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ARREST AND DETENTION

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1 Importance of Arrest

The importance of the arrest of the accused at the behest of an international criminal tribunal and its Prosecutor can hardly be overstated. As Gavin Ruxton, Legal Advisor at the ICTY OTP, has observed: 'The arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials; no development of the law by the courts; and ultimately, no international justice.'[1] Since the statutes of the tribunals prohibit trials *in absentia*

[1] GF Ruxton, 'Present and Future Record of Arrest War Criminals; the View of the Public Prosecutor of the ICTY' in WAM van Dijk and JL Hovens (eds), *Arresting War Criminals* (Nijmegen: Wolf Publishers, 2001), 19.

(with the notable exception of the STL),[2] without the presence of the accused, international tribunals cannot mete out justice, cannot establish a historical record, and thus cannot complete their mandate.[3] The presence of the accused can be the result of voluntary surrender (which elicits the obvious question to whom the accused should surrender, since the tribunals do not have a police force at their disposal),[4] by a summons to appear,[5] or by the most coercive method: arrest.

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[2] eg ICC Statute, Art 63(1): 'The accused shall be present during the trial'. Compare Statute of the STL, Art 22.1:

> The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: . . . (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

[3] Also SD Roper and LA Barria, 'State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects' (2008) 21 *Leiden JIL* 457, 458:

> The inability to apprehend suspects not only undermines the credibility of a justice system but, more fundamentally, thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals as well as the establishment of a historical record which can serve as a basis for possible national reconciliation. Therefore we regard the apprehension of suspects as a more fundamental problem than just enforcement—the inability to apprehend suspects undermines the entire international human rights regime.

[4] Voluntary surrender can be encouraged by strengthening the effectuation of arrest warrants. Eg after NATO/SFOR stepped up its efforts to arrest indicted persons in Bosnia, some of these persons came forward to hand themselves in. Cf R Kerr, *The International Criminal Tribunal for the former Yugoslavia. An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004), 149 and 159. See on voluntary surrenders to the ICTY: ibid, 169–72, noting at 171 that 'Indictees have been discouraged from surrendering partly because of the length of time that they would have to be in custody in The Hague before their case even came to trial.'

[5] ICC Statute, Art 58(7) provides that,

> As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear.

A summons for a person to appear is clearly a less coercive or intrusive measure than a warrant for the person's arrest. The ICC Prosecutor requested the issuance of a summons to appear in the cases against Harun and Kushayb (Darfur, Sudan situation), apparently because he believed, at least at the time of the request, in Sudan's cooperation (eg KJ Heller, *ASIL Insights* 2007, 'The Situation in Darfur: Prosecutor's Application under Article 58(7) of the Rome Statute', available at <http://www.asil.org/insights070314.cfm>). The Pre-Trial Chamber, however, 'considered that it [was] not satisfied that a summons to appear [was] sufficient to ensure Ali Kushayb's appearance before the Court, and that his arrest appear[ed] to be necessary': Situation in Darfur, Sudan, in the case of *Prosecutor v Ahmad Muhammad Harun* ('Ahmad Harun') and *Au Muhammad al Abd-al-Rahman* ('Ali Kushayb'), ICC-02/05-01/07, 27 April 2007, p 2. Regarding the Kenya situation, the Prosecutor again applied for a number of summonses to appear, for he did not perceive the suspects to be a flight risk, and did not doubt their willingness to cooperate. See Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-31, 15 December 2010, paras 204–12; Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-30, 15 December 2010, paras 215–23.

In this chapter, we will only focus on arrest proceedings, and ancillary detention issues.

The issue of arrest has taken on great significance in a number of international tribunals. This has particularly been the case at the ICTY: in all ICTY reports to the UN Security Council, the OTP's difficulties in arresting indicted persons are given the most prominent place[6] (only in 2011 had all the ICTY's indicted persons been arrested).[7]

History also shows that a tribunal's work expands dramatically when the number of arrested persons increases (because trials finally can start), and that the tribunals are not always well prepared, in terms of funding additional infrastructure and staff, for those contingencies.[8]

Although arrest is of crucial importance, it is notable that, with the exception of hybrid tribunals that are part of the national court system or part of an international civilian or military administration, an international tribunal typically has no arrest powers of its own. Such powers belong to states (Section 1) and to a lesser extent international organizations (Section 8). In such an *indirect* system of executing arrest warrants, the most an international tribunal, its Prosecutor and Registry, can do itself is to inform the international community about the presence of an accused in particular states,[9] request arrest and surrender from such states,[10]

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[6] eg ICTY Report 2007, UN Doc A/62/172, S/2007/469, para 77:

> The successful completion of the mandate of Tribunal fundamentally depends on the full cooperation of the relevant States. The timely arrest of the remaining fugitives is of primary concern.

[7] The final indictee, Goran Hadžić, was arrested by the Serbian authorities on 20 July 2011. Hadžić (IT-04-75-I) was indicted on 21 May 2004. Ratko Mladić (IT-95-18-I), the more high-profile fugitive, was arrested by Serbian police on 26 May 2011 and transferred to the ICTY.

[8] Compare ICTY Report 1998, para 3:

> The arrests and surrenders have resulted in considerable expansion of the judicial and prosecutorial activities of the Tribunal and a corresponding growth in its administrative infrastructure. The election of three additional judges has been approved by the Security Council. Two additional courtrooms have been constructed owing to generous donations from Canada, the Netherlands, the United Kingdom and the United States. The number of staff has increased from 368 to 511, with the overall number of approved posts totaling 646. The Tribunal has moved into additional office space in its building which became available in the course of 1997. The budget of the Tribunal has been increased by $13,744,600 USD and now totals $62,331,600 USD net.

[9] eg ICC Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09, 27 August 2010.

[10] eg *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision requesting observations from the Republic of Kenya, ICC-02/05-01/09, 25 October 2010, requesting

> the Republic of Kenya to inform the Chamber, no later than 29 October 2010, about any problem which would impede or prevent the arrest and surrender of Omar Al Bashir in case he visits the Republic of Kenya on 30 October 2010; and the Republic of Kenya to take any necessary measure to ensure that Omar Al Bashir, in the event that he visits the

or to report a state's non-compliance with the UN Security Council or the ICC Assembly of States Parties.[11]

Compliance with requests for arrest and surrender is essentially tied to state political willingness and international political pressure (Sections 2 and 3). This renders arrest selective—and inevitably casts a shadow over the universal, blind justice which the tribunals are supposed to administer.[12] Adequate awareness of the political environment and access to reliable sources of information (eg by the OTP's own 'tracking teams'—see Section 6), are crucial to the success of the OTP's arrest mission. When it comes to arrest, in fact, the Prosecutor ought to be a clever political operator rather than a stellar lawyer.[13]

Apart from cooperation problems and their solutions—which will be discussed at length—many other issues arise in relation to the role of the OTP in matters of arrest and detention. When exactly should the OTP move for the arrest of indictees (Section 4)? Should the OTP brace for admissibility challenges as early as the arrest warrant stage (Section 5)? Should it be physically involved in the arrest (Section 7)? How should it deal with competing requests for arrest and surrender (Section 9)? Is there a standard of prosecutorial due diligence in relation to arrest and detention? Can procedural defects of the arrest and detention process vitiate

country, be arrested and surrendered to the Court in accordance with its obligations under the Statute.

Also *Prosecutor v Omar Hassan Ahmad Al Bashir*, Demande de coopération et d'informations adressée à la République Centrafricaine, ICC-02/05-01/09, 1 December 2010. It was reported that in 2009–10 the ICC 'made numerous requests to States for cooperation or assistance pursuant to part IX of the Rome Statute', but also that 'Pursuant to article 87 of the Statute, the content of such requests and related communications is often confidential in nature': Report of the International Criminal Court to the United Nations for 2009/10, UN Doc A/65/313, 19 August 2010, paras 98–9.

11 eg ICC Statute, Art 87(7) (stating that the Court may refer such a matter to the Assembly of States Parties). Non-compliance could also be reported to the UN Security Council in case the Council has referred a situation to the ICC. See eg *Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07, 26 May 2010. The ICC Prosecutor urged the Security Council several times to ensure the arrest of said persons. Report of the International Criminal Court to the United Nations for 2009/10, UN Doc A/65/313, 19 August 2010, para 96.

The reporting of non-compliance has not proved very effective, however. Cf R Rastan, 'Testing Co-Operation: the International Criminal Court and National Authorities' (2008) 21 *Leiden JIL* 431, 443 (citing the lack of action of the UN Security Council, to which the ICTY has reported non-compliance), and G Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loyola of Los Angeles Int'l & Comparative L Rev* 605, 615–16 (pointing out that the ICC Statute is silent on sanctions that could be taken by the Assembly of States Parties in case of non-compliance, and arguing that 'this calls into question the effectiveness of the Assembly's responses to violations of the duty to cooperate').

12 Also Rastan (n 11), 455.

13 See eg C Gosnell, 'The Request for an Arrest Warrant in *Al Bashir*: Idealistic Posturing or Calculated Plan' (2008) 6 *J Int'l Criminal Justice* 841, 845, arguing that once a decision is made to go public with an arrest warrant, the Prosecutor 'becomes a political actor, despite the putatively legal and objective foundations of his charging decision'.

criminal proceedings (Section 10)? And, finally, what policy should the OTP develop with respect to detention and interim release of an accused (Section 11)?

2 Enforcement of Arrest Warrants

After the initiation of an investigation, the Prosecutor can normally apply for the issuance of an arrest warrant, or a summons to appear, by the international criminal tribunal if there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the tribunal, and the arrest of the person appears necessary to ensure their appearance at trial, to ensure that they do not obstruct the investigations, and to prevent them from continuing with the commission of crimes.[14]

As noted in Section 1, the system of *enforcing* the tribunals' arrest warrants is essentially a decentralized one, however. In this system, the tribunals are crucially dependent on state support.[15] Without state support, international criminal justice will remain elusive.[16] Unfortunately, history shows that state cooperation is not always forthcoming (Section 2.2). More centralized systems are sometimes put in place, in particular when the tribunal is part of a *national* judicial structure or when its sits in a zone of international occupation or administration (Section 2.1).

[14] See ICC Statute, Art 58(1). At some tribunals, but not at the ICC, the confirmation of an indictment precedes the issuance of an arrest warrant. ICTY Statute, Art 19(2); ICTR Statute, Art 18 (2); STL Statute, Art 18(2); SCSL Rules of Procedure and Evidence, Rule 47 in conjunction with Rule 54. This indictment follows the determination of the existence of a prima facie case, the criteria of which are comparable to the criteria for the issuance of an arrest warrant pursuant to ICC Statute, Art 58(1). Cf ICTY Statute, Art 18(4); ICTR Statute, Art 17(4); STL Statute, Art 18(1).

[15] Sometimes, the requests to states may be formulated as 'recommendations', especially in the case of an international or hybrid tribunal which is not yet fully operational, but whose work is anticipated by an investigatory commission. UNIIIC, which later became the OTP of the STL, eg, did not, and could not, issue arrest warrants. Instead, it gave recommendations to the Lebanese authorities to detain certain people. It was eventually the Lebanese Prosecutor-General who issued the arrest warrants. Cf also the first UNIIIC report, 19 October 2005, available at <http://www.un.org/news/dh/docs/mehlisreport/>, paras 166–7, discussing the arrest and detention of four high-ranking members of the Lebanese security and intelligence apparatus (stating that 'there was probable cause to arrest and detain them for conspiracy to commit murder in connection with the assassination of Rafiq Hariri'). The author wishes to thank Emiel Jurjens for pointing this out.

[16] See eg A Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European JIL* 2, 13: 'The ICTY is very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions'; L Arbour, 'The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results' (1998) 3 *Hofstra L & Policy Symposium* 502: 'If I may use the colourful image used by President Cassese in describing the Tribunal, which he called a giant without arms and legs, I am determined to put these limbs in place'; WW Burke-White, 'Proactive complementarity: the International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard Int'l LJ* 53, 65: 'Without a direct means to arrest indictees and in the face of limited state cooperation in apprehending suspects, the prospect that the ICC courtroom in The Hague will sit largely empty for the foreseeable future is all too real.'

2.1 The Easy Cases: 'Territorial' Tribunals

Sometimes state assistance with arrest and surrender is rather unproblematic. The many arrest warrants issued by the Co-Investigating Judges of the ECCC have, for instance, swiftly been executed by the Cambodian police in 2007–08. Because the ECCC, as a hybrid tribunal with national predominance, is integrated in the national court structure, the enforcement of its arrest warrants closely resembles the enforcement of arrest warrants in ordinary domestic criminal proceedings. ECCC Prosecutors and investigating judges can give orders to police officers placed at their disposal, and the police forces are required to execute these orders under national law. At the hybrid tribunals, the issue of arrest has therefore not been the most pressing one, unless of course an accused is beyond the jurisdiction of the hybrid tribunal and the national police forces it can call upon. In such a case, diplomatic demarches may be required (bilateral and/or multilateral) to have the accused extradited and transferred. In the case of the former Liberian President Charles Taylor, who was indicted by the SCSL but had sought refuge in Nigeria, those efforts eventually bore fruit.[17]

By the same token, arrests will be secured rather smoothly in the case of *occupation* or occupation-like situations, and if the occupying forces are the driving forces behind 'war crimes' justice. Without much ado, indeed, Nazi war criminals were rounded up in occupied Germany after Germany's surrender in 1945. It helped that the armistice agreements concluded at the end of the Second World War included explicit provisions on the apprehension and surrender of persons accused of war crimes (on the basis of which Germany thus ceded sovereignty to the Allied Powers to arrest war criminals),[18] and that Allied governments established administrative procedures for the mutual surrender of war criminals between the different sectors of Germany.[19] In addition, peace treaties with Bulgaria, Finland, Hungary, Italy, and Romania created a duty for these countries to cooperate with the Allied Powers in the search, arrest, and surrender of war crimes suspects. An important feature of all agreements was the absence of judicial control which contributed greatly to the swift arrest and transfer of fugitives. In contrast, international criminal tribunals established from the 1990s onward have to take into account substantial delays in surrender due to judicial review on the basis of cooperation statutes in the custodial state.[20]

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17 It took more than three years, however, before Taylor's indictment was followed by his arrest. Taylor was indicted, under seal, by the SCSL on 7 March 2003. The indictment was unsealed on 4 June 2003, the day Taylor planned to visit Ghana, in the hope that he could be arrested there. The arrest failed, however, which elicited renewed pressure of the international community to have him arrested. On 29 March 2006, Nigeria eventually extradited Taylor to Liberia (after he had first escaped to Nigeria's border with Cameroon), acting on a request of the Liberian president. At the airport in Liberia, he was handed over to SCSL officials and directly put on a flight bound for Sierra Leone.

18 B Swart, 'Arrest and Surrender' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 1639 at 1645.

19 Allied Control Council no 10, Arts II–V.

20 See eg the Ntakirutimana saga. In this case, a US court initially refused to grant the extradition to the ICTR of Ntakirutimana, an ICTR indictee who had fled to the United States, on the ground

Another distinctive feature of the Nuremberg and Tokyo Tribunals was the lack of popular resistance against arrests.[21] The exhausted populations were more concerned with economic survival in totally ravaged countries than with challenging the occupation authorities. For later international tribunals, popular resistance against arrest has been a major challenge, which has caused them to develop extensive outreach programmes. By and large, the post-Second World War situation of military occupation and control, and the attendant efficiency in enforcing arrests, were unique and are unlikely to be repeated.[22]

Nonetheless, similar propitious circumstances could be present in territories under international administration. In Kosovo, for example, where UNMIK, the UN administration in Kosovo, ran the prosecution and police services, international prosecutors worked closely with specialized UNMIK police units from the early stage of the investigations, and arrest warrants were readily executed.

When the suspect is outside the jurisdiction of the international territorial administration, however, success is much less assured. In the case of Timor-Leste, for instance, most of the 391 indicted persons remain(ed) at large[23] in Indonesia, which refused to cooperate, and which also refused to bring them before Indonesian courts.[24] Instead, the Timor-Leste Serious Crimes Unit simply focused its prosecution on those *already* in custody.[25] Limited enthusiasm for a

that there was no extradition treaty between the United States and the ICTR. An appeals judge later set aside that decision, and did grant extradition, but, in the end, four years had passed since the indictment before Ntakirutimana was surrendered to the ICTY. See on this case: G Sluiter, 'To cooperate or not to cooperate?: the case of the failed transfer of Ntakirutimana to the Rwanda Tribunal' (1998) 11 *Leiden JIL* 383; G Sluiter, 'The surrender of Ntakirutimana revisited' (2000) 13 *Leiden JIL* 495; M Coombs, 'In re Surrender of Ntakirutimana, 184 F.3d 419: US Court of Appeals, Fifth Circuit, Aug. 5, 1999' (2000) 94 *Am JIL* 171. See for the political background: KC Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave Macmillan, 2005), 156–61.

21 Y Totani, *The Tokyo War Crimes Trial. The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Asia Center, 2008), 31–2.

22 See on the unique success factors of those tribunals, Swart (n 18), 1647:

> [The Allied Nations] made their intention to bring to justice the perpetrators of international crimes perfectly clear to their enemies already during the war, they took specific steps to implement their plans in the meantime and they concluded armistice agreements and surrender declarations which obligated their enemies to hand over to them persons accused of having committed international crimes. However, all this does not sufficiently explain why they succeeded after 1945 where they had failed after 1918. The decisive difference seems to be that World War II, unlike World War I, ended with the Allied Nations occupying the territories of their enemies and thus being able to impose their will on them without too many difficulties.

23 International Center for Transitional Justice, 'The Serious Crimes Process in Timor-Leste: in Retrospect', March 2006, available at <http://ictj.org/publication/serious-crimes-process-timor-leste-retrospect>, 18. One of the most high-profile indicted persons who remained at large was General Wiranto, who participated in the presidential elections in Indonesia at the time of issuance of the arrest warrant (Case no 05/2003).

24 Ibid, 21–2. Indonesia contested the jurisdiction of the Panels and argued that there was no extradition treaty between Indonesia and Timor-Leste. Cf MC Othman, *Accountability for International Humanitarian Law Violations: the Case of Rwanda and Timor-Leste* (Berlin: Springer, 2005), 128–9.

25 ICTJ (n 23), 19 (noting resource and management constraints, as well as the limited progress of the major investigations).

serious accountability process on the part of both the Timor-Lesteese political class and the UN Security Council contributed to this situation.[26]

While a situation where the OTP can utilize the resources of local police units surely contributes to the effective enforcement of arrest warrants, caution is nevertheless warranted. Local police in post-conflict situations are often not particularly competent; on the contrary, they may be inefficient, badly organized, and prone to corruption.[27] International justice efforts should therefore also be directed at strengthening local law-enforcement authorities so as to enable them to clamp down on crime, and for our purposes, to arrest fugitives from international justice.

2.2 The Hard Cases: 'Extraterritorial' Tribunals

Truly international tribunals like the ICTY, the ICTR, and the ICC have faced serious obstacles in gaining custody of accused persons despite an obligation for states to cooperate. These tribunals have been set up *outside* the state where the atrocities occurred, and where many of the indicted persons will often still be present. Similar problems could arise when the tribunals may have been set up within the territorial state but the indicted persons are found abroad.

In Section 2.2.1, the cooperation problems with respect to arrests encountered by the ICTR and ICTY will be discussed. It will be shown that, even when cooperation with the ad hoc tribunals is mandatory for states—the tribunals being backed by the force of UN Security Council resolutions—considerations of domestic politics tend to trump international obligations. For the Prosecutor, it is therefore imperative to reach out to domestic players in order to have arrest warrants effectuated. As noted in Section 2.2.2, the same applies to the ICC, yet the practice of self-referrals by states may facilitate cooperation with the Court. Of course, states can only surrender indicted persons to the Court if they manage to arrest them in the first place. In vast lawless regions, such as in Central Africa, willingness to carry out arrests on the part of states should not be equated with capability. For arrests in such regions, where indicted persons may frequently cross borders, the Prosecutor, possibly in tandem with international organizations or representatives, may want to encourage police cooperation between the various states involved, as shown in Section 2.2.3. In any event, securing the presence of the accused through arrest and surrender by states calls for an elaborate diplomatic negotiation strategy by the Prosecutor (a strategy in which legal duties do not necessarily play a major role) (Section 2.2.4).

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26 Othman (n 24), 128–9.

27 Cf the situation in Kosovo, G Naarden and JB Locke, 'Peacekeeping and Prosecutorial Policy: Lessons from Kosovo' (2004) 98 *Am JIL* 727, 731.

2.2.1 Arresting ICTR and ICTY Indictees: A Cautionary Tale

The ICTR and the ICTY have been established on the basis of a Chapter VII Security Council resolution; any state is therefore under an obligation to cooperate with the tribunals' requests for arrest and surrender. Rwandan cooperation with the ICTR, for instance, was not particularly smooth (Rwanda having voted against the establishment of the ICTR in 1994), but this lack of cooperation hardly affected arrest matters, as many *génocidaires* had fled abroad after the genocide. The cooperation of the states where these *génocidaires* had sought refuge, however, was not satisfactory either. Many African states dragged their feet (Kenya and Zaire/DRC in particular),[28] although the relative pacification of the Great Lakes region had a beneficial effect on cooperation with the ICTR.[29] As a result of generally lacklustre international cooperation, there were still a number of remaining fugitives from the ICTR as of 2012. In contrast, by 2011, all persons indicted by the ICTY had been arrested, although, as is widely known, the ICTY has had its fair share of cooperation problems with the republics and entities of the former Yugoslavia, Serbia and the Republika Srpska in particular.[30]

The ICTY arrest saga bears testimony to the irreducible importance of domestic politics in having arrest warrants enforced. Cooperation will often only be forthcoming when a new regime has replaced the old one, but even then, the new regime may wish to bring the criminals of the old one before its *own* courts, and not before *international* courts that may sentence more leniently (cf Rwanda). For

[28] Cf Moghalu (n 20), 161–5.

[29] Roper and Barria (n 3), 461.

[30] See, however, on the lack of cooperation of Croatia: Kerr (n 4), 152 (citing the ICTY Prosecutor's reporting of Croatia's non-compliance with ICTY arrest warrants to the ICTY President in 2000).

The lack of cooperation led, as early as 1996, to the issuance of an *international* arrest warrant under ICTY Rule 61(D), as opposed to a normal arrest warrant (based on Rules 47 and 54) in the cases of Karadžić and Mladić. See ICTY, Trial Chamber, *Prosecutor v Radovan Karadžić and Ratko Mladić*, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-8-R61 and IT-95-18-R61, 11 July 1996, para 3:

> Recourse to the Rule 61 proceedings permits the International Criminal Tribunal which does not have a police force, to react to failure of the accused to appear voluntarily and to the failure to execute the warrants issued against them . . . Rule 61 proceedings permit the charges in the indictment and the supporting material to be publicly and solemnly exposed . . . . International criminal justice, which cannot accommodate the failures of individuals or States, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility.

See for an overview of ICTY Rule 61 proceedings, not only in respect of Mladić/Karadžić: ICTY Report 1996, paras 51–60.

The ICTY 'international' arrest warrant has mainly a symbolic aim (Swart (n 18), 1675, arguing that 'from a strictly legal point of view there is not really a need for it'). In the case of the former Yugoslavia, it was in practical terms to a large extent a call on NATO, rather than Yugoslavia or the Republika Srpska, to carry out arrests in Bosnia. Cf. Kerr (n 4), 157.

It is noted that the statutes and rules of other international criminal tribunals (apart from the ICTR, which broadly shares the ICTY Rules) do not provide for the issuance of a second 'international' arrest warrant in case of non-compliance with the first.

an international tribunal, the ideal domestic situation in the target state is possibly the one where a new elite has ascended to power, but where the old elite can still count on some popular support. Given the presence of remnants of the old regime, conducting a domestic trial in this situation may carry too great a risk of destabilization. This may in turn convince the new regime to transfer the accused to a faraway international tribunal to stand trial.[31] Former Yugoslav and Serb President Milošević's rather swift transfer after being deposed (2000–01)[32] was probably a risk the new powers in Belgrade thought they could take. Yet it should not be forgotten that the transfer occurred mainly at the instigation of the pro-Western Prime Minister Đinđić—who was able to control the media after he won the elections as the head of a 19-party coalition—and expressly against the wishes of the nationalist president Koštunica, who had defeated Milošević in the presidential elections. In contrast, probably in light of the strong support which Radovan Karadžić, the former president of the Republika Srpska still enjoyed within the Serb security apparatus, his arrest and transfer to the ICTY took place as late as 2008. Ratko Mladić, the Chief of Staff of the army of the Republika Srpska, who may enjoy even more support, was finally captured in May 2011. In any event, Serbia's hobbled cooperation record shows how important it is for the OTP to link up with powerful political figures who could push for change domestically.[33] One of those figures was Prime Minister Zoran Đinđić, who was assassinated in 2003.[34] Along similar lines, once the domestic power of the Sudanese President Al Bashir wanes, and challengers intent on deposing al-Bashir emerge, the arrest warrant against him may be enforced, even though at the time of issuance such effectuation may have been entirely fanciful.[35]

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31 Compare the case of Charles Taylor, who stood trial at the SCSL in The Hague, and not in Freetown, where the SCSL's premises are located. See the SCSL President's Order Changing Venue of Proceedings, SCSL-03-01-PT, 19 June 2006, and the Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceedings, SCSL-03-01-PT, 12 March 2007, pointing out that 'the security situation in Freetown rendered it necessary for the efficient exercise of the Court's functions for the trial of Mr Taylor to be moved outside of the West African region.'

32 Milošević accepted defeat in the presidential elections on 5 November 2000, was arrested on 31 March 2001, and transferred to The Hague on 28 June 2001.

33 The OTP may also depend on political operators in the capitals of powerful states in the international community, because these states may bring pressure to bear on the states where the indicted persons are hiding, or because these states are key members of an international organization whose forces are present in the field and can carry out arrests. See the role played by certain individuals (Madeleine Albright, Wesley Clark, Robin Cook) in convincing NATO troops to carry out arrests in Bosnia from 1997 onwards, as described in Kerr (n 4), 160–1. See for arrests by international troops Section 8 of this chapter.

34 See, however, also the policy space opened up by the centralization of power under the pro-Western President Boris Tadić in 2008. Cf 'A New Strongman', *The Economist*, 18 September 2008.

35 Cf C Gosnell (n 13), 842 and 846, arguing that 'The ICC should work towards serving that same function in 2010 for Sudan, as the ICTY did for Serbia in 2001'.

2.2.2 Challenges Facing the ICC

As the jurisdiction of the ICC has in the majority of cases been triggered by a self-referral of the state on whose territory the crimes allegedly took place (Uganda, DRC, Central African Republic), one might expect cooperation with the ICC to run smoothly.[36] However, even with regard to self-referrals, cooperation may sometimes not be forthcoming. First, the territorial state may have second thoughts after having triggered the ICC's jurisdiction, for instance because the enforcement of arrest warrants may be an obstacle to peace negotiations with rebel groups (eg a peace deal between the Ugandan Government and the Lord's Resistance Army (LRA)). Secondly, the state may suspend its cooperation in case the OTP reneges on an implicit deal not to target the government side, but only the insurgents (eg in case the OTP were to target the Ugandan government, and not only the LRA rebels). Or thirdly, the indicted person may have fled to another state than the state that referred the situation to the OTP, and that state is not willing to cooperate (eg former President of the Central African Republic Ange-Felix Patassé fled to Togo, a state not party to the ICC Statute).[37]

In case the jurisdiction of the ICC has not been triggered by a self-referral, the enforcement of ICC arrest warrants risks running into particular trouble. One should think of the ICC Prosecutor using his *proprio motu* powers (the Kenya scenario), or the Security Council referring a situation to the ICC (the Sudan scenario). Because in these cases, the state has not given its consent for an OTP investigation, and is quite probably unwilling to conduct genuine investigations itself,[38] it is not very likely that its cooperation in enforced arrests will be smooth, even though the state may be under a legal obligation to cooperate.[39] Still, in the case of Security Council referral, the international community's leverage may potentially be rather significant, as the increased authority and legitimacy with which such a referral is imbued may convince all states—irrespective of their being parties to the ICC Statute or not—to put their weight behind coaxing the target state into compliance. Obviously, this is not to say that this will happen as a matter of course, as the situation in Sudan demonstrates.[40]

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36 Also Roper and Barria (n 3), 464: 'ICC bargaining influence will be greater in those cases involving state party self-referrals because of the need to follow through with their referral commitment.'

37 In such a case, the OTP could call for a UN Security Council resolution forcing a state not party to enforce the arrest warrant against the person. Cf Rastan (n 11), 444.

38 Even states not parties to the Statute may be obliged to cooperate with the Court, in case the Security Council has referred a situation on their territory to the Court under a Chapter VII resolution (eg the situation in Sudan).

39 Also Roper and Barria (n 3), 464.

40 Also ibid, 464. Nonetheless, even before the Court had issued a warrant for the arrest of the Sudanese President al-Bashir, states—even states parties to the Rome Statute—indicated that they would not arrest the indictee. See 'Le Ghana ne compte pas arrêter Béchir', *Le Journal du Dimanche*, 24 September 2008.

2.2.3 On the Need for Inter-State Cooperation

Additional problems with respect to cooperation in arrest and surrender matters arise where weaker states, where international crimes typically occur, have porous borders (eg Central Africa). Perpetrators of international crimes can easily cross such borders to evade arrest. In unstable regions, international cooperation with a view to arresting suspects, involving states and international organizations, is essential.[41] The OTP will have to remain in close contact with all relevant authorities, including the United Nations, and may have to conduct field missions.

For instance, as far as the enforcement of the ICC's warrants for the arrest of the leadership of the LRA is concerned, Uganda established a regional security group, which was to focus, amongst others, on 'a joint regional military mechanism' involving Uganda, the DRC, and Sudan, as well as the UN missions MONUC (DRC) and UNMIS (Sudan), 'facilitating . . . cooperation with the International Criminal Court to execute the warrants of arrest against the LRA leadership'.[42] Uganda also requested UN support in the execution of the arrest warrants. After the issuance of the arrest warrants by the ICC, the OTP received regular updates on issues relating to the arrest warrants from the Ugandan, Sudanese, and DRC governments, met with senior officials from the justice and security departments of the Ugandan government involved in enforcing arrest warrants, conducted missions to Sudan and Uganda, and met with other states parties to the ICC Statute and UN officials.[43] These cooperative frameworks were to little avail as regards the LRA, but without a joint localization and arrest effort of international and national actors, the chances of successful arrest operations may have been much lower still.

2.2.4 OTP Negotiation Strategy

Cooperation frameworks always depend on the political reality of the day. This renders their faithful execution uncertain. However, under specific circumstances, the OTP may sometimes strategically *exploit* any cracks in the framework. This strategy may have particular relevance when the OTP has sought warrants for the arrest of persons who are accused of crimes committed in different states, and those states are all part of the cooperation framework. The OTP may then make a deal

41 In order to ensure maximum cooperation, requests for arrest and surrender may have to be transmitted to the different states in the region. It appears, however, that tribunals sometimes overshoot. See eg the ICC's transmission of requests for arrest and surrender, in the case against Harun and Kushayb to all states parties, all members of the Security Council, Sudan's remaining neighbouring states not covered by the first two categories, and, possibly in the future, if the Registry believes this desirable, to any other state. *Prosecutor v Ahmad Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, pp 56–7. For criticism, Rastan (n 11), 449.

42 ibid, para 18.

43 Submission of information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC 02-04/01-05, 6 October 2006, paras 21–2.

with one state, promising not to seek the (immediate) enforcement of an arrest warrant relating to the situation in that state, in return for cooperation in executing arrest warrants relating to a situation in *another* adjacent state. This is of course based on the assumption that the indictees of the latter situation are present in the former state and/or could be expelled to the latter state.[44] Burke-White has given the example of the ICC OTP playing Sudan against Uganda: the OTP could commit itself not to urge cooperation of Sudan in the enforcement of the ICC arrest warrants issued against its officials, provided that Sudan no longer offers a relatively safe haven to the LRA on its territory.[45] Similarly, the OTP could bring pressure to bear on the DRC to step up its efforts to arrest LRA leaders on its territory, in return for a 'promise' not to indict sitting DRC officials.[46]

This strategy will only work if the different states *could* be played against each other. This will be the case if they all have something to lose from not cooperating with the OTP, in particular when the odds are high that the OTP could target their own officials in cases of non-cooperation, or when overwhelming international pressure is applied. While the signs for success of this strategy may be propitious in the Great Lakes region, in light of the fact that a number of ICC arrest warrants relate to different but interconnected situations, other controversial questions may in fact beg an answer. First, is it morally defensible not to seek the enforcement of arrest warrants, however temporarily? Secondly, can the indictee challenge, before the Court, the OTP's decision to have arrest warrants enforced, or to seek indictments, in spite of the OTP's earlier promises to the contrary?

As to the first concern, it may be feared that the legitimacy of international justice will be undermined if the *selectivity* of enforcement efforts is not only attributable to states or the international community (see also below), but even to the very organ that has initially sought the arrest warrant: the OTP. How can the OTP exert credible pressure on states and the international community using moral arguments if its own decisions are seen as morally dubious?

Such a selective enforcement may deserve support if it is the only method of securing any arrest at all. Given the fact that 'the big men' in charge in the various states often provide political cover for each other, such serious enforcement difficulties are not fanciful. It may be argued that in such cases, the effectiveness of international criminal justice, which is in itself a moral value, should be allowed to trump considerations of moral even-handedness. Moreover, elective enforcement of arrest warrants should not be viewed as the abandonment of efforts to

44 The OTP, with the help of the international community, may also want to make an 'internal' deal with a state, pursuant to which the OTP would not seek the enforcement of a warrant if the state commits itself to enforcing other warrants. Eg one solution proposed for the situation in Sudan, of which the ICC is seized, would see the President shielded from arrest, while two other officials would be sacrificed.

45 WW Burke-White, 'Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria' (2008) 21 *Leiden JIL* 477 at 482 and 480.

46 Ibid.

have certain warrants enforced. Rather, it should be seen as giving priority to the enforcement of some warrants over others, on grounds of political desirability, feasibility, or gravity of the crime. The enforcement of warrants that are deprioritized is only deferred to a later stage, when the political reality is possibly more favourable. In the Uganda situation, for instance, the OTP has confirmed that it 'does not equate the simultaneous pursuit of important obligations other than that of effectuating the arrest warrants with unwillingness to effectuate those warrants.'[47] Those other obligations or responsibilities include, according to the OTP, 'to achieve peace and security and improve the humanitarian situation for the victims'.[48] The OTP may thus—at least temporarily—relax pressure on states when those states pursue legitimate policy objectives that clash with the aim of arresting the indictees. In general, apart from the specific situation of multiple arrest warrants relating to different situations, (immediate) arrest is not an overriding aim; instead, the OTP may countenance a temporary scaling back of enforcement efforts for the benefit of a more pressing social need.

Secondly, if the OTP does not live up to the promises of non-enforcement or non-indictment which it has made toward certain states, and the individuals it is supposedly protecting, the question may be asked whether those individuals have a case in court challenging the OTP arrest strategy. It may appear that in such cases, the OTP failed to act in good faith, and that it has frustrated the legitimate expectations of the state and the individual. But whether, in so doing, the OTP has vitiated the legal proceedings against the individual is another question. It is doubtful whether the OTP's promises would be legally binding at all. Even if they were, the challenging party, on whom the burden of proof lies, will probably face an uphill battle to adduce sufficient evidence to substantiate the claim that the deal between the OTP and the state (with the individual as a beneficiary) was really meant to produce legally enforceable obligations. Arguably, the challenge should not be dismissed a priori, however. The OTP is supposed to behave as a diligent and faithful actor. Any serious due diligence failures should therefore result in remedies being granted to the victim of those failures (see also Section 10 on due diligence), the very annulment of the proceedings being the most extreme remedy.

2.2.5 Grassroots Support

Success in enforcing arrest warrants not only depends on cunning diplomatic strategies and high politics, but also on grassroots support for the enforcement of arrest warrants (although both will often be entwined).[49] Without the

[47] Submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, 8 December 2006, ICC-02/04-01/05.

[48] Ibid.

[49] It was reported by the ICC that it met regularly with civil society representatives. Report of the International Criminal Court to the United Nations for 2009/10, UN Doc A/65/313, 19 August 2010, para 105.

involvement of civil society groups who translate the need for enforcement of international criminal law into a local, recognizable vernacular,[50] serious enforcement difficulties might be encountered. States, even if authoritarian, often do not want to go against the wishes of their populations for fear of violent uprisings. Also, they might cite the demands of the 'street' as a useful excuse for not enforcing arrest warrants, even in the face of pressure by the international community. Therefore, the development of specific outreach strategies geared towards positively influencing local public opinion is appropriate.[51] More specifically, the enforcement of arrest warrants of those deemed most responsible (and those bearing command or superior responsibility in particular) may have to be presented as a moment of moving beyond a shameful past towards a more hopeful future.

It is to be borne in mind that the grassroots level is not atomized: it does not consist of millions of separate individuals who share no bonds with each other. While the most readily identifiable bond which they share with each other is obviously their citizenship of (or residence in) the state where they live, they often have a stronger, more emotional bond with certain groups at the sub-state level, such as religious groups or tribal communities. The OTP may have to target the leaders of those groups, or other opinion-makers (such as influential editorialists). Convincing those leaders of the added value of arresting persons accused of international crimes, whatever their rank or political constituency, may be equated with actually convincing the population at large.

3 Support of the International Community

Without the consent of the state on whose territory the alleged atrocities have occurred, against whose nationals an arrest warrant has been issued, or where the suspect is found, it is not very likely that cooperation with the OTP, including the enforcement of arrest warrants, will be forthcoming.[52]

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50 Cf the need for vernacularization for the universality to be fully realized, in particular A An-Na'im, '"Area Expressions" and the Universality of Human Rights' in DP Forsythe and PC McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (Lincoln/London: University of Nebraska Press, 2003), 1; S Engle Merry, *Human Rights and Gender Violence* (Chicago, IL: University of Chicago Press, 2006), 1: 'In order for human rights ideas to be effective . . . they need to be translated into local terms and situated within local contexts of power and meaning.'

51 In this sense also Roper and Barria (n 3), 466; Burke-White (n 45) (favouring direct negotiation with domestic actors within the state).

52 Examples of non-cooperation are rife: Serbia has a long history of refusing to execute arrest warrants by the ICTY; Rwanda has been embroiled in a diplomatic-judicial war with the ICTR in order to have arrested persons transferred to Rwanda itself to stand trial there instead of at the ICTR; Nigeria allowed former Liberian President Charles Taylor to live comfortably on its territory, thereby defying SCSL arrest warrants; and Sudan has taken no steps to surrender the Sudanese officials indicted by the ICC.

Lacking the means to enforce the arrest warrants at its own initiative, and lacking any credible threat mechanism, almost out of necessity the OTP will have to rely upon the assistance of other, more powerful actors: supportive states and international organizations,[53] or put differently 'the international community'.[54] When enlisting the support of the international community, the OTP acts as a diplomat par excellence. It may tend to appeal to the international community's moral instincts by emphasizing the ethical imperative of bringing to justice mass criminals, but at the same time it cannot be so naïve as to underestimate the political constraints which the international community faces (eg the target state 'sheltering' the suspect may be of geostrategic interest to the Great Powers).

At times, the OTP may castigate the international community for not doing nearly enough to have suspects arrested—as ICTY Prosecutor Carla Del Ponte has repeatedly done. At other moments, it should tread cautiously in order not to alienate actors within the international community whose support it cannot do without. The abrasive Del Ponte, for instance, denounced the major powers for their lack of cooperation—also in the media—to a degree that was not deemed acceptable. Her criticism of SFOR for not doing enough to arrest Karadžić and Mladić, even as late as 2002, notably led to a furious reaction by NATO,[55] which later obliged her to spend energy mending fences with the organization and its member states.

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[53] In (post-)conflict situations, the latter may sometimes have military control over the territory where the suspects are presumably located, and may thus be in a unique position to effectuate arrest themselves.

[54] See also Rastan (n 11), 456:

> Unless the duty of states to co-operate in the fight against impunity is matched by the necessary degree of unity and support from the international community, the enforcement pillar simply will not hold.

See on the importance of the support of the international community, the statement of ICTY Prosecutor Del Ponte, *International Herald Tribune*, 1 February 2001:

> If the international community does not follow its words with action, future dictators will be able to run and hide. They might not even take the trouble to run and hide because they know they can remain inside their own borders with impunity. They will gamble that if one day things go wrong and they lose power, the political will to bring them to justice does not exist. If my recent visit to Belgrade is any indication, it seems that national sovereignty is still a strong factor—it has not changed. Narrow state interests still dominate, and collective action is a problem. Clearly, the International Tribunals for the former Yugoslavia and Rwanda should be the starting point, not the high point, of the move for justice against dictators and war criminals. Even if they can still hide, we must do what we can to make their lives as unpleasant as possible by freezing bank accounts, investigating business connections and issuing international arrest warrants that deter them from travelling abroad.

See also Report of the ICC Bureau on co-operation, ICC-ASP/6/21 (19 October 2007), Section B, citing such support of the international community as 'Supporting situation-specific activities of the Court, including arrest and surrender of wanted persons'.

[55] See the furious reaction of a NATO Commander, reprinted in F Hartmann, *Paix et châtiment* (Paris: Flammarion, 2007), 166.

The international community often does bring pressure to bear on recalcitrant states. However, because this pressure is rarely consistent or persistent, arrest warrants often remain unenforced. The states taken to task may indeed believe that they can get away with non-compliance when the international community does not speak with one voice.[56] The opening of rapprochement negotiations between the EU and Serbia in October 2005, for instance, did not provide a strong incentive for Serbia to arrest Radovan Karadžić and Ratko Mladić. Also, the conflicting voices within the EU on further rapprochement with Serbia in the aftermath of Kosovo's declaration of independence on 17 February 2008 (with the EU fearing that Serbia could gravitate towards Russia) and the unexpected arrest of Karadžić on 18 July 2008, may not have encouraged Serbia to have Mladić also arrested. Eventually, on 26 May 2011, Mladić *was* arrested in northern Serbia, although it was not readily clear whether this occurred due to international pressure. In any event, the arrest of Mladić, arguably Europe's most wanted war criminal, closed a dark chapter of recent Serbian history and made the prospect of EU membership considerably brighter.

The undeniable fact of international life that the political priorities of the international community may shift is also exemplified by the loss of international interest in tracking down the remaining Rwanda *génocidaires* in the Great Lakes region after 2002, when the international community's attention shifted more towards the events in the Middle East, Iraq and Afghanistan, and the so-called 'war on terror'.[57] This may explain why Félicien Kabuga, one of those believed most responsible for the Rwanda genocide, could remain at large for such a long time.

Often, the international community may be viewed as dragging its feet, satisfying itself with the mere indictment short of actual arrest. This stance may be informed by a number of reasons. First, for fear of political destabilization and out of a desire not to unhinge fledgling democracies in post-conflict countries, the international community may be reluctant, whether or not rightly so, to bring too much pressure to bear on unwilling states. Secondly, the international community or powerful states may fear that, when it eventually comes to a trial, the tribunal will expose their moral and political (if not legal) responsibility for the atrocities that took place (eg Srebrenica).[58] Thirdly, the willingness of third states to carry through the commitment for justice may be blunted by a desire to protect other states and their nationals with whom the former share an ethnic, religious, or political identity.

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[56] Compare the statement by ICC Prosecutor to the Eleventh Diplomatic Briefing, 10 October 2007, available at <http://www.icc-cpi.int/NR/rdonlyres/E4C106AC-F03F-40C2-A1B2-DF80D3B813E5/0/ICCDB11STLMOENG.pdf>:

> [The] silence [of my diplomatic interlocutors] could be interpreted as a weakening resolve of the international community on the enforcement of the arrest warrants.

[57] Cf Moghalu (n 20), 174.

[58] Also Hartmann (n 55), 238, 244.

These reasons explain why the major powers did not initially press for the arrest of Milošević, in spite of their paying lip-service to the need for international justice. It also explains why Karadžić and Mladić were left alone for 13 years, with the Russians overtly protecting Karadžić, and with the French and the Americans exchanging recriminations over the failure to have both indicted persons arrested.[59] Rumours also swirled that Karadžić was granted immunity in return for a withdrawal from political life in a secret contract or gentlemen's agreement between US negotiator Richard Holbrooke and a representative of the Republika Srpska. No conclusive proof of the existence of such a document has been offered. Regardless, the ICTY dismissed Karadžić's motion to dismiss the indictment against him, reasoning that the ICTY Prosecutor was not involved in making the agreement, that there was no evidence that the UN Security Council was involved directly in the making or implementation of the Agreement, and that Karadžić had failed to show that Holbrooke acted with the apparent authority of the Security Council in 1996.[60]

Mladić, for his part, would reportedly have been offered impunity by the French at the occasion of the liberation of two French prisoners, although President Chirac denied this,[61] and, again, no proof of such a deal exists. In any event, no serious efforts were made to arrest either Karadžić or Mladić until 2002.

That being said, an indictment without subsequent arrest could in itself produce certain desirable effects, such as the diplomatic isolation of leaders and the reinforcement of the opposition.[62] At the same time, it does not come at a cost for the major powers, as it is issued by the *tribunal* upon the OTP's own request, and not by states. Arrest, by contrast, does come at a political cost, as it requires bringing pressure to bear on the unwilling state, and thus implies taking sides.

Taking sides implies taking risks and possibly losing political or economic opportunities. The international community's willingness to have arrest warrants enforced will therefore be informed by political calculations, and pressure will, in the final analysis, be selective. When the intervention of the international community aimed at enforcing arrest warrants depends on political calculations rather than on the gravity of the crimes alleged in the indictment, the legitimacy of international justice, and the international rule of law, will inevitably suffer.[63] This may seem regrettable. But legal and institutional arrangements always reflect the art of the politically possible. While the UN Security Council is an equally selective enforcer, which intervenes when it suits the permanent members, no one can seriously doubt that the Council has played an important role in the

59 See on French reluctance, Kerr (n 4), 168.

60 ICTY Trial Chamber, *Prosecutor v Radovan Karadžić*, Decision on the Accused's Holbrooke Agreement Motion, IT-9S-SI1 8-PT, 8 July 2009, paras 56, 61, 79.

61 Hartmann (n 55), 198–9.

62 Ibid, 21–2.

63 As Florence Hartmann has pointed out in this context, international justice risks becoming 'le jouet des puissants contre les faibles': Hartmann (n 55), 55.

maintenance of international peace and security over recent years, however fitful this may have been. By the same token, the international criminal tribunals whose enforcement powers are exercised by the national and international political community can, in the nature of things, only deliver selective justice, because they either may not have jurisdiction over all criminal situations under their statute or may not be able to catch all the suspects they would like to, but it is nevertheless justice.

Assuming that at least in a number of situations the international community is willing to press for arrest, what incentives does it have at its disposal to encourage unwilling states to effectuate arrests, and how are these incentives developed?

Starting with the second question, it is noted that incentives are decided in national capitals or in the headquarters of international organizations. The OTP normally has no formal say in them. It could, however, try to influence the decision-making process when it discusses issues of cooperation with representatives of the international community. After all, the international community will often base the measures which it takes on the reports presented by the OTP.[64] Informally, the OTP may inform the international political representatives of its preference for this or that measure, and thus take part in bargaining with the target state. It should nevertheless avoid being seen as an overtly political operator lest it alienate the support of important international actors who might feel that they are being instrumentalized by the OTP. The OTP will always have to bear in mind that states will only heed the advice of the OTP to the extent that their broader national interests are aligned with the interests of justice which the OTP represents. When requesting international assistance, the OTP will often have to draw the attention of its political interlocutors to the wider positive implications of coaxing unwilling states into compliance with the tribunal's arrest warrants.

Incentives can be divided into 'carrots' or 'sticks'. Possible measures of the 'stick' variety are sanctions such as travel bans, freezing of assets,[65] reduction of political,

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64 The information contained in this report may be gathered by the tribunals' 'tracking team' (see next section). The tribunals' tracking efforts thus support diplomatic efforts. See D Tolbert, ICTY, ICC Second public hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts, The Hague, 26 September 2006, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+2/Session+2.htm>:

> 'the diplomatic and political efforts are made much more effective by having in-house expertise. At the ICTY, we call this unit the "Tracking Team"...'.

65 To that effect, indictees could be put on a 'terrorist black list'. See eg the listing of the LRA on the US State Department's Terrorist Exclusion List (2004) on the basis of Section 411 of the USA PATRIOT ACT of 2001 (8 USC § 1182) (list available at <http://www.state.gov/s/ct/rls/fs/2002/15222.htm>), and the appearance of LRA leader Joseph Kony at the top of the US Office of Foreign Assets Control 'specially designated global terrorists' list (2008) (list available at <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>). The listing of rebels which the state cannot catch anyway—which may precisely have been the reason to refer the situation to the ICC in the first place—will obviously only contribute to the marginalization of the rebels rather than to increased cooperation by states.

economic, or military aid to uncooperative regimes, or even military ('humanitarian') intervention.[66] Possible measures of the 'carrot' variety are promises of financial aid packages, rewards for information leading to the capture of indicted persons,[67] and promises of opening negotiations with a view to obtaining membership of an international organization. The EU and NATO, for instance, have played an important role in coaxing Serbia into more cooperation over the execution of ICTY arrest warrants by presenting a path towards association and partnership (the EU Stabilization and Association Process and NATO's Partnership for Peace Programme), and eventual membership of the European Union.

A word of caution in relation to sanctions is appropriate here. It is well known that sanctions do not always work.[68] At times, instead of encouraging cooperation, they precisely contribute to the radicalization of a beleaguered regime, and hence to even less cooperation with the tribunal. It is, for instance, not clear whether sanctions imposed on Sudan with a view to obtaining more cooperation with the ICC would be very effective. The effectiveness of sanctions also depends on the international support they can muster. If important international players do not implement a sanctions regime, its effectiveness will be limited. As a substantial number of major powers have not ratified the ICC Statute (eg the United States, Russia, China, India), securing sufficient support for sanctions aimed at ensuring compliance with ICC arrest warrants will always be an uphill struggle.

4 Timing of Arrest

In terms of prosecutorial strategy, one may consider at what moment the OTP should seek an arrest warrant and have it subsequently enforced. Three issues in relation to the timing of the arrest will be discussed in this section. First, is it always smart policy for the OTP to seek immediate disclosure of arrest warrants, or should tribunals sometimes resort to the issuance of arrest warrants under seal (Section 4.1)? Secondly, in cases of extreme urgency, can the OTP bypass the normal procedures for arrest and surrender (Section 4.2)? And thirdly, in terms of substantive prosecutorial policy in relation to arrests, should the OTP wait until

66 The latter option is not supported by the ICC Prosecutor, however. Cf Institute of War and Peace Reporting, 'ICC Chief Prosecutor Talks Tough', 28 April 2008, available at <http://www.iwpr.net/?p=acr&s=f&o=344364&apc_state=henh>: 'Arresting a minister is not a military operation, but a political one.'

67 eg the US 'Rewards for Justice' programme, which offers up to US$5 million for information leading to the detention of ICTY and ICTR fugitives. Cf <http://www.rewardsforjustice.net/>. An additional incentive could be to offer a *tax-free* reward. See eg Serbia's offer of such a reward for the capture of Ratko Mladić ('Serbia offers tax-free reward for Mladić capture', *Reuters*, 12 January 2009).

68 Compare Roper and Barria (n 3), 466–7, regarding political pressure as having only limited effectiveness, as opposed, however, to military and economic pressure.

hostilities have subsided before it seeks the enforcement of arrest warrants, in the interest of allowing peace to take hold (Section 4.3)?

4.1 Non-Disclosure and Arrest Warrants Under Seal

The exact timing of the arrest of an accused person is crucial. Because the accused may go into hiding or tamper with evidence when informed of a warrant for arrest, international criminal tribunals often issue an arrest warrant under seal, which is only disclosed to certain entities (ordinarily the state which is in a position to arrest the accused).[69] The warrant is only unsealed when there is a high probability that the arrest can indeed be effectuated, that is, when there is a low risk that the accused will learn of the warrant and subsequently abscond, and that adequate witness protection programmes are put in place.[70]

The ad hoc tribunals initially did not have the power to issue sealed indictments or sealed arrest warrants. All indictments were made public and transmitted to state authorities for execution. However, as Ruxton pointed out, 'That policy simply did not work, as it only served to give accused a head start in avoiding arrest'.[71] Because, as a result, no accused could actually be arrested, the ICTY Prosecutor decided to abandon this procedure in 1997 'in favour of making an assessment in each case of the most viable, lawful, method of facilitating arrests'.[72] This new strategy, which was worked out by the incoming, more 'practical' ICTY Prosecutor Louise Arbour (as opposed to the more 'moral' prosecutor Richard Goldstone),[73] immediately bore fruit, as two indicted persons were arrested in mid-1997.[74] This strategy met with some criticism from scholars sympathetic to the cause of the defence,[75] but its legality is fairly uncontroversial. However, in spite of the initial success of the sealed indictments/warrants strategy, in 2002 the ICTY Prosecutor 'changed her position regarding secret indictments and opted for greater involvement of the States in searching for and arresting the accused.'[76]

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69 eg ICTY Rule 53(D), which provides that the OTP may disclose indictments to certain entities for purposes of preventing the loss of an opportunity to secure the possible arrest of the accused.

70 See *Situation in Uganda*, Decision on Prosecutor's Application for Unsealing of the Warrants of Arrest ICC-02/04-01/05, 13 October 2005, paras 14, 17, and 20.

71 Ruxton (n 1), 20.

72 Ibid. Non-disclosure of documents and information is allowed under ICTY Rule 53. The non-disclosure of indictments was upheld by the ICTY in *Prosecutor v Slavko Dokmanović*, Trial Chamber Decision, IT-95-13a, 27 August 1997, para 54, holding that 'the non-disclosure of the Indictment does not constitute grounds for a challenge to the arrest of the accused'.

73 Kerr (n 4), 149 and 159. See also Arbour (n 16), 503, cited in Kerr (n 4), 159.

74 ICTY Report 1997, para 60 (arrest of Slavko Dokmanović and Milan Kovačević).

75 Cf G Sluiter, Commentary to *Dokmanović* case in A Klip and G Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals* (Antwerp: Intersentia), vol III, 154, arguing that 'the accused is denied the opportunity to surrender to the Tribunal . . . and the opportunity to prepare his defence', but admitting at p 155, that 'this situation may be remedied by granting him sufficient time before the commencement of the trial to prepare his case'.

76 ICTY Report 2002, para 7.

Apparently, the ICTY OTP become convinced of the advantage of *public* indictments and arrest warrants: if the accused is on the run anyway, would it not be more effective for all states to search for and arrest them?

The ICC OTP, unlike the ICTY OTP, does often apply for sealed arrest warrants.

A study of relevant ICC decisions reveals that arrest warrants under seal are typically issued in case public knowledge of the proceedings might result in the suspect hiding, fleeing, and/or obstructing or endangering the investigations of the proceedings of the Court.[77] The Court, at the request of the OTP, has indicated that the fact that the suspect is still fighting may in this connection also be one of the reasons to issue a sealed warrant.[78] For the OTP, requesting a sealed indictment/arrest from the Court will be an attractive option in case public knowledge of the proceedings might result in the suspect hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court. If the Court has honoured the OTP's request, the Prosecutor may choose the time and reasons of unsealing, and again apply to the Court for a decision on unsealing the warrant. The OTP has applied for unsealing warrants in case one or more of the following criteria are fulfilled: (1) the suspect is no longer fighting; (2) the suspect may have become aware of the existence of the warrant for his arrest; (3) protective measures have been taken to ensure the adequate security of the witnesses; (4) the suspect may flee or seek refuge in other (neighbouring) countries, a risk which may be decreased when the international actors are officially informed of the existence of the warrant; (5) the state which has already been notified of the warrant has taken steps to apprehend the suspect, a process which may be facilitated by unsealing the arrest warrants,[79] and (6), obviously, the state has already executed the sealed arrest warrant.[80] These criteria do not appear as cumulative conditions. Rather, they should be seen as indications that unsealing the arrest warrant may, at that moment, prove more effective in securing the arrest of the suspect.

Although the ICC Prosecutor has typically sought a sealed warrant, his application for the issuance of a warrant for the arrest of the Sudanese President al-Bashir was *not* for a sealed warrant. This raises the question as to what factors acted in favour of applying for a public warrant in that case. The single most important factor contributing to the Prosecutor's decision to apply for a public warrant was

77 eg *Prosecutor v Bosco Ntaganda*, Situation in the Democratic Republic of Congo, Decision to Unseal Warrant of Arrest, ICC-01/04-02/06, 28 April 2008, paras 79–80.

78 Ibid. Arguably, the OTP may fear that the issuance of the arrest warrant may embolden the suspect not to lay down arms. A continuation of the conflict runs foul of one of the purposes of ICC proceedings: to pacify conflict zones.

79 Cf OTP application for unsealing the arrest warrant against Bosco Ntaganda, ICC-01/04-02-06-15-US-Exp, 29 February 2008, with ICC Pre-Trial Chamber agreeing by Decision of 28 April 2008, in particular at 4–5.

80 eg *Prosecutor v Thomas Lubanga Dyilo*, Situation in the Democratic Republic of Congo, Decision to Unseal Warrant of Arrest, 17 March 2006, p 3.

probably the position of the suspect: incumbent president. Al-Bashir was only the third sitting head of state ever against whom an arrest warrant was issued (after Slobodan Milošević of Yugoslavia in 1999, and Charles Taylor of Liberia in 2003). The prosecutor will ordinarily not pin much hope on the swift execution of such a warrant. The cooperation of the state which the indicted person heads will obviously not be forthcoming as long as they remain in power. Moreover, the cooperation of other states, even states parties to the ICC Statute, where the head of state may be found (eg at an international conference), may not be forthcoming either: for political-strategic reasons, heads of state and government of those states will typically be loath to embarrass their counterparts by executing arrest warrants against them, and it is even open to doubt whether, in light of Article 98 of the ICC Statute, third states' arrest and surrender of a head of state or government protected by international immunities is even lawful.[81]

Because the execution of an arrest warrant against a sitting head of state will normally prove elusive, even if the person is caught by surprise, applying for a sealed warrant will not prove advantageous, rather the contrary. The issuance of such a 'secret' warrant could be perceived in the target state as casting doubt on the state's good faith, and lead to a hardly cooperative stance on its part.[82] By issuing a public warrant, in contrast, the Court may be seen as 'playing by the rules', showing that it has nothing to hide, while at the same time marginalizing the regime headed by the indicted head of state.[83] Marginalization is helped by the international publicity generated by a public arrest warrant against the head of state. As Gosnell has noted, such a warrant 'is nothing less than a demand for regime-change'.[84] Ideally, it may strengthen the hand of domestic reformers, backed up by pressure exerted by the international community. This will hopefully eventually result in the downfall of the regime, and the arrest of the regime's leaders, including the (deposed) head of state, with a view to international, or as the case may be domestic, prosecution. For that to succeed, however, the regime's crimes need to be proven as quickly as possible. Therefore, it is probably advisable that the OTP follows up on the issuance of an arrest warrant against a head of state by issuing arrest warrants against a number of 'smaller fry', who may more readily be sacrificed by states. Securing their conviction and the concomitant establishment of the legal 'truth' could keep the momentum going for regime change and the eventual surrender of the head of state.[85]

81 M Blommestijn and C Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir. A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 5 *Zeitschrift für Internationale Strafrechtsdogmatik* 428–44.

82 It has even been suggested that the conflict could, as a result of a sealed warrant, become more violent. Cf Gosnell (n 13), 844.

83 See also R Goldstone, 'Catching a War Criminal in the Act', op-ed *New York Times*, 15 July 2008, stating that 'The arrest warrants for President Bashir reveal to the world what type of regime holds power in Khartoum'.

84 Gosnell (n 13), 845.

85 Ibid, 847–8.

4.2 Provisional Arrest

In some cases the arrest of a suspect is extremely urgent, for example because he has just been located and may attempt to flee. The statutes and rules of the tribunals ordinarily provide for a special procedure for such arrests: until an 'ordinary' definitive arrest warrant is issued by the tribunal, a person may be 'provisionally' arrested.

At the ICTY and ICTR, a rather unique system of provisional arrest is in place, which gives far-reaching powers to the OTP.[86] Awaiting the order of the tribunal, the OTP may, in case of urgency, request a state to arrest an individual provisionally, even before the person has been indicted by the tribunal.[87] The individual could subsequently be transferred to the tribunal at the order of a judge.[88] There are no other statutes or rules of international tribunals that grant the power to deprive a person of his liberty to a prosecutor instead of to a judge, and such even without the requirement that evidence be given. Arguably, given the importance of the right to liberty, the power to issue an arrest warrant should not be given to the OTP, but only to the tribunal.[89] Tribunals that were later established have abandoned the far-reaching provisional arrest powers of the OTP. The statute or rules of the SCSL, for instance, do not provide for it, whereas at the ICC, the powers of the OTP have largely been taken over by the Pre-Trial Chamber of the Court, which could act at very short notice, thereby obtaining the need for OTP empowerment.[90] Article 92 of the ICC Statute indeed makes it clear that, like in

[86] Under the normal ICTY/ICTR system, warrants for the arrest and transfer of an accused are issued by the judge or Chamber that has confirmed the indictment. Cf RPE, Rules 47–61.

[87] ICTY and ICTR RPE, Rule 40.

[88] ICTY and ICTR RPE, Rule 40*bis*(B). ICTR Rule 40(B) also allows for provisional detention at the seat of the Tribunal 'Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape'. Under the rule, a tribunal order is, however, required for an order to transfer the suspect to the seat of the Tribunal. Rule 40*bis* was inserted on 15 May 1996 after it became clear that states had arrested individuals who had not yet been indicted. Indeed, in February 1996, the Bosnian government had arrested General Djukic and Colonel Krsmanovic (to be indicted by the ICTY), and in April 1996, 12 persons were arrested by Cameroon (to be indicted by the ICTR). Under the normal system, these persons could not be transferred to the tribunals.

[89] This is, however, not to say that it would violate international human rights law. Article 9 of the ICCPR does not require that arrest warrants be issued by a judge. Instead, it limits itself to requiring, in Art 9.3, 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'. This provision clearly allows for the issuance of arrest warrants by a prosecutor.

Admittedly, the ICTR Rules provide a number of safeguards for the arrested individual. Rule 40 (D) of the ICTR RPE: 'The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer'. There is no equivalent safeguard in Rule 40 of the ICTY RPE, as a result of which there does not seem to be a time limit to the period a person may be deprived of his or her liberty at the request of the OTP pending the issuance of an order by a judge or Chamber. See B Swart, 'Arrest Proceedings in the Custodial State' in Cassese, Gaeta, and Jones (n 18), 1247, 1250. There are, however, many safeguards under Rule 40*bis* of both tribunals' RPE, ie, the rule providing for provisional detention at the tribunal's seat.

[90] Cf Sluiter (n 11), 617.

normal situations of arrest, the *Court* retains the last word:[91] 'In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request.'[92] To prevent delay of arrest, not all supporting documents are to be presented immediately. In practice, the OTP will first ask the Court to request the provisional arrest. The *Bemba* case (2008) has demonstrated that the interaction between the OTP and the ICC in this respect can be very smooth and effective.[93]

4.3 Peace v Justice

A last issue that arises concerning the timing of the arrest is whether it is wise for the OTP to apply for an arrest warrant *during* a conflict, or whether it should rather wait until the hostilities have ended. This dilemma also plays out in the *indictment* phase, in tribunals where the indictment precedes the arrest warrant. But these are typically the tribunals that have been set up ad hoc after the end of hostilities, at which time the peace versus justice dilemma has less relevance. In practice, it is mainly the permanent ICC that is confronted with the problem, as well as to some extent the ICTY, which was established *during* the Balkan wars. As coping with this problem is mainly a question of selection of the accused, reference is made to Chapter 8 on strategy. Only issues relevant to arrest are covered here.

The very issuance of an arrest warrant in the course of a conflict normally implies that the OTP and the Court are of the view that justice should run its course. However, in some circumstances, the OTP may perhaps want to tolerate the temporary non-cooperation of states in enforcing arrest warrants if, at that juncture, the enforcement of the warrant is not feasible, not desirable, and even counterproductive in view of the larger political picture.[94] The OTP may prefer to

91 Cf the 'normal' arrest situation outlined in Art 58(1) of the ICC Statute, which provides that at any time after the initiation of an investigation, the Prosecutor may initiate a prosecution by applying to the Pre-Trial Chamber for the issuance of an arrest warrant for an individual. See also the reference to provisional arrest at the request of the Court in Art 58(5) of the ICC Statute.

92 The individual will be released if the request for surrender and the accompanying documents are not received in 60 days. Cf ICC Statute, Art 92(3).

93 On 9 May 2008, the OTP had filed an application for the issuance of an arrest warrant against Jean-Pierre Bemba under the (normal) Art 58 of the ICC Statute. But before the Pre-Trial Chamber could decide on this application, on 23 May 2008 the OTP filed another application for the *provisional* arrest of Bemba under Art 92. This happened after information became available to the OTP that Bemba appeared to have left Portugal for Belgium, that he intended to leave Belgium, and that, thus, he might avoid apprehension. Situation in the Central African Republic, Prosecutor's Application for Request for Provisional Arrest under Article 92, ICC 01-05, paras 4–7. The Pre-Trial Chamber acted swiftly and issued a warrant for the arrest of Bemba, 23 May 2008, ICC-01/05-01/08, as a result of which Bemba could be arrested by the Belgian authorities, and subsequently be transferred to the ICC. See for the relevant Belgian proceedings, *Bemba Gombo v Belgium*, Appeal judgment, Cassation no P 08 0896F; *Oxford Reports on International Law in Domestic Courts*, ILDC 1115 (BE 2008), 18 June 2008; J-P BG, Appeal judgment, Cassation no P 08 0971F; ILDC 1116 (BE 2008), 1 July 2008.

94 Officially, however, the OTP still maintains that the outstanding arrest warrants meant to serve justice contribute to peace, and believes that this is also the opinion of local and international

wait out the storm and to have the warrants enforced only after peace has come.[95] However, if the OTP continues to seek enforcement in a way that undermines chances of peace, the Security Council can always suspend the enforcement of arrest warrants for a renewable period of 12 months, under a mandate given by Article 16 of the ICC Statute. This option has notably been suggested in respect of the ICC's arrest warrants against LRA leaders with whom the Ugandan government is negotiating, and the ICC warrant for the arrest of the Sudanese President al-Bashir. The ICC Prosecutor, in any event, has made it clear that he would 'never again acquiesce to suspending international efforts to capture individuals against whom there were pending arrest warrants issued by the court.'[96]

The ICTY for its part issued arrest warrants against Radovan Karadžić and Ratko Mladić *during* the conflict in Bosnia in an apparent attempt to isolate them politically, thus forcing them to the negotiating table where they might be more willing to make concessions, or even render them politically spent forces.[97] There is some evidence that this strategy did work, as the Dayton peace negotiators did not extend an invitation to Karadžić and Mladić. This clearly reduced their influence on the General Framework Agreement for Peace in Bosnia and Herzegovina.[98]

The cases of Karadžić and Mladić illustrate that the mere issuance of an arrest warrant may contribute to peace,[99] perhaps only by drawing the attention of the

actors. See eg OTP, Submission of information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC 02-04/01-05, 6 October 2006, pp 3–4:

> The Ugandan government has acknowledged, as have others, *the positive effect that the warrants have had in motivating the LRA to attend peace talks*, and the Government continues to seek, as stated in its correspondence, 'a permanent end to the violence that serves the need for peace and justice, compatible with [Rome Statute] obligations.' . . . Importantly, there has been no request to the OTP for 'withdrawal' of the warrants. Rather, as is described below, there is also broad support locally and internationally for an ideal which is one of the aims expressed in the Preamble of the Rome Statute: that lasting peace requires that there be no impunity for crimes of concern to the international community as a whole. (emphasis added).

95 It may be observed here, however, that the OTP's targets may not be content with the mere suspension of an arrest warrant; instead, they may favour the wholesale withdrawal of the indictment. Cf Roper and Barria (n 3), 465, also citing A Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *Am JIL* 510, 545.

96 'ICC Chief Prosecutor Talks Tough', IWPR, 28 April 2008, available at <http://www.iwpr.net/?p=acr&s=f&o=344364&apc_state=henh>.

97 Cf T Mabasi, op-ed 'ICC arrest warrants no impediment to peace', *New Vision*, 27 August 2008, available at <http://www.newvision.co.ug/D/8/459/646751>:

> The deterrence effect is at work in Uganda because as the LRA case gained momentum in 2004, the humanitarian situation dramatically improved. Secondly, it is evident that the ICC indictments have generated such pressure that the LRA was left with no other option but to negotiate.

See also Kerr (n 4), 173, arguing that indictments and arrest warrants against Karadžić and Mladić excluded them from the political process and reduced violence in the Balkans.

98 See also Goldstone (n 83). An agreement of 29 August 1995, authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republika Srpska, the parts of the peace plan concerning it (see last preambular para of the Framework Agreement).

99 See in a Yugoslav context, Hartmann (n 55), 168–9.

international community to a conflict. Such attention could translate into a willingness to solve the conflict with an increased sense of urgency.[100] In the Dayton peace agreement, eventually, no word figured on the possible arrest of Karadžić and Mladić. This may have adversely affected any subsequent efforts at having them arrested.

5 Admissibility Issues During Arrest Warrant Proceedings

One of the features that distinguishes the ICC from the other tribunals is that its jurisdiction is *complementary* to the jurisdiction of states. Complementarity implies that the ICC will only declare a case admissible if a state is not able and willing to genuinely investigate and prosecute it.[101] The question may arise whether admissibility could, or even should, be examined at as early a stage as the arrest warrant proceedings.

The case law of the ICC Pre-Trial Chambers is not entirely consistent on the issue, but what is clear is that the Chambers do not feel precluded from examining admissibility to some extent in arrest warrant proceedings under Article 58 of the ICC Statute. In the case against Ntaganda (DRC situation, 2006), Pre-Trial Chamber I limited itself to ascertaining that the crimes fell within the jurisdiction of the Court,[102] but in other cases the Pre-Trial Chamber did address admissibility issues. In the decision on the warrant of arrest for Joseph Kony (Uganda situation), Pre-Trial Chamber II stated that the case 'appears to be admissible'.[103] In so doing, it implied that it had conducted a prima facie admissibility test, which did not, however, pre-judge a later admissibility test by the Court (eg at the confirmation of charges hearing). In the decision on the warrant of arrest for Thomas Lubanga Dyilo (DRC situation), Pre-Trial Chamber I even went a step further by holding that 'an additional determination on whether the case against Mr Thomas Lubanga Dyilo . . . is admissible is a prerequisite to the issuance of a warrant of arrest for him.'[104] Thereby, it seemed to *require* the performance of an elaborate admissibility test before it could actually issue an arrest warrant. It even raised the prospect of the Court later no longer being entitled to second-guess the admissibility determination by the Pre-Trial Chamber. In the cases against Katanga and Ngudjolo Chui (DRC situation, 2007), and against Harun and Kushayb (Sudan situation, 2007), and Bemba (Central African Republic, 2008),[105] similar wording was used, but the

100 Cf Burke-White (n 45), 480, arguing that 'the very political urgency created by an ongoing conflict may well increase the ICC's bargaining power'.

101 ICC Statute, Arts 17–19.

102 PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda, Warrant of Arrest (under seal), ICC-01/04-02/06, 7 August 2006.

103 *Prosecutor v Joseph Kony*, Warrant of Arrest for Joseph Kony, 8 July 2005, as amended on 27 September 2005, ICC-02/04-01/05, 27 September 2005.

104 *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art 58, ICC-01/04-01/06, 10 February 2006, paras 17–18.

105 PTC III, Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo, ICC- 01/05-01/08, 23 May 2008.

Court added that its admissibility determination was 'without prejudice to the filing of any challenge to the admissibility of the case under articles 19(2)(a) and (b) of the Statute and without prejudice to any subsequent decision in this regard.'[106]

Invoking the statutory structure of the ICC's complementarity regime, El-Zeidy has forcefully argued against Pre-Trial Chamber I's ruling that a determination on admissibility is mandatory during the arrest warrant stage,[107] for Article 19(1) of the ICC Statute states that the Court 'may'—as opposed to 'shall'—'determine the admissibility of a case in accordance with Article 17'. Moreover, the language of Article 19(2)(a) of the Statute militates against an interpretation that would prevent post-arrest warrant challenges to the admissibility of the case.[108]

Still, the ICC Statute does not prevent the Pre-Trial Chamber from determining admissibility at the arrest warrant stage, perhaps with a view to making it clear upfront that self-referrals by states—which were not explicitly contemplated by the drafters—are lawful and can be admissible.[109] In practice, since 2007, the Pre-Trial Chamber either simply stated that the case was admissible, without inquiring whether the admissibility requirements were *effectively* met,[110] or it abandoned an admissibility determination altogether.[111] If an admissibility determination is made by the Pre-Trial Chamber at the arrest warrant stage, it will normally be based only on the evidence and information presented by the OTP.[112] The

106 PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Germain Katanga, Warrant of Arrest, ICC- 01/04-01/07, 2 July 2007; Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Mathieu Ngudjolo Chui, Warrant of Arrest, ICC- 01/04-02/07, 6 July 2007; Situation in Darfur, Sudan in the case of the Prosecutor v 'Ahmad Harun' and 'Ali Kushayb', Warrant of Arrest, ICC- 02/05-01/07, 27 April 2007.

107 MM El Zeidy, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court' (2006) 19 *Leiden JIL* 741, 746–8.

108 Article 19(2)(a) of the ICC Statute provides that such challenges may indeed be made 'on the grounds referred to in Article 17 . . . by: (a) An accused or a person for whom a warrant of arrest or summons to appear has been issued under Article 58.'

109 El Zeidy (n 107), 750.

110 PTC I, Situation in Darfur, the Sudan, Summary of the Prosecutor's Application under Article 58, No 02/05, 20 November 2008, para 8 ('With regards to complementarity, there are no national proceedings in relation to the case'); PTC I, *Prosecutor v Callixte Mbarushimana*, Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10, 11 October 2010, p 4 ('no ostensible cause or self-evident factor manifestly requires [the PTC] to exercise its powers under article 19(1) of the Statute to determine the admissibility of the case, without prejudice to any filing of a challenge to admissibility in accordance with article 19(2)(a) and (b) of the Statute').

111 Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-31, 15 December 2010; Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-30, 15 December 2010.

112 See ICC Statute, Art 58:

> At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, *having examined the application and the evidence or other information submitted by the Prosecutor* . . . (emphasis added)

playing field is levelled at the stage of the confirmation hearing, when the defence can also make its observations on admissibility.[113]

6 Tracking Teams

The OTP often establishes a 'tracking team', a unit within the office of investigations which tracks the tribunal's fugitives. As Tolbert has stated, the tracking teams are 'the eyes and ears' of the tribunal.[114] Those eyes and ears serve a double purpose. On the one hand, they may help to locate the suspect, and thus help states to arrest him.[115] On the other hand, the tracking team's eyes and ears also serve as a tool for assessing state cooperation. The tracking team can check whether the state is lying about its own efforts to locate the suspect, and transmit relevant information to the international community, which may then take the necessary measures in order to induce cooperative behaviour on the part of the unwilling state (eg it could suspend partnership or accession talks with the state concerned). Because the tracking team also monitors compliance, it serves a political purpose that is wider than just facilitating arrest.

At the ICTY, a Fugitive Intelligence Support Team, tasked with tracking fugitives, started functioning within the OTP from 1996 onwards.[116] Later, the OTP succeeded in establishing an arrest team, financed by voluntary contributions.[117] According to the OTP, this team was rather successful in locating fugitives and having them arrested. In the 2007 ICTY Report, the Tribunal even stated, not particularly modestly, that 'Where effective cooperation [as regards arrest] at the regional level was established, it was due solely to the efforts of the Office of the Prosecutor.'[118] Former OTP spokeswoman Florence Hartmann similarly praised the efforts of the

113 ICC Statute, Art 61.

114 ICC Second public hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts The Hague, 26 September 2006 (n 64).

115 See eg the arrest of ICC accused Jean-Pierre Bemba by Belgium in May 2008. Bemba was arrested on 25 May 2008 by Belgian authorities at the request of the ICC, on the application of the OTP. The tracking team of the OTP had received credible information that, at the time of the submission of its application for the warrant for Bemba's arrest, Bemba was on the territory of Portugal. According to information received after the submission of the arrest warrant application, however, Bemba appeared to have left Portugal for Belgium, where he resided in a house outside Brussels. As there was a concrete possibility that he could flee and attempt by any means to avoid his apprehension, the OTP filed a request for Bemba's provisional arrest, which was granted by the Court. Cf Situation in the Central African Republic, Prosecutor's Application for Request for Provisional Arrest under Article 92, ICC 01-05.

116 ICTY Report, S/1995/665, 16 August 1996, at 85.

117 ICTY Report 2006, para 108. A proposal for a more institutionalized tracking team was aired by the OTP in 2001, but was abandoned for various reasons, not least for financial ones. See DA Leurdijk, 'The Establishment of an International Arresting Team: Fiction, Reality or Both?' in van Dijk and Hovens (n 1), 59, 69, identifying as the main problems: the formal status of the team, its precise powers, the coordination with SFOR, and the finances.

118 ICTY Report 2007, para 78, adding that 'The considerable resources and time spent by the Office of the Prosecutor in that regard led to two successful arrests in the Republika Srpska and Montenegro . . . '

tracking team, by observing that three persons in the team could collect more reliable information than the combined national secret services.[119]

The effectiveness of the ICTY tracking team was hampered, however, by the refusal of NATO member states (the United Kingdom and the United States in particular) to confirm or deny the validity of the information gathered by the OTP. It was further undermined by rivalry between the Great Powers. In a telling incident related by Hartmann, the intelligence chief of the Croatian-Bosnian entity, a prime interlocutor of the OTP, was reportedly fired by Paddy Ashdown, the international community's High Representative for Bosnia and Herzegovina, on the ground that he worked for the French government (the ICTY's tracking team also being headed by a Frenchman) and refused to cooperate with the British.[120] Cooperation improved however after in late 2005 Carla Del Ponte convinced NATO to set up a team of intelligence officers and analysts who would exclusively work on tracking Karadžić. OTP officers were allowed to participate in certain meetings of this team. But ultimately, the team was not very effective.

A tracking team was also set up at the ICTR. This team was perhaps not able to locate all fugitives, but it was at least instrumental in the eventual arrest of a number of them who had sought refuge in Kenya. The team's reports convinced the Great Powers to exert pressure on an uncooperative Kenya, which then led Kenyan police to locate seven persons, among whom the former Rwanda prime minister, in Nairobi in 1997 (operation NAKI).[121]

The ICC does not have an official tracking team, but the OTP does collect information about the whereabouts of suspects, and makes efforts to secure the cooperation of states and international organizations to arrest and surrender the persons named in ICC arrest warrants.[122] At the same time, the OTP has emphasized that it only takes responsibility for the *legal aspects* of arrest and surrender, while it falls to *states* to ensure that the suspects against whom warrants are issued are arrested and surrendered.[123] That being said, according to its most recent Prosecutorial Strategy, the OTP *galvanizes* efforts for arrest/surrender of individuals subject to ICC warrants/summons,[124] and 'develop[s] channels of

[119] Hartmann (n 55), 221.

[120] Ibid, 211.

[121] Moghalu (n 20), 167.

[122] ICC OTP, Report on the activities performed during the first three years (June 2003–June 2006), 12 September 2006, para 85.

[123] Ibid, para 84.

[124] In that respect, it issued the following guidelines, Prosecutorial Strategy 2009–2012, 1 February 2010, available at <http://www.icc-cpi.int>, para 48:

> a) eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court. When contacts are necessary, attempt first to interact with individuals not subject to an arrest warrant;
> b) in bilateral and multilateral meetings, proactively express support for the enforcement of the Court's decisions, request cooperation with the Court, and demand that crimes, if ongoing, cease immediately;

communication with States . . . in order to enhance all forms of cooperation and judicial assistance',[125] including cooperation with a view to executing arrest warrants. Concrete cooperation arrangements are largely confidential.

The success of a tracking team depends on a number of factors. First, it should be provided continuous funding. It should be part of the institutional structure of the OTP, and separate provision for funding should be made, preferably at the initial stages of the life of the tribunal. Secondly, the team should always remain in close contact with the relevant services of the states or territories where the fugitive is presumably present. Those services include state or sub-state authorities (prosecutors, police departments, secret services),[126] and the commanders of international organizations whose troops serve as peacekeepers or peace-enforcers in (post-)conflict territories. And thirdly, ideally, at the OTP a foreign liaison officer is installed who facilitates cooperation between the OTP and foreign authorities.[127]

7 Involvement of the OTP in the Execution of Arrest Warrants

While the legality and expediency of the OTP setting up a team tracking the fugitives is not disputed, it is another question whether it is appropriate for the OTP to be actively involved, alongside state or international forces, in the arrest of individuals on the ground: can and should OTP representatives participate in arrest operations?

The issue of OTP participation in arrests arose for the first time in the case against Dokmanović, who was also the first person arrested by UN forces in the former Yugoslavia (1997; see on the involvement of international forces in arrest efforts also Section 8). The OTP had contacted Dokmanović on several occasions and ultimately lured him out of the Federal Republic of Yugoslavia, upon which he was immediately arrested by troops of the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES). Before the ICTY, Dokmanović challenged this arrest method, yet the Trial Chamber held that 'no

c) contribute to the marginalization of fugitives and take steps to prevent that aid and funds meant for humanitarian purposes or peace talks are diverted for the benefit of persons subject to an arrest warrant; and
d) make collaborative efforts to plan and execute arrests of individuals subject to an arrest warrant issued by the Court, including by providing operational or financial support to countries willing to conduct such operations but lacking the capacity to do so.

125 Ibid, para 50.

126 The ICTY could, eg, work together with the Serbian National Council for Cooperation with the ICTY, the Serbian war crimes prosecutor (who was also the coordinator of action plan on fugitives), and the police department of the Republika Sprska (ICTY Report 2007, paras 82, 85). Also in Kosovo, there was an institutionalized relationship between the OTP ('the Criminal Division') and the police: police investigators could easily contact the OTP on matters of interest. See Naarden and Locke (n 27), 735.

127 Cf ICTY Report 2001, p 198, citing the installation of a liaison officer of the Republika Sprska in The Hague.

mention is made of States, nor is any limitation placed upon the authority of an international body or the Prosecutor to participate in the arrest process',[128] and that on transmission of the arrest warrant to the OTP under ICTY Rule 59*bis*, 'Clearly the OTP has the authority to [participate in taking an accused into custody]'.[129]

Involving the OTP in arrest operations does not seem to be problematic, as long as the 'accused was made aware of the purpose of his detention and arrest, of the charges against him, and of his rights'.[130] The ICC Statute also leaves ample room for such involvement, where it provides, in very broad terms, that 'The Prosecutor shall . . . take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court . . . '[131] What is more, the use of the term 'shall' in the Statute, as opposed to 'may' or 'should', indicates that the OTP might, depending on the circumstances, even be under an *obligation* to participate in enforcement proceedings, if such is necessary to secure arrest,[132] and to make sure that the rules are respected ('reading the rights').

In practice, the OTP's involvement in arrest operations will often be rather limited. The OTP of the ICC has stated that it 'is not directly involved in operational planning concerning arrests, this being the responsibility of the territorial States'.[133] This is understandable as for reasons of national security the OTP is not privy to all the operational detail.[134]

8 Arrest by International Forces

Arrest warrants issued by the tribunals are ordinarily enforced by national police forces. Exceptionally, they may be enforced by international forces when such forces are deployed in the area where the fugitives are hiding. One may think of the Allied Powers occupying Germany and Japan after the end of the Second World

[128] ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a-PT, 22 October 1997, para 38.

[129] Ibid, para 51. Pursuant to Rule 59*bis*, as amended in 1996,

> on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body *or the Prosecutor* a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for his prompt transfer to the Tribunal in the event that he be taken into custody by that authority or international body *or the Prosecutor*. (emphasis added)

See also Rule 37(b).

[130] Cf ICTY Rule 59*bis*(B) and (C). Also supported by MP Scharf, 'The Prosecutor v Slavko Dokmanović' (1998) 11 *Leiden JIL* 379.

[131] ICC Statute, Art 54(1)(b).

[132] Also H-R Zhou, 'The Enforcement of Arrest Warrants by International Forces' (2006) 4 *J Int'l Criminal Justice* 202, 211.

[133] Submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC-02/04-01/05, 8 December 2006, para 8.

[134] ibid, and Report from the Registry of 6 October 2006, ICC-02/04-01/05-118-Annex 2, p 2.

War, of NATO troops enforcing the peace in the former Yugoslavia, or of UN/African Union troops keeping the peace in Darfur (Sudan). Legal, political, and practical difficulties have, however, limited the role of international troops in enforcing arrest warrants.

8.1 The Authority of International Forces to Arrest

Although few would contest the legality of transmitting arrest warrants to international forces, to ward off legal challenges it is nevertheless prudent for states or court authorities to provide for an enforcement role of international bodies in the tribunal's statute or its rules of procedure.

As regards the ICTY, the statutory provision on cooperation and judicial assistance (Art 29) only provides for obligations of states,[135] but Rule 59*bis* of the ICTY Rules of Procedure and Evidence mentions the transmission of a copy of an arrest warrant to, amongst other bodies, an *international body*, together with an order for his prompt transfer to the tribunal in the event that he be taken into custody by that international body. In the *Simić* case, the ICTY ruled that

> there is no reason why Article 29 [ICTY Statute] should not apply to collective enterprises undertaken by States, in the framework of international organizations and, in particular, the competent organs such as SFOR (i.e., the NATO force deployed in Bosnia Herzegovina).[136]

And in the *Dokmanović* case, the ICTY, citing Rule 59*bis*, confirmed that

> once an arrest warrant has been transmitted to an international authority, an international body, or the Office of the Prosecutor, the accused person named therein may be taken into custody without the involvement of the State in which he or she is located.[137]

The ICC Statute does not address the arrest of suspects by international forces in a direct manner,[138] but requests to international organizations for cooperation in the enforcement of arrest warrants doubtless fall within the scope of Article 87 (6) of the ICC Statute, which provides that 'The Court may . . . ask for [any] forms of cooperation and assistance [other than providing information and documents] which may be agreed upon with such an organization and which are in accordance with its competence or mandate.'[139]

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135 See in particular Art 29.2(d) of the ICTY Statute:

> States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the arrest or detention of persons . . .

136 ICTY, *Simić*, Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, IT-95-9-PT, 18 October 2000, para 46.

137 *Dokmanović* (n 128), para 36.

138 S Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia' (2000) 70 *British YB of Int'l L* 165, 244.

139 See also ICC Statute, Art 54(3)(d).

Even where the statutory basis for arrest operations mounted by international forces is undisputed, the question arises what legal consequences attach to *ultra vires* acts of international forces.[140] In *Dokmanović*, the ICTY held that those forces are presumed to have acted within their mandate, and that it is not for the Tribunal to second-guess their authority under their institutional mandates to effect arrests.[141] This suggests a reluctance on the part of the tribunals to pass judgement on the *ultra vires* character of acts of international forces. Still, to dispel any doubts over international troops' power of arrest, it is appropriate for international organizations to confer an explicit arrest mandate on troops deployed under their auspices. The UN Security Council, for instance, gave an explicit mandate to a UN peacekeeping force to arrest Charles Taylor for purposes of surrender to the SCSL.[142] The adoption of an agreement on practical cooperation on arrest, detention, and surrender issues between the organization and the tribunal might be equally useful.[143]

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[140] Cf the UK Foreign Office and Ministry of Defence's opposition against NATO/SFOR carrying out arrests within the Federal Republic of Yugoslavia, as opposed to Bosnia, where the international troops were deployed, on the grounds that such an arrest would be unlawful and might result in the return of the arrested person to Yugoslavia. Cf Kerr (n 4), 163.

[141] Cf *Dokmanović* (n 128), paras 43–9. See also the commentary on this case by Sluiter (n 75), 151: 'The Tribunal has not been established to undertake in-depth reviews of the legality of activities of "sister organizations" such as the UNTAES'; Lamb (n 138), 181–2, 185–6, noting, however, that, with respect to Dokmanović's arrest, UNTAES' enforcement mandate was less than explicit. See also the rudimentary analysis of SFOR's mandate to effect arrests by the ICTY in *Nikolić*, ICTY Trial Chamber II, *Nikolić*, Decision on defence motion challenging the exercise of jurisdiction by the tribunal, IT-94-2-PT, 9 October 2002, para 53:

> From the practice of SFOR under the [Rules of Engagement], the Chamber deduces that SFOR does have a clear mandate to arrest and detain a person indicted by the Tribunal and to have that person transferred to the Tribunal whenever, in the execution of tasks assigned to it, SFOR comes into contact with such a person. These are the modalities which are defined by the North Atlantic Council and which fall within the mandate given by the Security Council.

[142] See UNSC Res 1638 (2005), operative para 1, deciding

> that the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.

See also UNSC Res 837 (1993), in relation to Somalia, at operative para 5, reaffirming

> that the Secretary-General is authorized under Resolution 814 (1993) to take all necessary measures against those responsible for the armed attacks . . . , including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions, their arrest and detention for prosecution, trial and punishment.

See for a discussion, M Frulli, 'A Turning Point in International Efforts to Apprehend War Criminals: the UN Mandates Taylor's Arrest in Liberia' (2006) 4 *J Int'l Criminal Justice* 451–61.

[143] eg the agreement between ICTY and NATO Supreme Headquarters Allied Europe, May 1996, as cited in ICTY, Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, *Simić*, IT-95-9-PT, Trial Chamber, 18 October 2000, para 46, and ICTY Trial Chamber II, *Nikolić*, Decision on defence motion challenging the exercise of jurisdiction by the tribunal, IT-94-2-PT, 9 October 2002, para 46.

8.2 The Willingness of International Forces to Arrest

The legal authority of international forces to arrest is unfortunately not necessarily matched by a willingness actually to carry out arrest operations. The lack of cooperation of the IFOR/SFOR NATO troops deployed in Bosnia Herzegovina with the ICTY is, for instance, well documented. Like the original UNPROFOR troops, the IFOR (later SFOR) NATO troops deployed in Bosnia after the Dayton Agreement initially undertook almost no effort to have persons indicted by the ICTY arrested. In fact, the official NATO policy was that NATO would arrest war criminals only if they stumbled upon them.[144] This restrictive policy was informed by the Somalia body-bag syndrome, which still haunts US memories and complicates the deployment of troops for purely humanitarian missions, and by the still widely held conviction that arresting war criminals is a task for civilian police and not for military troops (ie, the fear of mission creep).[145]

The Prosecutor, when confronted with international forces being reluctant to cooperate with the enforcement of arrest warrants, will often have to turn to the political leaders of the unwilling international organization and call on them to provide the forces with a more robust arrest mandate. This is exactly what the ICTY OTP did. The OTP was no longer willing to tolerate 'accounts of high-profile war criminals indicted by the ICTY living freely in their neighborhood and NATO patrols deliberately modifying their route so as to avoid them'[146]—which had resulted in there being only one detainee at the ICTY, the low-level perpetrator Dusko Tadić. Instead, it threatened to go public with information on the glaring lack of NATO cooperation, after which it was able to secure a Protocol

144 See the policy adopted by the North Atlantic Council and disseminated to the troops on the ground, 16 December 1995:

> having regard to the United Nations Security Council Resolution 827, the United Nations Security Council Resolution 1031, and Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina, *IFOR should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks*, in order to assure the transfer of these persons to the International Criminal Tribunal. (emphasis added)

See also the statement of NATO Secretary-General Solana at a press conference in Sarajevo on 3 January 1997:

> Our primary mission is not to chase war criminal[s]. We have said that on so many occasions [that] it's not worth repeating. We will of course cooperate with the Tribunal, as we have done. And in the course of our mission [if] we [encounter] a war criminal, you can be sure [that] they will be where they should be.

(Reprinted in ICTY Report 1998, para 190 fn 10.) It is noted that the source of this reluctance to arrest war criminals was the Pentagon. See Kerr (n 4), citing Goldstone, 155. At the time, however, NATO Supreme Headquarters Allied Powers Europe and the ICTY had already signed a Memorandum of Understanding setting out 'practical arrangements for the detention and transfer of persons indicted for war crimes to the ICTY' (text not released; 15 May 1996).

145 See Leurdijk (n 117), 63.

146 Zhou (n 132), 216 (with references in fn 52).

with NATO relating to cooperation in arresting war criminals. NATO SFOR subsequently received training to deal with post-arrest security threats,[147] and arrested a considerable number of persons indicted by the ICTY.[148] From 2001 onwards, however, the efforts slackened.[149]

In the Great Lakes region, one of the focal areas of the ICC's investigative activities, OTP requests for direct support of international troops in enforcing arrest warrants have been met with an equally lukewarm response. Article 16 of the Memorandum of Understanding between the ICC and MONUC (the UN mission in the DRC)[150] is rather clear on the support which the OTP can expect: the memorandum 'does not envisage the OTP directly requesting the aid of MONUC in supporting arrest efforts, but instead, views the territorial State to be the party with the obligation to request support in aid of execution of warrants of arrest.'[151] This is understandable in light of Article 89(1) of the ICC Statute, which only provides for the transmission of a request for the arrest and surrender of persons to *states*. The parties to the memorandum may possibly have wanted to prevent the awkward situation of MONUC (provisionally) arresting an individual at the request of the Court (the legal basis of which is Art 87(6) and Art 92 of the ICC Statute), and the individual not being able to be transferred to the ICC because the state is not willing to cooperate. The initiative is therefore safely left to states, with which the OTP can obviously remain in close contact.

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147 Kerr (n 4), 161 (referring to training received by the British contingent).

148 See ICTY Report 1998, para 5:

> Relationships that have been forged with international and multinational bodies to ensure co-operation and compliance with orders and arrest warrants issued by the Tribunal are beginning to bear fruit through productive and effective activity.

ICTY Report 1997, para 3:

> These arrests [by UNTAES and SFOR] represented a historic turning point: for perhaps the first time in history, international forces have arrested persons other than their erstwhile military opponents for the purpose of bringing them to justice before an international court.

149 ICTY Report 2001, para 195: 'Unfortunately, the rate of arrests by SFOR has dropped alarmingly compared with the same time period one year ago'); ICTY Report 2005, para 195:

> EUFOR [the successor to SFOR], together with the relevant local police authorities, conducted a number of search operations and attempts to apprehend the fugitives. It is regrettable, however, that the last successful operation to arrest a fugitive was conducted in July 2002.

See for a list of possible reasons, Kerr (n 4), 167.

150 Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Co-operation between the United Nations Organization Mission in the Democratic Republic of Congo, 8 November 2005, available at <http://www2.icc-cpi.int/iccdocs/doc/doc469628.pdf>.

151 Submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC-02/04-01/05, 8 December 2006, para 14. The MOU indeed provides that MONUC may agree to a request from the DRC government to carry out the arrest of persons sought by the Court in the areas where it is deployed and where this would be consistent with its mandate.

This system may work well if the state is willing to cooperate. One could, however, easily imagine a Yugoslavia- or Sudan-like situation of international troops being deployed in a certain area, and the local authorities opposing the international presence as well as any arrest operation those troops may carry out. For such a situation, a direct transfer from international custody to ICC custody, *without* the state acting as an intermediary, appears desirable. It is not fully clear whether the ICC Statute provides a legal basis for such a direct transfer, however. A possible way out could be for the international forces to have the arrested person first transferred to a (third) state that *is* willing to cooperate. After all, persons could be surrendered to the ICC by any state on the territory of which that person may be found,[152] arguably irrespective of how their presence on that territory was brought about. Alternatively, and more appropriately, a UN Security Council resolution authorizing the transfer by international forces may be sought.[153]

Even if legal obstacles could be overcome, it remains doubtful whether international troops are truly willing to enforce arrest warrants. Illustrative of this reluctance is UN Secretary-General Kofi Annan, responding to a request from the Security Council (Resolution 1663) to make proposals on the topic of how UN agencies and missions could more effectively address the problem of arresting LRA leaders, underscored 'the difficulties that the UN missions in the Congo and Sudan would face in mounting operations to support arrest', and endorsed the notion that the most promising means of addressing the LRA threat by force would be for the 'governments in the region [to] find a mutually agreeable way to strengthen cooperation on the ground among their security forces'.[154] Within the UN administration, there appears to be serious political resistance against endowing UN forces with a mandate of arresting war crimes suspects and surrendering them to the tribunals. It is noted that the ICC OTP has implicitly criticized this resistance when it urged that UN troops deployed in the eastern regions of the

152 ICC Statute, Art 98(1).

153 Cf UNSC Res 1638 (2005), operative para 1:

> *Decides* that the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone and to keep the Liberian Government, the Sierra Leonean Government and the Council fully informed.

154 Submission of information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC 02-04/01-05, 6 October 2006, para 19. This statement was informed by the death of eight Guatemalan soldiers in an arrest operation against Joseph Kony in the DRC. See also HRW, 'The Christmas Massacres. LRA Attacks on Civilians in Northern Congo', February 2009, 17–18. The unwillingness of the UN to authorize UN missions to arrest fugitives is also reflected in UNSC Res 1565 (2004), relating to the MONUC mission in the DRC. Admittedly, this resolution authorizes MONUC to 'co-operate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations', but it does not authorize the use of force to that effect (para 5(g)). As stated above, however, the MOU between the ICC and MONUC authorizes the latter to arrest fugitives if the *DRC*, as opposed to the Court itself, requests it to do so. See also Rastan (n 11), 445.

DRC be provided with special forces with a mandate to arrest fugitives.[155] But as international arrest (law enforcement) operations against warlords, even by the best special forces in the world, have turned out very deadly, it is unlikely that the UN will change its position soon.[156]

8.3 International Forces' Duty to Arrest

The lack of cooperation of international organizations invites the question of whether international forces not only have the *authority* to arrest (they have, as argued earlier), but also the *duty* to cooperate with the tribunals. Sluiter believes that, as far as tribunals established under a Chapter VII resolution of the UN Security Council are concerned (the ICTY and the ICTR in particular), such a duty is indeed incumbent on international organizations, as the member states of international organizations are ordinarily also members of the United Nations, and thus have to comply with Security Council resolutions.[157] Such a duty may also be incumbent on the UN itself, as binding Security Council resolutions arguably also create duties for the organization, the UN being a sum of its member states.

This argument has persuasive force indeed for Chapter VII tribunals—and one could add the ICC here, provided that a situation has been referred to it under a Security Council resolution. Still, international organizations are separate legal persons, and it is theoretically problematic to encumber them with international obligations on the same territory that their member states incur such obligations. The validity of the argument has not been conclusively decided by the tribunals.[158]

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155 'ICC Chief Prosecutor Talks Tough', IWPR, 28 April 2008, available at <http://www.iwpr.net/?p=acr&s=f&o=344364&apc_state=henh>. In the international media, it was reported that a joint UN and DRC force had undertaken military operations against the LRA in the DRC, but the Vice President of the government of Southern Sudan, who is also the Chief Mediator of the Uganda peace talks, denied the allegations. 'Sudan's Machar dismisses allegations of war against Ugandan rebels', *Sudan Tribune*, 12 September 2008.

156 eg the hunt for Somali warlord Mohamed Farrah Aidid in Mogadishu by US troops under UNOSOM II command in 1993, which cost over a thousand lives. See for an overview of the UNOSOM II operation and the fatal events, which eventually led to the withdrawal of US troops from Somalia, <http://www.un.org/en/peacekeeping/missions/past/unosom2.htm>, and LH Brune, *The United States and Post-Cold War Interventions* (Claremont, CA: Regina Books, 1998), 31–4.

157 Commentary to the *Dokmanović* case by Sluiter (n 75), 152.

158 ICTY, *Prosecutor v Brdjanin and Talić*, Decision on Motion by Momir Talić for Provisional Release, IT-99-36-PT, TC II, 28 March 2001, para 29: 'It appears that SFOR is given authority to arrest persons indicted by the Tribunal, but that it is *presently* placed under no obligation to do so' (original emphasis). See, however, *Nikolić* (n 141), 2002, para 62: 'Once a person comes "in contact with" SFOR, like in the present case, SFOR is obliged under Article 29 of the Statute and Rule 59 *bis* to arrest/detain the person and have him transferred to the Tribunal'). With respect to the latter decision, it should be realized that NATO had explicitly designed a 'coming into contact' policy. This raised some legitimate expectations that NATO would in good faith keep its own promises. The legal basis of NATO cooperation may therefore possibly lie in its unilateral cooperation declaration rather than in the ICTY's cooperation provisions. In the absence of such a policy, it may be harder to establish such a duty incumbent on an international organization.

For tribunals that have not been established by Security Council resolution, but by agreement between states, the argument may not apply.[159] But it may apply to the ICC to the extent that the states that make up the international organization are all parties to the Rome Statute. As the United States has not yet ratified the Rome Statute, it is evidently difficult to argue that NATO is required to enforce ICC arrests in areas where its troops are deployed. However, is not far-fetched to argue that the EU is under an obligation of arrest when it leads peace-support operations, since all EU member states are parties to the Rome Statute.

Whatever the merits of a legal argument, however, as noted already, it is unlikely to convince an international organization to grant its forces a mandate as sensitive as one to enforce arrest warrants. Therefore, ideas of endowing international criminal tribunals, the ICC in particular, with their own standing international forces, whether of a military or police nature,[160] presumably drawn from a pool which an international organization puts at the tribunal's disposal, will probably continue to fall on deaf ears.

9 Competing Requests for Surrender

It is not only an international tribunal that might seek the arrest of a suspect. Other actors, notably states, may also seek their arrest, with a view to bringing them before their own courts. The state holding custody of the individual may then have to deal with competing requests for surrender. In such a situation, the international tribunal's request will not always prevail: the tribunal, and the OTP in particular, may have to apply pressure on the custodial state in order to convince it to transfer the individual to the tribunal rather than to another interested state.

Theoretically, tribunals that are established under a Security Council resolution adopted under Chapter VII, such as the ICTY and the ICTR, have primacy over national courts.[161] This implies that the international tribunal may formally request states to defer to the competence of the tribunal.[162] Requested states are under an obligation to comply with the request of the tribunal.[163] Accordingly, when a state has received a request for surrender from the international tribunal, as well as an extradition request from another state, it should honour the former request.

159 Cf Rastan (n 11), 444, arguing that 'Outside the forms of co-operation voluntarily agreed upon, international organizations are under no legal obligation to co-operate with the [ICC]'.

160 See references in Zhou (n 132), 217 fn 31; also MMLA Hendrickx, 'An Operational Blueprint for Arresting War Criminals; a Low Risk and a High Risk Scenario' in van Dijk and Hovens (n 1), 25–35.

161 ICTY Statute, Art 9.2; ICTR Statute, Art 8.2.

162 Ibid.

163 ICTY Statute, Art 29; ICTR Statute, Art 28; UN Charter, Art 25.

In practice, however, the primacy of the ICTR has sometimes been a paper tiger only. The intriguing *Karamira* case may serve as an instructive example here. Karamira was amongst those believed to be most responsible for the 1994 Rwanda genocide. After the atrocities, he had fled to India, where he was tracked down by Rwandan agents in 1996. During his transit to Rwanda at the Ethiopian airport of Addis Ababa, he fled. The Ethiopian police managed immediately to re-arrest him, but the publicity that had been given to the case lifted the veil of secrecy in which the transfer of Karamira was cloaked:[164] upon learning of Karamira's presence in Ethiopia, the ICTR OTP swiftly acted to request his surrender to the ICTR. This caused particular headaches for the Ethiopian government, which was a political ally of the new Rwandan regime, and had apparently offered Rwanda transit through Ethiopia to move Karamira to Rwanda. Like in the case of Barayagwiza (see Section 10), Rwanda thereupon started to apply pressure on the ICTR OTP, threatening no longer to cooperate with the ICTR (eg the ICTR would no longer have access to witnesses in Rwanda). The pressure was so fierce that the OTP eventually decided to give in: Ethiopia transferred Karamira to Kigali rather than Arusha. He was executed in Rwanda in 1998.[165]

The *Karamira* case teaches us that blackmail by states competing with the tribunal for the surrender of an individual may well work: in case threats by the competing state may put the very functioning of the tribunal at risk, there may be no other option for the tribunal than to waive its right of primacy over national courts.[166] The OTP will have to balance the different interests involved, also with an eye on the future and legacy of the court. At times, it may withstand state pressure—as is illustrated by the transfer of Colonel Bagosora from Cameroon to the ICTR in the face of intense Rwandan pressure—but at other times, as is illustrated by *Karamira*, caving in to pressure will be the only viable option for the OTP.

It is noted, of course, that Rwanda presents a rather unique situation. The genocidal government had been deposed by the RPF, which had formed a new regime intent on bringing the former regime to justice. In most situations, the state on whose territory the atrocities occurred will *not* be interested in prosecuting the culprits, rather on the contrary (eg Serbia). It is not excluded, however, that such a state will, in spite of not being interested in genuine prosecution, request extradition, for the sole purpose of shielding the person from *international* prosecution. Obviously, in this situation, the requested state may be exposed to international criticism when extraditing the person to the requesting state rather than to the

164 Other secret Rwanda transfers were successful, however, such as the kidnapping of the former Rwandan minister of Justice in Zambia. Cf T Cruvellier, *Le tribunal des vaincus* (Paris: Calmann-Lévy, 2006), 28.

165 Ibid, 25–33.

166 Cf the statement of Prosecutor Richard Goldstone in this sense, quoted in Cruvellier (n 164), 31.

international tribunal. The lack of international protest against Karamira's transfer to Rwanda instead of to the ICTR was, in the final analysis, informed by the knowledge that Rwanda would truly mete out justice (the harsh manner in which justice was eventually meted out was taken for granted).

The OTP's diplomatic skills may be tested even more in the case of tribunals of which the statutes do not require universal state cooperation, such as the hybrid tribunals (SCSL, ECCC). These tribunals have been established on the basis of a bilateral agreement between the United Nations and the territorial state. Such an agreement is *res inter alios acta* for third states, and does not create obligations for them without their consent.[167] Third states, on whose territory indicted persons may be found, are accordingly under no obligation to surrender them to the tribunal seeking their arrest. They could freely choose to extradite them to other interested states (eg bystander states wanting to exercise universal jurisdiction).

To be true, at the ECCC the issue of extradition from other states was not relevant, as all sought persons lived openly in Cambodia, where the national police could arrest them in 2007–08. The SCSL, however, faced more difficulties, as its prime suspect, the former Liberian President Charles Taylor, had found refuge in Nigeria. It required some diplomatic manoeuvres in the end to have Taylor first extradited to his home state of Liberia (on the basis of a competing request for surrender, one could say), which subsequently consented to having him transferred to the SCSL in 2006.[168]

The ICC Statute devotes a specific, rather complicated article (Art 90) to competing requests. Unlike the ICTY and the ICTR Statutes, the ICC Statute does not generally require that a state honour the ICC request for surrender rather than a third state's extradition request. Priority should be given to the ICC's request, however, if the Court has determined that the case is admissible, irrespective of whether the requested state is a state party.[169] No cases of competing requests under Article 90 of the ICC Statute have been reported, but it is fair to say that, when competing requests are issued, problems similar to those encountered at the ad hoc and hybrid tribunals will arise, irrespective of whether the requested state is statutorily required to surrender to the Court. An adequate solution will require effective diplomacy on the part of the OTP, with the backing of the international community.

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167 Cf Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Arts 34–5 (1986). The Convention is not yet in force, but the pertinent provisions may be considered to reflect customary international law.

168 See for commentaries and explanation of how Taylor was caught: A Ross and C Lekha Sriram, 'Trying Charles Taylor: Justice Here, There, Anywhere?', JURIST Forum, 4 April 2006; D Crane, 'Handing Over Charles Taylor: It's Time', JURIST Forum, 22 March 2006.

169 ICC Statute, Arts 90(2) and 90(4). For a state not party, this only applies to the extent that it is not under an obligation to extradite the person to the requesting state, eg on the basis of a bilateral extradition treaty. If, in the latter situation, the requesting state is a state not party, the policy discretion for the requested state to extradite the person is further restricted by ICC Statute, Art 90(6).

10 Irregularities During Arrest and Detention; Due Diligence of the Prosecutor

Irregularities may occur when states or international forces arrest and detain fugitives. One may notably think of such wrongful acts as 'kidnapping', mistreatment during detention, or unreasonable delay in having the arrested person transferred to the court. Can the OTP be held liable for such irregularities, and do they have an effect on the course of justice before the tribunal?

It is noted at the outset that each national system can normally set its own requirements for lawful arrest. International law and international criminal tribunals need not be concerned prima facie about an individual's unlawful arrest and detention that can be attributed to a state. However, the law and practice of the tribunals demonstrate that the tribunals do care about irregularities relating to arrest and detention,[170] although it is unclear what the precise repercussions of unlawful arrest and detention on the criminal proceedings against the individual are or should be. Some authors have suggested that 'the dismissal of the indictment, resulting in the release of the accused, should not be ruled out as an appropriate and effective remedy',[171] but seem to have limited this ultimate remedy to 'gross violations in which the Prosecutor has been implicated'.[172] Other voices have pointed at the severity of the charges, and argued that, while the gravity of the alleged crime should not deprive the accused of his procedural rights, less far-reaching remedies might appear desirable.[173] Most practitioners and commentators would agree, however, that international criminal tribunals ought to play an exemplary role in maintaining the rule of law, and therefore should not countenance violations of the rights of the defence in the name of the greater good of prosecuting the most evil criminals.[174]

Given the deleterious impact of countenancing rights violations on the legitimacy of their decisions, the tribunals have proved willing to apply an 'abuse of process' doctrine (which originates in common law criminal systems) in carefully defined circumstances: proceedings could be stayed, or another remedy be granted,

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170 The ICC Statute, eg, unlike the statutes of the ad hoc tribunals, now provides for compensation for victims of unlawful arrest. Cf Art 85. A right to compensation in case of unlawful arrested was already cited in ICTR case law. See *Barayagwiza*, ICTR-97-19-AR72, 31 March 2000; *Semanza*, ICTR-97-20-I, 31 May 2000.

171 Sluiter (n 75), 153.

172 Ibid.

173 eg A Smeulers in Klip and Sluiter (n 75), vol XI, 109:

> The severity of the charges must not have any influence on the rights to which the accused are entitled . . . The severity of the charges might, however, influence a careful balancing of what remedies can be used in order to repair violations.

See also Lamb (n 138), 241–2.

174 Cf Sluiter (n 75), 153.

if 'in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice', provided that the rights of the accused 'have been egregiously violated'.[175]

The accused cannot challenge the lawfulness of his arrest or detention at any time during the proceedings. The ICC Trial Chamber II and the Appeals Chamber have held that 'a challenge to the lawfulness of the arrest and detention of the accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings',[176] as 'it is in the interests of all, and primarily of the suspects who have been deprived of their liberty, that the issue of the possible unlawfulness of their detention be raised and addressed as early as possible during the pre-trial phase.'[177] In principle, such a challenge should be brought before the Pre-Trial Chamber.[178]

There are various forms of irregular arrest and detention that may give rise to concern on the part of the defence, and that the OTP may want to avoid, if possible, if it wants to prevent legal challenges. A first mode that came before a tribunal is enticing or luring an individual into a jurisdiction where they can be arrested. In *Dokmanović*, the ICTY held such practices to be consistent with international law,[179] although the literature has been more critical.[180] Another controversial practice is kidnapping. In itself, under the principle of *mala captus*

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175 *Nikolić* (n 141), para 111, citing ICTR Appeals Chamber, *Barayagwiza*, ICTR-97-49-AR72, 23 November 1999, paras 73, 77. The tribunals have nevertheless implied that the application of the doctrine at the international level is not necessarily identical to the application at the national level. *Nikolić* (n 141), para 95, stressing, after discussing the principle of *male captus bene detentus* in national case law, that

> such core elements were developed in the context of horizontal relationships between sovereign and equal States. It is a different question whether, and if so, to what extent such elements apply in the particular—vertical—context in which the Tribunal operates in relation to States.

Also at para 100, 'in this vertical context, sovereignty by definition cannot play the same role'. In this context, the question may be posed in passing of whether international authorization to effectuate arrests may have a bearing on the application of the abuse of process doctrine. Possibly, a higher threshold may apply in case the arrest is effectuated under Security Council Chapter VII authority. ICTY Trial Chamber, *Dokmanović*, Decision on the Motion for Release, IT-95-13a-PT, 22 October 1997, para 77, stating 'there may be a question of whether the FRY's sovereignty would be violated if the accused was fraudulently lured and subsequently arrested by another State', and contrasting this with the UNTAES mission (carrying out the arrest in the case), established under Chapter VII authority, which testifies to the vertical relationship between the UNTAES forces and the FRY.

176 Trial Chamber II, Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings of 20 November 2009, ICC-01/04-01/07-1666-Conf-Exp-tENG, para 39; Appeals Chamber, 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', ICC C-01/04-01/07-2259, 19 July 2010.

177 Trial Chamber II, *Katanga* (n 176), para 40.

178 Appeals Chamber, *Katanga* (n 176), para 44.

179 *Dokmanović*, para 57.

180 MP Scharf, 'The Prosecutor v Slavko Dokmanović' (1998) 11 *Leiden JIL* 376; Sluiter (n 75), 153.

bene detentus, kidnapping may admittedly violate international law,[181] but need not vitiate the jurisdiction of the tribunal;[182] the tribunals, applying the abuse of process doctrine, have considered that jurisdiction is only problematic if serious violence has been used against the individual,[183] regardless of whether the OTP, or another organ of the tribunal, was involved in the mistreatment.[184] The abuse of process doctrine's rather strict requirement of serious violence being perpetrated against the suspect seems to be informed by the desire not to let the most heinous criminals off the hook,[185] which is surely an approach that deserves some support.

If the OTP *is* involved in the planning or execution of the violations, obviously, the tribunal's jurisdiction will more readily be vitiated.[186] This raises the question of what standard of due diligence should apply to the OTP. Does the OTP incur a positive obligation to make sure that states or international forces do not violate the rights of individuals? Evidently, if those actors have a poor record of arrest and

[181] See, however, on the international community's, and even private persons' 'authority to protect', and thus to arrest suspects, Lamb (n 138), 227, observing that 'the first priority with regard to persons suspected of having committed [international crimes] is to apprehend them, the question of who actually effects their arrest appears secondary.'

[182] Todorović was the first defendant who raised that he had been kidnapped, in that case by SFOR troops on the territory of the FRY. See *Prosecutor v Todorović*, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, Trial Chamber, ICTY, 25 March 1999. His motion was withdrawn, however, after he entered a guilty plea with the Prosecutor on 13 December 2000 (ICTY Eighth Annual Report, UN Doc A/56/352, 17 September 2001, paras 141–4). Also Lamb (n 138), 206–8.

[183] ICTY Trial Chamber II, *Nikolić*, Decision on defence motion challenging the exercise of jurisdiction by the tribunal, IT-94-2-PT, 9 October 2002; ICC Appeals Chamber, *Prosecutor v Lubanga*, 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, ICC-01/04-01/06-772, 14 December 2006; ECCC Investigating Judges' Order of Provisional Detention of Kaing Guek Eav (alias Duch), 31 July 2007, available at <http://www.eccc.gov.kh/english/cabinet/indictment/1/Order_of_Provisional_Detention-DUCH-EN.pdf>, and Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias 'Duch', Criminal Case File No 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007.

If the tribunal indeed reserves for itself the right to review arrest proceedings, evidentiary problems may easily arise, as states or other entities are unlikely to disclose all operational details of the arrest. Cf Transcript of ICTY Trial Chamber hearing of 4 March 1999, *Prosecutor v Todorović*, pp 356–8, cited in Lamb (n 138), 213.

[184] *Nikolić* (n 183), para 114:

> the Chamber holds that, in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated.

This is an approach which was supported by the ICTY OTP.

[185] Also Lamb (n 138), 237–8.

[186] Lamb (n 138), 237, *a contrario*.

detention, the OTP will have to be more cautious lest it be held directly responsible for the violations.[187]

In fact, there is only one case that elaborates on prosecutorial due diligence before the tribunals: *Barayagwiza* (ICTR). This case has been so controversial that it is hardly seen as a useful precedent,[188] but nevertheless it merits some discussion.[189]

Barayagwiza was transferred from Cameroon to the ICTR on 19 November 1997, 19 months after his initial detention on 17 April 1996 by Cameroon at the request of the ICTR. Upon arrival at the detention unit of the ICTR, a 96-day interval elapsed before he made his initial appearance on 23 February 1998. The delays appeared at least partly attributable to the ICTR. Believing that his rights were violated, Barayagwiza filed a habeas corpus-like motion with the Court. This motion was first dismissed by the Trial Chamber (1998).[190] But on appeal (1999), the Appeals Chamber ruled that the case was so egregious as to warrant a remedy under the abuse of process doctrine because of 'the combination of delays that seemed to occur at virtually every stage of the Appellant's case'.[191] Thus, in the Tribunal's view, it was the cumulative character of the violations of the OTP in relation to Barayagwiza's arrest and detention that led to a finding of abuse of process. The Tribunal observed starkly that 'the Appellant was simply forgotten about'.[192] Citing the duty of prosecutorial diligence, it concluded that 'the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion',[193] and that, in addition, she should have taken prudent steps so as to ensure that 'the accused is brought before a Trial Chamber "without delay" upon his transfer to the Tribunal'.[194] The Appeals Chamber then ordered the most extreme possible measure to remedy the prosecutorial inaction and the resultant denial of Barayagwiza's rights: the release of the appellant and the dismissal of the charges against him.[195]

The release of Barayagwiza immediately caused serious political problems for the ICTR, since Rwanda—which wanted to see Barayagwiza convicted for the role he played in the 1994 genocide—announced the suspension of all cooperation

187 Compare S Zappalà, *Human Rights in International Criminal Law* (Oxford: Oxford University Press, 2003), 72, 'the problem would be far more serious if one could prove a consistent pattern of violations of the rights of individuals by State or international authorities performing arrests at the request of ad hoc Tribunals'.

188 Cf WA Schabas in Klip and Sluiter (n 75), vol VI, 262, 'It is perhaps significant that the final Barayagwiza decision of the Appeals Chamber of 3 November 1999, seems to have been entirely forgotten in subsequent case law, as if it were a bad dream.'

189 The *Barayagwiza* case is also discussed, from a broader perspective, by Frédéric Mégret in Chapter 7 of this volume.

190 Trial Chamber, *Barayagwiza*, ICTR-97-19-AR72, Decision of 17 November 1998.

191 Appeals Chamber, *Barayagwiza* I, ICTR-97-19-AR72, 3 November 1999, para 109.

192 Ibid, para 96.

193 Ibid, para 98.

194 Ibid, para 99.

195 Ibid.

with the Tribunal until the Chamber reversed its decision.[196] From then onwards, politics took over.[197] Pressure mounted on the Tribunal to reconsider its ruling,[198] and indeed, on 31 March 2000, the Appeals Chamber rendered a new decision which, unsurprisingly, reversed the 1999 decision. Observing 'that the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the [1999] Decision is founded', the Chamber ordered that the initial remedy—the dismissal of the indictment and the release of the appellant, must be altered:[199] if he were found not guilty, he would receive financial compensation, and if he were found guilty, his sentence would be reduced.[200]

As expected, the Appeals Chamber's second decision was severely criticized, as the 'new' facts identified by the Chamber were actually known to the OTP (the moving party),[201] and the decision was thus considered to be politically inspired.[202] Nonetheless, criticism was also levelled at the Appeals Chamber's *first* decision,[203] so that, in the final analysis, the second decision may well represent good law.

The OTP can draw two lessons from the *Barayagwiza* episode. The first is that committing certain mistakes need not be fatal to the proceedings, as the obligation of prosecutorial due diligence is seriously hedged by the at times overriding goal of bringing a halt to impunity for international crimes. The second is that

196 V Peskin, *International Justice in Rwanda and the Balkans: Virtual Ttrials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), 179.

197 See also at length Moghalu (n 20), 111–23.

198 Peskin points out in this respect that '[ICTR Prosecutor] Del Ponte remained in Arusha for two weeks until the Appeals Chamber announced its decision to hold a hearing to reconsider its initial ruling': Peskin (n 196), 181.

199 Appeals Chamber, *Barayagwiza* II, ICTR-97-19-AR72, 31 March 2000, para 74.

200 Ibid, para 75. See also the ICTR's judgment in *Prosecutor v Nahimana, Barayagwiza, Ngeze*, ICTR-99-52-T, 3 December 2003, para 1107 (reducing Barayagwiza's sentence to 35 years of imprisonment).

201 eg Schabas (n 188), 261–2.

202 Cf Peskin (n 196), 184, noting that 'among many ICTR staff members, doubts emerged about the autonomy of the tribunal from Rwandan pressure'.

203 A tribunal judge cited by Peskin (n 196), 180, confided that 'If you have these kinds of allegations, I don't see how you can let [Barayagwiza] walk away on a technicality . . . You can't just let him walk away, that's not justice.' A tribunal judge, cited by Peskin, ibid, 184, also stated that it is inadvisable to render 'a legal decision that is wrong in the reality of the world'. Smeulers, an academic commentator, has deemed it 'unacceptable that such a man gets off the hook because of perceived small procedural mistakes . . . ': Smeulers (n 173), 111. Schabas, for his part, has observed that the judges

> found themselves adopting a position that was simply too extreme, too shrill, entirely disproportionate . . . the remedy proposed, namely a permanent stay of proceedings, was quite excessive . . . The 3 November 1999 decision was quite simply bad law, and the Appeals Chamber had to do something to fix it.

(Schabas (n 188), 261–2.) And Swart has commented that 'the violations of the Appellant's rights, although serious, were considerably less egregious and numerous than the Appeals Chamber believed': B Swart in Klip and Sluiter (n 75), vol II, 206.

undesirable decisions of the Court could be reversed if the OTP can enter into an (unholy) alliance with states or the international community that are able to bring sufficient pressure to bear on the Court to reverse its initial decision. The second lesson obviously highlights the highly political character of international justice: while the Court may pay lip-service to its independent functioning,[204] it may in reality succumb to sustained political pressure, for instance in relation to the consequences attached to irregularities in the arrest and detention process.

The *Barayagwiza*-like situation of irregular detention in conjunction with a lack of prosecutorial due diligence is not encountered in the case law of other tribunals. That being said, defendants have advanced detention irregularities with a view to obtaining a remedy before several international tribunals (ICTY, ICC, ECCC). Some tribunals' statutes, such as the UN Transitional Administration in Timor-Leste's Regulation No 2000/30 on transitional rules of criminal procedure in Timor-Leste (which in practical terms served, at least partly, as the statute of the Timor-Leste Special Panels for Serious Crimes),[205] even explicitly provide for the possibility of raising objections before the judge in cases of rights violations or unlawfulness of detention.[206] Prosecutors have not strongly opposed defendants seeking remedies before international tribunals in cases of irregularities, especially not if the irregularities were prima facie not attributable to the OTP itself, but rather to executing states.[207] The strict interpretation of abuse of process, outlined above, has, however, often resulted in motions of the defence being dismissed, in particular if the remedy sought was a stay of the proceedings. As egregious violations of the individual's rights, understood as serious (physical) mistreatment

[204] *Barayagwiza* II (n 199), para 34:

> 'The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999.' Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as 'amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.

[205] The UNTAET Regulation is available at <http://www.un.org/peace/etimor/untaetR/reg200030.pdf>.

[206] Regulation No 2000/30, s 20.4:

> The suspect may raise objections before the Investigating Judge concerning any allegation of ill treatment or violations of his or her human rights by police officers or other authorities, or the unlawfulness of his or her detention.

[207] Cf eg the statement of the UNIIIC's Head Daniel Bellemare in the Security Council, Meeting Records, United Nations Security Council Meeting 6047, 17 December 2008, S/PV.6047, p 3, discussing the possible consequences of the seemingly prolonged detention of a number of suspects by Lebanese authorities, and stating that 'If transferred to the Hague [to the STL], the detainees will then be in a position to seek new remedies before the Tribunal'. See for criticism of the prolonged detention of those suspects, G De Geouffre de la Pradelle, A Korkmaz, and R Maison, 'Douteuse instrumentalisation de la justice internationale au Liban', *Le Monde Diplomatique*, April 2007, 18–19 (the authors are the lawyers of one of the suspects).

could indeed not be readily identified,[208] as far-reaching a remedy as a stay of proceedings, or a dismissal of jurisdiction could not be granted. Less drastic remedies, such as a reduction of sentence, could be contemplated, however.[209]

11 Detention and Interim Release

Once an individual is in the tribunal's custody, issues relating to his liberty and detention remain relevant. The length of detention in particular has been cited as an issue of grave concern.

Prolonged detention may typically arise in the case of suspects being arrested prior to the establishment of an international tribunal, and thus before the actual indictment by the tribunal. The arrest may then have been carried out under the authority of a state or a transitional administration with a view to bringing the suspect before a tribunal of which the establishment is anticipated. In the meantime, of course, the suspects may suffer violations of their due process rights, in particular the right to a trial within a reasonable time. In addition, they may at times find themselves in legal limbo, deprived of a meaningful remedy to challenge their situation (ie, absence of habeas corpus protection).

This issue has taken on particular relevance before the tribunals for Timor-Leste, Cambodia, and Lebanon. In Timor-Leste, the Prosecution Service felt compelled in early 2001 to invest serious resources in order to process in a timely manner the prosecution of a rather large number of lower level perpetrators, who had been detained since 2000 by international forces *before* the establishment of the Serious Crimes Investigation Unit.[210] The STL, for its part, confronted with the prolonged detention of the suspects in Lebanon before the Tribunal was established, stated in one of its first decisions that it was a fundamental right, enshrined in all human rights instruments, that any individual arrested or detained be brought promptly before a judge to rule on his or her detention status, and thereupon ordered the Prosecutor to inquire whether continuation of the

[208] See above for the relevant cases. The author has discussed the consistency of these cases (in conjunction with the ICTR's *Barayagwiza* decision) in a separate publication, C Ryngaert, 'The Doctrine of Abuse of Process: a Comment to the Cambodia Tribunal's Decision in the Case against Duch' (2008) *Leiden JIL* 719. See also RJ Currie, 'Abducted Fugitives Before the International Criminal Court: Problems and Prospects' (2007) 18 *Criminal Law Forum* 349.

[209] See for a very exhaustive treatment of the subject of *male captus bene detentus* and abuse of process before international criminal tribunals, C Paulussen, *Male Captus Bene Detentus. Surrendering Suspects to the International Criminal Court* (Antwerp: Intersentia, 2010).

[210] Othman (n 24), 112–13, noting that

> Adherence to this policy led to the indictment of 29 detained persons for murder under Section 340 of the Penal Code of Indonesia by 21 March 2001, thus remedying the abuse of the judicial process caused by prolonged pre trial detention of non-indicted suspects.

detention was required.[211] At the ECCC, the defence challenged the prolonged detention of the Tribunal's first accused, Duch, who had already spent eight years in prison at the order of a Cambodian military tribunal before the ECCC started functioning. This challenge was, however, rejected by the co-investigating judges and later the pre-trial chamber on the grounds that the pre-2007 detention was not attributable to the ECCC, and that, in any event, the accused was not seriously mistreated.[212]

What can be gathered from these examples for OTP policy is that the OTP may want to limit the period of pre-trial detention as far as practically possible, if it wants to preclude due process-based challenges to the detention practices—for which in the final analysis it may be responsible. This may require that the OTP behave diligently (see also Chapter 6 on accountability and ethics), and that it speed up the process of investigation and prosecution so as to ensure that the suspects appear swiftly before a trial judge.

In complex cases, a trial can obviously not be organized overnight. The question then arises as to whether, and under what circumstances, the tribunal can order the interim release of the suspect during the pre-trial phase, and what the attitude of the OTP ought to be towards such release.

The international criminal tribunals' attitude towards interim release differs considerably from the practice of national tribunals. In line with Article 9.3 of the ICCPR, which provides that, '[it] shall not be the general rule that persons awaiting trial shall be detained in custody', before national tribunals individuals only remain in detention when this is absolutely necessary. At the international tribunals, in contrast, the general rule appears to be that 'liberty is the exception while detention is the rule'.[213] This was already the case at Nuremberg and Tokyo, where the Allied Powers held defendants in custody even before they were indicted, and provisional release was not provided for. Zappalà has attributed the defendant-unfriendly approach to a number of factors:

> The reasons behind the adoption of this solution were clearly linked to the unique character of those jurisdictions. The Nuremberg and Tokyo Tribunals were international military organs created by the victorious powers to judge persons allegedly

[211] STL, Order of the Pre-Trial Judge, 15 April 2009, available at <http://www.stl-tsl.org/sid/65>, ordering the Prosecutor to file in due course 'reasoned submissions stating whether or not he requests the continuation of the detention of the persons held in Lebanon'. A number of suspects involved in the murder of Rafiq Hariri had been held for a rather long time by Lebanese authorities in Lebanon, in fact at the recommendation of the UNIIIC, which later became the STL's OTP. According to the STL's pre-trial judge, who admittedly noted the specificities and complexity of the case, this raised serious fair trial concerns.

[212] See for the full text of the relevant detention order of the ECCC Co-Investigating Judges of July 2007: <http://www.eccc.gov.kh/english/cabinet/indictment/1/Order_of_Provisional_Detention-DUCH-EN.pdf>; Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias 'Duch', Criminal Case File No 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007. See for a comment, Ryngaert (n 208).

[213] Zappalà (n 187), 70.

> responsible for the most heinous crimes. Naturally, the combination of the gravity of the crimes, the international character of the proceedings, and the post-conflict situation created a solid set of reasons for trying to prevent any attempt at escape.'[214]

It is notable, however, that the long period of pre-trial detention at the Tokyo Tribunal came under criticism from US General MacArthur, the Supreme Commander of the Allied Forces in Japan, himself.[215]

The rise of human rights law, including procedural guarantees in the criminal procedure, made the Nuremberg and Tokyo solution difficult to defend later on. Nonetheless, at the ICTY and the ICTR, detention remained the norm, and release the exception.[216] The gravity of the crimes apparently warranted the continued detention of the individual.[217] This restrictive view was originally even codified in Rule 65(b) of the ICTY Rules of Procedure and Evidence, which provided that 'Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only 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.' Under the current version of the rule, release could also be ordered absent exceptional circumstances, but it still remains an exceptional measure.[218] The ICTY itself, however, believes that the amendment to Rule 65 'has neither made detention the exception and release the rule, nor resulted in the situation that despite amendment, detention remains the rule and the release the exception.'[219] In practice, there was ample room for keeping the individual in custody, and the OTP did not have to seriously bother about Rule 65 of the RPE.

The ICC era, however, has witnessed a merging of detention standards of international human rights law and international criminal justice. After the

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214 Ibid, 67.

215 Message of General MacArthur to the War Department, 12 May 1947, cited in Totani (n 21), 40: 'It is obvious that the restraint of personal freedoms for unreasonable periods without positive action will not only be contrary to any accepted concept of justice, but will adversely reflect upon the overall mission of the occupation', citing the responsibility of the special chief counsel in this regard).

216 Also Sluiter (n 11), 623–4.

217 *Barayagwiza I* (n 191), para 59:

> The Appeals Chamber recognizes that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to.

218 ICTY/ICTR RPE, Rule 65(b):

> Release may be ordered 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 victim, witness or other person.

219 ICTY, *Prosecutor v Jokić*, Order on Miodrag Jokić's Motion for Provisional Release, IT-01-42-T, 20 February 2002, para 17, adding that 'On the contrary, this Trial Chamber believes that the focus must be on the particular circumstances of each individual case, without considering that the outcome it will reach is either the rule or the exception.'

doctrine had already advanced that human rights law (eg Art 9 of the ICCPR) may well complement the statutes and rules of international criminal tribunals,[220] it was explicitly enshrined in Article 21(3) of the ICC Statute that 'The application and interpretation of [ICC] law must be consistent with internationally applicable human rights.' At the ICC, and other recently established ad hoc tribunals (eg the Timor-Leste Special Panels), detention appears to have become the exception, and release the norm.[221] The ICC Pre-Trial Chamber indeed held that

> unlike the situation at the ad hoc Tribunals, pre-trial detention is not the general rule, rule, but it 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.[222]

Upon a motion of the defence for interim release,[223] the burden of proof rests on the OTP: it should demonstrate that the conditions for detention under Article 58 (1) of the ICC Statute—these are the same conditions as for the issuance of an arrest warrant—continue to be met,[224] and that, accordingly, interim release is

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[220] eg Swart in Klip and Sluiter (n 75), vol II, 202.

[221] Read on in the main text for ICC practice. See for Timor-Leste, UNTAET/REG/2000/30:

> 20.9 The Investigating Judge shall review the detention of a suspect every thirty (30) days and issue orders for the further detention, substitute restrictive measures or for the release of the suspect.
> 20.10 Unless otherwise provided in UNTAET regulations, a suspect may be kept in pretrial detention for a period of no more than six months from the date of arrest.
> 20.11 Taking into consideration the prevailing circumstances in Timor-Leste, in the case of a crime carrying imprisonment for more than five years under the law, a panel of the District Court may, at the request of the public prosecutor, and if the interest of justice so requires, based on compelling grounds, extend the maximum period of pretrial detention by an additional three months.
> 20.12 On exceptional grounds, and taking into account the prevailing circumstances in Timor-Leste, for particularly complex cases of crimes carrying imprisonment of ten years or more under the law, a panel of the District Court may, at the request of the public prosecutor, order the continued detention of a suspect, if the interest of justice so requires, and as long as the length of pretrial detention is reasonable in the circumstances, and having due regard to international standards of fair trial.

[222] ICC Pre-Trial Chamber, *Katanga*, ICC-01/04-01/07, 18 March 2008, pp 6–7 (also citing case law of the international human rights supervisory bodies). The Court should obviously make sure that there is sufficient capacity to cope with the returns of those on provisional release. See the critical voice of the ICTY Report 2005, para 237, pointing at the need for a larger Detention Unit.

[223] Under Article 60.2 of the ICC Statute, 'A person subject to a warrant of arrest may apply for interim release pending trial'. Article 60.3 of the Statute provides that the 'Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at the request of the Prosecutor or the person'. Article 60.4 adds that the 'Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.'

[224] The Appeals Chamber in *Prosecutor v Lubanga* held that where the conditions under Art 58 (1) are met, there is an obligation to detain that person, and that where they are not met, there is an obligation to release the person. Cf ICC-01/04-01/06-824, 13 February 2007, para 134:

> At the outset, the Appeals Chamber deems it appropriate to clarify that the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of

not warranted.[225] Even in the absence of an application for interim release by the defence, the Pre-Trial Chamber reserves for itself the power to conduct a *proprio motu* review to determine whether the conditions for the pre-trial detention of a person continue to be met.[226] For the OTP, it is useful to know that detention prior to transfer to the Court is not relevant for the purpose of calculating the detention period.[227]

It is pointed out, finally, that respect for individual liberty has now been pushed to such lengths that the ICC Statute, unlike the statutes of the ad hoc courts, contemplates interim release by the custodial state, that is, the state party that has arrested a person at the request of the ICC.[228] On closer inspection, however, the Statute seriously circumscribes state judicial authorities' power effectively to release a person pending trial: emphasizing the gravity of the alleged crime (thereby echoing the approach at Nuremberg and the ad hoc tribunals), interim release will only be granted in 'urgent and exceptional circumstances', when 'necessary safeguards exist', and after full consideration of the recommendations of the Pre-Trial Chamber—and the OTP one may assume.[229] Arguably, the OTP has only very little to fear from states granting an interim release that goes against its own wishes. Not surprisingly, no cases of state authorities effectively granting interim release have been reported so far.

> article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained [sic] or shall be released.

225 The ICC OTP has resisted bearing the burden of proof for purposes of continued pre-trial detention. See notably *Katanga*, First Prosecution Observations, ICC-01/04-02/07-38-Conf., 22 February 2008, para 12 (seemingly laying the burden of proof on the defence). In the Second Prosecution Observations, however, the OTP stated that:

> Once the Defence makes an application for interim release, the Prosecution will demonstrate that the conditions under Article 58(1) of the Statute continue to be met. Until such time, the Prosecution will refrain from making any observations regarding the terms and requirements of Article 60(2) of the Statute.

(*Katanga*, Second Prosecution Observations, ICC-01/04-01/07-245, 3 March 2008, para 19.) The latter interpretation—which lays the burden of proof on the OTP was confirmed by the Pre-Trial Chamber, 18 March 2008, ICC-01/04-01/07, p 6, on the basis of the 'ordinary meaning' of the terms of Art 60.2.

See also the factors militating in favour of continued detention of Ngudjolo Chui, as cited by the OTP in its observations on the review of the individual's pre-trial detention: ICC-01-04/01-07, 22 February 2008 (para 18) and 2 July 2008 (paras 9–10), citing the risk that the individual may abscond in view of the nature of the charges against him, his past attempts at avoiding criminal prosecution, the numerous contacts which could facilitate his flight from the Court's jurisdiction, and the disclosure of the identities of Prosecution witnesses to the individual which could cause him to exert pressure on them.

226 Pre-Trial Chamber, *Katanga*, 18 March 2008, ICC-01/04-01/07, pp 8–9.

227 Pre-Trial Chamber, *Lubanga*, 13 February 2007, ICC-01/04-01/06-824, para 121 (for the purpose of Art 60(4) of the Statute, the article that prohibits a person's detention for an unreasonable period prior to trial).

228 ICC Statute, Art 59(3)–(6).

229 Ibid. See also Rastan (n 11), 433; Sluiter (n 11), 623–4.

12 Concluding Observations

No trials can be conducted successfully without the arrest of the suspect (trials *in absentia* being impossible before international criminal tribunals, with the exception of the STL). Arrest, at the request of the Prosecutor, is therefore crucial to the fulfilment of the mandate of the tribunal.

A decision on seeking an arrest warrant should not be taken lightly, however. After all, when seeking an arrest warrant, the Prosecutor sends a powerful signal to the international community that there are strong reasons to believe that a certain person has committed an international crime for which they ought to stand trial. Especially if that person is a high-ranking political figure, this signal may set in motion a chain of political and legal events, possibly leading to the isolation of the sought person, the eventual downfall of an entire regime, and the initiation of local prosecutions against suspects of international crimes. Circumspection on the part of the Prosecutor is also required when a violent conflict is still ongoing, and when it is unclear whether an arrest warrant will strengthen the forces of peace and justice or whether it will instead re-ignite the conflict.

The Prosecutor, when seeking an arrest warrant (and all the publicity and political impact this engenders), may be viewed as the all-powerful king, who may indeed seek the arrest of any person against whom sufficient evidence may be adduced, irrespective of the rank or political influence of that person, or political constraints. In reality, however, the Prosecutor is an emperor who has no clothes, without even the power to *execute* the arrest warrants which have been successfully sought. The Prosecutor is entirely dependent on *states* for the execution of arrest warrants issued by the tribunals at his request.

Unfortunately, states' legal obligation of cooperation with the tribunals has not always been translated into effective cooperation in executing arrest warrants. Nor has the international community proved willing to endow the Prosecutor with international police forces which mount search and arrest operations in states where a fugitive is presumably present. Therefore, a major part of the Prosecutor's policy in relation to arrest will consist in devising strategies to convince states to comply with their legal obligation to enforce arrest warrants issued by the international tribunal. These strategies involve diplomatic dealings with local and international power-brokers, backed up by reliable information as to the whereabouts of suspects (eg as gathered by the Prosecutor's own 'tracking team'). In those dealings, the Prosecutor is expected to behave diligently and avoid arrest and detention practices that run foul of the law, lest the accused evade justice.