

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. 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, it is satisfied that:

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

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
- (c) A concise statement of the facts which are alleged to constitute those crimes;
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
- (c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. 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. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

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A. Introduction/General remarks*

Article 58 of the *Rome Statute* was developed from article 52 of the Zutphen Draft which was based upon article 28 of the Draft Statute prepared by the ILC¹. The original provision in the ILC Draft Statute dealt with arrest. It provided that the Presidency of the Court may issue a warrant of arrest upon request of the Prosecutor².

While the ILC Draft Statute provided that the Presidency perform pre-trial functions, such as, for instance, the issuance of a warrant of provisional arrest or pre-indictment arrest, a

* Christopher K. Hall has, on the basis of the text written by Angelika Schlunk for the first edition, revised the whole commentary on this article for the second edition. Cedric Ryngaert revised the commentary and added relevant case-law for the third edition. Cedric Ryngaert thanks Raluca Racasan for her research assistance.

¹ The Zutphen Draft was named after the inter-sessional meeting from 19 to 30 Jan. 1998 in Zutphen, The Netherlands under the chairmanship of Adriaan Bos. The Dutch delegation had invited the chairpersons of the various working groups of the Preparatory Committee to draft a new consolidated Draft that would merge the existing proposals to a workable text for the final meeting of the Preparatory Committee before the Rome Conference in the spring of 1998. The result of the deliberations at Zutphen was presented in UN Doc. A/AC.249/1998/L.13 (4 February 1998) (available at: <http://www.iccnw.org/romearchive/zutphenmeeting.html>). It is also published in: Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998); *id.* (ed.), *International Criminal Court: Compilation of Documents and Draft ICC Statute Before the Diplomatic Conference* (1998); and Sadat-Wexler (A.I.D.P. 1998) *NEP 155 et seq.* All citations to the Zutphen Draft are to the relevant draft articles. The Zutphen Draft was reorganized and partly revised at the final session of the Preparatory Committee held from 16 Mar. to 3 Apr. 1998 in what is sometimes known as the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference. Although the number of draft article 52 [28], the predecessor of article 58 of the *Rome Statute*, changed to article 59 in the New York Draft, the text remained the same.

² The provisions of the ILC Draft Statute were reproduced in the 1996 Preparatory Committee Report II.

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growing number of delegates at the meetings of the Preparatory Committee felt, when the draft developed, that the Presidency should not be overburdened with pre-trial functions since it had numerous administrative duties. The Preparatory Committee Working Group No. 4 on procedural matters eventually created the Pre-Trial Chamber that would be responsible for a number of decisions during the investigation phase³.

In the spring of 1998, after the Preparatory Committee had completed its work and shortly before the Diplomatic Conference took place in Rome from 15 June to 17 July 1998, an informal working group drafted a text on the articles 52 and following of the Zutphen Draft, which it renumbered as articles 58 to 61. The re-draft was introduced as 'further option' to the conference text⁴.

- 2 In contrast to the *Statutes for the ICTY* and the *ICTR*, which contain no statutory provisions on the pre-trial phase, the *Rome Statute* provides specific rules on pre-trial detention and release⁵.

When the *Rules of Procedure and Evidence of the ICTY (ICTY Rules)* were drafted, the absence of a statutory provision on pre-trial detention and release was criticized⁶. However, at that time, the critics were concerned more about the absence of any pre-trial rules in the *ICTY Statute* than about a lack of balance of power between the organs of the Tribunal. The idea of establishing different judicial entities within the Court that would have specific responsibilities in accordance with the different phases of the proceedings only gradually developed during the negotiations of the Preparatory Committee. However, the inclusion of detailed provisions in article 58 governing the issuance of warrants of arrest and summons has been criticized by one commentator who considered that these subjects were more appropriately dealt with in the *Rules of Procedure and Evidence*⁷. The Preparatory Commission decided that no special rules were needed to implement article 58 and the Court did not include any provisions in the *Regulations* specifically referring to article 58. Whether article 58 will unduly restrict the flexibility of the Court in the issuance of arrest warrants remains to be seen. However, it does not seem to have impeded the Court with regard to the first arrest warrants, where the Prosecutor and the Pre-Trial Chamber took steps pursuant to article 68 not expressly required by article 58 to protect victims and witnesses (see footnote 29 below).

- 3 When deciding on the issuance of an arrest warrant (or a summons to appear), the Pre-Trial Chamber has to make an initial determination as to whether the case falls within the

³ The text referred to 'provisional' arrest. The term 'provisional' was later omitted, because delegations considered the wording too close to the traditional extradition model. See 1996 Preparatory Committee Report I, para. 241.

⁴ The terms 'Preliminary Investigations Chamber' and 'Indictment Chamber' were also used. For the model of a Pre-Trial Chamber see, in particular, article 54 of the alternative French Draft, UN Doc. A/AC.249/L.3, p. 45.

⁵ UN Doc. A/CONF.183/C.1/WGPM/L.1.

⁶ With respect to the pre-trial phase, article 15 of the *Statute for the ICTY* and article 14 of the *ICTR* only refer to the *Rules*. When the *Statute for the ICTY* was adopted, it was considered that this task could be left to the judges of the Court. The Report of the Secretary General containing the *Statute of the ICTY* of 3 May 1993 explains in paragraph 106 that 'it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused ...' (UN Doc. S/25704 (3 May 1993) and S/25704/Corr.1 (30 July 1993)). See also Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) 236. *ICTY Rules* 54 and 55 cover the issuance and the execution of a warrant of arrest. Pursuant to Rule 54, a judge or the Trial Chamber are competent for issuing a warrant of arrest. The *ICTR Rules* are modelled on the *ICTY Rules* and the *Rules of Procedure and Evidence of the Special Court for Sierra Leone* are in turn based on the *ICTR Rules*. Article 14 of the *Statute of the Special Court for Sierra Leone* provides that the *ICTR Rules* are to be used by the judges, subject to any necessary modifications made by the judges:

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.⁷

⁷ See K. A. A. Khan, *Article 60*, fn 1 with further references.

jurisdiction of the Court⁸. However, it does not normally determine the admissibility of the case in light of the complementarity principle⁹. It has this discretion under article 19 paragraph 1, but will only exercise it where there is an ostensible cause or self-evident factor impelling it to do so, especially where the Prosecution Application is made on a confidential and *ex parte* basis¹⁰.

A case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court¹¹. The parameters of the investigation of a situation can include not

⁸ *Prosecutor v. Ahmed Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Ali Abd-al-Rahman* ('Ali Kushayb'), ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 13; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 11; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 9; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 7; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 7; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 7; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 8; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 1; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 1; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, paras. 7-9; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, paras. 7-9.

⁹ See, e.g., *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 9; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 13.

¹⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 12; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, paras. 20-22 (stating that there is nothing to indicate that he is already being prosecuted at the national level for the crimes referred to in the Prosecutor's Application and that on the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC); *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 12; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 23; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 51; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 4.

¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 16; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 4; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 9; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 9; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 10; *Prosecutor v. Ahmed Muhammad Harun* ('Ahmad Harun') and

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only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation which initially triggered the referral to the Court¹².

The Chamber will analyse whether the crime is one of the crimes set out in article 5 of the *Statute* (jurisdiction *ratione materiae*), whether the crime was committed within the time-frame specified in article 11 of the *Statute* (jurisdiction *ratione temporis*) and whether the crime satisfies one of the two criteria, or both, laid down in article 12 of the *Statute*; namely whether it was committed on the territory of a State Party to the *Statute* or by a national of that State, or whether it was committed on the territory of a State which has made a declaration under article 12 paragraph 3 of the *Statute* or by nationals of that State¹³. Nevertheless, article 12 paragraph 2 does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the UN Charter, pursuant to article 13 (b) of the *Statute*¹⁴. Thus, where a situation is referred to it by the Security Council, the Court may exercise jurisdiction over crimes committed in the territory of States which are not Party to the *Statute* and by nationals of such States¹⁵.

If extensive similarities exist with the Prosecutor's Application in a previous case, the Chamber may adopt its earlier reasoning laid down in its Decision on the Prosecutor's Application Pursuant to article 58 as regards the jurisdictional requirements¹⁶.

Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb'), ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 14; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 1; *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 1; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 14; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 6.

¹² *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 14; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 6.

¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 12; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 11; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 4; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 11; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 10; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/11, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 8; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 8; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 9; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁴ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁵ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 9; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 9.

In a few cases, the Chamber examined in some depth the admissibility of the case in light of investigations being conducted in the territorial State¹⁷. In particular, it has declared cases admissible on the ground that national proceedings did not encompass both the person and the conduct which was the subject of the case before the Court. By and large, it appears that the Chamber is satisfied as soon as there are *potential* cases that would be admissible due to the absence of national proceedings against those appearing to be most responsible, and in light of the gravity of the acts committed¹⁸.

B. Analysis and interpretation of elements

Article 58 only applies to persons who are suspected of having committed a crime within the jurisdiction of the Court; it does not apply to offences against the administration of justice under article 70¹⁹. By contrast, a witness or an expert cannot be summoned to appear before the Court pursuant to article 58 of the *Statute*²⁰. A summons to appear under this article is an alternative to the issuance of a warrant of arrest in those cases where there are not sufficient grounds to arrest the suspect, article 58 paragraph 1 (b)²¹.

The wording does not distinguish between pre-indictment and post-indictment arrest as did the Zutphen Draft. The provision refers to all warrants of arrest issued by the Pre-Trial Chamber during the investigation phase²².

¹⁷ E.g., *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 13; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 19.

¹⁸ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, paras. 17–20; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, paras. 17–22; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 11; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 50; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 21; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 11.

¹⁹ Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1207.

²⁰ The procedure for offences against the administration of justice is governed by rules 162 to 172 of the *Rules of Procedure and Evidence*.

²¹ Pursuant to article 64 para. 6 (b), however, the Trial Chamber 'may, as necessary: ... (b) Require the attendance and testimony of witnesses ... by obtaining, if necessary, the assistance of States as provided in this Statute'. There is no provision in the *Rules of Procedure and Evidence* expressly implementing article 64 para. 6 (b), but presumably it could be implemented by the issuance of a request to States to compel attendance. It is probable that the Court has the inherent power to issue an arrest warrant or a summons to compel the attendance of witnesses and experts rather than simply issuing a request to States to take this step, but either step would have been taken on another basis than article 58. The obligation of States Parties under article 64 para. 6 (b) to assist the compulsory attendance of witnesses (apart from the exceptional case of persons in custody, where consent of the person and the custodial state is required pursuant to article 93 para. 7, an anomaly reflecting the traditional, inefficient and increasingly outdated extradition regime between States rather than the new system of surrender to international courts) is independent of their separate obligation in article 93 para. 1 (e) to facilitate the voluntary appearance of witnesses and experts.

²² The *Statute* does not use the word 'suspect'. However, for the sake of convenience, this term is used in this chapter to describe any person with respect to whom, within the meaning of article 55 para. 2 'there are grounds to believe ... has committed a crime within the jurisdiction of the Court'. The point at which a suspect becomes an accused will have to be resolved by the Court. It is clear from the *Statute* that once the Pre-Trial Chamber has confirmed charges pursuant to article 61 para. 7 a suspect is an 'accused'. However, there are a number of earlier stages in the proceedings at which a person could become an accused, including the moment the Prosecutor

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The provision states the purposes for and the conditions under which the Pre-Trial Chamber can issue an arrest warrant (paragraph 1). The Pre-Trial Chamber will only act upon application by the Prosecutor. It is not in a position to issue an arrest warrant on its own motion under article 58²³.

I. Paragraph 1

1. Chapeau

- 6 a) ‘any time after the initiation of an investigation ...’. The Prosecutor can apply to the Pre-Trial Chamber for a warrant of arrest only once he or she has started the investigation of a case; he or she may not apply for a warrant at an earlier stage.
- 7 b) **Examination of application, evidence and other information submitted by the Prosecutor.** The Pre-Trial Chamber has the right to examine the application put forward by the Prosecutor. The criteria according to which the Pre-Trial Chamber will check the application are laid out in paragraphs 1 and 2 of this article.
- 8 The Pre-Trial Chamber will not initiate investigations by itself. If the Prosecutor does not present sufficient evidence or other information to underpin his or her application for an arrest warrant, the Pre-Trial Chamber is not obliged under article 58 to investigate further²⁴. The basis for its decision under article 58 is ‘the application and the evidence or other information submitted by the Prosecutor’²⁵.
- 9 There are no specific prerequisites as to what type of evidence or information may be presented. In principle, the Prosecutor may decide at his or her discretion what he or she believes necessary and appropriate to serve as evidence or information to convince the Pre-Trial Chamber that a warrant of arrest be issued.
- 10 c) **Issue of a warrant of arrest.** If the Pre-Trial Chamber comes to the conclusion that the evidence or information submitted is sufficient to issue a warrant of arrest and that the warrant is necessary to ensure the presence of the suspect at the trial, it must grant the application of the Prosecutor. The Pre-Trial Chamber is legally bound by the *Statute* in the sense that if the requirements of paragraph 1 are fulfilled, the Pre-Trial Chamber is obliged to issue the warrant of arrest. There is no room for discretion for political or ideological reasons, but it would be required under article 69 paragraph 7 to disregard ‘[e]vidence obtained by means of a violation of this *Statute* or internationally recognized human rights’ if ‘[t]he violation casts substantial doubt on the reliability of the evidence’ or ‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’²⁶.

submits an application for a warrant of arrest, which will contain the essence of the charges included in article 61 para. 3 document (see article 19, fn 9).

²³ See, for instance, the wording of article 52 of the Zutphen Draft, note 2.

²⁴ Article 57 para. 3 provides that the Pre-Trial Chamber may, ‘[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation’.

²⁵ However, the Pre-Trial Chamber has considerable powers under article 56 with regard to unique investigative opportunities and it may take certain measures to preserve evidence on its own initiative if it considers that the Prosecutor’s failure to request such measures are unjustified.

²⁶ However, if the Prosecutor failed to submit relevant material collected by the Pre-Trial Chamber in relation to a unique investigative opportunity pursuant to article 56, article 58 would not preclude the Pre-Trial Chamber from considering that information when reviewing the Prosecutor’s application for an arrest warrant. The *Statute* does not expressly authorize the Pre-Trial Chamber to go beyond the application and the evidence or other information submitted by the Prosecutor and information collected pursuant to article 56, either to seek further information from the Prosecutor or to seek information from other sources on this question. However, nothing in either article would appear to prevent the Pre-Trial Chamber from considering relevant information presented to it by victims. Under paragraph 1 of regulation 48, a controversial regulation adopted by the judges in confidential proceedings without any discussion with civil society, states that ‘[t]he Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or

Although the use of sealed warrants by the ICTY based on confidential *ex parte* applications by the Prosecutor as a technique to increase the chances of being able to arrest persons suspected of crimes was initially controversial, it proved an effective tool and article 58 does not preclude the use of sealed warrants of arrest²⁷. Indeed, the first warrants of arrest issued by the Court were initially sealed pending verification that victims and witnesses were effectively protected²⁸.

The provision does not list as a ground for detention the question of the suspect being harmed or at risk, but the Court could take a range of other less restrictive measures to protect the suspect²⁹.

2. The different subparagraphs

a) Reasonable grounds for a 'crime within the jurisdiction of the Court'. The term 'reasonable grounds' leaves room for interpretation, even though it is a common term in most legal systems³⁰. It is understood to embody objective criteria,³¹ and essentially means that a reasonable conclusion that the person committed a crime within the jurisdiction of the Court can be drawn. It does not mean that this is the only reasonable conclusion that can be drawn from the evidence³². In this respect, in *Al Bashir*, the Appeals Chamber held that the Chamber had acted erroneously in rejecting the application for a warrant of arrest in relation to the counts of genocide on the basis that the existence of genocidal intent of the suspect was *only*

summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in articles 53 para. 3 (b), 56, para. 3 (a), and 57, para. 3 (c)'. However, none of these provisions would be directly relevant to an application for an arrest warrant.

²⁷ For example, the admission of evidence obtained as the result of torture or cruel, inhuman or degrading treatment or punishment would necessarily 'be antithetical to and would seriously damage the integrity of the [article 58] proceedings'.

²⁸ Although one commentator has contended that '[i]t is not clear from the Statute ... whether [the Pre-Trial Chamber] may have recourse to the practice of sealed indictments', Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1223, there is nothing on the face of the Statute, its drafting history or the routine practice of the ICTY, ICTR, Special Panels for Serious Crimes and the Special Court for Sierra Leone that would suggest that the use of sealed indictments is precluded. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* (2002) 232.

²⁹ The first application for arrest warrants, with regard to the Uganda investigation, was sealed. The warrants of arrest were issued under seal by Pre-Trial Chamber II on 8 July 2005 to 'ensure the safety or physical or psychological well-being of' and to 'prevent the disclosure of the identity or whereabouts of any victims, potential witnesses and their families'. The Chamber decided on 13 Oct. 2005 to unseal the arrest warrants, noting that 'the overall plan in respect of the situation in Uganda for the security of witnesses and victims in the field has been completed and implemented; and that by the assessment and advice of the Prosecutor and the Victims and Witness Unit the overall plans provides the necessary and adequate protective measures for all concerned at this stage'. *Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo* 16, ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, Pre-Trial Chamber, 13 October 2005.

³⁰ Some delegations at the Preparatory Committee 'favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 61 [43]'. *Supra* note 1, Zutphen Draft, article 52 [28], n. 169. However, that draft article [now article 68], which then included an obligation on the Prosecutor to protect the accused, now limits that obligation to protect victims and witnesses and there is no express obligation under the *Rome Statute* to protect suspects or accused.

³¹ The standard is lower than 'substantial grounds to believe that the person committed the crime charged' used in article 61 para. 7 in determining whether to confirm charges. Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1219 *et seq.* ('reasonable grounds' constitutes a less strict test than that for a *prima facie* case). Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* (2002) 231. The factors considered in determining whether there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' under article 58 para. 1 (a) are, of course, different from those used by the Prosecutor in determining whether 'there is a reasonable basis to proceed with an investigation' pursuant to article 15 para. 3 and whether 'there is no reasonable basis to proceed' when deciding pursuant to article 53 para. 1 whether to investigate. The term 'reasonable grounds' was chosen in preference to the term 'serious reasons'. See Zutphen Draft, article 52 [28], para. 1, 167.

³² See, e.g., *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 19.

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one of several reasonable conclusions available on the materials provided by the Prosecution³³. In the Appeals Chamber's view, requiring that the existence of genocidal intent must be the only reasonable conclusion would amount to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubts³⁴. Imposition of such a standard would be tantamount to the creation of an obligation on the part of the Prosecution to prove genocidal intent beyond reasonable doubt, a higher and more demanding standard than the one required under article 58 paragraph 1 (a) of the *Statute*³⁵. This reasonable conclusion should be drawn on the basis of the present evidentiary record³⁶.

In accordance with article 21 paragraph 3 of the *Statute*, the Chamber has interpreted and applied the expression 'reasonable grounds to believe' in accordance with internationally recognized human rights³⁷. It has been guided in particular by the 'reasonable suspicion' standard under article 5 paragraph 1 (c) of the European Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under article 7 of the American Convention on Human Rights³⁸.

In practice, the Chamber first determines whether there are reasonable grounds to believe that the contextual element is present, before considering whether the relevant criminal acts referred to in the Prosecution Application are also present³⁹.

³³ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 1.

³⁴ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 33.

³⁵ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 39.

³⁶ *Prosecutor v. Mathieu Ngujolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012 (Chamber recalling that Pre-Trial Chamber I had found in September 2010 that there were reasonable grounds to believe that the FDLR did have an organizational policy to attack the civilian population in 2009 (*Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 26), but that on the basis of the present evidentiary record which had significantly expanded since September 2010, it did not consider that the existence of an organizational policy is reasonably tenable and therefore finding no reasonable grounds to believe that crimes against humanity were committed, at paras. 28–29).

³⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 16.

³⁸ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 32; *Situation in Darfur, Sudan*, Case No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 28; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 24; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 16; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 27.

³⁹ *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 29; *Prosecutor v. Mathieu Ngujolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngujolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 27; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 53; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 7; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 6; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 6.

The Pre-Trial Chamber is not entitled to issue a warrant of arrest if the evidence presented does not allow qualification of the crime committed as genocide, a crime against humanity or a war crime under the Rome Statute. If the suspect can only be prosecuted for homicide as a crime under national law, the Court has no jurisdiction over the case. It would not be competent to act, with the consequence that the Pre-Trial Chamber would have to refuse to grant the application.

The Prosecutor may present the same facts under different legal characterizations in his application for an arrest warrant⁴⁰, or charge a person with different crimes⁴¹. The Chamber does not decide these issues in its arrest warrant decision, so as not to limit the options that may exist for establishing criminal responsibility under the *Rome Statute*⁴². Instead, it issues a warrant of arrest as soon as it is convinced that there are reasonable grounds to believe that the person has committed at least one crime within the jurisdiction of the Court⁴³, even if the Chamber disagrees with the Prosecutor's legal characterization of the relevant conduct⁴⁴. This characterization is revisited in light of the evidence submitted to the Chamber by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure a fair and expeditious conduct of the proceedings⁴⁵.

Note that, in reaching its conclusions on whether the 'reasonable grounds to believe' and the 'appearance' standards required by article 58 paragraph 1 of the *Statute* have been met, the Chamber may not only rely on the evidence and information specifically discussed in the decision itself, but also on the overall evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response⁴⁶.

b) 'The arrest of the person appears necessary'. The wording makes it clear that the Pre-Trial Chamber must be satisfied with the evidence and information presented at the time of the application, no matter whether the arrest proves necessary in the end. Three grounds for issuing an arrest warrant are specified⁴⁷. In contrast, the ILC Draft provided for more limited and different grounds for provisional arrest at any point during the investigation of a suspect and for arrest of an accused after confirmation of the indictment. The Prosecutor could request the provisional arrest of a suspect if there was 'probable cause to believe that the

⁴⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 25.

⁴¹ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 42 (Chamber stating that since that was not the only crime attributed by the Prosecution to Germain Katanga, the question of whether criminal liability can arise under article 8 (2) (b) (i) or 8 (2) (e) (i) of the *Statute* for the launching, or attempted launching, of an indiscriminate attack will be better dealt with at the confirmation hearing stage rather than at the stage of issuance of a warrant of arrest.)

⁴² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 27; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 28; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, paras. 74–75.

⁴³ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 28.

⁴⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 70.

⁴⁵ *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 27; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 25.

⁴⁶ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 26.

⁴⁷ See note 1, Zutphen Draft, article 52 [28], 166.

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suspect may have committed a crime within the jurisdiction of the Court' and 'the suspect may not be available to stand trial unless provisionally arrested'⁴⁸. After confirmation of the indictment an arrest warrant for the accused had to be issued unless the accused would 'voluntarily appear for trial' or there were 'special circumstances making it unnecessary for the time being to issue the warrant'.

The Appeals Chamber has determined that in order to justify arrest under article 58 paragraph 1 (b) of the *Statute*, it must appear to be necessary⁴⁹. Therefore, when addressing the risk of further offending, the question revolves around the possibility, not the inevitability, of a future occurrence⁵⁰.

The conditions set forth in article 58 paragraph 1 (b) are presented in the alternative, with it being sufficient that only one of the conditions is satisfied in order to issue a warrant of arrest⁵¹. However, although the Chamber must be satisfied of only one of the conditions set forth in article 58 (1) (b) of the *Statute* being met⁵², even after finding that the issuance of an arrest warrant was justified on the basis of one condition being met, it has in most cases analysed whether the other conditions put forward by the Prosecution were also fulfilled.⁵³

In ruling upon the necessity to issue the arrest warrant, the Chamber will take account of internationally recognized human rights in accordance with article 21 paragraph 3 of the *Statute*.⁵⁴

- 16 aa) 'To ensure the person's appearance at trial'. The main reason to detain a suspect is to make sure that the trial can take place with the accused present. Trials *in absentia* are not permitted by the *Statute*, which means that the trial could not be held if the accused was not available. It is up to the Pre-Trial Chamber to determine which circumstances could endanger the appearance of the accused before the Court. The experience of the ICTY with voluntary surrenders and pre-trial releases suggests that warrants of arrest will not always be necessary to secure the appearance of the accused (see article 59, fn 53).

Some of the reasons why the Court has found the issuance of an arrest warrant to be necessary in order to ensure a person's appearance at trial are the person's political position,

⁴⁸ For criticism of these grounds, see note 20, O. Fourmy, *Powers* 1220 *et. seq.*

⁴⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81.

⁵⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 42.

⁵¹ *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 51.

⁵² *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 77.

⁵³ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 63; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 50; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 66.

⁵⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 90.

international contacts and/or economic resources⁵⁵, detention⁵⁶, the seriousness of the crimes and the length of the likely to receive sentence⁵⁷, the person's failure to surrender to a national warrant of arrest⁵⁸, the rejection of the Court's jurisdiction⁵⁹ and the State's history of non-cooperation with the Court in executing warrants of arrest⁶⁰.

bb) 'To ensure that the person does not obstruct or endanger the investigation or the Court proceedings'. If there is reason to believe that a suspect would interfere with the investigations of the Prosecutor, he or she can be detained according to the wording of paragraph 1 (b) (ii). The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. One factor in the assessment could be the gravity of the charges and the presumed consequences for the suspect, but it would not be decisive, since all persons before the Court are likely to face the gravest possible charges and the practice of the ICTY demonstrates that some persons facing the most serious charges can be at liberty pending trial (see article 59 fn 53). More compelling would be convincing information indicating that the suspect might interfere with, destroy or conceal evidence⁶¹, intimidate or

⁵⁵ *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 43; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 85; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 64; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 47; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 72.

⁵⁶ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 62; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 133.

⁵⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 43.

⁵⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 41; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 63.

⁵⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 93.

⁶⁰ *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 44; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 228.

⁶¹ See on concealing evidence *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 131; see also *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 101 (position to instruct troops to destroy evidence).

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influence witnesses or victims⁶², engage in collusion with accomplices⁶³, orchestrate the cover-up of crimes committed by the Security Forces⁶⁴.

- 18 cc) 'to prevent the person from continuing'. aaa) 'the commission of that crime'. The Pre-Trial Chamber may issue a warrant of arrest if a person allegedly has committed a crime within the jurisdiction of the Court and if there is reason to believe that he or she will either continue to commit acts that constitute the same crime or if the person attempts to prolong the damage and harm caused by the crime⁶⁵, e.g., by continuing to use his power and absolute control over the State apparatus to continue the commission of crimes⁶⁶. It may seem to be problematic that the Pre-Trial Chamber here acts on the assumption that the suspect has already committed the crime, thereby infringing the presumption of innocence. This is a problem that in fact besets the operation of the entire article, which allows for the issuance of an arrest warrant as soon as '[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' (article 58 (1) (a)).

To dispel the impression that the Pre-Trial Chamber, by the very issuance of an arrest warrant, presumes the person to be guilty, the drafters of the *Statute* may have wanted to insert a reference to the presumption of innocence in the provisions regarding the pre-trial phase⁶⁷. While this has not occurred, the Pre-Trial Chamber has explicitly held that '[t]he right to be presumed innocent is ... guaranteed by the Statute not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court'⁶⁸. It has added that the right to be presumed innocent is enshrined in many international human rights instruments⁶⁹. But the most potent safeguard for the presumption is probably the current *dédoublement fonctionnel* of

⁶² *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, paras. 45–50; *Prosecutor v. Jean-Pierre Bemba Gombo*, CC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 89; *Prosecutor v. Germain Katanga*, ICC-01/04–01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 63; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 130; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 233.

⁶³ ILC Draft Statute, article 28 para. 1 (a) and (b).

⁶⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011.

⁶⁵ See the proposed wording for article 52 para. 1 (b), 168 of the Zutphen Draft. These specific examples were proposed in the Zutphen Draft, but the current formulation was adopted in response to suggestions from some delegations that they 'could be merged under a more general formulation such as "obstructing or endangering the investigation or the Court proceedings"'. *Ibid.*

⁶⁶ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011.

⁶⁷ Compare W.A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', (1998) 6 *EJCLCJ* 84, 111 (arguing that 'the article dealing with the presumption of innocence appear[ing] in Part 6, concerning trial', 'can also claim a legitimate place in Part 2', and submitting that '[i]n indeed, in the early drafting stages of the statute the presumption of innocence text was considered to be part of general principle').

⁶⁸ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, Pre-Trial Chamber I, 31 January 2011, para. 8.

⁶⁹ *Ibid.*, para. 9. Note that the Pre-Trial Chamber has held that the human rights-based presumption of innocence does not oppose the imposition of pre-trial detention following arrest when this is justified in accordance with article 58 (1). See *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kololo Musamba, Jean-Jacques Magenda Kabongo, Fidele Babala Wandu and Narcisse Arido 17*, ICC-01/05-01/13, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba', Appeals Chamber, 11 July 2014, para. 68.

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the Court, which assigns responsibility for deciding questions regarding arrest warrants to the Pre-Trial Chamber, without prejudice to the Trial Chamber's ability to subsequently decide the question of guilt or innocence *de novo*⁷⁰. The Pre-Trial Chamber's determination at the arrest warrant stage does not even prejudice its determination on the occasion of the confirmation of charges, when the more exacting standard of 'substantial' (as opposed to 'reasonable') 'grounds to believe' applies⁷¹.

bbb) 'related crimes within the jurisdiction of the Court arising of the same circumstances'. A related crime could be any act that falls under the jurisdiction of the Court provided that it is connected to the same historical context⁷². The Pre-Trial Chamber, however, may not issue a warrant of arrest if the suspect has committed a crime and there is reason to believe that he or she is going to commit a crime under national law of fraud or forgery. In a given case, it may be difficult to distinguish between the commission of a related crime and the continuation of the same crime, if the elements that constitute the crime differ or cover several distinct crimes. In practice, the distinction between the continuation of the same crime and the commission of a related crime may not be relevant as long as the crime is within the jurisdiction of the Court.

II. Paragraph 2: Minimum requirement for application

The application needed to issue the warrant of arrest has to encompass the five types of information listed in this paragraph⁷³. There are no provisions in the *Statute* regulating the application and the consequences if the application is lacking. Although the first edition of this Commentary recommended that this paragraph be implemented in the *Rules of Procedure and Evidence*, neither the *Rules* nor the *Regulations of the Court* do so⁷⁴. Paragraph 2 should be read together with articles 91 paragraphs 2 and 4 and 92 paragraphs 1 and 2, which state what is required in a request for arrest, or provisional arrest, and surrender once an application to issue a warrant has been granted.

1. Name and other identifying information

The primary obligation of any authority examining the arrest of a person is to verify that the person arrested is identical with the person described in the warrant issued by the Court⁷⁵.

The notion of the name of the person refers to the name and forename, including any aliases possibly registered or any other name that the person is known to use, such as a *nom de guerre*, for example.

The notion of any other relevant identifying information encompasses size, height, sex, any particular objective and permanent physical features as well as nationality, accent or other identifiable features. A photograph of the person may be attached to the arrest warrant⁷⁶. It

⁷⁰ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 53.

⁷¹ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010.

⁷² The proposed wording for article 52 para. 1 (b) (v) of the Zutphen Draft was '... continue to commit a crime within the jurisdiction of the Court'.

⁷³ The reference to related crimes was not in the Zutphen Draft and was added in Rome.

⁷⁴ This paragraph, which was not in the Zutphen Draft was added in Rome.

⁷⁵ In the absence of specific rules on the application proceedings, the Pre-Trial Chamber may request, should the information submitted with the application not be complete, additional information in support of the application or deny the issuance of an arrest warrant. If it refuses to issue an arrest warrant on the basis that the application was lacking, the Prosecutor may renew the application.

⁷⁶ See, e.g., *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of

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falls to the Prosecutor to assess what type of identifying information may be necessary and helpful for the identification of the person sought.

2. Specific reference to the alleged crime

- 22 The subparagraph requires that the Prosecutor apply for a warrant if the crime allegedly committed is within the jurisdiction of the Court. The application shall pertain only to crimes within the jurisdiction of the Court. For example, if a person is suspected to have been actively involved in the commission of genocide, the application would make reference to that crime. It would not refer to any other crime that the suspect may also have committed such as the crimes of burglary or fraud under national law, because those crimes are not within the jurisdiction of the Court. The Prosecutor could not add any crimes that are not within the jurisdiction of the Court to an application referring to genocide, crimes against humanity or war crimes.

It is observed that the Pre-Trial Chamber's legal characterization of the facts or of the modes of liability at this stage is without prejudice to the Chamber's possible reconsideration of such characterization at a later stage of the proceedings⁷⁷.

3. Concise statement of the facts

- 23 The application shall describe the facts on which the Prosecutor bases his or her assessment of the case. Based upon this information about the facts, the Pre-Trial Chamber will examine whether the assessment of the Prosecutor permits that the act or omission be qualified as a crime within the jurisdiction of the Court. If the Pre-Trial Chamber is in doubt that the facts presented by the Prosecutor support his or her assessment, it may deny the application.

4. Summary of the evidence and any other information

- 24 The Prosecutor shall present those pieces of evidence that support his or her case. It is sufficient that the Prosecutor shows that there are reasonable grounds to believe that the suspect has committed the crimes referred to in the application. The notion of reasonable grounds pertains to objective criteria. If the Pre-Trial Chamber is not satisfied with the evidence presented, it may deny the application.

5. Reasons for the necessity of the arrest

- 25 The Prosecutor has to present not only persuasive evidence that the suspect has committed a crime within the jurisdiction of the Court, but also that the suspect should be taken into custody. The reasons for arresting a suspect are laid out in paragraph 1 of this article. However, the Prosecutor is not obliged to present reasonable grounds to support his or her belief that the suspect has to be detained pending trial. It is sufficient that he or she convincingly argues that arrest is necessary for one of the reasons listed in paragraph 1 of this article⁷⁸.

arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010; *Prosecutor v. Mathieu Ngunjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngunjolo Chui, Pre-Trial Chamber I, 6 July 2007; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008.

⁷⁷ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 27; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 39.

⁷⁸ See article 59 para. 2.

III. Paragraph 3: Minimum requirements for a warrant of arrest

The warrant of arrest is the basis for the detention of the suspect⁷⁹. It has to encompass the information contained in the application by the Prosecutor with the exception of the summary of evidence and the reasons why the Prosecutor considers an arrest necessary. If the Pre-Trial Chamber issues a warrant of arrest in accordance with the application by the Prosecutor, the Pre-Trial Chamber will have satisfied itself that the evidence presented is sufficient and that the detention of the suspect is necessary pursuant to paragraph 1 of this article.

As to the subparagraphs (a) to (c) of this Paragraph, see remarks under section II.

IV. Paragraph 4: Duration of effect

The Paragraph clarifies that only the Court has the power to lift the arrest warrant⁸⁰. The competent authorities of the custodial State where the suspect has been detained are not in a position to do so. They may decide upon interim release in accordance with article 59 paragraphs 3 and 4 of the *Rome Statute*.

The provision refers to the Court but does not name the Pre-Trial Chamber. The reason is that the warrant of arrest may be lifted by the Pre-Trial Chamber as long as the case is still under investigation, but also by the Trial Chamber or the Appeals Chamber once the criminal proceedings have progressed. The competence to lift a warrant of arrest issued by an organ of the Court depends upon what organ of the Court is in charge of conducting the proceedings at the particular time.

V. Paragraph 5: Provisional arrest, arrest and surrender on request of the Court

If the Pre-Trial Chamber has issued a warrant of arrest pursuant to this article, it has to base any request to national authorities for provisional arrest (see article 92) and any request for arrest and surrender on this warrant of arrest⁸¹. The purpose of the provision is to make it clear that if a warrant of arrest by the Pre-Trial Chamber exists, the request for provisional arrest or the request for arrest and surrender has to be based upon this arrest warrant.

The provision does not specify to what extent the request for provisional arrest or arrest and surrender shall make reference to the contents of the arrest warrant or whether the request shall be accompanied by a copy of the arrest warrant. Such matters are not specifically addressed either in the *Rules of Procedure and Evidence* or the *Regulations of the Court*, so they will be determined in practice.

VI. Paragraph 6: Amendments of warrants of arrest

1. Request of the Prosecutor with regard to the crimes specified

The Prosecutor may require the modification of the warrant of arrest at any time during the investigation phase⁸². The provision only applies, however, as long as the Pre-Trial

⁷⁹ Article 59 provides that the court of the custodial State will determine whether a person arrested pursuant to a warrant of arrest issued under article 58 should be detained or released pending surrender to the Court. After surrender, the arrested person may apply pursuant to article 60 para. 2 to the Pre-Trial Chamber for interim release pending trial.

⁸⁰ Paragraph 3 was added in Rome.

⁸¹ This paragraph replaces a variety of proposals that set different expiration periods for pre- and post-indictment warrants of arrest. See article 53 [28] paras. 2 and 5 of the Zutphen Draft.

⁸² Article 52 [28] para. 4 of the Zutphen Draft provided that the Court, including all of its organs, 'shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9 [7]'.

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Chamber is competent for issuing a warrant of arrest. Once the criminal proceedings have progressed to the trial phase, article 58 is no longer applicable⁸³.

- 32 The wording leaves open the scope of possible modifications of the warrant. A restrictive reading of this paragraph might suggest the Prosecutor may request only that another crime within the jurisdiction of the Court be added to the list of crimes referred to in the warrant or that the facts of the crimes be modified⁸⁴. However, the provision should be interpreted in a wider sense allowing also for an amendment of the name or any identifiable features as referred to in paragraph 3 (a) of this article.
- 33 The Paragraph does not pertain to a modification of the summary of evidence or the reasons given by the Prosecutor for the need to detain the suspect as referred to in paragraph 2 (d) and (e) of this article, because the warrant of arrest does not contain those pieces of information pursuant to paragraph 3 of this article. An amendment in that respect would be redundant.
- 34 There is nothing in paragraph 6, the *Rules of Procedure and Evidence* or the *Regulations of the Court* concerning the form of the request for amendment or modification. However, the request does not require the same pieces of information as the application as referred to in paragraph 2, notably because the information contained in the application is already contained in the existing warrant of arrest.

2. Decision of the Pre-Trial Chamber

- 35 The Pre-Trial Chamber will amend the warrant of arrest only if the Prosecutor has presented reasonable grounds to believe that the suspect has committed the modified or additional crimes. The wording implies an obligation of the Pre-Trial Chamber to examine the request of the Prosecutor. The notion of ‘reasonable grounds’ entails the same objective criteria as does paragraph 1 (a) of this article.
- 36 The paragraph does not describe any particular proceedings for amendment or modification of the warrant of arrest. If the Pre-Trial Chamber has decided to amend or modify an existing warrant of arrest, it will do so by issuing a warrant of arrest that contains the modifications or additions requested. The provision does not tackle the question what happens to the former warrant of arrest. There are two possibilities: the warrant could either cease to exist automatically with the issuance of the amended warrant of arrest or the Pre-Trial Chamber would have to determine that the former warrant no longer is in force. The question is of practical relevance insofar as a request for provisional arrest or arrest and surrender would be based upon the warrant of arrest issued by the Pre-Trial Chamber⁸⁵. If the former warrant of arrest is not lifted when an amended warrant is issued, there is a risk that the request for provisional arrest or arrest and surrender would be based upon the former warrant instead of the amended warrant.

VII. Paragraph 7: Summons to appear as an alternative

1. Chapeau

- 37 a) **Application of the Prosecutor.** During the discussions at the meetings of the Preparatory Committee, the issue was raised whether a summons to appear could be considered as an alternative to a warrant of arrest. Both the warrant of arrest and the summons to appear before court are compulsory measures. Strictly speaking, however, a summons is less

⁸³ There was no provision in the Zutphen Draft concerning amendment of warrants of arrest.

⁸⁴ However, it is possible that a person who has been summoned or who has been arrested and released pending trial flees after the commencement of the trial. Presumably, the Trial Chamber, acting pursuant to articles 61 para. 11 and 64 para. 6 (a) could issue a warrant of arrest under article 58, as this step would be an exercise of a function of the Pre-Trial Chamber.

⁸⁵ See also the wording of the second sentence of this paragraph which only makes reference to the alternative that the person is suspected to have committed the modified or additional crimes.

restrictive than a warrant of arrest as it does not necessarily constrain the liberty of the person wanted. It is also less constraining than measures of judicial supervision that would control his or her personal freedom. The provision draws upon those cases where the circumstances do not support the issuance of a warrant of arrest pursuant to paragraph 1 of this article. The arrest may not appear necessary, e.g. if there are no grounds to believe that the suspect will disappear before the trial will take place.

The Prosecutor has to determine whether the circumstances of the case require a warrant of an arrest or a summons to appear. The provision does not provide for the application for other measures of judicial supervision in order to ensure that the person wanted will appear before the Court. An earlier version of the Draft Statute provided for the option to issue a warrant for judicial supervision in order to place the person wanted under restriction of liberty other than arrest⁸⁶. The proposal was deleted, because the issue of judicial supervision was dealt with in the following article concerning pre-trial detention or release (now article 60 of the *Rome Statute*)⁸⁷. A similar provision is now contained in paragraph 7, second sentence of this article.

The Prosecutor may apply for a summons to appear alongside an arrest warrant⁸⁸.

b) Decision of the Pre-Trial Chamber. aa) Reasonable grounds to believe that the person committed the crime alleged and the summons is sufficient to ensure the appearance. The Pre-Trial Chamber has the right and the obligation to examine the request of the Prosecutor for a summons to appear. It has to check in the same way as for a warrant of arrest if there are reasonable grounds to believe that the person committed the alleged crime within the jurisdiction of the Court and in addition the assessment of the Prosecutor that an application for a warrant of arrest is not necessary, because there were no grounds to believe that the suspect would not appear before the Court⁸⁹. Eventually, the Chamber needs to be satisfied that a summons to appear would be equally effective as a warrant of arrest to ensure the person's appearance before the Court⁹⁰. To this effect, the Chamber needs to ensure, before issuing a summons to appear, that the Prosecution Application and its supporting material provide sufficient guarantees that the person will appear before the Court⁹¹. The State's willingness to cooperate is an important factor in this respect⁹². Other factors that have been taken into consideration by the Court when deciding that a summons is sufficient to ensure

⁸⁶ Paragraph 5 of this article.

⁸⁷ Article 52 [28] para. 1 (b) of the Zutphen Draft at the bottom of the Paragraph.

⁸⁸ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 4.

⁸⁹ *Prosecutor v. Omar Hassan Ahmed Al Bashir* ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 29; *Prosecutor v. Abdallah Banda Abakaer Nourain* ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009 para. 34.

⁹⁰ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 116.

⁹¹ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 118; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 29; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 32; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 54; *Prosecutor v. Uhuru Muigal Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 53.

⁹² ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, paras. 122–124.

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appearance before the Court is that the persons were not perceived to be a flight risk and that nothing indicated that they would evade personal service of the summons or refrain from cooperating if summoned to appear⁹³.

41 A summons to appear is not an option if there are grounds to believe that the suspect may obstruct or endanger the investigation or the court proceedings, paragraph 1 (b) (ii), or if there is a risk that the suspect might continue to commit the crime he or she allegedly has committed or commit a related crime within the jurisdiction of the Court, paragraph 1 (b) (iii). Neither can it be issued for a person currently detained by national authorities, as in the Court's view this would be contrary to the object and purpose of article 58 paragraph 7: indeed, as pursuant to this article the Court can issue a summons to appear with conditions restricting liberty, only a person who is not already being detained can be the addressee of such a summons⁹⁴.

42 The Pre-Trial Chamber may reserve its right to review the finding that a summons to appear is sufficient to ensure the person's presence at trial either *proprio motu* or at the request of the Prosecutor, particularly if the suspect fails to appear on the date specified in the summons or fails to comply with the orders contained in the summons to appear issued by the Chamber⁹⁵.

43 **bb) Conditions under national law.** The decision of the Pre-Trial Chamber can be taken 'with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear'.

The *Statute* does not specify the types of conditions restricting liberty that could be adopted, but refers to national law. The provision offers the opportunity to the Pre-Trial Chamber to make use of judicial instruments that may be available in the State where the person wanted was located. In that respect, the paragraph offers a wide range for flexibility. Such measures, however, should be consistent with the *Rome Statute* and other international law standards.

The Pre-Trial Chamber only is in a position to order restrictions of liberty, if it declines to issue a warrant of arrest on the grounds that a summons to appear is sufficient to ensure the suspect's appearance before the Court. The wording in brackets clarifies that the notion of restrictions of liberty only refers to measures other than detention as detention is regarded as the most restrictive measure of liberty upon arrest.

44 The *Statute* does not provide for rules on how the conditions of restriction of liberty will be conducted or supervised. As a rule, the execution of such measures will be effected pursuant to the law of the State where the person wanted is located. The Court may request the assistance of the national authorities in accordance with the provisions on cooperation of Part 9 of the *Statute* as applicable⁹⁶. The Registrar may be ordered to monitor compliance with the conditions imposed⁹⁷.

⁹³ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 56; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 55.

⁹⁴ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para 120.

⁹⁵ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 32; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 35; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 56; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 55.

⁹⁶ Article 53 [29] para. 5 of the Zutphen Draft; see also article 52 [28] para. 1, 170.

⁹⁷ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, pp. 18–19; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, pp. 19–20.

The summons to appear may order the person to whom it is addressed to not have contact with any person who is or is believed to be a victim or a witness of the crimes for which the summons has been issued, to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence, to refrain from committing any crimes set forth in the *Rome Statute*, in addition to attending all required hearings at the Court⁹⁸.

2. The different subparagraphs

With respect to the elements referred to in subparagraphs (a), (c) and (d), the same observations can be made as put down with respect to paragraph 3 of this article.

In contrast to a warrant of arrest, a summons to appear has to contain the date of the hearing or trial on which the person is to appear. The paragraph does not require the summons to include the address where the person is to appear; but it is self-evident, that the obligation to appear can only be fulfilled by the person wanted if the exact address of the place is given to the person summoned. This provision has been criticized for failing to specify the penalty for non-compliance with a summons, failing to include provisions concerning allowances payable and what travel expenses are reimbursable or pre-paid⁹⁹.

With regard to the last sentence of paragraph 7, '[t]he summons shall be served on the person', the Pre-Trial Chamber may request the State where the person summoned is located to transmit the summons to appear in accordance with the provisions on cooperation in Part 9 of the *Statute*. Paragraph 7 would appear to exclude service by mail, but it will be up to the Court to determine what forms of service under national law constitute service 'on the person'.

⁹⁸ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, p. 23; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, pp. 23–24.

⁹⁹ Such a request could be based upon articles 86 and 93 para. 1 (l) (requiring States Parties to provide any type of assistance not listed in article 93 para. 1 (a) – (k) which is not prohibited by the law of the requested State) that does not specify the type of assistance requested.

Article 59 Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- a) The warrant applies to that person;
- b) The person has been arrested in accordance with the proper process; and
- c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Directly relevant Rules of Procedure and Evidence: Rule 117.

Literature: *General:* Abi Saab, G., 'Droits de l'homme et juridictions pénales internationales: Convergences et tensions', in: R.-J. Dupuy, (ed.), *Mélanges en L'honneur de Nicolas Valticos: droit et justice* (Éditions A Pedone 1999) 252; Amnesty International, *Fair Trials Manual* (Amnesty International Publications 1998); Delmas-Marty, M., *Procès pénal et droits de l'homme* (Presses Universitaires de France 1992); Fourmy, O., 'Powers of the Pre-Trial Chambers', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute Of The International Criminal Court: A Commentary*, Vol. II (2002) 1207; Friman, H., 'Rights of Persons Suspected or Accused of a Crime', in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 247; *id.*, 'Investigation and Prosecution', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 516; Gallant, K.S., 'Securing the Presence of Defendants before the International Criminal Tribunal for the Former Yugoslavia: Breaking with Extradition', (1994) 5 *CLF* 557; Green, L.C., 'Erdemović, Tadić, Dokmanović: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal', (1997) 27 *IsybHumRts* 313; Guariglia, F., 'Investigations and Prosecutions', in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 227; Harris, D., 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', (1967) 16 *IsCompLQ* 355; Knoops, J.G.A., *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (Brill, Nijhoff 2003); Krefß, C. and Broomhall, B., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: C. Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, II: Constitutional issues, cooperation and enforcement* (Nomos 2005) 515; Marchesiello, M., 'Proceedings before the Pre-Trial Chamber', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002) 1231; Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel 1993); Rodley, N.S., *The Treatment of Prisoners Under International Law* (OUP 2nd edition 1999); UN Centre for Human Rights and Crime Prevention And Criminal Justice Branch, *Handbook of International Standards Relating to Pre-Trial Detention* (United Nations 1994); Swart, B., 'Arrest Proceedings in the Custodial State', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*,

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A. Introduction/General remarks

Article 59 is based upon article 29 of the ILC Draft Statute¹. When discussing paragraph 1, 1 the delegates pondered whether national judicial authorities or the Court, be it the Presidency, the Trial Chamber or the Indictment Chamber or Pre-Trial Chamber, should have control over the legality of the detention of the suspect².

The *Rome Statute* distinguishes between arrest proceedings in the custodial State, governed 2 by article 59, and the proceedings before the Court, governed by article 60. Article 59 is based upon the assumption that, as a rule, a suspect will be located and detained by the local authorities in the territory of a State Party rather than by the Court. At the Preparatory Committee, the proposal was made that the Prosecutor himself or herself should have the authority to execute the warrant of arrest if the competent judicial authority was not available or ineffective. This proposal was abandoned, because a consensus could not be reached on resolving the practical questions concerning arrests by the Prosecutor or where such issues should be addressed in the *Statute*³. Nevertheless, as noted below, the Court will be faced

¹ 1994 ILC Draft Statute; see 1996 Preparatory Committee Report II, p. 139.

² 1996 Preparatory Committee Report II, pp. 139 *et seq.*

³ These issues before the Diplomatic Conference included 'under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute'. Article 53 para. 1bis no. 177 of the Zutphen Draft, <<http://www.legal-tools.org/en/doc/7ba9a4>> accessed 30 September 2014. It is also published in: M.C. Bassiouni

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with a number of novel questions not expressly addressed in article 59, for example, concerning the applicability of this provision to arrests by staff of intergovernmental organizations in peace-keeping operations, as well as to arrests by members of national contingents, both from States Parties and from other States, participating in such operations. Article 59 governs only arrest and surrender proceedings regarding crimes within the Court's jurisdiction⁴.

Article 59 is related to article 92 in Part 9 on cooperation with the ICC. This article mainly concerns the requirements which requests for provisional arrest by the Court should satisfy. Although it is not as such concerned with arrest proceedings in the custodial State, article 92 (3) provides that '[a] person who is provisionally arrested [in accordance with article 59 (1)] may be released from custody if the requested State has not received the request for surrender and the documents supporting the request...' This article goes on to state that 'the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible'.

- 3 Practice has shown that the custodial State mentioned in article 59 (2) is not necessarily the State where the alleged crime has been committed or of which the sought person is a national. Instead, the custodial State is any State which is in a position to execute the arrest warrant against the sought person who happens to be on its territory, whether this State is a party to the *ICC Statute* or otherwise under an obligation to cooperation with the Court, *e.g.*, under a UN Security Council Resolution. Several suspects were arrested in third countries.⁵ Where cooperation is not forthcoming, the Court may inform the Security Council and the Assembly of State Parties about the presence of the person on the said territory, in order for them to take any measure they deem appropriate.⁶ The non-cooperative State can also be requested by the Court to submit observations concerning its alleged failure to comply with the Cooperation Requests issued by the Court,⁷ after which the Court may make a finding in this regard, which will be transmitted to the Security Council and the Assembly of State Parties.⁸ Furthermore, in case the person has been present on the territory of the third State before and the State has failed on such occasion to proceed to the arrest and surrender of the

(ed.), *The Statute of the International Criminal Court: A Documentary History* (1998); M. C. Bassiouni (ed.), *International Criminal Court: Compilation of Documents and Draft ICC Statute before the Diplomatic Conference* (1998) and L. Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee*, 13bis NEP (A.I.D.P. 1998) 155 *et seq.* All citations to the Zutphen Draft are to the relevant draft articles. The Zutphen Draft was reorganized and partly revised at the final session of the Preparatory Committee held from 16 March to 3 April 1998 in what is sometimes known as the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference. Although the number of draft article 52 [28], the predecessor of article 58 of the Rome Statute, changed to article 59 in the New York Draft, the text remained the same.

⁴ Rule 165 para. 2 expressly provides that article 59 and any Rules related to that article do not apply to offences against the administration of justice.

⁵ Callixte Mbarushimana was arrested in France on 11 October 2010, Jean-Pierre Bemba Gombo was arrested in Belgium on 24 May 2008 and between 23 and 24 November 2013, the Dutch authorities arrested Jean-Jacques Mangenda Kabongo, the Belgian authorities arrested Aimé Kilolo Musamba and the French authorities arrested Narcisse Arido. Charles Blé Goude was arrested in Ghana and extradited to the Côte d'Ivoire but he was not arrested with the purpose of being surrendered to the ICC.

⁶ See, *e.g. Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 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, Pre-Trial Chamber I, 27 August 2010; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 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, Pre-Trial Chamber I, 27 August 2010; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 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 Djibouti, Pre-Trial Chamber I, 12 May 2011.

⁷ See, *e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 18 August 2011.

⁸ See, *e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued

person, the State will be required to submit observations to the Court regarding any problems which would impede or prevent the arrest and surrender during the upcoming visit and to proceed to arrest and surrender in accordance with its obligations under the *Statute*.⁹

B. Analysis and interpretation of elements

Article 59 expressly applies to States Parties to the *Statute*. However, it would necessarily apply to States that have made declarations recognizing the Court's jurisdiction pursuant to article 12 (3)¹⁰, and to States that are under an obligation to cooperate with the Court by virtue of a UN Security Council Resolution.¹¹ Presumably, it would also apply to a State that had entered into a cooperation arrangement or agreement with the Court pursuant to article 87 paragraph 5 and an intergovernmental organization that had reached an agreement with the Court pursuant to article 87 paragraph 6¹². The wording covers a request for provisional arrest as well as a request for arrest and surrender by the Court¹³. The arrest proceedings will be conducted according to Part 9 of the *Rome Statute* and the national law of the custodial State¹⁴.

The term 'surrender' was chosen in preference to the term 'extradition', because the negotiators were of the opinion that the transfer of suspects to the Court should be considered as distinct from current extradition regimes (see article 102 for the definition of these terms)¹⁵.

by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011.

⁹ See, e.g., *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision requesting observations from the Republic of Kenya, Pre-Trial Chamber I, 25 October 2010.

¹⁰ The Côte d'Ivoire has made such a declaration recognizing the jurisdiction of the Court over crimes committed since 29 September 2002, although as of 31 January 2006, it had not been published by the Registrar.

¹¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, Pre-Trial Chamber I, 10 December 2014, para. 1, referring to UN Security Council resolution 1970 (2011), UN Doc. S/RES/1970, para. 5; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, Pre-Trial Chamber II, 9 March 2015, paras. 13–15. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 March 2012, paras. 12–13; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, Pre-Trial Chamber I, 18 January 2013, para. 10. These decisions relate specifically to article 89, but the same *rationale* underlies the surrender obligation under article 59. Note that third States non-Parties may not be specifically targeted by UN Security Council resolutions containing cooperation obligations. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Pre-Trial Chamber I, 28 August 2013, para. 13, finding that Mauritania has no obligations vis-à-vis the Court arising directly from the *Statute* since it is not a State Party to the *Statute*, no ad hoc arrangement or agreement has been concluded between the Court and Mauritania and no other appropriate basis under article 87(5)(a) of the *Statute* imposes an obligation on Mauritania with respect to the arrest and surrender of Mr Al-Senussi to the Court. The decision to cooperate imposed by the Security Council was imposed solely on Libya (*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Pre-Trial Chamber I, 28 August 2013, para. 14).

¹² See also Negotiated Agreement between the International Criminal Court and the United Nations.

¹³ In the field of legal assistance, a request for provisional arrest usually is effected automatically when the warrant of arrest is filed with the police information system. If the Court decides to keep a warrant confidential, it may place the request for provisional arrest directly with the State Party where the suspect is presumed to be located.

¹⁴ 1996 Preparatory Committee Report II, para. 240.

¹⁵ The issue of terminology was controversial until the Diplomatic Conference. The terms 'extradition' and 'surrender' were still bracketed in conference working paper UN Doc. A/CONF.183/C.1/WGPM/L.2.

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I. Paragraph 1: Immediate reaction

- 5 The wording makes apparent that States Parties are obliged to comply with a request for provisional arrest as well as a request of arrest and surrender by the Court. In that respect, the paragraph requires that the arrest should be taken both in accordance with their laws and with the provisions on international cooperation of Part 9 of the *Statute*. The obligation spelled out in paragraph 1 falls within the general obligation in article 86 to cooperate with the Court in its investigations and prosecutions and the obligation in article 88 to ensure that there are procedures available under national law for all of the forms of cooperation that are specified in Part 9. The requirement of immediacy laid down in this paragraph, together with the obligation of national authorities in paragraph 2 to bring the arrested person promptly before a judicial authority and in paragraph 7 to surrender a person as soon as possible once a surrender order has been issued suggests that all subsequent steps taken pursuant to article 59 should be taken expeditiously.¹⁶

In addition, international law and standards require that if the person arrested at the request of an international criminal court remains in detention, proceedings in the national court must be prompt¹⁷.

- 6 The judicial authorities of the requested State Party would decide upon the steps to be taken to arrest the person sought by the Court in accordance with their national law and Part 9 of the *Statute*¹⁸. Of course, the national law at stake must be consistent with international law. In any event, as of the day when the arrest warrant is notified to the national authorities, the obligation to surrender arises. In exceptional circumstances, pursuant to article 95, the requested State is allowed to postpone the execution of the Court's request for surrender until such time as the Court has ruled on an admissibility challenge.¹⁹

II. Paragraph 2

1. Appearance before the competent judicial authority

- 7 The procedure described in article 59(2) necessarily follows from arresting a person pursuant to a surrender request.²⁰ It is for the law of the custodial State to determine which judicial authority is competent to conduct proceedings concerning the person arrested²¹.
- 8 Paragraph 2 requires that the arrested person be brought 'promptly' before the judicial authority in the custodial State with competence²². It would be in keeping with normal

¹⁶ Note in this respect also that the Court has held that the obligation to surrender arises as of the day when the arrest warrant is notified to the national authorities. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 4 April 2012, para. 19.

¹⁷ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para. 62, modified with respect to relief granted, 31 March 2000.

¹⁸ 1996 Preparatory Committee Report II, pp. 140 *et seq.*

¹⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, Pre-Trial Chamber I, 1 June 2012, p. 16.

²⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 4 April 2012, para. 19.

²¹ For an explanation of what would constitute a judicial authority, see Amnesty International, *Fair Trials Manual* (1998) sec. 5.1.1 and 12.4.

²² Paragraph 2 reflects international law and standards such as article 9 para. 3 of the International Covenant on Civil and Political Rights; Principle 11 para. 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; article 10 para. 1 of the UN Declaration on the Protection of All Persons from Enforced Disappearance; article 5 para. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 7 para. 5 of the American Convention on Human Rights; article XI of the Inter-American Convention on Forced Disappearance of Persons; and paragraph M.3 (a) of the Principles

principles of treaty interpretation for the concept of ‘promptly’ to be assessed in the light of international law and standards, rather than according to how the term is defined in national law or practice²³. The only reference in this paragraph to the national law of the custodial State is to the procedure for determining whether the criteria in subparagraphs (a) to (c) have been met. However, that procedure, necessarily, must be consistent with the *Statute* and other international law. Although paragraph 2 is silent on the question, it would be consistent with the requirement in paragraph 1 that a State take immediate steps to arrest a person and to bring the arrested person promptly before judicial authorities in paragraph 2 to require States Parties to ensure that all legal challenges and appeals of judicial decisions are resolved promptly. Still, it remains unclear what timeframe is precisely denoted by the term ‘promptly’. Accordingly, there is a risk that, despite the attempts of the drafters of the *Rome Statute* when designing surrender procedures to avoid the use of the extradition model, with its obstacles and protracted proceedings, surrender proceedings in the custodial State could become protracted. Regrettably, article 59 provides only limited tools for the Pre-Trial Chamber to encourage expeditious proceedings and the Court may be reluctant to resort to article 87 paragraph 7 except in cases involving gross abuses, even though there is no such threshold before the provision can be invoked²⁴.

Paragraph 2 implies that the warrant of arrest issued by the Court be effected by a State Party rather than by an organ of the Court. An earlier proposal provided that the Prosecutor of the Court was to execute the warrant of arrest with the consent of the Pre-Trial Chamber, if the competent judicial authority of the State Party was either not available or ineffective²⁵. The proposal was dropped, however, because the suggested provision raised a number of controversial issues, including, for instance, under what conditions the Prosecutor should be able to exercise such authority, or whether he or she would have adequate resources to do so²⁶. Although this proposal was dropped, it is not clear whether the absence of an express provision in the *Statute* would prevent staff of the Office of the Prosecutor from executing an arrest warrant or serving a summons. For example, it is not clear what the scope of the Prosecutor’s powers is when taking specific investigative steps pursuant to article 57 paragraph 3 (d) when a State Party is unable to do so²⁷. Presumably, national legislation could permit staff of the Office of the Prosecutor to carry out arrests. As noted above, however, the Court is likely to be presented with a number of other novel situations not expressly addressed in article 59²⁸.

and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples’ Rights, 33rd Ord. Sess., 15 to 19 May 2003.

²³ In many States there can be considerable delays, both because of law and practice, in bringing arrested persons before a judge. However, a State Party could not successfully argue that the term promptly should be measured by its national law and practice rather than by international law and standards. See Vienna Convention on the Law of Treaties, article 27 (‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’).

²⁴ Whether the Court could issue a request to a State to expedite proceedings or whether it has any inherent powers to supervise national authorities acting as the Court’s agents does not appear to have been explored in any detail by the drafters of the *Statute*.

²⁵ See Zutphen Draft, article 53 para. 1*bis*.

²⁶ See Zutphen Draft, article 53 para. 1*bis*, No. 177.

²⁷ Article 57 para. 3 (d) permits the Pre-Trial Chamber to ‘[a]uthorize the Prosecutor to take specific investigative steps’ when it ‘has determined that the State is clearly unable to execute a request for cooperation’, but it does not define investigative steps. The most plausible way of interpreting this provision is that it would permit the Pre-Trial Chamber to authorize the Prosecutor to execute any request for cooperation that the requested State is unable to execute, including a request to execute an arrest warrant or to serve a summons. There are other situations when an arrest by staff of the Prosecutor could be authorized. For example, if a suspect for whom a sealed arrest warrant had been issued were to appear on Court premises, permitting such an arrest, perhaps with an immediate transfer to the host State or the State where the Court was sitting pursuant to article 3 para. 3, subject to effective safeguards for the rights of the arrested person, might be consistent with the *Statute*. It is also possible that in situations not covered by article 57 para. 3 (d) the Pre-Trial Chamber could authorize the Prosecutor to seek the assistance of UN peacekeepers to execute a warrant of arrest.

²⁸ For example, an arrest might not be carried out by a State Party, but by a State that had made a declaration pursuant to article 12 para. 3 or which had entered into a special arrangement or agreement with the Court pursuant to article 87 para. 5 or by staff of an intergovernmental organization pursuant to article 87 para. 6. In

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- 10 The wording ‘which shall determine’ makes it clear that the State Party where the person sought was arrested, is obliged to ensure that the arrest proceedings are conducted in accordance with the applicable rules of the *Statute* and the law of the State Party²⁹.

The precise contours of the procedure before the competent national judicial authority are determined by the State, ordinarily on the basis of ICC implementation legislation. In one case, a domestic court has held that the right to judicially contest a provisional arrest under national law is based on articles 91 and 92 (2) rather than on article 59³⁰. None of these provisions explicitly provides for a right to contest a decision of a competent national authority, however, arguably because the drafters did not want to be seen too intervening in the domestic judicial structures of States Parties³¹. In that same case, the court ruled that the person could no longer contest his arrest once the (domestic) pre-trial chamber had decided to surrender him to the ICC, at which moment a new basis for detention was created³².

2. The different subparagraphs

- 11 Paragraph 2 identifies only three matters which are to be considered by the competent judicial authority in the custodial State. Thus, there is no role under the *Statute* for executive authorities in the custodial State in making such determinations, in contrast to decisions on interim release, which are to be made by the competent authority in the custodial State (paragraph 3). As discussed below, in addition to these proceedings in the custodial State, parallel proceedings may be taking place in the Pre-Trial Chamber on other matters within its jurisdiction, such as the appointment of counsel for proceedings before the Court, challenges to the issuance of the arrest warrant and challenges to jurisdiction and admissibility³³.
- 12 a) **The warrant applicable.** The judicial authority of the custodial State that is in charge of the arrest proceedings has to verify whether the person arrested is the same as the person sought under the arrest warrant. In making that determination, the judicial authority can rely upon the supporting information and material required by article 91 paragraph 2 in the request for arrest and surrender. In addition, the judicial authority should, after sufficient notice, permit the Office of the Prosecutor, which will have relevant information, and the

addition, military police of a State Party (custodial State) serving in a peace-keeping operation might carry out an arrest in the territory of another State. A literal interpretation of paragraph 2 would suggest that the military police would have to send the arrested person promptly back to a court in the custodial State, both when the courts in the territorial State were open and when the judicial system had collapsed. A degree of flexibility in the implementation of article 59 that is consistent with the purpose of the *Statute* may be possible, such as bringing the person promptly before a court of the custodial State sitting in the State with jurisdiction where the person was arrested or prompt surrender to the Court, provided that the safeguards for the rights of the suspect, as envisaged in article 59, were fully respected and kidnapping in violation of international law was prohibited. In this respect, the Court should reject the approach of the ICTY in *Prosecutor v. Dokmanovic*, IT-95-13a-PT, Decision on the Motion for Release, Trial Chamber, 22 October 1997 (decision not available on ICTY website) and *Prosecutor v. Nikolić*, IT-95-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 2 October 2002, to allegations that the accused was kidnapped in violation of international law. See *Green* (1997) *IsYbHumRts* 313; *Abi Saab*, in: Dupuy (ed.), *Mélanges en L'honneur de Nicolas Valticos: droit et justice* (1999) 252; see also Krefß and Broomhall, in: Krefß et al. (eds.), *The Rome Statute Of The International Criminal Court And Domestic Legal Orders* (2005) 515, 520 et seq.

²⁹ The elements which the competent judicial authorities have to examine in particular pursuant to that paragraph were agreed upon during the meeting of the Preparatory Committee in August 1997. See Zutphen Draft, article 53 para. 2, p. 102.

³⁰ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para. 5.

³¹ See on the balance between the role of State authorities and the ICC in respect of article 59. Preparatory Committee Report Vol. I at 52.

³² *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0971F, ILDC 1116 (BE 2008), Appeal Decision, 1 July 2008, paras. 5 and 10.

³³ Rule 117 para. 2 (appointment of counsel for proceedings in the Court) and para. 3 (challenges to the issuance of the arrest warrant); article 19 (challenges to jurisdiction and admissibility).

Pre-Trial Chamber to participate at all stages of the proceedings and to make recommendations. The determination should be subject to expected appeal³⁴.

b) Arrest ‘in accordance with the proper process’. The arrest proceedings are governed by the law of the custodial State³⁵. Article 59 does not address the criteria of proper process. Basically, it means that the warrant be duly served on the person arrested and that the process be consistent with international law and standards³⁶. It may be argued that the right to be arrested ‘in accordance with the proper process’ in article 59(2)(b) is in fact just one of the rights to be respected in accordance with article 59(2)(c), so that in practice both provisions have to be read together.³⁷

c) Rights to be respected. The rights referred to in this subparagraph would include both rights under national law and under international law, including the rights recognized in article 55, such as the right to be informed of one’s rights and the right to counsel. They would also include the suspect’s right to be informed about the charges and the grounds for the detention³⁸. The ICTR Appeals Chamber has made clear that arrest and transfer proceedings in a national court must conform to international law³⁹. Article 59 does not state what the judicial authority in the custodial State may do if it determines that the suspect’s rights were not respected, although it should inform the Pre-Trial Chamber promptly of any violations. Nothing in the *Statute* would prevent the judicial authority from awarding reparations, which could include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, for violations of rights under national or international law⁴⁰. In addition, it is not excluded that the national judicial authority releases the person or suspends the proceedings in case of manifest violations. However, a restriction of this authority’s power may be called for when the ICC has already declared a case admissible during arrest warrant proceedings⁴¹. Especially in such a situation neither the determination by the national judicial authority that the suspect’s rights were violated nor the remedies it adopted should be allowed to prevent surrender to the Court. Any further remedy for violations of rights, such as the exclusion of evidence pursuant to article 69 paragraph 7, would need to be sought initially from the Pre-Trial Chamber rather than from the national authority. In addition, article 85 paragraph 1 provides that persons who have been the victim of unlawful arrest or detention are entitled to compensation, which would necessarily include compensation for unlawful arrest or detention on the basis of a warrant of the Court by the

³⁴ Ordinarily, the decision by the national courts after exhaustion of all possible appeals would be final. However, if the decision were to amount to a failure to comply with a request of the Court contrary to the *Statute*, for example, because the proceedings were a sham, then the Court could take appropriate steps pursuant to article 87 para. 7.

³⁵ 1996 Preparatory Committee I, para. 240.

³⁶ See article 29 para. 1 of the ILC Draft Statute.

³⁷ El Zeidy (2006) 4 *JICJ* [448], 454.

³⁸ See, for example, article 9 para. 2 of the International Covenant on Civil and Political Rights; principles 10 and 11 para. 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the UN Basic Principles on the Role of Lawyers; articles 5 para. 2 and 6 para. 3 (a) of the European Convention on the Protection of Human Rights and Fundamental Freedoms; article 7 para. 4 of the American Convention on Human Rights; article 6 of the African Charter on Human and Peoples’ Rights; Paragraph M.2.(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples’ Rights, 33rd Ord. Sess., 15 to 19 May 2003; *Barayagwiza* (Appeals Chamber Decision), see note 17, paras. 78–86.

³⁹ *Barayagwiza* (Appeals Chamber Decision), see note 17.

⁴⁰ The scope of the right to reparations for violations of rights is reflected to a large extent in the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joint Principles), Definitions, B., UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; Draft Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven-Bassiouni Principles); and Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

⁴¹ El Zeidy (2006) 4 *JICJ* [448], 456.

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custodial State or by anyone else. This leaves open the question, however, whether the person could also challenge his unlawful arrest or detention by State authorities with an international human rights supervisory body, such as the European Court of Human Rights, and what the impact of a decision by such body would be on ICC proceedings⁴².

III. Paragraph 3: The right to apply for ‘interim release’

- 15 Paragraph 3 guarantees the right of the person arrested to apply to the competent judicial authority in the custodial State for interim release pending surrender to the Court. The person arrested can apply for interim release where either he has been provisionally arrested, or where he has been arrested for purpose of surrender to the ICC⁴³. He can do so even if the competent authority has not yet taken a decision for provisional arrest or a decision to surrender⁴⁴.

In contrast to the determination which must be made by the competent judicial authority pursuant to paragraph 2, decisions on interim release pursuant to paragraph 3 are to be made by the competent authority⁴⁵. The procedure in the custodial State for determining pre-trial release would govern applications for release, to the extent that they are consistent with international law, including the *Rome Statute* and general principles of law, such as those reflected in article 9 paragraph 3 of the International Covenant on Civil and Political Rights.

- 16 Nothing in the *ICTY* or *ICTR Statutes* or *Rules* permits national courts to order provisional release; such determinations can only be made by the Tribunals. Article 29 of the ILC Draft Statute provided that only the Court in the form of the Presidency has the right to decide upon the release of the person arrested pursuant to an arrest warrant by the Court⁴⁶. As alternatives to the Presidency, the representatives at the meetings of the Preparatory Committee named the Trial Chamber or the Indictment Chamber or Pre-Trial Chamber as responsible for the release of the suspect⁴⁷. However, in a dramatic shift, the *Rome Statute* allocated responsibility for determinations on interim release to a competent authority of the custodial State in accordance with the national and international law applicable, as long as the person arrested is within their territory or subject to their jurisdiction⁴⁸. Despite this allocation of responsibility, the Pre-Trial Chamber would probably still have a responsibility as the court that issued the arrest warrant to respond if the competent authority in the custodial State failed to act in accordance with the *Statute*. In

⁴² El Zeidy (2006) 4 *JICJ* [448], 462, who has reasonably argued in this respect that the ICC may ‘be guided by that decision, but not obliged to take it into account’, although possibly making a reservation in case of gross human rights violations, in which the abuse of process doctrine may be applied to stay proceedings.

⁴³ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para. 8.

⁴⁴ *Ibid.*

⁴⁵ Most national implementing legislation provides that decisions on interim release will be made by a court. However, at least one State has provided in its implementing legislation that executive authorities can overturn court decisions denying interim release. See, for example, International Criminal Court act 2002, No. 41, 2002, section 25 para. 1 (b) (Australia) (‘The Attorney-General must ... direct a magistrate to order the release from custody of a person remanded by the Division, or the discharge of the recognizance on which bail was granted to the person, as the case requires, if: ... (b) in any case – after considering the matters mentioned in subsection 23 (6) [which repeat the factors in article 59 para. 4 of the Statute], the Attorney-General considers for any other reason that remand should cease’).

⁴⁶ See 1996 Preparatory Committee Report II, p. 139.

⁴⁷ Zutphen Draft, see note 3. Article 53 [29] para. 3 of the Zutphen Draft provided two options for making interim release determinations; either the Pre-Trial Chamber or the competent judicial authority in the custodial State. The reason that the requirement that the competent authority be a judicial one was dropped when it was decided that these decisions should be made at the national level is not clear. It may have been made simply because such determinations are made in some States by executive authorities rather than by a court and those States did not wish to change this practice.

⁴⁸ It is quite possible that the arrested person would be detained by members of the armed forces of the custodial State abroad, for example, during the course of a peace-keeping operation.

addition, it may review the grounds for the detention once the person arrested has been transferred to the Court⁴⁹.

However, the competent authorities of the custodial State are not in a position to lift the arrest warrant issued by the Court. The factors that they may consider in determining whether to grant interim release are specified in paragraph 4. 17

The authors are aware of two instances of a person arrested applying for interim release with the competent judicial authority in the custodial State: Jean-Pierre Bemba, upon his arrest in Belgium⁵⁰, and Callixte Mbarushimana upon his arrest in France⁵¹. 18

IV. Paragraph 4: Conditions

1. ‘urgent and exceptional circumstances’

Paragraph 4 gives guidance to the competent authorities of the custodial State when examining the grounds for a possible interim release of the arrested person. However, this provision must be interpreted in light of the general principles of law applicable to pre-trial release, as reflected, for example, in article 9 paragraph 3 of the International Covenant on Civil and Political Rights, which states that ‘[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial ...’ Paragraph 4 states that when reaching a decision on an application for release, the competent judicial authority ‘shall consider whether, given the gravity of the crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court’. The second factor is discussed below. These factors should not be seen as exclusive. Moreover, national courts will certainly look at the practice regarding pre-trial release of international criminal courts, as well as of national courts that have been conducting proceedings involving crimes under international law. National courts are however not allowed to grant interim release in cases where, objectively speaking, no urgent and exceptional circumstances justifying such interim release are present⁵². 19

An urgent and exceptional circumstance would be that of an arrested person in the advanced stages of a terminal illness, although it is noted that, in most cases of illness an arrested person could be held in custody in a prison hospital or a comparable institution. A more liberal interpretation of ‘urgent and exceptional circumstances’ is however also possible, in accordance with the approach of the international criminal tribunals towards application for provisional release⁵³.

⁴⁹ See article 60 para. 2.

⁵⁰ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008. In Belgium, article 59 (3) was implemented through article 16 (1) of the Cooperation Law for ICC and Tribunals.

⁵¹ *Procureur v. Callixte Mbarushimana*, ICC-01/04-01/10, Recommandations adressées à la Chambre d’Instruction de la Cour d’Appel de Paris en vertu de l’article 69 du Statut de Rome, 29 November 2010.

⁵² *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18th June 2008.

⁵³ See as regards the ICTY notably *Prosecutor v. Sainovic*, IT-99-37-AR65, Decision on Provisional Release, Appeals Chamber, 30 October 2002, para. 6 (‘A Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion. This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. In relation to the present application for provisional release, a reasonable Trial Chamber would have been expected to consider, and thus to list, *inter alia*, the following factors: the fact that the applicants are charged with serious criminal offences; the fact that, if convicted, they are likely to face long prison terms; the circumstances in which they surrendered; the degree of co-operation given by the authorities of the FRY and Serbia; the fact that the government of the FRY and the government of the Republic of Serbia gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release; the fact that both accused held very senior positions, so far as it is relevant to the weight of governmental guarantees; the fact that the FRY recently passed a Law on Co-

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2. ‘necessary safeguards’

- 20 The second condition for granting interim release is that the custodial State takes appropriate measures to ensure that the transfer of the arrested person to the Court is not put at risk. The wording stresses the obligation of the State Party to surrender a suspect to the Court upon its request for surrender.
- 21 As a rule, the detainee shall be held in an appropriate location for detention that fully satisfies international law and standards concerning detention⁵⁴. If interim release is granted, when the competent authority determines what safeguards are necessary to ensure surrender it should consider to what extent the safeguards used by the Court listed in rule 119 on conditional release would be appropriate, as well as the safeguards required by the ICTY. This step would help to ensure consistency of approach by national and international courts when determining the same issue. Although the factual circumstances of pre-trial release in the host State may be different from those in States where crimes within the Court’s jurisdiction are taking place, it should be borne in mind that the ICTY has permitted accused persons on provisional release in certain circumstances to return to their own countries⁵⁵.

3. No consideration ‘whether the warrant of arrest was properly issued’

- 22 The wording of paragraph 4 makes it clear that the competent authorities of the custodial State shall decide upon detention or interim release pursuant to this article, but may not rule on challenges to the grounds of the issuance of the warrant of arrest. The underlying assumption of this paragraph is that only the authority that has issued the warrant is in a position to lift it. Consequently, the competent authority of the custodial State in charge will not hear, for instance, challenges to the competence of the Court to issue the arrest warrant or to the correctness of the presentation of the facts. The arrested person may bring forward those challenges only before the Pre-Trial Chamber. However, rule 117 paragraph 3, which

operation with the International Tribunal; the fact that the Applicants gave personal guarantees in which they undertook to abide by the conditions set by the Trial Chamber should they be released; the likelihood that, in light of the circumstances prevailing at the time of the decision and, as far as foreseeable, the circumstances as they may turn out to be at the time when the accused will be expected to return for trial, the relevant authorities will re-arrest the accused should he decline to surrender; and the fact that the accused provisionally accepted to be interviewed by the Office of the Prosecutor, thereby showing some degree of co-operation with the Prosecution.’); *Prosecutor v. Markač*, IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004.

As far as the ICC is concerned, Jean-Pierre Bemba Gombo has been granted interim release by the Pre-Trial Chamber II on 14 August 2009, after being denied such release on three previous occasions, due to a substantial change of circumstances since the last decision on interim release had been rendered. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Pre-Trial Chamber II, 14 August 2009.

⁵⁴ For example, the relevant standards include the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1990 UN Basic Principles for the Treatment of Prisoners. In addition, to the extent that they are consistent with international law and standards, the Court should consider the various instruments concerning detention by the ICTY: Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, Rev. 8, 29 November 1999; Regulations to Govern the Supervision of Visits to and Communications with Detainees, Rev. 3, 22 July 1999; House Rules for Detainees June 1995; Regulations for the Establishment of a Complaints Procedure for Detainees, April 1995; Regulations for the Establishment of a Disciplinary Procedure for Detainees, April 1995; Appointment of Inspecting Authority for the Detention Unit, 28 April 1995; Agreement on Security and Order, 14 July 1994. It should also consider, subject to the same caveat, similar instruments on the same basis adopted by ICTR and the Special Court for Sierra Leone. The Court has yet to adopt any instruments governing detention. On the law and standards governing pre-trial detention, see Rodley, *The Treatment of Prisoners in International Law* (1999).

⁵⁵ See, for example, *Markač* (Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release), note 53.

provides for challenges to the issuance of the warrant, does not restrict such challenges to challenges made after surrender to the Court, so he or she could make such a challenge before the Pre-Trial Chamber while still in the custodial State⁵⁶.

V. Paragraph 5

1. Notification of the Pre-Trial Chamber and recommendations

The provision reflects the underlying assumption of the *Statute* that the organs of the Court and the States Parties will work closely together on all issues of cooperation, although such cooperation may not always be forthcoming from States Parties or from other States. The purpose of the provision is to balance the competence of the local judicial authority of the custodial State to decide upon detention or interim release of the suspect with the control functions of the Pre-Trial Chamber during the investigations of the Court. Paragraph 5 requires that the Pre-Trial Chamber be informed, presumably in a timely manner, of any request for interim release to permit it to make recommendations and requires that the Pre-Trial Chamber make recommendations to the competent authority in the custodial State. Rule 117 paragraph 4 requires that these recommendations be made within the time limits set by the custodial State⁵⁷. 23

In contrast to rule 117 paragraph 3, which requires the Pre-Trial Chamber to obtain the views of the Prosecutor with respect to a challenge to the issuance of an arrest warrant, neither paragraph 5 nor rule 117, paragraph 4 expressly require the Pre-Trial Chamber to obtain the views of the Prosecutor on a request for interim release. This omission must be an oversight since the Prosecutor will normally be in the best position to provide recommendations concerning such a request. If the Pre-Trial Chamber is to make effective recommendations on interim release, it will need to consult the Prosecutor. Neither paragraph 5 nor rule 117 paragraph 4 specify what recommendations the Pre-Trial Chamber may make, although it is clear from the structure of paragraph 5 that recommendations concerning the request for interim release, ‘including any recommendations on measures to prevent the escape of the person’, are obligatory. The first edition of this Commentary suggested that such recommendations might address security issues, the possible danger to the life of the suspect deriving from his or her involvement in criminal activities or from his or her status in his or her country of residence. The Pre-Trial Chamber or Prosecutor may have confidential information about other inmates of the detention facilities that may endanger the physical integrity of the suspect. Although the Pre-Trial Chamber may not be in a position to share such 24

⁵⁶ Rule 117 para. 3 provides:

‘A challenge as to whether the warrant of arrest was properly issued in accordance with article 58, para. 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide upon the application without delay’.

A government delegate closely involved in the drafting of this rule has stated: ‘It seems that because no time limits are established for such a challenge, it could also be filed when the person is still in the custodial State’. Friman, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 516. Rule 117 para. 3 would appear to provide a procedure for a challenge by the arrested person while detained in the custodial State to at least some aspects of the lawfulness of detention seeking release if that detention were to be determined unlawful. Although there is no express provision in the *Statute* for such a challenge, it is implicit in the prohibition in article 55 para. 1 (d) of arbitrary arrest and detention. In any event, the Court has the inherent power to entertain such a challenge and provide such relief. See, for example, *Prosecutor v. Semanza*, ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000, paras. 112 *et seq.*; *Barayagwiza* (Appeals Chamber Decision), see note 17, para. 88.

⁵⁷ Rule 117 para. 4 provides that when the custodial State has notified the Pre-Trial Chamber of a request for release, then ‘the Pre-Trial Chamber shall provide its recommendations within any time limit set by the custodial State’. Although not expressly stated in the *Statute* or the *Rules*, the custodial State should act in good faith by providing such notice promptly, inform the Pre-Trial Chamber of the time limit and ensure that the time limit is a reasonable one.

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information, it may recommend that the arrested person be sent to another facility within the custodial State. If the Pre-Trial Chamber or Prosecutor possesses such information, there would be an obligation to recommend appropriate measures to the custodial State, as the use of the term ‘shall’ suggests. In addition, the recommendations should address the extensive list of factors considered in the recent jurisprudence of the ICTY concerning provisional release discussed above and measures that the Pre-Trial Chamber would itself consider pursuant to rule 119 were appropriate guarantees for appearance in proceedings in the Court.

Paragraph 5 simply sets out the requirement that the Pre-Trial Chamber make recommendations concerning interim release; it does not preclude the Pre-Trial Chamber from making recommendations concerning other matters. Given that the Pre-Trial Chamber will have a clear interest under the *Statute* in ensuring that the surrender proceedings are promptly concluded and that the rights of the arrested person, including the rights of access to families, counsel, independent medical attention and to a judge and the right to be free from torture and other ill-treatment, are fully respected at all stages of the proceedings in the custodial State, it may make recommendations concerning such matters.

Neither paragraph 5 nor rule 117 paragraph 4 state how the Pre-Trial Chamber should make these recommendations, but they do not specify that such recommendations need to be in writing. Therefore, these provisions would not prevent a representative of the Pre-Trial Chamber or, more appropriately, a member of the Office of the Prosecutor to appear in person to make these recommendations and to present oral or written evidence relevant to the recommendations, whether they concern interim release or other matters. As indicated above, the custodial State should ensure that the Prosecutor and the Pre-Trial Chamber can appear at all stages of the proceedings.

2. Full consideration to recommendations

- 25 Although the custodial State is required ‘to give full consideration’ to the recommendations by the Court, the measures taken have to be in keeping with the applicable law of the custodial State, to the extent that this law is consistent with the *Statute* and other international law and standards. In that respect, the competent authority would have to take into account any constitutional principles applicable such as, for instance, the principle of proportionality, meaning that the measure recommended should be sufficient to prevent the escape of the person under arrest, but should not restrict his or her freedom more than is necessary.
- 26 If the competent authority decides to grant interim release while the conditions of these Paragraphs are not fulfilled or the necessary safeguards were not provided and the person sought escapes, the decision would amount to a failure ‘to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute’, thus permitting the Court, pursuant to article 87 paragraph 7 ‘to make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.

VI. Paragraph 6: Periodic reports

- 27 If the arrested person is released, paragraph 6 states that the Pre-Trial Chamber may ‘request periodic reports on the status of the interim release’. Whether this paragraph is strictly necessary is doubtful since the Pre-Trial Chamber would have the power to issue such a request in any event, but it is a useful reminder to competent authorities in the custodial State that such requests can be made. As a request concerning the investigation and prosecution of crimes within the jurisdiction of the Court, the custodial State must comply with the Pre-Trial Chamber’s request pursuant to article 86. Rule 117 paragraph 5 requires

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the Pre-Trial Chamber to ‘inform the custodial State how and when it would like to receive periodic reports on the status of the interim release’. The purpose of paragraph 6 is to balance the responsibilities of the custodial State to decide upon detention or interim release and the Pre-Trial Chamber to control the progress of the investigation and to ensure that the criminal proceedings before the Court are not at risk.

Although the decision of the Pre-Trial Chamber to request periodic reports is discretionary, rule 117 paragraph 5 seems to envisage such requests as a matter of course and it is difficult to imagine how it could fulfil its responsibilities effectively without, at a minimum, periodic reports from the custodial State.

VII. Paragraph 7: Surrender on order

If the Pre-Trial Chamber requests that the arrested person be surrendered to the Court, the custodial State has to comply with that request, provided that it is a State Party to the *Statute*, has made a declaration pursuant to article 12 paragraph 3 or has made an arrangement or agreement with the Court pursuant to article 87 paragraph 5. As a request concerning the investigation and prosecution of crimes within the jurisdiction of the Court, the custodial State must comply with that request pursuant to article 86 and it must have procedures in place permitting surrender⁵⁸.

⁵⁸ See article 88.