), *Methods of Human Rights Research* (Intersentia, 2009)
- Corten O., *Méthodologie du droit international public* (Editions de l'ULB, 2009)
- Crawford J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2005)
- Crawford J., *Brownlie's Principles of Public International Law* (OUP, 2012 8th edition)
- Croquet N., 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' (2011)11(1) *Human Rights Law Review* 91-131
- Cryer R., 'Déjà vu in International Law' (2002)65 *The Modern Law Review* 931-949
- Cryer R., 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006)11(2) *Journal of Conflict & Security Law* 239-263

- Cryer R., 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009)12 *New Criminal Law Review* 390-405
- Cryer R., 'Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders' in Kaikobad K. and Bohlander M. (eds.), *International Law and Power Perspectives on Legal Order and Justice* (Brill, 2009) 183-206
- Cryer R., Hervey T., Sokhi-Bulley B. and Bohm A., *Research Methodologies in EU and International Law* (Hart Publishing, 2011)
- Cryer R., 'The philosophy of international criminal law' in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Elgar Publishing, 2011) 232-268
- Cryer R., 'International Criminal Tribunals and the Sources of International Law. Antonio Cassese's Contribution to the Canon', (2012)10 *Journal of International Criminal Justice* 1045-1061
- Damaska M., 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010-2011)36 *North Carolina journal of international law and commercial regulation* 365-388
- Damaska M., 'Reflections on Fairness in International Criminal Justice' (2012)10 *Journal of International Criminal Justice* 611-620
- D'Amato A., 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995-1996)25 *Georgia Journal of International and Comparative Law* 47-98
- D'Amato A., 'Trashing Customary International Law' (1987)81 *American Journal of International Law* 101-109
- David Ohlin J., 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009)14 *UCLA Journal of International Law and Foreign Affairs* 77-120
- Davidson C. L., 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2011)60(1) *American University Law Review* 1-67
- Davidson C. L., 'May It Please the Crowd? – The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants' (2011) available at http://works.bepress.com/caroline_davidson/2/ (last accessed 21 March 2015)
- Davidson A., 'Human Rights Protection before the International Criminal Court, Assessing the Scope and Application of Article 21(3) of the Rome Statute' (2016)18 *International Community Law Review* 72-101
- de Boer T. and Zieck M., 'ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State' (2015) *International Journal of Refugee Law* 1-34

- De Feyter K., 'Treaty Interpretation and the Social Sciences' in Coomans F., Grünfeld F. and Kamminga M. T. (eds.), *Methods of Human Rights Research* (Intersentia, 2009) 213-231
- DeFrancia C., 'Due Process in International Criminal Courts: Why Procedure Matters' (Nov. 2001)87(7) *Virginia Law Review* 1381-1439
- DeFranck M., 'Provisional Release: Current Practice, a Dissenting Voice and the Case for a Rule Change' (2002)80 *Texas Law Review* 1429-1464
- Degan V-D., 'On the Sources of International Criminal Law' (2005)4(1) *Chinese Journal of International Law* 45-83
- de Meester K., Pitcher K., Rastan R. and Sluiter G., 'Investigation, Coercive Measures, Arrest, and Surrender' in Sluiter G. and others (eds.), *International Criminal Procedure. Principles and Rules* (OUP, 2013)
- Den Heijer M., 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013)4(2) *Journal of International Dispute Settlement* 361-383
- Deprez C., 'Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors' (2012)12 *International Criminal Law Review* 721-741
- Deprez C., 'La mise en liberté avant jugement dans la pratique de la Cour pénale internationale: une rupture avec l'héritage des tribunaux ad hoc?' in Bernard D. and Scalia D., *Vingt ans de justice internationale pénale* (La Charte, 2014)
- Deprez C., 'The Authority of Strasbourg Jurisprudence from the Perspective of the International Criminal Court' (2015)3 *European Journal of Human Rights* 278-296
- De Schutter O., *International Human Rights Law* (CUP, 2010)
- De Schutter O., 'Human Rights and the Rise of International Organisations: the Logic of Sliding Scales in the Law of International Responsibility' in Wouters J., Brems E., Smis S. and Schmitt P. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 51-128
- De Vos C., Kendall S. and Stahn C. (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015)
- De Wet E. and Vidmar J. (eds.), *Hierarchy in International Law. The Place of Human Rights* (OUP, 2012)
- Dimitrijevic V. and Milanovic M., 'Human Rights before International Criminal Courts' in Grimheden J. and Ring R. (eds.), *Human Rights Law: From Dissemination to Application: Essays in Honour of Goran Melander* (Martinus Nijhoff, 2006)

- Doran K., 'Provisional Release in International Human Rights Law and International Criminal Law' (2011)11 *International Criminal Law Review* 707-743
- Dörr O., 'Detention, Arbitrary' *Max Planck Encyclopedia of Public International Law*
- Doswald-Beck L., *Human Rights in Times of Conflict and Terrorism* (OSAIL, 2011)
- Dubuisson M., Bertrand A-A. and Schauder N., 'Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court' in Stahn C. and Sluiter G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 565-584
- Dupuy P., 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999)10(2) *European Journal of International Law* 371-385
- Elewa Badar M. and Higgins N., 'General principles of law in the early jurisprudence of the ICC' in Mariniello T., *The International Criminal Court in Search of Its Purpose and Identity* (Routledge, 2015) 264-281
- El Zeidy M. M., 'Critical Thoughts on Article 59(2) of the ICC Statute' (2006)4 *Journal of International Criminal Justice* 448-465
- Fairlie M. A., 'The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled' (2010)33(4) *Fordham International Law Journal* 1101-1178
- Farrel B., 'The Right to a Speedy Trial before International Criminal Tribunals' (2003)19 *South African Journal on Human Rights* 98-117
- Fauveau N. and Moriceau P., 'La détention et la mise en liberté provisoire devant les juridictions internationales' (2011) *Recueil Dalloz* 1368
- Fedorova M., Verhoeven S., Wouters J., 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings' (June 2009) *Working Paper n°27* available at <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp137e.pdf> (last accessed 21 March 2015)
- Fedorova M. and Sluiter G., 'Human Rights as Minimum Standards in International Criminal Proceedings' (2009)1 *Human Rights and International Legal Discourse* 9-56
- Ferdinandusse W., 'The Dutch Experience' in Bassiouni M. C. (ed.) *International Criminal Law. Volume III International Enforcement* (Transnational Publishers, 2008) 385-397
- Forcese C., 'The Capacity to Protect: Diplomatic Protection in the 'War on Terror'' (2006)17(2) *European Journal of International Law* 369-394
- Forrest Martin F., 'Delineating a Hierarchical Outline of International Law Sources and Norms' (2002)65 *Saskatchewan Law Review* 333-368

- Forsythe D., 'Human Rights Studies : On the Dangers of Legalistic Assumptions' in Coomans F., Grünfeld F. and Kamminga M. T. (eds.), *Methods of Human Rights Research* (Intersentia, 2009) 59-74
- Friman H., 'Rights of Persons Suspected or Accused of a Crime' in R. Lee (ed.), *The International Criminal Court: the making of the Rome Statute* (Kluwer Law International, 1999) 247-260
- Fuller L. L., 'Positivism and Fidelity of Law – A Reply to Professor Hart' (1958)71 *Harvard Law Review* 630-672
- Gaja G., 'General Principles of Law' *Max Planck Encyclopedia of Public International Law*
- Gallant K., 'Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court' in Bassiouni M. C., *International Criminal Law- Volume II. Enforcement* (Transnational Publishers, 1999) 693-722
- Gaynor F., 'Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia' in Doria J. (ed.), *The Legal Regime of the ICC: Essays in Honour of the Professor J. P. Blisshchenko* (Koninklijke Brill N.V., 2008) 183-207
- Geneuss J., 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' 'Unique Context' and the Flexibility of the European Court of Human Rights' Case Law' (2015)84 *Nordic Journal of International Law* 404-427
- Gillich I., 'The Normativity of Principles. Within the Positivist Theory of International Law' (2015-2016)41 *North Carolina Journal of International Law* 1-31
- Gillet M. and Schuster M., 'The Special Tribunal for Lebanon swiftly adopts its Rules of Procedure and Evidence' (2009)7(5) *Journal of International Criminal Justice* 885-909
- Goldsworthy J. D., 'The Self-Destruction of Legal Positivism' (1990) *Oxford Journal of Legal Studies* 449-486
- Golubok S., 'Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation?' (2010)9(2) *Law & Practice of International Courts & Tribunals* 295-311
- Gradoni L., 'International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down' (2006)19(3) *Leiden Journal of International Law* 847-873
- Gradoni L., '“You will receive a fair trial elsewhere’ The Ad Hoc International Criminal Tribunals Acting as Human Rights Jurisdictions' (2007)54(1) *Netherlands International Law Review* 1-49
- Gradoni L., Lewis D. A., Mégret F., Nouwen S. M. H., David Ohlin J., Reisinger-Coracini A. and Zappalà S., 'General Framework of International Criminal Procedure' in Sluiter G. and others (eds.), *International Criminal Procedure. Principles and Rules* (OUP, 2013)

- Grover S. C., *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer, 2010)
- Gunning I. R., 'Modernizing Customary International Law: The Challenge of Human Rights' (1991)31(2) *Virginia Journal of International Law* 211-245
- Guzman A. T., 'Saving Customary International Law' (2005)27 *Michigan Journal of International Law* 116-177
- Hafner G. and Binder C., 'The Interpretation of Article 21 (3) ICC Statute Opinion Reviewed' (2004)9 *Austrian Review of International and European Law* 163-190
- Hall C. K., 'Article 58' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1133-1145
- Hannum H., 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96)25 *Georgia Journal of International and Comparative Law* 287-397
- Hart H. L. A., 'Positivism and the Separation of Law and Morals' (1958)71(4) *Harvard Law Review* 593-629
- Hartwig A., 'Pre-Trial Detention of the Suspect' in Safferling C. (ed.), *International Criminal Procedure* (OUP, 2012) 291-310
- Harmon M., 'The pre-trial process at the ICTY as a means of ensuring expeditious trials: a potential unrealized' (2007)5(2) *Journal of International Criminal Justice* 377-393
- Harris D. J., 'Recent Cases on Pre-Trial Detention and Delay in Criminal Proceedings in the European Court of Human Rights' (1970)44 *British Yearbook of International Law* 87- 110
- Hayden P., 'Cosmopolitanism and the Need for Transnational Criminal Justice. The Case of the International Criminal Court' (2004) *Theoria* 69-95
- Heller K. J., 'What Happens to the Acquitted?' (2008)21(3) *Leiden Journal of International Law* 663-680
- Henquet T., 'International Organisations in The Netherlands: Immunity from the Jurisdiction of the Dutch Courts' (2010)57(2) *Netherlands International Law Review* 267-301
- Henry B., 'The Acquitted Accused, a Forgotten Party at the ICTR' (2005)12 *New England Journal of International and Comparative Law* 81
- Hochmayr G., 'Applicable Law in Practice and Theory' (2014)12 *Journal of International Criminal Justice* 655-679
- Holà B. and van Wijk J., 'Life after Conviction at International Criminal Tribunals. An Empirical Overview' (2014)12 *Journal of International Criminal Justice* 109-132

- Irving E., 'The Relationship between the International Criminal Court and its Host State: Impact on Human Rights' (2014)27(2) *Leiden Journal of International Law* 479-493
- Jackson J. D. and Summers S. J., *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (CUP, 2012)
- Jenks C., 'Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009)33(1) *Fordham International Law Journal* 57-100
- Kadens E. and Young E., 'How Customary is Customary International Law?' (2012-2013)54 *William & Mary Law Review* 885-920
- Kambale P. K., 'A story of missed opportunities: the role of the International Criminal Court in the Democratic Republic of Congo' in De Vos C., Kendall S. and Stahn C. (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015) 171-197
- Kammerhofer J., 'International Legal Positivism' August 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477317 (last accessed 6 September 2016)
- Kaufman Hevener N. and Steven Mosher A., 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978)27(3) *International and Comparative Law Quarterly* 596-613
- Kaul H-P. and Kreb C., 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999)2 *Yearbook of International Humanitarian Law* 143-175
- Kersten M., 'Between justice and politics: the ICC's intervention in Libya' in De Vos C., Kendall S. and Stahn C. (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (CUP, 2015) 456-479
- Khan K. A. A., 'Article 60' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1159-1169
- Killander M., 'Interpreting Regional Human Rights Treaties' (2010)13(7) *SUR International Journal on Human Rights* 145-169
- Kitai R., 'Presuming innocence' (2002)55 *Oklahoma Law Review* 257-295
- Klamberg M., 'What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime' (2010)79(2) *Nordic Journal of International Law* 279-302
- Knoops G-J. A., *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law International, 2005)
- Kolb R., 'Selected problems in the theory of customary international law' (2003)50(2) *Netherlands International Law Review* 119-150
- Koskeniemi M., 'The Politics of International Law' (1990)1 *European Journal of International Law* 4-32

- Koskenniemi M., *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (CUP, 2001)
- Koskenniemi M., *The Politics of International Law* (Hart, 2011)
- Krieb C. and Prost K., 'Article 86' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1513-1516
- Krieb C. and Prost K., 'Article 88' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1532-1536
- Krieb C. and Prost K., 'Article 93' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1569-1588
- La Rosa A-M., 'A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial' (1997)321 *International Review of the Red Cross* 635-650
- LePard B. D., *Customary International Law: A New Theory with Practical Applications* (CUP, 2010)
- Lillich R. B., 'The Growing Importance of Customary International Human Rights Law' (1995-1996)25 *Georgia Journal of International and Comparative Law* 1-30
- Lock T., 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010)10(3) *Human Rights Law Review* 529-545
- Macovei M., *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights* (Council of Europe, 2004)
- Maki L. J., 'General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention' (1980)10 *California Western International Law Review* 272-313
- May R. and others (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Brill, 2000)
- McAuliffe deGuzman M., 'Article 21' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 701-712
- McAuliffe P., 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014)13 *Chinese Journal of International Law* 259-296
- McCorquodale R., 'International Organisations and International Human Rights Law: One Giant Leap for Humankind' in Kaikobad K. and Bohlander M. (eds.), *International Law and Power Perspectives on Legal Order and Justice* (Brill, 2009) 141-162

- McIntyre G., 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Boas G. (ed.), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff, 2003) 193-238
- Mechlem K., 'Treaty Bodies and the Interpretation of Human Rights' (2009)42 *Vanderbilt Journal of Transnational Law* 905-947
- Meernik J. A., 'Is Justice Delayed at the International Criminal Court?' (2008-2009)91 *Judicature* 276-287
- Mégret F., 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure' (2009)14 *UCLA Journal International Law and Foreign Affairs* 37-76
- Mégret F., 'In Search of the 'Vertical': Towards an Institutional Theory of International Criminal Justice's Core' in Stahn C. and van den Herik L. (eds.), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2010) 178-224
- Mégret F., 'International Human Rights Law' in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Elgar Publishing, 2011) 199-232
- Mégret F., 'The Apology of Utopia: Some Thoughts on Koskenniemi Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law' (2013)27 *Temple International & Comparative Law Journal* 455-497
- Meron T., 'On a Hierarchy of International Human Rights' (1986)80(1) *American Journal of International Law* 1-23
- Meron T., 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996)90(2) *American Journal of International Law* 238-249
- Meron T., 'Revival of Customary International Law' (2005)99(4) *American Journal of International Law* 817-834
- Michaels R. and Pauwelyn J., 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2011-2012)22 *Duke Journal of Comparative and International Law* 349-376
- Michels J. D., 'Compensating Acquitted Defendants For Detention Before International Criminal Courts' (2010)8(2) *Journal of International Criminal Justice* 407-424
- Milano E., 'Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?' (2004)35 *Netherlands Yearbook of International Law* 85-142
- Milanovic M. and Papić T., 'As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law' (2009)58 *International Comparative Law Quarterly* 267-296

- Milanovic M., 'Norm Conflict in International Law: Wither Human Rights?' (2009-2010)20 *Duke Journal of Comparative and International Law* 69-132
- Milanovic M., 'Al-Skeini and Al-Jedda in Strasbourg' (2012)23(1) *European Journal of International Law* 121-139
- Mills A., 'Rethinking Jurisdiction in International Law' (2014) *British Yearbook of International Law* 187-239
- Mowbray A., 'The Creativity of the European Court of Human Rights' (2005)5(1) *Human Rights Law Review* 57-79
- Müller C. A., 'The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals' (2008)3 *International Criminal Law Review* 589-626
- Murphy S. D., 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999)93(1) *American Journal of International Law* 57-97
- Naert F., 'Binding International Organisations to Member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations' in Wouters J., Brems E., Smis S. and Schmitt P. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 129-168
- Naymark D., 'Violations of Rights of the Accused at International Criminal Tribunals: the Problems of Remedy' (2008)4(2) *Journal of International Law and International Relations* 1-18
- Nicholls J., 'Evidence: Hearsay and Anonymous Witnesses' in Haveman R. and others (eds.), *Supranational Criminal Law: A System Sui Generis* (Intersentia, 2003) 239-303
- Nicol-Wilson M. C., 'The realization of the right to bail in the Special Court for Sierra Leone: Problems and prospects' (2007)7 *African Human Rights Law Journal* 496-521
- Nollkaemper A. and van Alebeek R., 'The Legal Status of Decision by Human Rights Treaty Bodies in National Law' *Amsterdam Law School Legal Studies Research Paper* n°2011-02, 21 April 2011 available at: <http://ssrn.com/abstract=1817532> (last accessed 21 March 2015)
- Nubberger A., 'The Concept of 'Jurisdiction' in the Jurisprudence of the European Court of Human Rights' (2012)65 *Current Legal Problems* 241-268
- O'Boyle M. and Lafferty M., 'General Principles and Constitutions as Sources of Human Rights Law' in Shelton D. (ed.) *The Oxford Handbook of International Human Rights Law* (OUP, 2013)
- Ochoa J.C., 'The Settlement of Disputes Concerning States Arising From the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Effective and Independent ICC' (2007)7 *International Criminal Law Review* 1-43

- Oluwatoyin Okebukola E., 'A Universal Procedural Framework for War Crimes Tribunals' (2012)14 *International Community Law Review* 85-116
- Orakhelashvili A., *Peremptory Norms in International Law* (OUP, 2006)
- Panezi M., 'Sources of Law in Transition. Re-visiting General Principles of International Law' (2007) *Ancilla Iuris* 66-79
- Parker T., 'Pollyannas Need Not Apply: International Justice is, to a Certain Extent, Political Justice' in Steinberg R. H. (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill, 2016) 445-452
- Pati R., 'Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?' in Kruesmann T. (ed.), *ICTY: Towards a Fair Trial?* (Neuer Wissenschaftlicher Verlag, 2008) 147-184
- Pellet A., 'Applicable Law' in Cassese A., Gaeta P. and Jones J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. II* (OUP, 2002) 1051-1083
- Peskin, V. *International Justice and the Balkans* (CUP, 2008)
- Peskin V., 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009)31 *Human Rights Quarterly* 655-691
- Peskin V., 'Assessing the Contemporary International Criminal Tribunals: Performance, Persuasion, and Politics' (2014)108 *ASIL Proceedings* 122-125
- Pitea C., 'Interpreting the ECHR in the Light of "Other" International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?' in Boschiero N., Scovazzi T., Pitea C. and Ragni C. (eds.), *International Courts and the Development of International Law. Essays in Honour of Tullio Treves* (Springer, 2013) 545-559
- Pogge T. W., 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48-75
- Ramsden M. and Chung C., 'Reasonable Grounds to Believe' An Unreasonably Unclear Evidentiary Threshold in the ICC Statute' (2015)13(3) *Journal of International Criminal Justice* 555-577
- Rastan R., 'Testing Co-operation: The International Criminal Court and National Authorities' (2008)21(2) *Leiden Journal of International Law* 431-456
- Ratner S., 'From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities' in Fastenrath U. (eds.) *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (OUP, 2011) 155-171
- Rearick D. J., 'Innocent Until Alleged Guilty: Provisional Release at the ICTR' (2003)44 *Harvard International Law Journal* 577-595

- Rietiker D., ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis’ (2010)79 *Nordic Journal of International Law* 245-277
- Roach S. C., ‘How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy’ (2013)19 *Global Governance* 507-523
- Roberts A. E., ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001)95 *American Journal of International Law* 757-791
- Robinson P. L., ‘Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia’ (2000)11(3) *European Journal of International Law* 569-589
- Robinson D., ‘The Identity Crisis of International Criminal Law’ (2008)21(4) *Leiden Journal of International Law* 925-963
- Roth R. and Tulkens F., ‘The influence of the European Court of Human Rights’ case law on (international) criminal law: introduction’ (2011)9(3) *Journal of International Criminal Justice* 571-575
- Rückert W., ‘Article 4’ in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 121-127
- Ryngaert C., ‘The International Prosecutor: Arrest and Detention’, (2009)24 *Working Paper n° 24*, Leuven Centre for Global Governance Studies
- Ryngaert C., ‘The Responsibility of Member States in connection with Acts of International Organizations: Assessing the Recent Case Law of the European Court of Human Rights’ (2011)60 *International & Comparative Law Quarterly* 997-1017
- Safferling C., *International Criminal Procedure* (OUP, 2012)
- Saland P., ‘International Criminal Law Principles’ in Lee R. (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999)
- Schabas W., ‘Droit pénal international et droit international des droits de l’homme: faux frères?’ in Henzelin M. and Roth R. (eds.), *Le droit pénal à l’épreuve de l’internationalisation* (Bruylant, 2002) 165-181
- Schabas W., *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006)
- Schabas W., *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010)
- Schachter O., *International Law in Theory and Practice* (Springer, 1991)

- Schomburg W., 'Development of Human Rights before International Criminal Tribunals: A European Perspective' available at hrcak.srce.hr/file/129734 (last accessed 21 March 2015) 909-938
- Schönteig M., 'The overuse of pre-trial detention: causes and consequences' (2013)92(1) *Criminal Justice Matters* 18-19
- Scott S. V., 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994)5 *European Journal of International Law* 313-325
- Shaw M., *International Law* (CUP, 2008 6th edition)
- Shelton D., 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' (2002)65 *Saskatchewan Law Review* 301-331
- Shelton D., 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies' in Hestermeyer H. P. and others (eds.), *Coexistence, Cooperation and Solidarity* (Martinus Nijhoff, 2011)
- Sheppard D., 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010)1 *International Criminal Law Review* 43-71
- Simma B. and Alston P., 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989)12 *Australian Year Book of International Law* 82-108
- Simma B. and Paulus A. L., 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999)93 *American Journal of International Law* 302-316
- Simma B. and Pulkowski D., 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006)17(3) *European Journal of International Law* 483-529
- Sluiter G., 'Naleving van de rechten van de mens door internationale straftribunalen' (2002)27 *NJCM-bulletin* 699-713
- Sluiter G., 'The Surrender of War Criminals to the International Criminal Court' (2003)25 *Loyola of Los Angeles International & Comparative Law Review* 605- 652
- Sluiter G., 'International Criminal Proceedings and the Protection of Human Rights' (2002-2003)37 *New England Law Review* 935-948
- Sluiter G., 'Implementation of the ICC Statute in the Dutch Legal Order' (2004)2 *Journal of International Criminal Justice* 158-178
- Sluiter G., 'Human rights protection in the ICC pre-trial phase' in Stahn C. and Sluiter G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 459-474
- Sluiter G., 'Cooperation of States with International Criminal Tribunals' in Cassese A. (ed.), *The Oxford Companion to International Criminal Justice* (OUP, 2009)

- Sluiter G., 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law' (2010)8(3) *Northwestern Journal of International Human Rights* 248-268
- Sluiter G., 'Shared Responsibility in International Criminal Justice. The ICC and Asylum' (2012)10 *Journal of International Criminal Justice* 661-676
- Smith-van Lin L., 'Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases' in Bekou O. and Birkett D. (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice* (Brill, 2016) 114-151
- Soares P. P., 'Tackling human rights and international criminal law: the practice of international tribunals and the call for rationalized legal pluralism' (2012)23(1) *Criminal Law Forum* 161-191
- Stahn C. and Sluiter G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009)
- Stahn C. and van den Herik L., 'Fragmentation', Diversification and '3D' Legal Pluralism, International Criminal Law as the Jack-in-the-Box?' in Stahn C. and van den Herik L. (eds.), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff, 2012)
- Stahn C., 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012)25(2) *Leiden Journal of International Law* 251-282
- Stapleton S., 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation' (1998-1999)31 *New York University Journal of International Law and Politics* 535-610
- Starygin S., 'Judicial Discretion in ECCC Decisions on Pre-trial Detention against the Backdrop of the Case-law of the International Criminal Tribunals' (2011)11(2) *International Criminal Law Review* 315-358
- E. Stein, 'Bruno Simma, The Positivist?' in U. Fastenrath (eds.) *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (OUP, 2011) 19-31
- Steiner H. J., Alston P. and Goodman R., *International Human Rights in Context. Law Politics Moral* (OUP, 2007 3d edition)
- Stevens L., 'Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use' (2009)17 *European Journal of Crime, Criminal Law and Criminal Justice* 165-180
- Strijards G. A. M., 'Article 103' in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 1647-1657
- Swart B., 'Damaska and the Faces of International Criminal Justice' (2008)6(1) *Journal of International Criminal Justice* 87-114

- Sznajder R., 'Provisional Release at the ICTY : Rights of the Accused and the Debate that Amended a Rule' (2013)11(1) *Northwestern Journal of International Human Rights* 108-144
- Talmon S., 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015)26(2) *European Journal of International Law* 417-443
- Tams C. J., *Enforcing Obligations Erga Omnes in International Law* (CUP, 2005)
- Teraya K., 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001)12(5) *European Journal of International Law* 917-941
- Thirlway H., 'Human rights in customary law: an attempt to define some of the issues' (2015)28(3) *Leiden Journal of International Law* 495-506
- Tho Pesch S., 'The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law' in Weiss N. and Thouvenin J-M. (eds.), *The influence of Human Rights on International Law* (Springer, 2015) 55-67
- Tobin J., 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010)23 *Harvard Human Rights Journal* 1-50
- Tochilovsky V., *Jurisprudence of the International Criminal Court and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff, 2007)
- Tomuschat C. and Thouvenin J-M., *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, 2006)
- Tondini M., 'The 'Italian Job': How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States' in Wouters J., Brems E., Smis S. and Schmitt P. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 169-212
- Trechsel S., 'Rights in Criminal Proceedings under the ECHR and the ICTY' in Swart B., Zahar A. and Sluiter G. (eds.), *The Legacy of the ICTY* (OUP, 2011) 149-188
- Treves T., Customary International Law, *Max Planck Encyclopedia of Public International Law*
- Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008)
- Trotter A., 'Innocence, Liberty and Provisional Release at the ICTY: A Post-Mortem of 'Compelling Humanitarian Grounds' in Context' (2012)2 *Human Rights Law Review* 353-374
- Trotter A., 'Pre-Conviction Detention in International Criminal Trials' (2013)11 *Journal of International Criminal Justice* 351-377
- Van Der Borgh E., 'Prosecution of International Crimes in The Netherlands: An Analysis of Recent Case Law' (2007)18 *Criminal Law Forum* 87-136

- van der Wilt H., 'On the Hierarchy between Extradition and Human Rights' in De Wet E. and Vidmar J. (eds.), *Hierarchy in International Law. The Place of Human Rights* (OUP, 2012) 148-175
- Van Wijk J., 'When international criminal justice collides with principles of international protection: assessing the consequences of ICC witnesses seeking asylum, defendants being acquitted, and convicted being released' (2013)26(1) *Leiden Journal of International Law* 173-191
- Vasiliev S., 'Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality' (Toogdag Seminar, Utrecht University, 18 April 2008) available at <http://ssrn.com/abstract=1718960> (last accessed 21 March 2015)
- Vasiliev S., 'Fairness and its Metric in International Criminal Procedure' 18 April 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177 (last accessed 21 March 2013)
- Vasiliev S., 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilisation' (2015)84 *Nordic Journal of International Law* 371-403
- Vaurs-Chaumette A-L., 'Provisional Release in International Criminal Proceedings: The Limits of the Influence of Human Rights Law' in Weiss N. and Thouvenin J-M. (eds.), *The influence of Human Rights on International Law* (Springer, 2015) 131-144
- Verhoeven J., 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law' (2002)33 *Netherlands Yearbook of International Law* 2-22
- Vermeer-Künzli A., 'A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes' (2007)56 *International and Comparative Law Quarterly* 553-581
- Vidmar J., 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in De Wet E. and Vidmar J. (eds.), *Hierarchy in International Law. The Place of Human Rights* (OUP, 2012) 13-41
- Vitanyi B., 'Les positions doctrinales concernant le sens de la notion de "principes généraux du droit reconnu par les nations civilisées"' (1982) *Revue générale de droit international public* 48
- Voyiakis E., 'A Theory of Customary International Law' (25 January 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895462 (last accessed 5 January 2016)
- Wald P. and Martinez J., 'Provisional Release at the ICTY: a Work in Progress' in May R. and others (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Brill, 2000) 229-242
- Waldron J., 'Normative (or Ethical) Positivism' in Coleman J. (ed), *Hart's Postscript. Essays on the Postscript to the Concept of Law* (OUP, 2001) 410-433
- Warbrick C., 'International Criminal Rights and Fair Trial' (1998)3 *Journal of Armed Conflict* 43-65

- Weisbord N. and Smith M. A., 'The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure' (2011) *North Carolina Journal of International Law and Commercial Regulation* 253- 275
- Wessel J., 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication' (2005-2006)44 *Columbia Journal of Transnational Law* 377-452
- Wouters J., Brems E., Smis S. and Schmitt P. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010)
- Yabasun D. and Holvoet M., 'Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility' (2013)13 *International Criminal Law Review* 727-747
- Young R., 'Internationally recognised human rights before the International Criminal Court' (2011)60(1) *International & Comparative Law Quarterly* 189-208
- Zammit A., 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals' (2013)24(2) *European Journal of International Law* 649-661
- Zammit A., 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals' (2013)14(2) *Melbourne Journal of International Law* 608-642
- Zappalà S., *Human Rights in International Criminal Proceedings* (OUP, 2003) 280p.
- Zeegers K., 'De Invloed van Internationale Mensenrechten op Internationaal Strafprocesrecht' in Abels D., Dolman M. M. and Vriend K.C.J. (eds), *Dialectiek van Nationaal en Internationaal Strafrecht* (Boom Juridische Uitgevers, 2013)
- Zeegers K., 'Provisional Release before the Ad Hoc Tribunals' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323468 (last accessed 14 February 2016)

4. International Organizations' Reports

- OSCE, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina. Progress and Obstacles' (March 2005) available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf (last accessed 8 April 2015)
- Committee on Formation of Customary (General) International Law, 'Final Report on Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (ILA, 2000)

- Committee on International Human Rights Law and Practice, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' in International Law Association Report of the Seventy-First Conference (Berlin 2004) (ILA, 2004) 626