

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. 1*bis* 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 Goudé 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.

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.