DISSERTATION / DOCTORAL THESIS

Titel der Dissertation / Title of the Doctoral Thesis

"Release from Pre-Trial Detention in Theory and Practice in Modern International Criminal Justice in the Light of International and European Human Rights Standards"

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirementrs for the degree of

Doktor der Rechtswissenschaften (Dr. iur.)

Wien, 2017 / Vienna 2017

Studienkennzahl lt. Studienblatt / degree programme code as it appeas on the student record sheet:	A 783 101
Dissertationsgebiet / field of study as it appears on the student record sheet:	Rechtswissenschaften
Betreut von / Supervisor:	Univ.-Prof. Dr. Frank Höpfel

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACCRONYMS

ACCP	Austrian Code of Criminal Procedure, StPO
AL-ICC	Austrian Law on the Cooperation with the ICC
AL-ICTY	Austrian Law on the Cooperation with the ICTY
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
(UN) HRC	(United Nations) Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	United Nations International Criminal Tribunal For Rwanda
ICTY	United Nations International Criminal Tribunal For the Former Yugoslavia
IHL	International Humanitarian Law
IO	International Inter-Governmental Organization
NATO	North Atlantic Treaty Organization
StVG	Strafvollzugsgesetz, Austrian Law on Enforcement of Prison Sentences
UDHR	Universal Declaration of Human Rights
UN	United Nations Organization
UNSC	Security Council of the United Nations
VCLT	Vienna Convention on the Law of Treaties

METHODOLOGY

The wide use of pre-trial detention in international criminal proceedings has been subject to discussion and criticism particularly in the initial period of the International Criminal Tribunal for the former Yugoslavia (ICTY). Currently, the lack of pre-trial releases before the International Criminal Court (ICC) is equally widely noted with concern. With regards to the practice of the shifting the burden of proof to the accused in release motions before the ICTY, comprehensive academic research surrounding the question of legality of such an instrument from a human rights point of view was – in my view - missing. The question of jurisdiction of human rights courts over those standing trial before international criminal courts was considered an unrealistic scenario and as such not thoroughly discussed.

In my research, I have tried to conduct an in-depth examination of these issues by thoroughly analysing the jurisprudence of leading human rights courts. With regards to limiting the release to exceptional circumstances this was done by examining primarily the case law of the European Court of Human Rights (ECtHR) which originated from cases relating to serious crime. The question of the legality of reversing certain burdens of proof to the detriment of an accused - both in substantive as well as in procedural matters - was considered as one of crucial relevance for any legal order attempting to act both in a human rights compliant manner while guaranteeing the efficacious operation of law enforcement. The principles thereby developed by reverting to leading jurisprudence of the ECtHR were applied to the peculiarity of release motions before the ICTY. The aim was, however, to design a pattern against which the legality of any reverse burden of proof mechanism could be tested. With regards to the ICC this study tried to find answers as to why a pre-trial release mechanism in conformity with human rights has to date not translated into a system in which defendants stand a realistic chance of being released. Regarding the question of access to the ECtHR for defendants from the ICC and ICTY, which was considered a logical consequence of conducting a human rights assessment of ICTY or ICC procedures, the decisions by the ECtHR were critically analysed and notably compared to leading principles of the Strasbourg jurisprudence regarding other international inter-governmental organizations.

This study tried to analyse key aspects inherent to the sytem of pre-trial detention for those standing trial for international crimes both at the international level as well as the domestic level. For the international level the ICTY and the ICC were selected. The ICTY was chosen as being the most important international criminal court of our time, both in terms of verdicts and in shaping jurisprudence (notably also in pre-trial detention matters), and the ICC as the sole permanent international criminal court having developed distinct and progressive features not present in its *ad hoc* predecessors. At the domestic level, the practice of Austria was examined as a member to the ICC and representative of a domestic civil law jurisdiction which establishes a statutory presumption against the possibility of pre-trial releases for the most serious crimes.

Following an examination of relevant primary and secondary sources, this doctoral thesis made an attempt to contribute to a perceived gap in academic literature pertaining to the law and practice of reverse burdens of proof in international criminal proceedings before the ICTY, the ICC and Austrian domestic practice. With regards to the question of jurisdiction of the European Court of Human Rights (ECtHR) over persons detained by the ICTY or the ICC, this contribution tried, due to the novelty character of the topic, to raise the most central issues without having realistically expected to provide definite and complete answers to this fascinating and unique but also controversial issue which is expected to further develop in future.

The relevant legal provisions were analysed according to the established methods of legal interpretation**.** The dissertation is expository, intra-disciplinary (ICL and human rights law) and is widely based on the doctrinal research method. It relies on official documents by the examined criminal and human rights courts, which include public judicial decisions, founding documents and statements, working guidelines, transcripts of hearings, and parties' submissions, as indicators of the practice of the proceedings. It was further inspired by leading academic writings and commentary which provide the theoretical and comparative frameworks to complement primary source documents.

Personal experiences from study visits to the ECtHR and the Human Rights Committee as well as working for an ICTY defence team (3 months) and the ICC Registry (5 months) provided me with practical insight. My personal thanks go to Michael Rowse for commenting on an earlier version of this dissertation as well as to Sara Pedroso for her contribution in proof-reading the English grammar.

Abstract: *This contribution examines certain characteristics of pre-trial detention in International Criminal Law from a human rights perspective. Particular focus will be laid on the human rights compatibility of a restrictive release regime conditioning pre-trial liberty upon the existence of exceptional circumstances (**Chapter I**), as well as the application of reverse legal burdens in provisional release matters more generally (**Chapter II**). Possible alternatives to detention for those awaiting trial will be examined as well as the practice of post-conviction release in International Criminal Law (**Chapter III**). The final chapter (**Chapter IV**) will examine possible recourses to international human rights courts of those standing trial before international criminal bodies and who are subject to potential human rights violations.*

INTRODUCTION

The relationship between human rights and international criminal justice was once compared to that of a protecting shield and sword. Whereas the guarantee of human rights and fair trial rights traditionally protects citizens against state actions ("*shield function*"), serious human rights violations in the context of International Criminal Law (ICL) may at the same time trigger the prosecution of the perpetrators ("*sword function*").[1] Judge *Van den Wyngaert* referred to the binary functions of human rights: the defensive or "shield" function on the one side and the offensive or "sword" function on the other.[2] Defendants before international criminal courts and tribunals encounter both[3]; while the enforcement of the most serious human rights violations triggers their arrest, trial and detention upon the initiation of investigations; they are to be guaranteed a fair trial that respects fundamental procedural rights.[4] From a fair trial perspective, international criminal courts, formally not bound by international human rights treaties or other form of external monitoring, still lack the corrective safeguards inherent to most domestic criminal proceedings. To stay with the metaphor, such courts must be cautious not to inadvertently act as a sword cutting into carefully constructed jurisprudential regimes – right through the protective shield that any defendant indicted in a human rights oriented domestic legal system reporting to the European Court of Human Rights (ECtHR) or the Human Rights Committee of the United Nations (HRC) would benefit

[1] Thomas Margueritte, "International Criminal Tribunals and Human Rights" in William A. Schabas & Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge 2011), p. 446.
[2] Françoise Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights" (2011) 9 (3) Journal of International Criminal Justice, 577-595.
[3] The wording international criminal courts [and tribunals] refers to issues faced by most international courts adjudicating international crimes (to a lesser degree also to hybrid tribunals), with a primary focus on the ICTY and the ICC.
[4] The terms defendant or accused will be used for persons detained on behalf of the ICTY and the ICC regardless of the stage of proceedings. Strictly speaking before the ICTY, persons not indicted are referred to as suspects, whereas persons indicted are referred to as accused (Article 2 Rules of Procedure and Evidence). The ICC refers to persons until the confirmation of charges; thereafter the term accused is used. See Article 61 of the Rome Statute.

from.[5] The one matter in which the leading international criminal courts and tribunals – for reasons elaborated below - took perhaps the most distinct approach among the principles established in the jurisprudence of both the European and International human rights courts was the mechanism of pre-trial detention.[6]

What Is Release from Pre-Trial Detention and Why Does it Matter?

Provisional release at the two *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) or interim/conditional release at the International Criminal Court (ICC) denominates the system of release from detention for a temporarily limited period of time prior to (or pending) trial at the three currently leading international criminal courts.[7] As long as pre-trial liberty (e.g. in the form of a "summons to appear") in ICL is practically absent[8] and the overwhelming majority of defendants are detained from an initial arrest until final verdict, temporary release serves as the necessary safeguard not only with regards to humanitarian reasons but also in order to mitigate the adverse effect of long periods of detention on the health and mental conditions of the defendants. Like most of the procedure before international courts, the procedure triggering this mechanism combines principles of the Common Law system of bail with Civil Law elements.[9] The right to be released prior to a final verdict is thereby considered inherent to the right of individual liberty of a defendant to be presumed innocent and is among the strongest

[5] For instance the German case of N. Jorgić who after his conviction for the crime of genocide committed in the former Yugoslavia by a German court appealed to the ECtHR; *Jorgić v. Germany*, 74613/01, 12 July 2007, Düsseldorf Court of Appeal of 26 September 1997. Discussed by Madalena Pampalk, Marc Sitzer in Binder C et al. (eds.), *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010), p.83.
[6] This dissertation will exclusively focus on the issue of detention; it will not dwell into an analysis of the difficult mix of legal systems that is seen as a major contributing factor to the considerable length of average proceedings.
[7] Reference to pre-trial detention will also encompass detention pending trial. This is important as unlike in domestic proceedings, the trial stage itself before international courts often lasts several years.
[8] The ICC is the only leading institution where an accused can be summoned *in lieu* of an arrest. So far at least six accused benefitted from this form of pre-trial liberty. The problems related to this instrument which has partly led to the fact that none of the six cases ended with a final verdict will be discussed in the last section of the first Chapter.
[9] Andre Klip & Goran Sluiter (eds.), *Annotated Leading Cases of the International Criminal Tribunal for the Former Yugoslavia 2001-2002*, Volume VIII (Intersentia 2005), p. 84 ("It seems that the legal-cultural background of the lawyers and Judges quite often inform their approaches to various legal issues-including provisional release/bail.").

procedural guarantees.[10] However, despite the fact that leading international human rights treaties, such as the International Pact on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), propagate the *maxime* that (at least with reference to national criminal proceedings) detention should be the exception for persons awaiting trial[11] and that the gravity of the alleged crime alone does not justify longer periods of pre-trial detention[12], the default state for accused in ICL from the onset has been detention.[13] Even the Rome Statute of the ICC as arguably the most progressive legal framework in this respect[14], while setting the threshold for detention considerably higher could, at least to date, not transform the previously mentioned human rights based approach into a record of accused being released subsequent to an initial arrest.[15] Overall, a defendant before the above mentioned Hague courts is in a disadvantaged position compared to the national level where the maximum time limit for each ground for detention is often limited and proportional to the gravity of the crime and the expected sentence or regardless of the gravity of the crime or the expected sentence becomes

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[10] *Prosecutor v. Aleksovski,* ICTY-IT-94-14/1, Decision Denying a Request for Provisional Release, 23 January 1998, p. 3 ("The justification for provisional release must be seen as emanating from or as the corollary of the presumption of innocence").

[11] See Article 9(3) International Pact on Civil and Political Rights (ICCPR): "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial."; the ECtHR in *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001 ("Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases"); *Stögmüller v. Austria*, 1602/62, 10 November 1969, para 4 considering detention prior to conviction as a "serious departure from the rules of respect for individual liberty and of the presumption of innocence").

[12] *Idalov v. Russia*, 5826/03, 22 May 2012, para. 145, *Chraidi v. Germany*, 65655/01, 26 January 2007, para. 40, *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, paras. 80-81, *Garycki v. Poland*, 14348/02, 6 May 2007, para. 47. For the ICCPR, see the Concluding observations regarding Argentina 2000, para. 10.

[13] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 12 ("[t]he change in the Rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants") citing *Prosecutor v. Brđanin & Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 18. At the ICC, as of June 2017 no defendant charged with core crimes of the Rome Statute was released.

[14] The ICC Rome Statute sets a high threshold for the ordering of detention, the continuous necessity of which must be periodically reviewed.See the detailed discussion in the first Chapter.

[15] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, 18 March 2008, p. 6-7 ("consistent with the interpretation of [Rome Statute] according to which, and unlike the situation at the *ad hoc* Tribunals, pre-trial detention is not the general rule, but it is the exception [..]"). Until June 2017, not a person accused of core crimes of the Rome Statute was released from detention.

excessive *per se*.[16] Such benchmarks are absent in international criminal proceedings not least due to the lack of statutory sentencing provisions. Where defendants before international courts and tribunals face sentences ranging between zero years up to life imprisonment, pre-trial detention may never become disproportionate.[17]

Detention not warranted by urgent necessities equates to advanced punishment.[18] The long periods of pre-trial detention of on average 3-5 years at the ICTY[19] or even 6-7 years at the ICC[20] lead to scenarios incompatible with the aims of criminal justice. Long periods of detention for defendants of typically older age and poorer health (including post-traumatic stress symptoms) have considerable effect on both the physical and mental health which in turn may affect their right to a proper defence.[21] Long periods of pre-trial detention are particularly regrettable where a trial ends with an acquittal after the accused has spent several years in custody. It may also cause a second unwanted scenario, when following a conviction the sentence does not exceed the periods spent in detention awaiting judgement and the convicted person is to be released almost immediately upon

[16] At the domestic human rights level several safeguards exist. Firstly, certain grounds for detention are limited in time, such as the risk of tampering of evidence or the risk of damage to the public order. Secondly, the period of pre-trial detention must be proportional to the expected sentence, typically not exceed over half of the sentence in case of a conviction. Lastly, the right of being tried within a reasonable time can be infringed where detention lasts excessively long, a case in which the accused is to be released. The ECtHR has in its jurisprudence found that periods of pre-trial detention exceeding five years were excessive and could only be justified in exceptional circumstances due to the complexity of a particular case.

[17] For the ICTY Article 24 of the Statute limits the sentence to imprisonment. The Tribunal has handed down sentences varying from five years to 45 years as well as life imprisonment sentences. At the ICC, Article 77 of the Rome Statute sets the maximum penalty with thirty years or, when justified by extreme gravity, with life imprisonment.

[18] Karim Khan in Triffterer/Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition 2016, Beck, Hart, Nomos), p. 1478 ("Pre-trial detention is not pre-trial or advance punishment. The deprivations or limitations on liberty should only be imposed if necessary in the interests of justice.").

[19] Wolfgang Schomburg, "The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights", (2009), 8 (1) North-Western University Journal of International Human Rights, p. 14.

[20] Lubanga (6 years: arrest in March 2006, convicted in July 2012); Katanga (7 years: first appearance in October 2007, convicted in March 2014); Ngudjolo Chui (4 years: arrested in February 2008, acquitted in 2012 and 2015, second instance); Bemba (8 years: arrested in May 2008, convicted in March 2016). The median being 6.25, Info obtained from ICC webpage: ICC Info Situations and Cases.

[21] As per February 2016, twelve defendants standing trial before the ICTY have passed away in detention either standing trial or prior to sentence enforcement. Balkan Transitional Justice, 10 February 2016, http://www.balkaninsight.com/en/article/deaths-spotlight-hague-tribunal-s-ageing-defendants-02-10-2016, retrieved online 27 May 2017. In May 2016, with G. Hadžić the number stands with at least 13.

the final judgement being delivered.[22] This would create a situation that appears harmful to effective remorse and reflection where a defendant is to be considered innocent almost until the date of his or her release.

Challenges for Defendants Seeking Release in ICL: Current Perspectives

Three main factors can be identified that prevent radical change of paradigm towards release in ICL. Foremost, detention is often deemed necessary and justified by the fact that accused before international courts stand trial exclusively for "the most serious crimes"[23] of mankind and, if convicted, are likely to face long prison sentences.[24] This triggers the presumption that an accused person, once released, would have "nothing to lose" and be more inclined to try to abscond.[25] Re-arrest is certainly burdensome as international courts, which do not control any territory, must heavily rely on cooperating states to implement enforcement measures.[26] A second obstacle often raised relates to the fact that by definition the majority of the accused standing trial were influential political, military or police figures in their countries, some of which potentially capable, through "existing networks", of interfering with the investigation and posing a threat to crucial

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[22] See *Prosecutor v. Milan Gvero*, ICTY-IT-05-88-ES, Decision of the President on the Early Release of Milan Gvero, 28 June 2010, para. 5. Gvero was sentenced to five years of imprisonment; however, after having served over 1.500 days in detention, he was granted early release before transfer to the enforcement state. See more recently the sentencing in the *Bemba et al.* contempt case where the four co-accused of Bemba despite having been found guilty had their sentences subsumed in the time spent in pre-trial detention.

[23] Article 1 of the ICC Rome Statute.

[24] Clemens Müller, "The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals", (2008), 8 International Criminal Law Review, p. 607. While the long sentence to be expected is often invoked when denying release, the length of sentences handed down by the ICTY is not much harsher than the sentencing practice at (European) national level for capital crimes. The first four persons at the ICC received sentences of 12 (Katanga), 14 (Lubanga), 18 (Bemba) and 9 years (Al-Mahdi, guilty plea) respectively. Conversely, the Special Tribunal for Sierra Leona (with a single sentence handed down of 50 years in the Charles Taylor case) and the ICTR applied a more strict sentencing practice with a considerable number of life imprisonment sentences.

[25] *Prosecutor v. Limaj et al*., ICTY-IT-03-66-AR65, Decision on Limaj's Request for Provisional Release, 31 October 2003, para. 30 ("It is evident that the more severe the sentence which an accused faces, the greater is the incentive to flee [..]".).

[26] *Prosecutor v. Brđanin and Talić*, ICTY-IT 99-36PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000 ("The absence of any power in the Tribunal to execute its own arrest warrant [..] and the need to rely upon local authorities within that territory [..] places a substantial burden upon the applicant for provisional release.").

key witnesses.[27] The third significant variable, while not expressly set in any legal provision, as will be argued, is the underlying concern that the release of a suspected war criminal might trivialise the criminal courts in the public eye and outrage the victims in the affected region.[28] The picture that comes to mind is that of a suspected war criminal sitting in a café in proximity to a village where the crimes he or she is accused of took place. This factor, as will be argued, increases in relevance at times where international criminal courts are subject to particular criticism. The ICTY was harshly criticized throughout the 1990s for being a costly and ineffective court.[29] The impact of a person absconding from detention would have been disastrous to the extent of potentially threatening the continuous operation of the Tribunal. Compared to that, the escape of an ICTY defendant from provisional release in 2005 or 2010 would have likely had a much lesser effect on the credibility of an already well-functioning and respected court. Much like the case with the early ICTY, the performance of the ICC in terms of judgements rendered in its first decade was equally falling below the threshold of the high expectations of the world community. There is valid hope and reason to believe that with the opening of several cases and investigations in recent years, the ICC will soon be more immune also to its most persistent criticism relating to the modest number of verdicts rendered. This may entail a more progressive approach to pre-trial liberty by the ICC in future. Lastly, a number of factual obstacles exist, such as the reluctance of states to host defendants standing trial, making any form of restricted liberty or house arrest during trial practically impossible.[30]

[27] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 13. *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1-Red, Pre-Trial Chamber decision on Prosecution Application, para. 65.

[28] Public perception and confidence in the Tribunals proceedings are affected. At the time of the departure of the first Prosecutor Goldstone in autumn 1996 only six persons were in custody from seventy-six indicted persons. Goldstone admitted that the credibility of the Tribunal suffered considerably by this lack of arrests. See John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Balkans* (Chicago Series 2003), page 97. Later it was invoked that victims would react strongly when indicted persons would be released into small villages making contact almost unavoidable.

[29] Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (Palgrave Macmillan 2011), p.82. The ICTY grew into a court with an annual budget of a quarter of a billion US dollars (2004), at the same time the number of accused in custody until the late 1990s was very modest.

[30] As of January 2017, Belgium was the only country to declare willingness to accept defendants pending trial. See Belgium & ICC sign agreement on interim release of detainees, ICC-CPI 20140410PR993, 10 April 2014.

Reverse Legal Burdens of Proof in International Criminal and Human Rights Law?

A central aspect in motions for provisional release is, in view of the widely adversarial nature of the proceedings, the question of who bears the legal burden of proof for proving or disproving the relevant circumstances: the prosecution or the defendant? The *ad hoc* Tribunals deviated from the general rule that the burden of proof is in practically every aspect on the Prosecution and permitted a shifting of the burden of proof onto the defendant - creating reverse legal or persuasive burdens of proof - in three main matters all linked to the release of the defendant: provisional release, the question of unfitness to stand trial[31] and early release.[32] In provisional release matters, while the duty to establish reasonable suspicion that a person has committed a crime remained on the Prosecution (already as precondition for an indictment and linked thereto the arrest warrant), in order to be subsequently released, the defendant had to actively demonstrate on a balance of probabilities (and not merely raise doubts on this matter as it would be in case of an evidential burden of proof) that he or she would not escape or pose a threat to witnesses and/or victims;[33] a fact for which the ICTY was widely criticized by practitioners and academia alike.[34]

Article 67 of the Rome Statute of the ICC expressly provides the defendant with the guarantee not to have any onus of proof reversed to his or her detriment.[35] While there exists litte controversy in the assessment of the fitness to stand trial or in early release

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[31] *Prosecutor v. Hadžić*, ICTY-IT-04-75-T, Decision on the Continuation of Proceedings, 26 October 2015, para 13.

[32] *Prosecutor v. Milan Gvero*, ICTY-IT-05-88-ES, Decision of the President on the Early Release of Milan Gvero, 28 June 2010. In early release matters the convicted person can of course no longer invoke the presumption of innocence.

[33] *Prosecutor v. Gotovina et al*, ICTY-IT-06-90-PT, Decision on Defendant Ante Gotovina's Motion for Provisional Release, 28 November 2007, page 7.

[34] Shane Darcy & Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (Oxford University Press 2010), p. 328-9 ("Subparagraph (B) [of Rule 65] raises two fundamental problems. Most significant is the reference to the exceptional nature of liberty prior to conviction. This cannot be viewed otherwise than as a flagrant violation of international human rights law. The unfairness ensuing from this proposition lies to a large degree in the shifting of the burden of proof"); Andrew Trotter, "Innocence, Liberty and Provisional Release at the ICTY: A Post Mortem of "Compelling Humanitarian Grounds" in Context", (2012) Human Rights Law Review, p. 12 ("However, it is neither just nor logical to impose upon an accused the burden of demonstrating that he will not flee or interfere with the evidence in relation to charges of which he is presumed to be innocent").

[35] Article 67(1)(i) ICC Rome Statute ("[The Right] Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal").

matters[36], in interim release motions the practical application of this guarantee set in Article 67 remains subject to debate. After the conditions for an arrest were initially properly demonstrated by the Prosecution, the burden - it was long argued by defendants but also members of academia - might be in practice still on the defendant to demonstrate changed circumstances warranting release.[37] The practice and most recent case law of the ICC in this respect will be assessed in a search for clarity. While in principle the right of a defendant not to have any burden of proof reversed to his or her detriment in criminal matters is a corollary of the presumption of innocence,[38] the presumption of innocence is not an absolute right[39] and the ECtHR approved the application of reverse legal burdens in its case law both in procedural and substantive matters under the condition that the infringement of the presumption of innocence was duly confined within reasonable limits.[40] The case law of the ECtHR will be analysed and this dissertation will in its second Chapter aim to establish a valid test pattern against which the human rights compatibility of any reverse burden of proof mechanism can be tested.

Human Rights as the *Litmus Test* in International Criminal Law Proceedings

This study will analyse the development of pre-trial detention and temporary release at both the ICTY and the ICC primarily from a fair trial and human rights angle.[41] Human

[36] Regarding unfitness to stand trial: *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, para. 56; regarding early release at the ICC, see *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 22 September 2015, para.27 referring to the trigger mechanism for the commencement of the sentence review under Article 110(3) of the Statute.

[37] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 724. See *inter alia Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para 11.

[38] William Schabas/Y. McDermott in Otto Triffterer/ Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court* (3rd edition 2016, Beck, Hart, Nomos), p. 1674; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Press 2010), p. 815 (Commentary to Article 67 Rome Statute); Clemens Muller "The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals", 8 (2008), International Criminal Law Review, p. 599 ("Likewise, the shift of the burden of proof to the defence was a departure from the standard under international and national law").

[39] *Salabiaku v. France*, 10519/83, 7 October 1988; P. Roberts & A. Zuckermann, Criminal Evidence. (2nd edition Oxford University Press 2010), p. 272.

[40] John Frederik Archbold, *Criminal Pleading, Evidence and Practice* 16-106, (Sweet &Maxwell 2012) citing *inter alia Salabiaku v. France*, 10519/83, 7 October 1988, para.28.

[41] The ICTY is chosen being not only the Tribunal with the largest number of completed proceedings, but also the one having developed the leading jurisprudence in this matter. Contrary thereto, the Tribunal for

rights and fair trial rights are recognized to serve as the *litmus* test or necessary corrective for the system of international criminal justice against which its procedural framework must be tested.[42] It is important to keep in mind that international criminal courts only validly assume jurisdiction (from otherwise competent national courts) based on the promise of fair trials of the highest human rights standards which the territorial state is considered unable or unwilling to guarantee.[43] While both the ICTY and the ICC overall considered themselves to be bound by human rights principles as expressed and defined by the ECtHR, the Human Rights Committee or other regional human rights treaties as expression of international customary law, both to different degrees expressly reject a binding nature *in concreto* and rather prefer to rely solely on the most suitable case law of the said human rights courts.[44] This would correspond to the dictum of the *Tadić* jurisdiction decision, in which Judge *Cassese* famously held that in the absence of a hierarchy or centralized structure in international law every Court or Tribunal in international law must be considered a "self-contained system".[45] Not being subject to monitoring from another supreme court, this approach is, as will be argued, unsatisfactory at least with respect to fair trial rights before criminal tribunals and those developed by international human rights law. The implications of this approach and possible remedies will be particularly assessed regarding the interplay between the ICTY and the ICC as the two leading international criminal courts with the ECtHR as perhaps the leading authority on human rights worldwide. Any deviation by international criminal

Rwanda (ICTR), operating on the same legal framework concerning provisional release, has not provisionally released a single person. The same applies for the majority of the hybrid and special tribunals. The ICC is of particular importance as being the only permanent institution in international criminal law, but also as it has developed a human rights based framework for pre-trial detention.

[42] Clemens Muller, "The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals", 8 (2008), International Criminal Law Review, p. 589. William Schabas, *Routledge Handbook of International Criminal Law*, p. 446 ("only respect for the human rights of defendants in international criminal trials can achieve the rightful aspiration of justice.").

[43] *Prosecutor v. Milošević*, ICTY-IT-02-54-AR73.4, Dissenting Opinion Judge David Hunt, 30 September 2003, para 22 ("This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials").

[44] *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, *Appeals Chamber Dec.,* 3 November 1999, para. 40.

[45] *Prosecutor v. Dusko Tadić*, ICTY IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 11. Cited in Theodor Meron, Speech delivered by T. Meron on the occasion of the opening of the judicial year of the European Court of Human Rights, 25 January 2013, Annual Report of the European Court of Human Rights 2013, published by the Registry of the ECtHR 2014, p. 41.

bodies from developed human rights standards is not only detrimental to the credibility of these courts; it further risks the fragmentation of fair trial standards at national and international level particularly in relation to the adjudication of international crimes.

The **first Chapter** will first look at the leading international human rights treaties with a view of defining what is meant by international human rights standards. It will then outline the legal framework as well as the practice of pre-trial custody and temporary release from detention, and where applicable, existing alternatives to detention, at the ICTY and the ICC. The practice of the ICTY, both in its early years of operation as well as in its current form, will be compared to the principles set by international human rights treaties. Focus will be laid on the Tribunal's very restrictive and much criticized release practice in its first years in which release was conditional upon the existence of "exceptional circumstances", such as attendance at funerals or severe illness.[46] For reasons to be discussed, the Tribunal from 1999 onwards shifted towards a more liberal and human rights compatible release practice, where most of the defendants stood realistic chances to be provisionally released despite the fact that no periodic review of detention took place and the burden of proof remained on the defendant. The final section will anticipate the key question of the second chapter – the legality of reverse persuasive burdens of proof in release motions – concerning motions for releases in humanitarian situations. With regards to conditional release before the ICC, an analysis will be made as to why – contrary to the post-1999 practice before the ICTY – as per August 2017 not a single person accused of core crimes of the Rome Statute has been effectively released following an initial arrest.

The **second Chapter** focuses on arguably the most essential aspect inherent to the question of pre-trial detention matters and release from custody, namely the attribution of the burden of proof in relation to valid detention grounds. Notably, the two *ad hoc* Tribunals operate to date on a reverse burden of proof insofar as the defendant has the onus of proof to demonstrate that he or she will not escape and not pose a risk to

[46] Christoph Safferling, "International Criminal Procedure and its Participants: An Examination of the Interaction of Judges, Prosecutor and Defence at the Yugoslav Tribunal" (2002) 5 Yearbook of International Humanitarian Law, p.243 ("One of the most contested issues of the procedural order at the ICTY is that of pre-trial detention").

witnesses and victims. As will be seen, such a presumption against release is not uncommon also in certain national criminal systems. The Austrian example will be analysed, where a provision in the code of criminal procedure establishes a "presumption against release" when dealing with pre-trial detention of those accused of the most severely punishable crimes,[47] a provision which in the view of many Austrian academics is incompatible with both constitutional principles and European human rights standards.[48] The Human Rights Court in Strasbourg had on several occasions to pronounce itself on the legality of the imposition of such reverse burdens of proof notably in substantive law matters. The attempt will be made to deduce the core characteristics that must be met as minimum requirements to be held compatible with the presumption of innocence and *a fortiori* establish a pattern against which the human rights compatibility of any reverse burden mechanism can be tested. The focus will be on the one inherent to the provisional release motions before the ICTY.

In the **third Chapter** the use of electronic foot monitoring both in international and national criminal law will be assessed in view of effectively eliminating or considerably mitigating the risks inherent to the most widely applied detention grounds. With Belgium as the first country having in 2014 declared willingness to host defendants awaiting trial before the ICC, the question is whether house arrest could in the future become an alternative to detention? Experiences from the domestic practice in Austria will form part of the assessment. The second part of this Chapter analyses the practice of post-conviction release for prisoners serving sentences in national prisons. With the presumption of innocence having ceased to exist upon conviction, detention is rightly the standard rule; release may nonetheless be warranted in case of humanitarian grounds but equally for integrative or other purposes. Contrary to ICTY proceedings, the legal

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[47] Austrian Supreme Court (OGH) 15Os22/00, 2 March 2000, citing (Egmont Foregger/ Gerhard Kodek, *Strafprozessordnung*, 7th ediction, § 180 Comment VII). ("nach Art einer Umkehrung der Beweislast"/in the form of a reverse burden of proof); the German Code of Criminal Procedure operates on a similar presumption in favour of detention with regards to serious crime. Haftgrund der Schwerkriminalität [112 (3) German StPO; („Gegen den Beschuldigten, der einer Straftat nach § 6 Abs. 1 Nr. 1 des Völkerstrafgesetzbuches, [..] oder, soweit durch die Tat Leib oder Leben eines anderen gefährdet worden ist, nach § 308 Abs. 1 bis 3 des Strafgesetzbuches dringend verdächtig ist, darf die Untersuchungshaft auch angeordnet werden, wenn ein Haftgrund nach Absatz 2 nicht besteht").

[48] See the debate in the Second Chapter of this dissertation.

framework of the ICC explicitly sets out the procedure for prisoners considered for "outside prison activity" (i.e. recreational activities outside of the penitentiaries that are only partly guarded or unguarded) where such measures are foreseen in the national laws governing enforcement.[49] An evaluation of the forms of release granted to the ICTY prisoners having served their sentences in Austria will also be conducted with a view of examining which of the release-related provisions of the Austrian National Law of Sentence Enforcement may be considered for ICC prisoners in future cases.[50]

Irrespective of the outcome of the previous chapters, i.e. whether the international criminal courts and tribunals in their approach to pre-trial detention were or even continue to be in breach of pertinent international human rights principles, the **fourth and final Chapter** will assess the wider question what the consequence of such manifest breach of leading human rights would be: whether a complaint from a person standing trial before either the ICTY or the ICC could and should be subject to scrutiny of an international forum such as the ECtHR.[51] This will be done not least in view of the Strasbourg jurisprudence relating to other international (intergovernmental) organizations seated in Convention states. The analysis will encompass both scenarios, the one where a human rights violation is invoked while an ECHR Member State is directly and actively cooperating with the court in matters such as arrest, provision of evidence and enforcement of sentences, and secondly the situation –as it would notably be the case where a defendant is in pre-trial detention ordered by the courts – where proceedings are in full control of the ICTY or the ICC and the central connection point to ECHR protection is the seat of both criminal courts in the Netherlands, hence on ECHR territory.

[49] Rule 211 of the ICC Rules of Procedure; Article 6 of the Enforcement Agreement concluded between the ICC and Austria makes explicit reference to the procedure and supervisory role of the ICC in relation to prison programmes and benefits available under Austrian national law.

[50] Between 2002 and 2014 a total of six ICTY convicted prisoners have served their sentence in Graz-Karlau, Austria. Mitar Vasiljević (transferred in 2004, http://www.icty.org/en/press/mitar-vasiljevi%C4%87-transferred-austria-serve-his-prison-sentence), Dario Kordić and Zoran Žigić (jointly transferred in 2006, http://www.icty.org/en/press/dario-Kordić-and-zoran-Žigić -transferred-austria-serve-their-prison-sentences, Dragan Jokić (transferred in 2008, http://www.balkaninsight.com/en/article/icty-Jokić-to-be-released-from-prision): Duško Sikirica and Damir Došen (transferred in 2002, http://www.internationalcrimesdatabase.org/Case/98/Sikirica-et-al/).

[51] In the following the term used International Organization will exclusively refer to International Intergovernmental Organization.

CHAPTER ONE: The Notion of "Internationally Recognized Human Rights" Pertinent to Pre-Trial Detention Law and Its Transformation in ICTY and ICC Proceedings?

This *Chapter* will be divided into three sub-chapters. The *first part* of the Chapter will provide a brief introduction to the leading universal, international and regional human rights conventions and their approach to key aspects of pre-trial detention matters. The aim is two folded: to identify a common body of principles shared by those treaties and to define a set of internationally recognized human rights principles against which the proceedings before the Hague courts are to be measured against. In the *second part*, the legal framework of the pre-trial detention system of both the ICTY and the ICC will be outlined. This will be followed by a critical assessment in the *third part* both of the underlying theory as well as of the respective practical record of pre-trial release of the two courts from a human rights angle.

A. Release-related Fair Trial Rights in International Human Rights Law

The Secretary General of the United Nations (UN) when establishing the ICTY held in his report that it was axiomatic that the Tribunal "must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings".[52] Similarly, Article 21(3) of the Rome Statute setting the applicable law in ICC proceedings postulates that "[t]he application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights". Both the report and the Rome Statute remain vague as to the origin of such internationally recognized human rights. The following section will provide an overview of the leading international and regional human rights treaties and the principles relating to pre-trial detention.

[52] Report of the UN Secretary-General pursuant to Paragraph 2 of UN Security Council Resolution 808 [1993], S/25704, 3 May 1993, page 27, para. 106.

1. Human Rights Protection at the Level of the UN: The UDHR and the ICCPR

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the UN in 1948. Its thirty Articles contain several key fair trial rights, many of which are considered to have become customary international law.[53] Most relevant for detention matters are Article 9 prohibiting any form of arbitrary arrest and/or detention[54] and Article 10 setting fundamental fair trial rights, such as the right to a fair and public hearing before an independent and impartial tribunal,[55] which must be based on the presumption of innocence and in accordance with all guarantees necessary for a proper defence.[56] While not adopted in the form of a binding treaty itself, it has paved the way for two binding UN human rights covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)[57], both multilateral treaties adopted in 1966 that entered into force ten years later. The importance of the UDHR lies in its universal recognition and that it laid the foundation for future development in the sphere of fair trial and procedural rights. What concerns the degree of human rights protection, the UDHR reflects a compromise of core human rights shared by the community of nations, without, however, allowing for an individual person to benefit from concrete specific enforceable rights. For this purpose, the ICCPR was drafted for countries wishing to implement a more rigid human rights standard.

1.1. The International Covenant on Civil and Political Rights (ICCPR)

As of February 2017, the ICCPR has 169 State Parties.[58] Out of these, 115 countries are also Parties to the Optional Protocol allowing for individual petitions to the Human

[53] Fausto Pocar, "The Rome Statute of the International Criminal Court and Human Rights", in Mauro Politi, Giuseppe Nesi *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, p. 68.
[54] Article 9 UDHR: No one shall be subjected to arbitrary arrest, detention or exile.
[55] Article 10 UDHR: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
[56] Article 11 UDHR: 1.Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
[57] International Covenant on Civil and Political Rights, entered into force 23 March 1976, 999 UNTS 171.
[58] UN Human Rights Office of the High Commissioner, Status of Ratification, retrieved online under http://indicators.ohchr.org/, 6 March 2017.

Rights Committee (HRC).[59] The most relevant fair trial rights concerning a suspect or an accused during arrest and detention are contained in Articles 9 and 14 of the Covenant.

> ***Article 9***
>
> *1. Everyone has the right to liberty and security of person. No one shall be subjected to* ***arbitrary arrest or detention****. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> *2. Anyone who is arrested shall be informed, at the time of arrest, of the* ***reasons for his arrest*** *and shall be promptly informed of any charges against him.*
>
> *3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.* ***It shall not be the general rule that persons awaiting trial shall be detained in custody****, but release may be subject to* ***guarantees to appear for trial,*** *at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

Article 9(3) suggests a firm presumption against detention for those awaiting trial. This interpretation was confirmed by several General Comments as well as the constant jurisprudence of the HRC. Any detention pending trial must be based on the individualized determination that it is reasonable and necessary as to prevent flight, interference with evidence or the recurrence of a crime.[60] Pre-trial detention must particularly not be based upon vague and expansive standards such as “public security”[61] and should “not be obligatory for all defendants charged with a particular crime, without due consideration of the concrete individual circumstances”.[62] The HRC equally expressed that the duration of pre-trial detention should be determined by the need to bring the detained to court, and not by the length of a sentence after conviction.[63] Overall, the imposition of pre-trial detention should be an exceptional measure.[64] Alternatives to detention must be considered, such as bail, electronic bracelets or other conditions rendering detention unnecessary.[65] Following an initial detention, periodic re-examination is required whether it continues to be reasonable and necessary in light of

[59] Ibid.
[60] *Marinich v. Belarus*, 1502/2006, para. 10.4, *Cedeño v. Venezuela*, 1940/2010, para. 7.10; *Torobekov v. Kyrgyzstan*, 1547/2007, para. 6.3.
[61] See Concluding observations regarding Bosnia and Herzegovina, 2006, para. 18.
[62] See Concluding observations regarding Argentina 2000, para. 10; regarding Sri Lanka 2003, para. 13.
[63] See Concluding observations regarding Argentina 2000, para. 10.
[64] Ibid.
[65] *Smantser v. Belarus*, 1178/2003, para. 10.3.

possible alternatives.[66] In *Hill & Hill v. Spain*, the HRC found the Spanish Courts to be in violation of Article 9(3) by not setting an adequate bail and failing to provide sufficient information concerning the risk of flight.[67] This was not seen as sufficient to justify a deviation from the pre-trial liberty as the rule for persons awaiting trial.

Article 14 contains the presumption of innocence as well as the right of an accused to be tried within a reasonable time.

> ***Article 14***
>
> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. […]*
>
> *2. Everyone charged with a criminal offence shall have the* ***right to be presumed innocent*** *until proved guilty according to law.*
>
> *3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> *(c) To be tried* ***without undue delay.***[68]

In General Comment No. 32 of the HRC, the Committee reiterated that the presumption of innocence imposes on the Prosecution the burden of proving the charge. It guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt and ensures that the defendant has the benefit of doubt.[69] The period after which a delay becomes unreasonable must be assessed for each case, taking into account the complexity of the case, the behaviour of the accused and the

[66] *Taright v. Algeria*, 1085/2002, paras. 8.3-8.4.
[67] Ibid.
[68] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, retrieved from www.ohchr.org, the highlights and iTalićs are not in the original document.
entry into force 23 March 1976, in accordance with Article 49.
[69] General Comment No 32, ICCPR/C/GC/32, 23 August 2007, p. 9, para 30. Roza Pati, "Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization", in Thomas Kruessmann, *ICTY: towards a fair trial?* (NWV 2008), text related to Footnotes 31 and 32.

conduct of the judicial authorities.[70] Where bail is denied, the accused must be tried as expeditiously as possible.

1.2. The Monitoring of the ICCPR Provisions?

Compliance with the implementation of the ICCPR by the signatories is monitored by the HRC, to which the State Parties are obliged to report regularly. The ICCPR is considered by some as the "most prominent and important modern human rights treaty"[71] with – apart from China - nearly global reach.[72] Whereas the ICCPR limits itself to a dispute resolution mechanism for intra state disputes, the First Optional Protocol also provides for an individual complaint mechanism to the HRC, although at the cost of a smaller number of State Parties. The almost universal membership of countries with different legal traditions and cultures has as effect that – in comparison with regional treaties – the jurisprudence of the Committee must accommodate countries with different levels of human rights standards. For instance, as opposed to the Council of Europe States, many of the ICCPR signatories adhere to the death penalty.[73] Individual petitions to the HRC and to the ECtHR mutually exclude each other.[74] The rigid implementation of ECtHR judgements as well as the power of the Court to award compensation to the injured party

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[70] *Sextus v. Trinidad & Tobago*, Communication No 818/1998, para 7.2 cited in General Comment No 32, para. 35

[71] Jack L. Goldsmith, *The Limits of International Law* (Oxford University Press 2006), page 126.

[72] Stuckenberg identifies the People's Republic of China as the only country in the world that has traditionally operated a system denying the principle of the presumption of innocence. Carl--Friedrich Stuckenberg, „Die normative Aussage der Unschuldsvermutung" (1999) 111 ZStW Heft 2, p. 423 (Footnote 2).

[73] See *Michael Steadman v. Jamaica*, Communication No. 528/1993, 2.April 1997, General Comment of the Committee 6 (16) according to which a death sentence may only be imposed if the procedural guarantees were respected, including a fair hearing, the presumption of innocence and minimum defence rights.

[74] In the optional protocol to the ICCPR, according to Article 5(2)(a) a communication shall not be considered if the same matter is "being examined under another procedure of international investigation or settlement"; almost identical Article 35(2)(b) ECHR. Austria made an interpretative declaration to the Optional Protocol of the ICCPR, not to consider applications already examined by the Strasbourg Court (see UN Treaty Collection Optional Protocol to the ICCPR, Declarations and Reservations, retrieved 22.November 2014).

in case of a violation therefore renders applications from the 47 Member States of the Council of Europe to the HRC the absolute exception.[75]

2. Protection of Fundamental Fair Trial / Detention Rights at the Regional Level

With the exception of Asia and Australia, regional human rights treaties exist in the majority of continents. In the following sections the African, American, Arabic and European regional treaties will be introduced. These treaties are of importance as they reflect regional human rights custom relating to pre-trial detention. The aim of analysing their pre-trial detention framework is to deduce both a common universal standard and to establish the most progressive human rights convention which should be used as primary reference in proceedings before the ICTY and the ICC.

2.1. African Charter on Human and Peoples' Rights ("Banjul Charter")

As of 2016, 53 Member States of the African Union (AU) have ratified the Banjul Charter.[76] The provisions relevant for pre-trial detention are contained in Articles 6 and 7.

ARTICLE 6 - Right to Personal Liberty and Protection from Arbitrary Arrest: Every individual shall have the right to liberty and to the security of his person. **No one may be deprived of his freedom except for reasons and conditions previously laid down by law.** In particular, no one may be arbitrarily arrested or detained.

ARTICLE 7- Right to Fair Trial

1. Every individual shall have the right to have his cause heard. This comprises:
    1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
    2. **The right to be presumed innocent until proved guilty by a competent court or tribunal;**
    3. The right to defence, including the right to be defended by counsel of his choice;
    4. **The right to be tried within a reasonable time by an impartial court or tribunal.**

[75] Applicants from such states may, however, choose the UN Court over Strasbourg where differences exist in the jurisprudence such as concerning matters related to religion where the UN Court is – again due to many of its members States being governed by religious principles - less rigid. See: Freedom of Religion in Public Schools: Strasbourg Court v. UN Human Rights Committee, from Strasbourg Observers, February 14, 2013, retrieved online http://strasbourgobservers.com/2013/02/14/freedom-of-religion-in-public-schools-strasbourg-court-v-un-human-rights-committee/.

[76] African Commission on Human and People's Rights, Ratification Table: African Charter on Human and Peoples' Rights. Retrieved online http://www.achpr.org/instruments/achpr/ratification/ on 6 March 2017. The only country of the African Union not signatory is South Sudan.

Two monitoring organs exist, the African Commission on Human and Peoples' Rights in Banjul, Gambia, as well as the African Court of Human and Peoples' Rights seated in Arusha, Tanzania.[77] As of January 2015, the African Court has received 33 contentious applications.[78] The right to individual petition is an important feature and being situated in Arusha, the Court can rely on the legal expertise and experience from the gradually winding down ICTR. On the downside, to date only half of the African Union members have ratified the Court and there are still only a modest number of cases. The creation of vivid and coherent regional human rights jurisprudence in Africa that could be of relevance for complex human rights issues before the *ad hoc* Tribunals or ICC will hence require, apart from stability, continuous political will and dedication to democracy, additional time.

2.2. American Convention on Human Rights (ACHR)

The American Convention on Human Rights was adopted in San José, Costa Rica in 1969 and entered into force about a decade later. The Convention is monitored by two organs of the Organization of American States (OAS): the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Neither Canada nor the United States have ratified the Convention nor accepted the jurisdiction of the Court.

> **<u>Article 7. Right to Personal Liberty</u>**
>
> 1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to

[77] Article 2 (Relationship between the Court and the Commission) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and People's Rights. To date only about half of the member states of the African Union have ratified the African Human Rights Court.
[78] Webpage of the Court, Press Release, "German President Commends Work of the African Court on Human and Peoples' Rights", 9 February 2015. Despite this modest record, the African Union following a recent controversy between several African politicians and the International Criminal Court (ICC) called for adjudication of African crimes before African Courts, suggesting the Court in Arusha. See *inter alia*, Don Deya, "Pushing for the African Court to exercise jurisdiction for international crimes", 6 March 2012, retrieved online (4 July 2016) http://www.osisa.org/openspace/regional/african-court-worth-wait.

exercise judicial power and **shall be entitled to trial within a reasonable time or to be released** without prejudice to the continuation of the proceedings. **His release may be subject to guarantees to assure his appearance for trial**. [..].

Article 8. Right to a Fair Trial

[…] 2. Every person accused of a criminal offense has the **right to be presumed innocent so long as his guilt has not been proven according to law**. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

The human rights system in the Americas is characterized by an unequal level of protection depending on whether a State has (i) ratified the Convention and accepts the jurisdiction of the Court, (ii) only ratified the Convention or (iii) is merely affected by the advisory powers attributed to the Commission *qua* membership of a State to the OAS.[79] Within the latter category, the Commission in 2013 also received 109 applications against the United States, from which five were accepted for processing.[80] Perhaps the biggest problem faced by the American human rights system is the shortage in funding. In 2015, the budget of the IACHR only accounted for 6% of the total annual budget of the OAS[81] a figure that, if compared, is about only 5 % of that available by the ECtHR in Strasbourg.[82] In July 2016 the contracts of nearly half of its staff risked not to be extended due to a lack of funding.[83] This comes at a time when the Court experienced a growth in complaints of about 100% between 2002 and 2013 (2.061 complaints in 2013)[84], even if from the complaints received in 2013, only 11 cases were submitted to the Court for binding judgement.[85] The contribution of the American system lies in the

[79] Articles 18 and 20 Statute of the Inter-American Commission on Human Rights. Under Article 20, the Commission as a principal organ of the OAS is entitled to monitor the observance of certain core human rights and to make recommendations to OAS member States not party to the Convention. Ariel Dulitzky, "The Inter-American Human Rights System Fifty Years Later: Time for Changes", (2011) Quebec Journal of International Law, p. 132.
[80] Inter-American Commission on Human Rights, Annual Report 2013, Petition and Case System, p. 40-41.
[81] IACHR, Financial Resources 2015, http://www.oas.org/en/iachr/mandate/financial_resources.asp. Compare to the Council of Europe that earmarks 41.5 percent of its budget to the promotion and protection of human rights. See, OAS Press Release, Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff, 23 May 2016, http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp.
[82] In 2015, the IACHR had a total budget of 8.7 million USD, whereas the budget of the ECtHR in 2015 was 166,361 600 Euros. See Council of Europe Programme and Budget 2014-2015.
[83] OAS Press Release, Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff, 23 May 2016, http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp.
[84] Inter-American Commission on Human Rights, Annual Report 2013, Petition and Case System, p. 45
[85] Inter-American Commission on Human Rights, Annual Report 2013, p. 54.

improvement of the human rights situation on a continent that was (in its Southern part) for decades controlled by military dictatorships. In view of the moderate number of cases and the imminent shortage of funding, one may overall not expect a leading role of the American human right courts in the development of leading detention related jurisprudence.[86] In matters of pre-trial detention, the Court instead frequently draws inspiration from the ECtHR in matters of detention.[87]

2.3. Arab Charter on Human Rights (ACHR)

The current text of the Arab Charter was adopted by the League of Arab States in 2004. It was inspired by the UDHR, the ICCPR and the Cairo Declaration on Human Rights in Islam.[88] At the end of 2013, the Charter had been ratified by thirteen Member States of the League of Arab States.[89] The Arab Human Rights Committee can only receive reports from NGOs which are registered in the responding state, which effectively curtails the level of protection since critical organizations risk being refused the necessary recognition.[90] The Committee drafted its first state report in 2012.

Article 5: Everyone has the right to life, liberty, and security of person; these rights are protected by law.

Article 7: The accused is **presumed innocent until proven guilty** in a lawful trial where defence rights are guaranteed.

Article 8: Every person has the right to liberty and security of person. No one shall be subjected to arrest or detention or stopped without legal basis and must be brought before the judiciary without delay.

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[86] The IACtHR is recognized for its contribution in certain spheres of human rights such, for instance in the Protection of Irregular Immigrants' Rights or in the Development of Transitional Justice. See Eleonora Ceia, "The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice", Volume 14, Issue 3 The Law & Practice of International Courts and Tribunals (2015), 457-75 and Ana Beduschi, "The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges," Volume 34, Issue 4, Refugee Survey Quarterly, (2015), 45–74.

[87] Exemplary, "the simple reference to the nature of the crime cannot be considered an adequate rationale for flight risk" (*Piruzyan v. Armenia* et al.); "the gravity of the charges brought against a person cannot be the only element taken into consideration to justify the subsequent protraction of pre-trial detention" (*Idalov v. Russia et al*.). Both principles were cited in the Report on the Use of Pre-Trial Detention in the Americas, IACHR, December 2013, page 64, para 154 (under Invalid or Inadequate Grounds for Detention).

[88] Preamble of the Charter ("Reaffirming the principles of the [..]).

[89] League of Arab States Webpage; States Parties; www.lasportal.org.

[90] The Arab League and Human Rights: Challenges Ahead, Regional Seminar in Cairo, February 2013, Report, p. 15.

In 2014, a draft of a Statute of an Arab Court on Human Rights was presented. According to Article 19, access would be reserved to States who can, subject to their discretion, also allow NGOs to present complaints on behalf of individuals. The lack of direct access for individuals was criticized by several human rights organizations active in the region[91] and *Bassiouni,* in view of these shortcomings, predicted that the Court would remain weak and ineffective.[92] The International Commission of Jurists denied the Court the label of a "genuine human rights court" in its current form, on the basis of a lack of individual complaints and enforcement mechanisms, which "defeat the very purpose of establishing a human rights court".[93]

2.4. European Union Charter of Fundamental Rights

The aim of the European Charter of Fundamental Rights is to counter fragmentation arising from the fact that the individual rights applicable on the territory of the European Union (EU) were established at different times. The Charter shall entrench in addition to the rights and freedoms enshrined in the ECHR, further the jurisprudence of the European Court of Justice (ECJ) and the common constitutional principles and traditions of the EU Member States.[94] The Charter became binding with the entry into force of the Treaty of Lisbon in 2009.

Art 48. Presumption of innocence and right of Defence

1. Everyone who has been charged shall be ***presumed innocent until proved guilty*** *according to law.*

2. Respect for the ***rights of the defence*** *of anyone who has been charged shall be guaranteed.*

Article 48 of the European Charter corresponds to Article 6(2) and (3) of the ECHR. As such, the meaning and scope of those rights shall be the same as those laid down by the

[91] Human Rights Watch, Proposed Arab Court of Human Rights: An Empty Vessel Without Substantial Changes to the Draft Statute, 6 June 2014, http://www.hrw.org/news/2014/06/06/proposed-arab-court-human-rights-empty-vessel-without-substantial-changes-draft-stat.
[92] International Bar Association, C.Bassiouni: "New Arab Court for Human Rights is fake 'Potemkin tribunal'", 1 October 2014, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c64f9646-15a5-4624-8c07-bae9d9ac42df.
[93] Ibid, Said Benarbia, Director of the Middle East & North Africa Programme at the International Commission of Jurists (ICJ).
[94] European Commission, "Why the EU Charter of Fundamental Rights exists", 25 July 2013, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm retrieved in April 2017.

ECHR.[95] Wherever EU law provides a more extensive protection compared to ECHR jurisprudence, the Charter prevails. While the Charter proclaims the presumption of innocence, no provision exists regarding the right to be released pending trial. Therefore, the Charter at this stage seems negligible for the purpose of this examination.

2.5. European Convention on Human Rights (ECHR)

The ECHR was established in 1950 by the Council of Europe. Since 1959, alleged violations are examined by the ECtHR in Strasbourg ensuring compliance of its Member States. Through the interpretation of its provisions by the Court, the Convention becomes a living instrument, extending the scope of the Convention to situations that were not foreseeable at the time of its first adoption.[96] As of January 2017, the Council of Europe has 47 Member States, all of which have signed the ECHR.[97]

What concerns the protection upon arrest and detention as well as fair trial rights, the Convention offers under Articles 5 and 6 a level of protection similar to that of the ICCPR. The main distinction, as will be argued, between the ECHR as a fully-fledged human rights regime, and the ICCPR, is the dynamic interpretation, and hence evolution of its provisions by the ECtHR. The interpretation of the ECHR by the Strasbourg Court creates, in the view of *Schabas*, "the most detailed and sophisticated jurisprudence on international fair trial standards and related issues."[98]

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    a. [..];
    b. [..];
    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on **reasonable suspicion of having committed an offence** or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[95] Article 52(3) of the European Charter.
[96] "Does the Convention evolve?" - retrieved from the webpage of the European Convention on Human Rights http://www.echr.coe.int in April 2017.
[97] The Council of Europe in Brief - retrieved from the official webpage of the Council; http://www.coe.int on 6 March 2017.
[98] William Schabas, "Synergy or Fragmentation, International Criminal Law and the European Convention on Human Rights", 9 (2011), Journal of International Criminal Justice p. 613.

d. […]

2. […]
3. **Everyone arrested or detained in accordance with the provisions of paragraph 1.c** of this Article shall be **brought promptly before a judge or other officer authorised by law** to exercise judicial power and shall be entitled to trial within a reasonable time **or to release pending trial**. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [..]
2. Everyone charged with a criminal offence shall be **presumed innocent until proved guilty** according to law.
3. Everyone charged with a criminal offence has the following minimum rights: […]

Any period of pre-trial detention must have a basis in domestic law and duly respect the principles of legal certainty and non-arbitrariness. Detention orders providing no detention grounds[99] or extremely laconic reasoning[100] were considered by the Court as not meeting these criteria. Continued detention upon arrest requires specific indications of public interest which must outweigh the presumption of innocence of Article 6 ECHR and the rule of respect for individual liberty under Article 5 ECHR.[101] The continued reasonable suspicion that an accused has committed an alleged crime is "*a conditio sine qua non*" for detention for the lawfulness of detention, but after a lapse of time no longer sufficient.[102] Instead, detention is to be based on detention grounds that must be both "relevant" and "sufficient".[103] Even where such grounds are seen to validly exist, the authorities must display "special diligence" when conducting the proceedings, otherwise the period of detention may nonetheless become excessive or unreasonable.[104]

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[99] *Stasaitis v. Lithuania*, 47679/99, 21 March 2002, paras. 66-67.
[100] *Khudoroyov v. Russia*, 6847/02 , 5 April 2005, para. 157.
[101] *Stögmüller v. Austria*, 1602/62, 10 November 1969, para. 4.
[102] *Stögmüller v. Austria*, 1602/62, 10 November 1969, para. 4; *Chraidi v. Germany*, 65655/01, 26 January 2007, para. 36.
[103] *Zherebin v. Russia*, 51445/09, 24 March 2016, *Yagci and Sargin v. Turkey*, 16419/90 and 16426.90, Judgment, 8 June 1995, para. 52.
[104] *Chraidi v. Germany*, 65655/01, 26 January 2007, paras. 44-45.

The arguments for and against release must not be "general" and "abstract"[105] but must rather make reference to the specific facts and the individual circumstances of the applicant that may warrant his release.[106] Any quasi-automatic prolongation of detention is incompatible with Article 5(3) ECHR[107] and the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate reasons warranting for his or her release.[108] The case law of the ECtHR has developed four acceptable reasons for refusing bail: i) the risk that an accused will fail to appear for trial, and ii) the risk that the accused, once released, will take action to prejudice the administration of justice, iii) commit further offences or iv) cause public disorder.[109] The danger of absconding, as the most frequently invoked reason for detention, must not be invoked solely in view of the severity of the sentence faced, but must be assessed with reference to a number of other factors weighing in favour or against detention.[110] The gravity of the charges cannot by itself justify long periods of detention on remand.[111]

Authorities are obliged to consider alternative means of ensuring the appearance of the accused at trial.[112] The necessity of any period of detention, no matter how short, must be convincingly demonstrated by the detaining authority.[113] Applications claiming violations of pre-trial detention in accordance with Article 5 ECHR are among the most frequently invoked, resulting in an elaborate jurisprudence.[114]

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[105] *Boicenco v. Moldova*, 41088/05, 11 July 2006, para. 142; *Khudoroyov v. Russia*, 6847/02, 5 April 2005, para. 173.
[106] *Aleksanyan v. Russia*, 46468/06, 22 December 2008, para. 179.
[107] *Tase v. Romania*, 29761/02, 6 July 2002, para. 40.
[108] *Bykov v. Russia*, 4378/02, 10 March 2009, para. 64.
[109] *Tiron v. Romania*, 17689/03, para. 37, 7 April 2009; *Smirnova v. Russia*, 46133/99 and 48183/99, 24 July 2003, para. 59, *Piruzyan v. Armenia,* 33376/07, 26 June 2012, para. 94.
[110] *Panchenko v. Russia*, 11496/05, 11 June 2015, para. 106
[111] *Idalov v. Russia*, 5826/03, 22 May 2012, para. 145, *Chraidi v. Germany*, 65655/01, 26 January 2007, para. 40, *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, paras. 80-81, *Garycki v. Poland*, 14348/02, 6 May 2007, para, 47.
[112] *Idalov v. Russia*, 5826/03, 22 May 2012, para. 140.
[113] *Idalov v. Russia*, 5826/03,, 22 May 2012, para. 140, *Tase v. Romania*, 29761/02, 6 July 2002, para. 40, *Castravet v. Moldova*, 23393/05 , 13 March 2007, para. 33, *Belchev v. Bulgaria*, 39270/98), 8 April 2004, para. 82.
[114] In 2015, from the total of 823 judgements rendered by the ECtHR, 182 concerned the right to liberty and security and another 104 the excessive length of proceedings. For the period 1959 until 2015, from a total of 18.577 judgements, 3.053 concerned the right to liberty and security and another 5.435 the excessive

3. Which Convention Should Serve as Primary Instrument when Assessing the Performance of International Criminal Courts and Tribunals?

Most human rights instruments have both *advisory functions*, i.e. assisting Member States to correctly implement the respective human rights instrument *in abstracto,* and *adjudicatory functions*, i.e. adjudicating and guaranteeing the effective application of the human rights treaty *in concreto*. Granting the right to individual petition requires considerable political will by a state as it challenges its exercise of state power against the human rights instruments it has signed, as well as considerable organisational and administrative resources and costs. However, a state may benefit, in return, from a coherent case law. It is clear that only a strong and well equipped adjudicatory organ can turn a set of principles into a living instrument.

The two Conventions providing individuals with the effective right to petition are the ICCPR at UN level and the ECHR at the wider European level.[115] Particularly, the existence of individual complaints was vital for the evolution of said human rights instruments into living instruments. The UDHR, although seen as the "expression of customary international law",[116] was never intended to be a binding instrument and is characterized by vague provisions. Other regional instruments at the American, African or Arab levels do not enjoy full support of all the countries in the respective regions and states have to deal with shortages of political will, funding and cooperation. The lack of effective individual petitions in these regional instruments is ultimately preventing - at least for the foreseeable future - the creation or elaboration of an effective and innovative jurisprudence that could become relevant – and under circumstances to be discussed, even directly applicable - in international criminal justice proceedings via the notion of

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length of proceedings. See European Court of Human Rights, Violations by Article and by State 2015 & European Court of Human Rights, Violations by Article and by State 1959-2015.

[115] The right to individual petition existing in the American system was not further considered due to its highly restrictive practice that results only in a very small number of cases. At the ECtHR individual petitions are since the reform of the Court in 1998 mandatorily; Protocol 11 of the ECHR created the automatic right to individual petition, Protocol 11 and the new European Court of Human Rights, Research Paper 98/109, 4 December 1998, International Affairs and Defence Section, House of Commons Library. For the ICCPR, individual petitions are possible against any State Party to the First Optional Protocol.

[116] Fausto Pocar, "The Rome Statute of the International Criminal Court and Human Rights", in Mauro Politi, Giuseppe Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, p. 68.

"internationally recognized human rights" or through the expression of regional custom. Both the HRC and the ECtHR have developed firm principles based on the presumption of innocence that favour release pending trial and irrespective of the gravity of the alleged crime.[117] Certainly, the universality of the ICCPR advocates in favour of the Covenant as the primary source when examining human rights conformity of international criminal courts, an opinion that was seemingly shared by the Secretary General upon creation of the ICTY, explicitly referring to the ICCPR.[118] Conversely, the argument in favour of the ECHR as the standard against which international criminal procedures are primarily to be measured against can be based on the fact that the jurisprudence of the ECtHR may be considered by far the most in-depth analysis of human rights law. The reason for this is to be seen not least in the close level of exchange between the Strasbourg court and the national authorities, but also by a mere comparison of the number of cases, employees and Judges/experts sitting in the two courts. As a result, the European case law should be regarded as the primary reference point. When comparing the two systems, *Bantekas* refers to the ECtHR as an international judicial body with compulsory jurisprudence and binding judgements, as opposed to the HRC which he considers a "quasi-judicial body" rendering non-binding rulings.[119] In practice, while the ECtHR jurisprudence will in the following be seen as the primary reference point, the divide with regards to fair trial rights is not that relevant. The two courts have established a good spirit of cooperation and the HRC as a non-permanently sitting organ with a much smaller number of cases frequently reverts to ECtHR jurisprudence.

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[117] In case of the ICCPR, this can be derived from the Statute (Article 9(3). The ECtHR has stressed the same in its case law.

[118] Report pursuant to paragraph 2 of UNSC Res 808 (3 May 1993) S 25704/1993.

[119] Ilias Bantekas, *International Criminal Law*, p. 15-16 citing D. Mc Goldrick, *The Human Rights Committee* (Oxford University Press, 1994) 202-204. Bantekas nonetheless admits that the HRC judgements are nonetheless respected and complied by a large number of States. Concerning the primacy of the ECtHR further Zappala in "Human Rights in International Criminal Proceedings" (Oxford University Press 2003), p.14 ("The UN Committee does not really operate as a judicial body"). Safferling in the same direction ("The system of the Concil of Europe is undoubtedly the best-working system of human rights protection, and indeed the ECHR and the case law of the Court may serve as an excellent tool for interpreting human rights") in Christoph Safferling, "International Criminal Procedure and its Participants: An Examination of the Interaction of Judges, Prosecutor and Defence at the Yugoslav Tribunal" (2002) 5 Yearbook of International Humanitarian Law, p.247. Bert Swart, Alexander Zahar and Goran Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press 2011) ("the ECtHR enjoys acceptance of its case-law which clearly exceeds that of a non-judicial – or at most quasi-judicial institution such as the Human Rights Committee- no disrespect implied").

4. Symbiosis between Human Rights, Humanitarian Law and ICL?

International Humanitarian Law (IHL), Human Rights Law and International Criminal Law (ICL) developed widely independently from one another.[120] IHL regulating the conduct of war (*jus in bello*) was codified in the mid-19th century through the Geneva Conference of 1863 and the Hague Conventions of 1899 and 1907. Confined to the law of war, not a single one of this set of international treaties include the general protection of human dignity, nor do they provide for individual criminal responsibility in case of a norm violation, or the duty of a State to prosecute the violation of treaty provisions.[121] The concept of individual human rights was gradually introduced into Public International Law in the aftermath of World War II.[122] Yet again, neither the UDHR nor any other convention extended its protection of human rights to include armed conflict.[123] The first linkage between human rights and armed conflict was established through the four Geneva Conventions of 1949.[124] Since then the development of international humanitarian law was decisively shaped by human rights jurisprudence.[125] During the conflict in the former Yugoslavia, the bifurcation of jurisdiction persisted, insofar as violations of humanitarian law committed in wartime fell under the core jurisdiction of the ICTY whereas human rights violations *hors de combat* were primarily prosecuted before domestic courts.

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[120] Hans-Peter Gasse, "The Changing Relationship between International Law, Human Rights Law and Humanitarian Law" in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds) Brill | Nijhoff (2009), page 1111.

[121] Ibid Hans-Peter Gasse, p. 1112.

[122] Nowak-Far, The protection of fundamental rights in Europe - remarks in the context of International Law, March 2nd 2015, Presentation at the Vienna Diplomatic Academy ("Entirety of International Law is perforated by Human Rights Law, hence we have to see International Law through a Human Rights perspective"). Meron refers to a "human rights revolution" which was triggered not least by the ECHR. In Theodor Meron, Speech delivered by T. Meron on the occasion of the opening of the judicial year of the ECtHR, 25 January 2013, Annual Report of the European Court of Human Rights 2013, published by Registry of the ECtHR 2014, p. 42.

[123] Hans-Peter Gasse, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009), p. 1112.

[124] Later expressly during the Six Days War in the UN General Assembly Resolution 2444/1968 entitled "Respect for Human Rights in Armed Conflict".

[125] Annual Report of the European Court of Human Rights 2013, published by Registry of the ECtHR 2014, p. 41.

It was not until the creation of the Rome Statute that the requirement of a link to armed conflict for crimes against humanity and genocide was abandoned, making the ICC the first criminal court exercising jurisdiction over violations of both humanitarian law (war crimes) and human rights law (crimes against humanity and genocide where committed other than during an armed conflict).[126] The Rome Statute was applauded for adopting a notion of crimes against humanity, which "fully belongs to the field of human rights law".[127] While the primary purpose of ICL remains the protection of the "common good" of the international community, such as peace and security, the scope of protection was to encompass individuals deprived of adequate protection due to abuse of power of national leaders.[128]

The Individual as Subject to Rights and Obligations in the International Legal Order

For centuries, rights and duties in international law belonged almost exclusively to state entities. A violation of rights belonging to an individual in his or her capacity as a national of a state committed by another state could trigger, at most, the state responsibility of the latter.[129] It was with the development of human rights in the second half of the 20th century that an individual person had for the first time personal, inherent and enforceable rights *vis-a-vis* state actors committing an internationally wrongful act. The development of IHL and its enforcement since Nuremberg and Tokyo complemented the system insofar as every individual as an actor on the international stage in addition to a set of fundamental and exercisable personal rights is at the same time exposed to

[126] Torture, rape, forced disappearances or "imprisonment or other severe deprivation of physical liberty" in violation of fundamental rules of international law" all constitute crimes against humanity if said violations are being committed pursuant to "as part of a widespread or systematic attack", Article 7 Rome Statute: Crimes against humanity; Torture (Article 7(1)(f)), rape (Article 7(1)(g), illegal deprivation of liberty (Article 7(1)(e), the enforced disappearance under Article 7(1)(i) requires the authorization, support or acquiescence of a State or a political organization (see Article 7(2)(i).
[127] Fausto Pocar, "The Rome Statute of the International Criminal Court and Human Rights", in M. Politi, F. Nesi *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, p. 77)
[128] Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (C.H.Beck 2008), p. 112-13.
[129] T. Meron, Speech delivered by Theodor Meron on the occasion of the opening of the judicial year of the European Court of Human Rights, 25 January 2013, Annual Report of the European Court of Human Rights 2013, published by Registry of the ECtHR 2014, p. 42.

individual responsibility towards the international community whenever he or she is accused of having committed international crimes.[130]

ICL and human rights courts are characterized by their universal application to every individual, without exception, and where a national state does not provide a satisfactory remedy to individuals, the international community is determined to step in.[131] Another significant interplay between human rights and humanitarian law is the fact that the adjudication of those that have allegedly breached the boundaries of IHL must be tried in accordance with human rights, notably the defendant's fundamental fair trial rights. Judgements reached without full regard for defence rights risk being deprived of the necessary degree of credibility and convincing character; not only in relation to the person standing trial but also in the wider aim of establishing a valid and balanced historical record of historic events.

5. Fair Trial Rights in International Criminal Justice: From Nuremberg to Kosovo

After some attempts by the international community to bring to justice the German emperor in the aftermath of World War I,[132] the International Military Tribunals of Nuremberg and Tokyo were created to try the high command of Germany and Japan and are widely considered the birthplace of international criminal justice. While many legal principles were developed and applied for the first time, including a number of fair trial rights such as the right to legal counsel[133] and that of a fair and public trial, shortcomings such as the use of the death penalty, the lack of a right to appeal or of "any options to

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[130] Ibid. 43.

131 Remedies would be to mitigate or compensate the violation of human rights on the one hand and prosecute those accused of international crimes on the other.

[132] Paul Mevis & Jan M. Reijntjes, "Hang the Kaiser! But for What, and Would It Be Justice?", No.2 (2014), Erasmus Law Review, The Netherlands refused to extradite Kaiser Wilhelm. Several trials took place in Leipzig from 23 May to 16 July 1921 before the Reichsgericht in Leipzig, inter alia for mistreatment of prisoners of war or crimes in the submarine war (Leipzig War Crimes Trials).

[133] Article 16 (d) of the Nuremberg Charter.

argue for provisional release",[134] in combination with a lack of funding for defence counsels – from a human rights perspective - left a mixed legacy of the Tribunals.[135]

The UN *ad-hoc Tribunals* were established in the early 1990s in response to atrocities committed in the former Yugoslavia (ICTY, 1993) and Rwanda (ICTR, 1994). The Tribunals created by the UN Security Council, influenced by a culture of human rights that developed since the Second World War, put great emphasis on the respect of modern international human rights law and particularly fair trial standards.[136] Given their limited temporal and territorial jurisdiction, the *ad hoc* Tribunals are expected to soon fade out and it is envisaged that quasi-monopoly in international justice will be claimed by the permanent ICC as the primary international judicial organ for crimes of international proportion and concern to the world community. The ICC was built on the practical experiences and vast jurisprudence of the two UN-Tribunals and promised to provide remedies to certain alleged human rights issues inherent to the initial period of the Tribunals, such as the here discussed human rights issues related to detained defendants.

Lastly, contrary to the intention of the parties to the Rome Conference in 1998 establishing the ICC, political realities[137], the limited capacity of the ICC[138], as well as practical and financial considerations have led to the establishment of special hybrid

[134] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p.67. Despite this fact one of the accused (Gustav Krupp) was not detained in prison due to humanitarian reasons. His trial was postponed and he died in 1950.
[135] Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", Eur J Int Law (2010), p. 1085-1102, Besides executing the death penalty and the prominent question of *nullum crimen sine lege* for certain crimes, also other safeguards were below contemporary standards (e.g. trials in absentia were permitted, low "convenient" thresholds for admitting evidence, no right to appeal). S. Zappala, Human Rights in International Criminal Proceedings (Oxford University Press 2003), p.8.
[136] William Schabas, "Synergy or Fragmentation, International Criminal Law and the European Convention on Human Rights", 9 (2011), Journal of International Criminal Justice p.625.
[137] Contrary to initial hopes countries such as the United States, China or Russia have not joined the ICC. Instead, those countries can be considered sceptical of the concept of international criminal justice. All three countries have made use of their veto powers in the UN Security Council to prevent the condemnation (and in consequence adjudication) of certain regimes being of strategic interest to them.
[138] The adjudication of crimes committed on a scale as in Syria and Iraq in recent years (since 2011) with dozens if not hundreds of accused would arguably overwhelm the ICC in its current form. While the political leaders and military commanders of the conflict parties could theoretically be tried before the ICC (again subject not least to a UN Security Council referral), a hybrid Tribunal, combining Syrian law with international human rights standards and impartiality, for the lower ranks would be necessary.

tribunals or internationalized courts in Bosnia and Herzegovina,[139] Cambodia,[140] East Timor,[141] Lebanon,[142] Sierra Leone,[143] and most recently in Kosovo (Kosovo Specialist Chambers (KSC)).[144] The advantage of such hybrid courts lies primarily in their flexibility. Some of the courts apply domestic substantive and international procedural law.[145] The Judges are typically mixed between judges from the situation country and international Judges. The fact that the latest Tribunal adjudicating crimes committed in the Kosovo has started its operation in 2016 confirms the attractiveness of such hybrid courts as an alternative to the ICC. Another tendency is likely to be an increase of trials of international crimes before domestic courts, for instance the adjudication of crimes committed by foreign nationals involved in the Syrian war since 2014. While in the case of mixed tribunals, due to the effective role played by national states recourse for a defendant to the ECtHR or the HRC is at least imaginable[146], in case of the adjudication of international crimes before domestic courts this is accepted to be the case.[147]

[139] The War Crimes Chamber in Bosnia and Herzegovina which was established in 2005.

[140] The Extraordinary Chambers in the Courts of Cambodia (ECCC) or Khmer Rouge Tribunal was established in 1997.

[141] The Special Panels of the Dili District Court also referred to as the hybrid international–East Timorese tribunal was created in 2000.

[142] The Special Tribunal for the Lebanon (STL) was established in 2009. It applies Lebanese criminal law and international procedural law.

[143] The Special Court for Sierra Leone (SCSL) was established by the government of Sierra Leone and the UN in 2002.

[144] "Kosovo court to be established in The Hague", 15 January 2016, site of the Netherlands Government, retrieved online, https://www.government.nl/latest/news/2016/01/15/kosovo-court-to-be-established-in-the-hague. The KSC is an internationalized tribunal with a Constitutional Chamber. See A. Heinze, The Kosovo Specialist Chambers' Rules of Procedure and Evidence, Blog of the European Journal of International Law, 17 August 2017, https://www.ejiltalk.org/the-kosovo-specialist-chambers-rules-of-procedure-and-evidence/.

[145] See the KSC in The Hague which has adopted International Rules of Procedure and Evidence whereas the law consists of Kosovo laws and customary international law. See https://www.scp-ks.org/en/specialist-chambers/background retrieved 15 September 2017.

[146] See *Maktouf and Damjanović v. Bosnia and Herzegovina*, [GC] 2312/08 34179/08, 18 July 2013, a case which originated before the Sarajevo Special War Chamber, a mixed court.

[147] There is no uniform model for mixed or hybrid Tribunals. In the War Crimes Chamber of the Court of Bosnia and Herzegovina for instance Judges from Bosnia and Herzegovina worked together with international Judges. Trials were conducted in accordance with the national law of Bosnia. Bosnia being a Member State to the ECHR would be under the scrutiny of the ECtHR also in respect to those trials. Two defendents before the War Crimes Chamber have effectively complained to the ECtHR in 2008, but their complaint was found inadmissible. See the discussion in Chapter Four.

6. Human Rights in the Hierarchy of Norms of the *ad hoc* Tribunals and the ICC?

The classical theory of international law resolves questions relating to the priority of conflicting norms (within the same category of norms) by reverting to the maxims *lex posterior* and *lex specialis* according to which later endorsed norms and/or more specific ones would prevail.[148] In addition, one must consider *jus cogens* norms, or peremptory norms which cannot be validly derogated from by any form of agreement (examples comprise acts to which the international community attaches particular importance, such as the prohibition of genocide and/or torture).[149] While both the ICTY and the ICC Statute were created *a posteriori* to the ECHR, the latter can, from a human rights perspective, be seen to constitute *lex specialis*. The different modes of establishment of the ICTY and the ICC must equally be considered. At the time of their creation in 1993, the international community was willing to endow the two UN *ad hoc* Tribunals (ICTY, ICTR) with nearly unprecedented legal power. This was notably done in the context of a geographically limited context distant from any superpower's direct sphere of interest.[150] Matters were markedly different during the negotiations leading to the adoption of the ICC Rome Statute in 1998, in which many powerful states were cautious to limit the Court's powers in many ways, notably to prevent it from possessing binding force on non-Member States. One of the main differences between the Tribunals and the ICC is that the former, by virtue of their creation under the auspices of the UN Security Council, benefit from the provisions of Article 103 of the UN Charter. Crucially, this means that every UN Member State must cooperate with the Tribunals and that further obligations of

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[148] Zbiginiew Galićki, "Hierarchy in International Law Within the Context of its Fragmentation in "International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner" (Nijhoff Publishers 2008), p. 50.

[149] Z. Galićki, Hierarchy in International Law Within the Context of its Fragmentation (Nijhoff), p. 50. ("Exactly which norms can be so designated in modern international law is still subject to some controversy, but it is accepted that the status of peremptory norm derives from the importance of the content of the norm to the international community: an example is the prohibition of genocide"). R. Pati, Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization, in T. Kruessmann, ICTY: towards a fair trial? (NWV 2008), text related to Footnote 58.

[150] Russia in 1993 despite being a traditional ally of Serbia was willing to go along with the European States and the United States and abstained from using its veto power and thus allowing the creation of the Yugoslavia Tribunal through Security Council Resolution 808 and 827. Y. Beigbeder, International Criminal Tribunals: Justice and Politics, (Palgrave Macmillan 2011), p.53 ("The Chinese were reticent but were told that Tibet would not be involved. Russia had its own internal problems and Boris Yeltsin needed American support").

UN Member States towards the Tribunals (e.g. in cooperation matters) transcend any of their other conflicting international treaty obligations including, in principle, those under human rights treaties.[151] The ICC, as a treaty based organ, lacks such a trump card and is consequently more vulnerable to external scrutiny in cases where its rulings stand in conflict with a cooperating state's human rights obligations, for example those created by the ICCPR or the ECHR. This must be taken into account to better understand the differing approach towards human rights of the *ad hoc* Tribunals and the permanent ICC.

6.1. *Ad hoc* Tribunals: Primacy of the Statute and Rules over Human Rights?

Both the relevant UNSC Resolutions establishing the ICTY[152] and the ICTY Statute remain silent as to which sources of law (and in which order) the Tribunals should apply in their proceedings, namely in matters where the Statute or the Rules of Procedure and Evidence ("Rules") provide no explicit guidance.[153] In relation to the fair-trial rights of the accused, the UN Secretary-General expressed that it was "axiomatic" that internationally recognized standards were to be respected at all stages of the trial.[154] Explicit reference was made to the fair trial rights protected under Article 14 ICCPR.[155] Despite this authoritative interpretation, the *ad hoc* Tribunals were initially reluctant to apply in procedural matters any sources of international law other than its own Statute and the Rules.[156]

Two leading ICTY and ICTR Appeals Chamber findings shed some more light upon the sources of law applicable, as well as their interplay with human rights treaties. The ruling in *Erdemović*[157] suggests the supremacy of the Statute and Rules over the sources of law enumerated in the list of sources of international law of Article 38 of the Statute of the

[151] To give an example, Austria may not validly refuse cooperation with the UN Security Council endorsed ad hoc Tribunals invoking a provision derived from an EU regulation on data protection.
[152] UNSC Res 808 (27 February 1993) UN Doc S/RES/808 and UNSC Res 827 (25 May 1993) UN Doc S/RES/827 - in relation to the ICTY.
[153] Account must further be taken of the expeditious manner, in which the Statute was drafted, the novelty nature of such criminal Tribunal as well as of the still nascent discipline of international criminal law.
[154] Report pursuant to paragraph 2 of UNSC Res 808 (3 May 1993) S 25704/1993.
[155] Ibid para 106, Art .14 ICCPR has served as basis for Article 21 of the Statute.
[156] Alexander Zahar , Goran Sluiter, *International Criminal Law*: A Critical Restatement (Oxford 2007), p. 16.
[157] *Prosecutor v. Erdemović*, ICTY-IT-96-22-A, *Judgement Appeals Chamber*, 7 Oct. 1997, Separate Opinion of Judge Mc Donald and Judge Vohrah, para. 40.

International Court of Justice (ICJ), that apply "in the second place".[158] This would mean that the Statute and Rules take precedence over *inter alia* international conventions, international custom as well as the general principles of law recognized by civilized nations.[159] In *Barayagwiza,* it was held that jurisprudence of regional human rights courts such as the ECtHR, whilst regarded as "persuasive authority" useful for interpreting the applicable law, could never create any binding effect upon the Tribunal.[160] Only its indirect application, as representing a form of evidence of international custom, remained possible.[161] In spite of the Secretary-General's words, the ICTY (and ICTR) Statute and Rules were therefore widely deemed to prevail over human rights provisions not explicitly incorporated in the Statute or Rules of the Tribunals.

6.2. Human Rights Prevailing over Contradicting Laws in ICC Proceedings?

Article 21(1) of the Rome Statute is considered the first codification of the sources of ICL.[162] It asserts the primacy of its own Statute, the Elements of Crimes as well as the Rules of Procedure. Where appropriate, the applicable treaties and the principles and rules of international law apply in second place, followed by, as last resort, the principles of national legal systems. In the final negotiations of the Rome Statute, the proposed broader wording of "relevant treaties" gave way to the narrower "applicable treaties",[163] thereby excluding the ICCPR or the ECHR, which while "relevant" to the Court proceedings[164], do not apply as such. Either way, the Court retained the discretion to apply such treaties only "where appropriate". Principles deriving from the two human

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[158] Margaret M. deGuzman in Otto Triffterer/ Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court (3rd edition 2016, Beck, Hart, Nomos)*, p. 935.

[159] See Article 38 International Court of Justice : 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; […], Statute of the International Court of Justice, retrieved online : http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II.

[160] *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Appeals Chamber Decision, 3 November 1999, para. 40.

[161] Ibid.

[162] DeGuzman in Otto Triffterer/ Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court (3rd edition 2016, Beck, Hart, Nomos)* p. 935.

[163] DeGuzman in Otto Triffterer/ Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court (3rd edition 2016, Beck, Hart, Nomos* p. 738.

[164] Relevant in the sense that both the ICC and the ICTY make frequent reference to the judgements of the ECtHR.

rights organs could be seen to "apply" as principles and rules of international law.[165] The ranking of applicable law under Article 21(1) hence widely corresponds to the one elaborated in the jurisprudence of the Tribunals. In its third paragraph, Article 21 of the Statute, however, further asserts that "[t]he application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights". This not only seems to indicate the prevalence of human rights law over the Statute and the Rules insofar as it provides "a standard against which all law applied by the Court should be tested"[166], but as *Safferling* remarks, it could further lead to a development of judicial law-making compatible with human rights, even beyond the language of the applicable law".[167] *Pellet* holds the view that nothing would prevent a Judge from refusing to apply a Rule or Statute provision in conflict with such rights.[168] Article 21(3) deserves therefore to be considered "one of the more important provisions of the Rome Statute".[169] Notably, reference is not made to fundamental rights in the sense of peremptory norms, but to the much broader notion of internationally recognized human rights.[170] Such an approach would allow for a constant adaptation of the Rome Statute which, due to its political implications and the involvement of the State Parties in any amendment of the Statute, would be otherwise difficult to achieve. Further, it would enable what can be considered to be one of the ICC's core responsibilities: the establishment of universal standards for criminal proceedings.

The development from the ICTY to the ICC was taken a step further by the newly founded Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC), seated in The Hague and Priština. Instead of referring to internationally recognized human rights, the KSC referred directly to the ECHR and the ICCPR. Article 22 of the Constitution of

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[165] Ibid, p.706.
[166] Alain Pellet in Cassese at al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary: Volume II* (Oxford 2002), p. 1080.
[167] Christoph Safferling, *International Criminal Procedure* (Oxford 2012), p.120.
[168] Alain Pellet in Cassese (2002) p. 1080. Further, DeGuzman in Triffterer /Ambos (2016), p. 948 citing Arsanjani (1999) AJIL 22,29.
[169] Ibid.
[170] Alain Pellet in Cassese at al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary: Volume II* (Oxford 2002, p. 1081.

Kosovo elevated the ECHR to constitutional rank, despite the fact that Kosovo is not a member of the Council of Europe. [171]

6.3. Interim Conclusion

This Sub-Chapter started with an assessment of the leading universal, international and regional human rights treaties. All the examined human rights instruments operate on the presumption of innocence.[172] Apart from the Arab Charter, all expressly provide the right of an accused to have continued detention conditioned upon the existence of detention grounds by the national authority[173] and to limit the maximum time in custody by entitling the accused to trial within a reasonable time.[174] The ICCPR in its Article 9 explicitly states that detention should be the exception for those standing trial, a principle the ECtHR developed in its jurisprudence.[175] Both the UN and the ECtHR envisage that the gravity of a particular crime alone does not justify long periods of detention. Alternatives to detention, such as electronic monitoring, must be considered. All human rights treaties introduced operate under the understanding that the detaining authority must periodically examine the necessity of detention by actively establishing reasoned decisions. Reversing the burden of proof to the defendant as to why he or she should be released does *a priori* not seem compatible with the structure and the spirit any of the operating human rights treaties. Relevant case law of the HRC and in particular the ECtHR will be examined in the following chapters.

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[171] See the Law on Specialist Chambers and Specialist Prosecutor's Office (Article 3): . https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office-3-aug-2015, retrieved 15 September 2017. Further Heinze, The Kosovo Specialist Chambers' Rules of Procedure and Evidence, Blog of the European Journal of International Law, 17 August 2017, https://www.ejiltalk.org/the-kosovo-specialist-chambers-rules-of-procedure-and-evidence/.

[172] ICCPR: Article 14(2); African Charter: Article 7(1) lit. (2), American Convention: Article 8(2), Arab Charter: Article 7, EU Charter: Article 48(1), ECHR: Article 6(2).

[173] ICCPR: Article 9, African Charter: Article 6, American Convention: Article 7, Arab Charter: Article 8 EU Charter, ECHR: Article 5.

[174] ICCPR: Article 14(3) lit.c, African Charter: Article 7(1) lit 4, American Convention: Article 7(5), ECHR: Article 5(3). The EU Charter does also not expressly provide for such right which is owed to the rudimentary nature of the text that makes reference to the ECHR.

[175] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001 ("Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases"); *Stögmüller v. Austria*, 1602/62, 10 November 1969, para 4 considering detention prior to conviction as a "serious departure from the rules of respect for individual liberty and of the presumption of innocence").

In the search for the human rights treaty to be used as primary reference, it was concluded that only the ICCPR and the ECHR offer an effective adjudicatory organ that establishes guiding jurisprudence. Although the HRC is the organ with the widest international membership, the ECtHR, due to its large volume of cases and judgments rendered in pre-trial detention matters, will in the following be considered as the primary source of case law against which the compatibility of practice of the international criminal tribunals is to be assessed. The European framework may be considered in many ways an “elitist” system, consisting of countries forced to adhere to the strictest human rights standards in the world. However, it can undoubtedly only be this prime standard against which the procedure before an international criminal court is to be assessed. The ICTY and ICC assume a role model function concerning the adjudication of international crimes similar to the function the ECtHR has concerning the protection of human rights for both domestic but also the other regional human rights courts. Foremost the ICCPR, but also regional human rights treaties, should be considered where they offer a different approach to the issue of pre-trial detention.

While both the ICTY and the ICC stress the importance of human rights principles in their respective proceedings, their approaches towards the binding nature of human rights norms seem to be decisively different. It appears from the case law that the ICTY (and ICTR) consider(s) its own law takes precedence over the body of established human rights principles in case of conflict, whereas for the ICC, Article 21(3) Rome Statute seems to establish a primacy of human rights principles over ICC law. The practical effects of these approaches are manifold. With regards to the ICTY, this implies that decisions of the leading human rights courts could never be binding even where in conflict with ICTY law. Conversely, the ICC is expected to closely follow and respect developing human rights principles, such as those created by the ECtHR, and interpret its own case law according to them, otherwise risking a violation of its Statute. Both the ICTY and the ICC must in any event respect human rights norms amounting to *jus cogens*. For the ICC this is because it is a treaty based organization and norms of *jus cogens* are beyond the reach of the states attributing powers to international organizations. For the ICTY, it is because *jus cogens* is considered to stand above Article

103 UN Charter which forms the basis of the obligation for states to cooperate with the UNSC endorsed *ad hoc* Tribunals.[176] The last Chapter of this dissertation will aim to shed some light on the practical consequences for the proceedings and for the defendant where a practice before the *ad hoc* Tribunals or the ICC may stand at odds with permanent jurisprudence of the ECtHR.

B. Detention and Release in International Criminal Law: Theory and Practice

7. Legal Framework of Pre-Trial Detention before the ICTY and the ICC

The approach to pre-trial detention is arguably one of the strongest deviations that the drafters of the Rome Statute took from the path first established by the ICTY and then adopted by the ICTR as well as the Special Court for Sierra Leone (SCSL).[177] While the ICTY generally omitted any statutory provisions regarding the pre-trial phase and as a consequence offered neither an alternative to detention nor a system of statutory detention review, the ICC Rome Statute introduced explicit provisions on detention and release for the pre-trial stage.[178]

7.1. ICTY: Detention as Default State, Release as the Exception

In ICTY proceedings, the issuance of a warrant for arrest is linked to the confirmation of an indictment.[179] The warrant comprises an order for prompt transfer of the accused to The Hague and from a legal perspective serves, as the basis for detention at the UN

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[176] Gerhard Hafner, "Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in K. Wellens (ed*.) International Law: Theory and Practice*, 1998, p. 657.

[177] The ICTR Rules are based on the ICTY Rules (C. Muller (2008) p. 614) The Rules of the Special Court for Sierra Leone (SCSL) in turn follow the ICTR Rules. See C. Hall and C. Ryngaert in Triffterer/Ambos (2016), p. 1440 (FN 6).

[178] UN Doc A/CONF.183/C.1/WGPM/L.1.; M. Marchesiello, Proceedings before the Pre-Trial Chamber, in Antonio Cassese, Paulo Gaeta & John Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary, Vol. II (Oxford University Press 2002), p. 1240 (Footnote 7): In the ICTY and ICTR there is no provision, concerning pre-trial release. [..] The reason is to be found, simply, in the absence of a pre-trial phase as such").

[179] Article 19(2) ICTY Rules of Procedure and Evidence; the confirmation of an indictment requires a prima facie case against a person. This was defined in the jurisprudence of the ICTY as "a credible case which, if accepted and un-contradicted, would be sufficient basis on which to convict the accused", *Prosecutor v. Milošević*, IT-01-51-I, Decision on Review of Indictment (The Reasoning). Cited in S. Zappala, Human Rights in International Criminal Proceedings (Oxford University Press 2003), p 315.

Detention Unit (UNDU) until a decision of conviction or acquittal is reached (in accordance with Rule 99 (B) the legal title can be even extended following an acquittal until the end of the time limit for the Prosecution to file an appeal).[180] To protect the rights of the defendant, the issuance of an arrest warrant is linked to a *prima facie* case expressed in an existing indictment and confirmed by at least one Judge.[181] No alternatives exist in the Rules to an arrest warrant and subsequent detention.[182] Upon transfer to the UNDU, the accused must, without delay, be brought before the Trial Chamber or a Judge for an initial appearance.[183] No formal review of the necessity of the detention by the Court is foreseen; neither at the initial appearance nor at a later stage in the pre-trial or trial phase. Nothing, however, prevents the accused from filing a motion for provisional release as early as the initial appearance.[184] Equally, no statutory time limit exists as to the length of the temporary release. Motions for release, whereas initially only foreseen at the pre-trial stage of trial may, since an amendment made in 2011, be also granted pending trial (e.g. court recess) or on the basis of sufficiently compelling humanitarian grounds as late as at the appellate stage following a first instance conviction.[185] Rule 64 of the Rules (Detention on Remand) provides for the

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[180] Rule 99 (B) ICTY RPE: Status of the Acquitted Person. If, at the time the judgement is pronounced, the Prosecutor [..] [may apply for] an order for the continued detention of the accused, pending the determination of the appeal. Article 19 of the ICTY Statute, *Prosecutor v. Jokić*, ICTY-IT-01-42-PT, Order on M. Jokić's Motion for Provisional Release, 20 February 2002, para 15 (The arrest warrant provides the legal basis for detention of the accused as soon as he or she is arrested".) citing in Footnote 14: Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brdjanin* et al., ICTY-IT-99-36-PT, 28 March 2001, para. 21: "The detention of an accused person is justified in accordance with the Tribunal's procedures by the issue of the arrest warrant, which in turn is justified by the review and confirmation of the indictment which is served." In addition, Decision on Motions by Momir Talić (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to Motion for Provisional Release, Prosecution v. Brdjanin et al., ICTY-IT-99-36-PT, 1 February 2000, para. 21: "According to the Tribunal's 'procedures [...] established by law', therefore, the only actions by the Tribunal which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant.".

[181] Rule 47 (D) of the ICTY Rules in connection with Art. 18 & 19 of the ICTY Statute.

[182]In contempt proceedings where penalties are limited fines and/or seven years of imprisonment [Rule 77 (G)] summons were deemed as sufficient in at least two cases. *Prosecutor v. Hartmann*, ICTY-IT-02-54-R 77.5, Order *in Lieu* of an Indictment on Contempt, 27 August 2008; *Prosecutor v. Marijacić & Rebić*, ICTY-IT-95-14 R77.2Decision on Review of Indictment, 26 April 2005.

[183] Rule 62 of the ICTY Rules of Procedure and Evidence.

[184] ICTY-IT-01-42-PT, *Prosecutor v. Jokić*, Order on M. Jokić's Motion for Provisional Release, 20 Feb.2002

[185] Rule 65 (B) as amended following Revision 46 on 20 October 2011.

detention of an accused upon transfer to the tribunal.[186] Its last paragraph grants the President power to order the modification of the conditions of detention.[187] Such a modification in the form of a house arrest was granted in one of the earlier cases, but was later discontinued for various logistical and financial reasons in view of the increasing numbers of accused persons.[188] A right to provisional release is absent from the Statute and Rules[189] and from the point of transfer to The Hague until final conviction, defendants seeking release must meet the criteria of Rule 65. Its nature as interlocutory application (as opposed to that of a periodic review like at the ICC) already indicates that the applicant has the burden of proof concerning the existence or non-existence of the relevant circumstances.[190] The standard to be met is that of the balance of probabilities.[191] The decision of a Trial Chamber to release or not to release a defendant can be made subject of an appeal by the defendant, but also by the Prosecutor.[192]

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[186] Detention shall be either in facilities provided by the host country (Netherlands) or in exceptional cases in another country. Through the 11th Revision of the RoPE dated 25 July 1997 it was inserted into Rule 64 that in "exceptional circumstances the accused may be held in facilities outside of the host country; two such cases have occurred. In *Prosecutor v. Norać*, the indicted person was already serving a sentence imposed by a national Court for different charges. ICTY-IT-04-76, Trial Chamber, Decision on Pre-Trial Detention, 8 July 2004; Gabrielle McIntyre in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, p.459; in *Bagaragaza,* where the defendant, was transferred from Arusha to The Hague for security concerns, ICTR-2005-86-1, President, 13 August 2005; McIntyre (ibid), p. 459.

[187] *Prosecutor v. Blaškić,* IT-95-14-1, before the Presiding Judge (Antonio Cassese), Public Transcript of Hearing 02 April 1996, page 3 clarifying that requests for modification and for provisional release cannot be made in the same procedure due to the fact that the first must be addressed to the President of the Tribunal whereas the second is upon the Trial Chamber to decide.

[188] See the house arrest granted in *Blaškić*, this will be discussed further in the third Chapter. At the ICC, in the Article 70 (Contempt) case, four of the accused are since November 2014 in a form of house arrest pending their trial.

[189] M. Marchesiello, "Proceedings before the Pre-Trial Chamber," in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. II* (Oxford University Press 2002), p. 1240.

[190] Andrew Trotter, "Innocence, Liberty and Provisional Release at the ICTY: A Post Mortem of "Compelling Humanitarian Grounds in Context", (2012), Human Rights Law Review p. 12.

[191] *Prosecutor v. Popović et al*, ICTY-IT-05-88-A, Decision on Vinko Pandurevic's Request for Provisional Release, 14 March 2014, para. 5.

[192] Rule 65 (D) and (E) ICTY Rules of Procedure and Evidence.

7.2. ICC: The Issuance of a Summons to Appear as an Alternative to Pre-Trial Detention and the Different Scenarios in which a Defendant May be Entitled to Release

The system at the ICC, contrary to the *ad hoc* Tribunals, is bifurcated as it provides for pre-trial liberty as an alternative to an arrest warrant, imposing overall stricter conditions for deprivation of liberty than at the Tribunals.[193] Under Article 58(1) of the ICC Statute, the Prosecutor may, at any time after the initiation of an investigation, apply to the Pre-Trial Chamber for either an arrest warrant, a summons to appear or both at the same time.[194] For both a summons and an arrest warrant, the Pre-Trial Chamber must ascertain that reasonable grounds exist to believe that the person has committed a crime within the jurisdiction of the Court and, where an arrest warrant is requested, whether at least one of the three grounds justifying detention under Article 58(1) (b) exist, namely that an arrest appears necessary in order to either ensure the person's appearance at trial, to prevent the obstruction of the proceedings, or to prevent the person from continuing the crime.[195] The Pre-Trial Chamber must grant the request where at least one of the three sets of conditions is established.[196] Both the defendant and the Prosecutor may appeal any decision granting or denying release.[197] Upon the execution of an arrest warrant or voluntary surrender, a defendant may rely on four alternative provisions when applying for release. *Firstly* pending the surrender to the ICC, the accused can, in accordance with Article 59(3), file a request for interim release before the authorities of the custodial state. Contrary to the *ad hoc* Tribunals, where only the Tribunal was in power to order interim release pending surrender, the Rome Statute attributed this power to the authorities of the custodial states.[198] The wording of urgent and exceptional circumstances indicates a

[193] Cryer R et al, An Introduction to International Criminal Law and Procedure (Cambridge University Press 2007), p.371.
[194] ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammand Harun and Ali Abd-al-Rahman*, 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.
[195] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para. 8.
[196] *Prosecutor v. Abel Raheem Muhammad Hussein*, Public Redacted version of "Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, 13 July 2012, para. 77.
[197] Article 82 (1) (b) of the ICC Rome Statute.
[198] Christopher Hall and Cedric Ryngaert in Triffterer/Ambos (2016), p. 1466; the ICC Preparatory Committee originally envisaged for the Court to be competent for such a decision.

presumption against release pending surrender limiting possible cases to terminal illnesses or similar situations.[199] *Secondly*, upon transfer to international custody, a detained person may apply for interim release at any time pending trial pursuant to Article 60(2) ICC Statute. The same wording – interim release - is used for release pending surrender and pending trial; nonetheless, the requirements are different. Article 60(2) ICC Statute makes no reference to urgent and exceptional circumstances and is instead to be seen as a by-product of the accepted principle that deprivation of liberty should be the exception.[200] The Pre-Trial Chamber must release a defendant if the Prosecution fails to demonstrate that the conditions justifying an initial arrest set under Article 58(1) continue to be met. *Thirdly*, Article 60(3) Rome Statute requires the Pre-Trial Chamber *proprio motu*[201] or on the request of either the Prosecution or the accused to periodically review its initial ruling under Article 60(2) as described above, jointly with any modifications made to that decision under Article 60(3) as the case may be.[202] Such a review shall take place at the latest every 120 days[203] counting from the day of the rejection of the first application for interim release under Article 60(2) or any time at the request of either party.[204] In reaching its decision, the Chamber must consider all relevant changed circumstances and relevant information, regardless of whether it was raised by a

[199]Karim Khan in Triffterer/Ambos (2016), p. 1476, "Article 59 (detention in the custodial state) effectively creates a presumption in favour of custody [..]".

[200] *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 31; *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre- Trial Chamber II, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para.36., *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-163, Decision on the "Defence Request for Interim Release', para. 33; ICC-01/05-01/08-321, para. 31; ICC-01/05-01/08-403 para. 36, footnote 50, as cited in *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Defence application for the interim release of Mr Bosco Ntaganda, 20 August 2013, para. 20.

[201] *Prosecutor v. Katanga et al*, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, ICC-01/04-01/07, 18 March 2008, p.8-9.

[202] Judgment on the appeal of Mr Jean-Pierre Bemba against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05- 01/08-1019, para. 46.

[203] Rule 118 (2) Rules of Procedure and Evidence. While the idea of a periodic review is also for the Chamber to ascertain itself of the well-being of the accused, a Chamber is not obliged to hold an oral hearing every 120 days. Instead Rule 118 (3) of the Rules, an oral hearing shall be held at least once a year. Regarding the remaining requests the Pre-Trial Chamber may, but is not obliged to hold a hearing.

[204] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford 2010), p. 727. Hence, the Court is not obliged to periodically review the conditions provided for the person's arrest according to Article 58(1). Requiring a review of an arrest warrant every 120 days was considered an illogical interpretation of Article 60(3). See *Prosecutor v. Lubanga*, ICC-01/04-01/06-842, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber entitled [..], 13 February 2007, para. 99. K. Khan in Triffterer/Ambos (2016), p. 1480.

party.[205] Importantly, the Prosecutor has the burden of proof regarding the conditions for detention even where the motion was triggered by the Defence.[206] *Fourthly,* Article 60(4) provides the defendant with the right to seek release where he or she has been detained for an unreasonably long period prior to trial and where such delay was due to an inexcusable delay by the Prosecutor.

House arrest is not explicitly mentioned, but may be ordered under Rule 119 of the ICC Rules of Procedure which sets a non-exhaustive list of conditions restricting liberty. Any defendant seeking release before the ICC must actively indicate the state to which he or she wishes to be released[207], following which the Chamber is to "seek observations from the host state and from the state to which the person seeks to be released"[208] and hear submissions from the state to which a defendant wishes to be released on the conditions that should be imposed in such a release order.[209]

8. Record of Provisional Release at the ICTY from 1994 until 2017

The original version of Rule 65 of the Rules required the defendant to prove three substantive conditions for release with the burden of proof resting on the Defence[210]. The Chamber needed to be satisfied that the accused, if released, would *(a)* appear for trial and *(b)* not pose a danger to victims, witnesses or other persons. Furthermore, pre-trial liberty being an exception to the norm, and despite a presumption against release

[205] *Prosecutor v. Bemba*, ICC-01/05-01/08, 1019, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", 19 November 2010, para. 52.

[206] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para. 14.

[207] *Prosecutor v. Lubanga*, ICC-01/04-01/06-128-t, Order on the application for interim release, 29 May 2006. A Pre-Trial Chamber may wish to ensure the person does not return to the scene of the crime.

[208] Regulation 61 of the ICC Regulations of the Court.

[209] Rule 119 (3); *Prosecutor v. Bemba*, ICC-01/05-01/08-1789-Red, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release', 19 August 2011, para. 55.

[210] *Prosecutor v. Zejnil Delalić et al,* ICTY-IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, 25 September 1996, page 3 ("They are conjunctive in nature, and the burden of proof rests on the Defence").

appearing to exist,[211] at least one *exceptional circumstance* was to be established. Later, a procedural fourth condition, the hearing of submissions by The Netherlands as the host country, was added. The criteria were conjunctive in nature; if only one requirement was not met, the defendant had to remain in detention.[212] The relevant excerpts of Rule 65 in its original version read as follows:[213]

Rule 65
Provisional Release

(A) Once detained, an accused may not be released except upon an order of a Trial Chamber.

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

Rule 65 does not indicate which party may submit request for release. In theory, the Prosecution could present such a motion *proprio motu* as was notably considered in *Šešelj* in view of the exceptionally lengthy detention of the defendant.[214] This corresponds to the special duty of objectivity the Prosecution assumes in the proceedings.[215] The regime of provisional release at the ICTY can be split into a pre- and

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[211] *Prosecutor v. Tihofil Blaškić* IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 April 1996, page 4 ("That Rule 65 sets forth a presumption of opposition to provisional release."; "Considering that the Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes."); *Prosecutor v. Tihofil Blaškić* IT-95-14-T, Order Denying a Motion for Provisional Release, 20 December 1996, pages 4-5 ("both the letter of Rule 65 (B) and the spirit of the Statute of the International Tribunal require that the legal principle is detention of the accused and that release is the exception.[..] the gravity of the crimes .. leaves no place for another interpretation).

[212] *Prosecutor v. Zejnil Delalić et al*, ICTY-IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, 25 September 1996, page 3.

[213] Rules of Procedure and Evidence, IT/32, 14 March 1994 (adopted on 11 February 1994). Rule 65 continues in Section (C) and (D) setting the conditions imposed on an accused considered for release.

[214] *The Prosecutor v. Vojislav Šešelj*, ICTY-IT-03-67-T, Order Inviting the Parties to Make Submissions On Possible Provisional Release of the Accused Proprio Motu, 13 June 2014.

[215] The Prosecution is the organ that triggers the arrest of a suspect and therefore initiates the proceedings. From this fact, it is deduced that the Office of the Prosecution is to some extent responsible for the protection of the rights of the defendant. The ICTY and ICTR Judges have repeatedly recognized the 'minister of justice' role of the Prosecutor, despite the primarily adversarial setting of investigations and

a post-1999 Rule 65 amendment period when the exceptional circumstances criterion was abandoned. Only after did the defendants stand a realistic chance of being released, bringing the provision seemingly closer to full compliance with modern international human rights standards. What remained unchanged from the initial approach is that the burden of proof remained on the accused to convince the Chamber that, if released, he would (i) appear for trial and (ii) not pose any danger to victims or witnesses or other persons ("core guarantees").[216] The standard of proof is on the balance of probabilities[217] as opposed to the more onerous standard of "substantial burden", which stands between the standards of balance of probabilities and beyond reasonable doubt.[218]

8.1. Release only in "Exceptional Circumstances" (1993-1999)

While the original version of Rule 65 was in place from 1993 until November 1999 only four suspects met the "exceptional circumstances" criterion for release; two were granted guarded attendances at funerals of close relatives and two others were released on grounds of severe medical conditions ("immediately life threatening") which could not be treated at the detention centre.[219] Leading Judges at the ICTY, despite often citing the respective case law of the ECtHR, accepted such deviation from international and regional human rights law (i.e. according to which pre-trial detention should be the exception, not the rule) with reference to the "special circumstances" under which the

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trial at the tribunals. On this topic see Sergey Vasiliev's chapter in L. Reydams, J. Wouters, and C. Ryngaert (eds.), *International Prosecutors* (2012), 700.

[216] *Prosecutor v. Brđanin & Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 13 ("The wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release").

[217] *Prosecutor v. Popović et al*, ICTY-IT-05-88-A, Decision on Vinko Pandurevic's Request for Provisional Release, 14 March 2014, para. 5 ("The Appeals Chamber recalls that "whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities".).

[218] The substantial burden was advocated in a number of earlier decisions, See *Prosecutor v. Brđanin & Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 18 ("The absence of any power in the Tribunal to execute its own arrest warrant [..] place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released. That is not a re-introduction of the previous requirement that the applicant establish exceptional circumstances to justify the grant of provisional release.[..]).

[219] *Prosecutor v. Kunarac et al*, IT-96-23/23&1, Decision on request for provisional Release of Dragoljub Kunarac, 11 November 1999, para 8.

Tribunal operated.[220] The requirement to demonstrate "exceptional circumstances" was abolished by an amendment to the Rules by unanimous vote of the Judges at the 17th Revision of the Rules in late 1999.[221]

8.2. Post-amendment Provisional Release at the ICTY: 1999-2017

While the new wording of Rule 65 led to an increase of releases,[222] hopes that the Rule would from then on be interpreted in a manner that release would be the rule for defendants were soon disappointed as was the hope that the burden of proof would shift on to the Prosecution.[223] Instead, it became an often-repeated dictum that detention remained the default state for the accused and liberty the exception. Similarly, the fact that the burden of proof was on the defendant was upheld and appeared justified given the many difficulties the Tribunal faced in terms of cooperation.[224] Nonetheless, many defendants were released once or even multiple times. After the first accused was released for non-medical reasons in 2000,[225] release was *inter alia* granted over the summer and winter court recesses for recovery purposes or to allow for better preparation

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[220] See the opinion of Presiding Judge and later ICTY President McDonald (1997-1999) in a decision rejecting a motion for provisional release by Delalić, IT-96-21-T, 25 September 1996, *Prosecutor v. Delalić et al*, Decision on the Provisional Release filed by the Accused Zejnil Delalić .

[221] In accordance with Rule 6 (B) of the ICTY Rules, a rule can be amended , if unanimously approved by the permanent Judges. This amendment, made at the twenty-first session of the plenary, entered into force on 6 December 1999 (see IT/161) cited in *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para. 12.

[222] While in the period 1993-1999 only four persons were provisionally released, nine persons were released in the two years following the amendment. From M. DeFrank, "ICTY Provisional Release:Current Practice, a Dissenting Voice and the case for a Rule Change", 80 (2002), Texas Law Review, p. 1451-52.

[223] In his dissenting opinion dated 8 October 2001 para. 16 Judge Robinson suggested a new interpretation of Rule 65 (B) under which "the Prosecutor was under the obligation to prove both that the accused will not return for trial and that he or she will pose a danger to any victim, witness or other person. Otherwise, the Trial Chamber must grant provisional release").

[224] *Prosecutor v. Brđanin and Talić*, ICTY-IT 99-36PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000 ("The absence of any power in the Tribunal to execute its own arrest warrant [..] and the need to rely upon local authorities within that territory [..] places a substantial burden upon the applicant for provisional release."). *Prosecutor v. Simiić*, Decision on Milan Simiić's Application for Provisional Release, 29 May 2000, p. 5 ("may be granted only if the Trial Chamber is satisfied that the accused has met the requirements set out in the Rule").

[225] *Prosecutor v. Simić and others,* ICTY-IT–95–9-PT Decision on Miroslav Tadić's Application for Provisional Release, 4 April 2000 and *Prosecutor v. Simić and others*, ICTY-IT–95–9-PT) Decision on Simo Zarić's Application for Provisional Release, and others, 4 April 2000, cited in S. Zappalà, *Human Rights in International Criminal Proceedings*, (Oxford University Press 2003), p. 96.

of the defence case and without being tied to any humanitarian or similar reasons.[226] This practice could be interpreted as an implied recognition that liberty at the pre-trial and trial stage should be the standard. As the Netherlands refused to host defendants on its territory, release pending trial could (except for longer trial breaks where the defendant would return home) not be considered.[227] Further radical changes, apart perhaps from the 2011 amendment of Rule 65 (B) allowing for release at any stage of the proceedings[228], did not occur as this could, in the eyes of one commentator, "call a long string of jurisprudence into question and challenge the grounds on which many decisions have been rendered".[229] This raises the question whether the situation would have been different had it been reasonably predictable at an earlier stage that the ICTY would still exist in 2005, not to mention in 2017 or beyond.[230]

9. Conditional Release and Summons to Appear in the ICC Practice

Despite the fact that the ICC pre-trial detention regime offers both a mandatory periodic review mechanism and several other outlets for a defendant to apply for release, since the first accused was transferred to the ICC Detention Unit in early 2006, not a single person initially arrested was subsequently released, neither temporarily nor indefinitely, i.e. until the beginning of trial and/or the verdict.[231] The only persons that were released from detention were four accused standing trial for offences against the administration of justice, despite the fact that the decision ordering their release was overturned by the

[226] *Prosecutor v Perisić*. ICTY-IT-04-81-T, Decision on Mr. Perisić's Motion for Provisional Release During the Summer Recess (15 July 2010), para. 21.
[227] The position of the Netherlands Government was that while it would go along with the decisions of the Tribunal, it would expel any person with no legal permit to stay once no longer under the jurisdiction of the ICTY. See ICTY-IT-95-14-T, Letter from the Ministry of Foreign Affairs addressed to the Registrar, 18 July 1996 (p.3035-3036). Prosecutor v. *Milutinović et al.,* ICTY-IT-05-87-AR65.2, 14.12.2006, para.9 ("application of the Rule is confined to the provisional release of an accused whose trial has not yet begun".).
[228] Rule 65 (B) Rules of Procedure and Evidence as amended following Revision 46 on 20 October 2011.
[229] A. Trotter, "Innocence, Liberty and Provisional Release at the ICTY: A Post Mortem of "Compellling Humanitarian Grounds in Context", 2012 Human Rights Law Review, p.21.
[230] In view of the decision by the Chamber in *Stanisić & Simatović,* of December 2015 ordering a complete re-trial the ICTY (or in the form of the MICT Mechanism) can be expected to exercise its functions at least until 2020.
[231] The first arrest warrant was issued against Thomas Lubanga on 10 February 2006 and unsealed on the occasion of the accused's arrest and transfer to The Hague on 17 March 2006. See https://www.icc-cpi.int/drc/lubanga, retrieved 16 May 2017.

Appeals Chamber.[232] Also, one defendant benefitted from interim release allowing him to attend a funeral while being constantly guarded.[233]

Meanwhile, the ICC considered arrest to be unwarranted in at least six cases. While such a system of summonses to appear, where the defendant awaits trial in liberty with only less strict forms of monitoring, would naturally represent the best possible scenario, the experience of the ICC is not promising; from the six cases relating to the situations in Kenya and in Sudan, none of the cases ended with a verdict.

C. Assessment Concerning the Human Rights Compatibility of the Pre-Trial Detention Practices of the ICTY before and after the Deletion of the "Exceptional Circumstances" Criterion and that of the ICC Practice

The provisional release mechanism before the ICTY has to be separated into one period until 1999 and a second period in place since 1999. In the following the first mechanism characterized by the necessity for a defendant to demonstrate exceptional circumstances in motions for release will be analysed. The human rights compatibility of the second mechanism will be subject to examination in the next Chapter, where the legality of reverse burdens of proof will be discussed. With regards to the ICC practical aspects will be raised that continue to prevent a more progressive pre-trial release practice.

10. The ICTY Pre-1999 Release Mechanism: The Practice Leading to the Amendment of Rule 65 (B)

As outlined above, all three conditions of Rule 65 had to be proven by the applicant conjunctively.[234] Where only one condition was not met, the Trial Chamber was not only

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[232] *Prosecutor v. Bemba et al,* ICC-01/05-01/13 OA 5, OA 6, OA 7, OA 8, OA 9, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015.

[233] *Prosecutor v. Bemba*, ICC-01/05-01/08-437-Conf, Decision on the Defence's Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, ICC-01/05-01/08, 3 July 2009; *Prosecutor v. Bemba*, ICC-01/05-01/08-1099-Conf Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, ICC-01/05-01/08, 12 January 2011.

able to reject the entire motion, but was moreover not even obliged to consider the remaining arguments (in great depth).[235] Typically, and in accordance with the ranking of the criteria set by the wording of pre-1999 Rule 65 (B), the "exceptional circumstances" criterion was discussed in the first place and the high threshold developed resulted in most applications being denied practically already at this criterion.[236] In this period ranging from the transfer of the first indicted person to the UNDU in May 1995 until November 1999, out of 35 motions for provisional release, only on four occasions did an accused meet the criteria for release.[237] This is a small number compared to the increasing numbers of detained people awaiting trial which by mid- 1998 had already increased to twenty-seven. All four accused were released based on either severe health issues (*Đjukić,*[238] *Simić*[239]) or to visit funerals or ailing family members respectively (*Josipović,*[240] *Cerkez*[241]).

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[234] Following the third revision of the Rules of Procedure, a fourth criteria had to be established insofar as that the host state had to be heard before any decision in order to allow re-entry into the Netherlands. See A 50/365/, S/1995/728, 23 August 1995; Second Annual Report of the Tribunal to the Security Council and General Assembly, para. 22, footnote 7. The position of the Netherlands Government was that while it would go along with the decisions of the Tribunal, it would expel any person with no legal permit to stay once no longer under the jurisdiction of the ICTY. See IT-95-14-T, Letter from the Ministry of Foreign Affairs addressed to the Registrar, 18 July 1996 (p.3035-3036). Accused would be under ICTY jurisdiction when either in detention or at the Tribunal or in transfer. This made any form of house arrest practically impossible. Matthew DeFrank, "ICTY Provisional Release: Current Practice, a Dissenting Voice and the case for a Rule Change", 80 (2002) Texas Law Review, 1437.

[235] Clemens Muller, "The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals", 8 (2008) International Criminal Law Review p. 596.

[236] *Prosecutor v. Mucić et al*, ICTY-IT-96-21, Decision on Motion for Provisional Release filed by Hazim Delić, 24 October 1996.

[237] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 12 and Footnote 25; The Trial Chamber reiterated that as of 8 October 2001 55 applications were made for provisional release in total, from which 20 were made after the amendment of 1999. In total 8 motions were granted, four pre- and four post-amendment.; Matthew DeFrank, "ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change", May 2002, Vol 80, 6, Texas Law Review,, p.1432.

[238] *Prosecutor v. Djukic*, ICTY-IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996; *Prosecutor v. Krajišnik & Plavšić*, IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001; The Trial Chamber reiterated that per 8 October 2001, 49 persons were held in detention while one was provisionally released. See, para. 12 and Footnote 25.

[239] *Prosecutor v. Milan Simiić*, ICTY-IT-95-9-PT, Decision on Provisional Release of the Accused, 26 March 1998.

[240] *Prosecutor v. Kupreškić et al*, ICTY-IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipovic (Request for Permission to Attend Funeral), 6 May 1999.

[241] *Prosecutor v. Kordić and Čerkez,* ICTY-IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release, 14 September 1999.

10.1. Release for Humanitarian Reasons

Release of a defendant as a corollary of the recognized principle that detention for accused awaiting trial shall be the exception is to be distinguished from release granted due to severe health reasons and/or guarded temporary releases to hospitals or funerals ("humanitarian release"). The case law of the ICTY defined exceptional release as follows:

10.1.1. Immediately Life Threatening Health Condition

The average age of ICTY detainees per 11 May 2012 was 59.6 years, a high age compared to most national detention facilities, where the average prisoner is about twenty years younger.[242] Furthermore, many accused arrived with "various health issues",[243] often physical and mental consequences of war, such as post-traumatic stress.[244] Consequently, it was to be expected that a number of prisoners would require medical assistance which could not be adequately provided at the detention facility (e.g. chemotherapy), while others would face irreversible medical conditions rendering the accused unfit to stand trial. The Trial Chamber initially applied a high threshold and deemed the granting of release for medical reasons only appropriate in "very rare

[242] Hans Holthuis,, Registrar ICTY, Diplomatic Seminar of the ICTY, June 2008, at 3-7 cited in *Prosecutor v. Prlić et* al, ICTY-IT-04-74-T, Decision on the Accused Praljak's Motion for Provisional Release, 2 December 2008 (over eighty percent of those arriving at the UNDU were above the age of fifty). In Austria, the total number of criminal convictions in the year 2012 was 35.541, out of which the age group between the ages 18-21 (4.442 convictions) and 21-25 (6.058 convictions) was proportionally most affected whereas in total numbers the age group of the 25-40 year olds faced most convictions (13.548). The age group 40 plus accounted for 9.656 convictions, a small number compared to this age group in society. Data from „Gerichtliche Kriminalstatistik 2012, Statistik Austria, Wien 2013, Tabelle A3 Verurteilungen nach Sanktionen und Geschlecht, Alter bei Rechtskraft des Urteils, Staatsangehörigkeit, Vorverurteilungen, Gerichtssprengeln und Alter zum Tatzeitpunkt 2012, page 68".

[243] Hans Holthuis,, Registrar ICTY, Diplomatic Seminar of the ICTY, June 2008, at 3-7

[244] As the stress and horror of war affected many defendants, the Court set a high tier to declare a person unfit to stand trial based on such symptoms alone. See ICTY in *Erdemović* where after a first expert report had concluded that the defendant had suffered post-traumatic stress and was insufficiently able to stand trial, a second report found Erdemović fit for trial. *Prosecutor v. Erdemović*, ICTY-IT-96-22-T, Sentencing Judgement, 29 November 1996, paras. 5 & 8. At the ICC: *Prosecutor v. L. Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC-02/11-01/11-286-Red, 2 November 2012, paras. 87 – 98 where the psychiatrist held that said the defendant's hospitalisation syndrome and post-traumatic stress disorder were "minimal", and even though he was easily fatigued, he remained capable of performing complex intellectual reasoning.

cases"[245] where the accused's state was incompatible with any form of detention[246] and where the applicant could establish that his state of health was (a) terminal or immediately life threatening and (b) could not be treated effectively in the Netherlands.[247]

Đorđe Đukić was granted release on 24 April 1996 after it was established that he suffered from an incurable illness in its terminal phase.[248] Due to the "inevitable mental decline" of the accused, the Prosecution proposed a withdrawal of the indictment,[249] a request denied by the Trial Chamber.[250] Đukić died on 18 May 1996 in the Military Hospital in Belgrade while on provisional release.[251] The other accused whose medical problems were considered as an exceptional circumstance justifying longer release was Milan Simić, who required intensive daily care by a qualified medical team.[252] He returned to The Hague two weeks prior to the commencement of his trial, more than one year after his release in June 1999.

10.1.2 Visit of Funerals and of Ailing Family Members

The second scenario in which, during this period, provisional release was granted was to attend the funeral of a close family member. Whereas provisional release for medical reasons is typically given for longer periods and under a lesser form of restraint, the

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245 *Prosecutor v. Tihofil Blaškić*, ICTY-IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 April 1996, page 4.

246 *Prosecutor v. Đorđe Đukić*, ICTY-IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, page 4 ("Considering that the extreme gravity of the medical condition of General Đukić is not compatible with any form of detention and that the palliative care which his condition requires, or will require, justifies a different environment.").

247 *Prosecutor v. Simo Drljača & Milan Kovačević,* ICTY-IT-97-24-PT, Decision on Defence Motion for Provisional Release (by Milan Kovačević), 20 January 1998, para 14.

248 *Prosecutor v. Đorđe Đukić,* ICTY-IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, page 3.

249 *Prosecutor v. Đorđe Đukić,* ICTY-IT-96-20-T, Motion to Withdraw the Indictment, 19 April 1996, Chief Prosecutor Goldstone was cited as having feared Djukic could become a "martyr" if dying in detention. J.Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, (University of Chicago Press 2003), p.74.

250 *Prosecutor v. Đorđe Đukić,* ICTY-IT-96-20-T, 24 April 1996, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release; It was invoked that neither the Statute or the Rules of Procedure and Evidence allow for such a procedure. Further, reference was made to similar situations in the Tokyo and Nuremberg trials where it was not considered necessary to withdraw the indictments.

251 *Prosecutor v. Đorđe Đukić,* ICTY-IT-96-20-T, Order Terminating the Appeal Proceedings, 29 May 1996.

252 *Prosecutor v. Milan Simić*, ICTY-IT-95-9-PT, Decision on Provisional Release, 26 March 1998, page 3.

release to attend a funeral was limited to 1-2 days and in most cases under constant surveillance by escorting police officers. This was the case in *Josipović* ("transported and escorted").[253] At a later stage, the visit of close relatives in critical, life-threatening condition was considered to constitute a sufficient humanitarian ground. Mario Cerkez was granted three days of release in September 1999 to visit his father in hospital ("under constant 24-hour surveillance by the Croatian police").[254] In these cases given the imposed conditions, the risk to abscond and/or to threaten victims and witnesses was negligible. The period of release was to be strictly "proportional to those circumstances"[255] and last "no longer than it would take to visit the family member".[256]

Requests were declined where the ailing family member was not expected to die within a short period of time. Security risks were only considered in a few cases, among them *Delić,* where the Appeals Chamber held that the funeral of a close relative "may" constitute such exceptional circumstances, but in the case denied the accused's request to attend the funeral of his mother for security reasons in view that the applicant was already at the appellate stage.[257] Post Rule 65 amendment, the approach was more liberal in granting release on compassionate grounds. As such it was held that even though weddings, births and death memorials considered separately were not sufficiently compelling humanitarian reasons for release, when considered cumulatively, they could constitute a sufficient basis for provisional release.[258] From the decisions it follows that within the humanitarian grounds, the Tribunal evolved towards a more liberal practice. While the first successful applicant in 1996 was released primarily to prevent him from

[253]*Prosecutor v. Drago Josipović et al,* ICTY-IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipović (Request for Permission to attend Funeral) 6 May 1999; Contrary to most cases relating to health reasons, the decision funeral cases must be decided upon within a very short period of time. In the case at hand, the mother of Drago Josipović had passed away in the night from 5th May to 6th May, the funeral was scheduled for May 7 in the afternoon.
[254]*Prosecutor v. Mario Čerkez et al,* ICTY-IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release, 14 September 1999, page 4.
[255]*Prosecutor v Prlić et al*, ICTY-IT-04-74-AR65, Decision on Prosecution's Appeal from Decision Relative a la Demande de Mise en Liberte Provisoire de la Accuse Petkovic, 31 March 2008, para. 17.
[256] *Prosecutor v Prlić et al*, ICTY-IT-04-74-T, Decision on Prosecution's Appeal From Decision Relative a la Demande de Mise en Liberte Provisoire de l'Accuse Prlić, 7 April 2008 (25 April 2008), para. 18.
[257]*Prosecutor v. Hazim Delić et al*, ICTY-IT-96-21-A, Order of The Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999, pages 3-4.
[258]*Prosecutor v Perisic*, ICTY-IT-04-81-T, Decision on Mr. Perisic's Motion for Provisional Release during the Summer Recess (15 July 2010), para. 21.

dying in the detention unit, the second later returned for his trial after his provisional release in 1998. A similar evolvement could be observed in the Tribunal's interpretation of the right to family: while the first applicant in May 1999 was released to attend the funeral of his father, four months later a second one was released to visit his ailing parent.

10.2. Humanitarian Release Pending Trial before the ICC

Before the ICC, Bemba was on two occasions released on exceptional humanitarian circumstances in order to travel to Belgium with a view to attend the funerals of his father and step-mother in 2011.[259] In both cases he was under constant guard and had to cover the occurring expenses.[260] By contrast, in *Gbagbo*, the defendant was denied a request for conditional release in order to travel to the Ivory Coast and organise and attend his mother's funeral.[261] The Trial Chamber recognised that a defendant can be released "when compelling humanitarian circumstances justify" such a release[262], but ultimately rejected the motion as no "set of specific conditions [could] sufficiently mitigate the security and logistical concerns" and his release ran a risk "of endangering the populace in Cote d'Ivoire, Court staff and Mr Gbagbo himself".[263]

10.3. Reasons for Deletion of Exceptional Circumstances of Rule 65: Practical Necessities or Human Rights Concerns?

Rule 65 was amended in plenary on 30 November 1999 striking-out the exceptional circumstances criterion. The Court never provided an official version of the reasons for the amendment and rather insinuated practical issues concerning capacity limits warranting a more liberal approach for persons that surrendered voluntarily.[264]

[259] *Prosecutor v. Bemba*, ICC-01/05-01/08-437-Conf Decision on the Defence's Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, ICC-01/05-01/08, 3 July 2009; *Prosecutor v. Bemba*, ICC-01/05-01/08-1099-Conf Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, ICC-01/05-01/08, 12 January 2011.
[260] *Prosecutor v. Bemba*, 3 July 2009. pages 5-6; *Prosecutor v. Bemba*, 12 January 2011, p. 8-9.
[261] *Prosecutor v. Gbagbo*, ICC-02/11-01/11-711-Red, Decision on the urgent request of the Defence for Mr Gbagbo to attend his mother's funeral, 29 October 2014, para. 3, 9.
262 Ibid. para. 25.
263 Ibid, paras.26, 27.
[264]The Sixth Annual Report of the ICTY to the UN (A/55/273, 7 August 2000, para 293) mentions in a short notice that the new test for provisional release should reflect the circumstances in which the Tribunal found itself, mentioning long delays between arrest and trial and the number of detainees in custody; "By June 1998 about 37 defendants were under detention in the Tribunals twenty-four-unit facility. The result

Undoubtedly, the increased pace of indicted persons arriving in the detention unit from the arrival of the first accused in 1996, to seven (August 1996)[265], eleven (1997)[266] and twenty-eight in 1999[267] has tested the logistics of the Tribunal. Measures taken such as the repeated enlargement of the detention unit, the inauguration of a third courtroom as well as the formation of a new Trial Chamber, could not prevent an imminent backlog of cases.[268] Realistic chances to be released while awaiting trial was equally seen to serve as an impetus to surrender for the remaining persons still at large.[269] Less openly discussed were cost considerations[270] or the negative attitude such a practice caused among parts of the population in the affected region.[271]

While these practical concerns were indeed significant, any assessment would be incomplete not taking into account the widespread and constant criticism the Tribunal's restrictive detention regime had received.[272] The debate was further sparked by the deaths

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was that the ICT was under-budgeted and beyond its physical capacity." John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago Univ. Press 2003), page 109.

265 Third Report of the ICTY to the General Assembly, A/51/292, S/1996/665, 16 August 1996, p. 8.

266 Fourth Report of the ICTY to the General Assembly, A/52/375, S/1997/729, 18 September 1997, p. 27.

267 Sixth Report of the ICTY to the General Assembly, A/54/187, S/1999/846, 25 August 1999, p. 3.

268 In the reporting period of the Sixth Annual report, 28 July 1998- 31 July 1999, 12 additional cells were built, at the end of the reporting period having a capacity to hold 36 detainees. (para 162). In the reporting period of the Seventh Annual Report of the ICTY to the UN, 1 August 1999-31 July 2000, 13 indicted persons were arrested in one single year, bringing the total number of those detained to 37 (para 2). 12 new cells together with an additional area for visits was made available. The new capacity stood at 48, while the number of staff increased to 57 (para 233-34). In June 1998 a third courtroom was inaugurated. Furthermore, three new Judges were appointed to form an additional Trial Chamber. In the Ninth Annual Report of the ICTY to the UN, on 4 September 2002, the detention unit was further extended to accommodate 68 detainees (para 303).

269 See James Meernik, "Why Do Individuals Surrender to the International Criminal Court", 15 (2015) International Criminal Law Review (Nijhoff), p. 946 in relation to those facing the chances of a summons to appear by the International Criminal Court.

270 The daily rate to be paid by the Tribunal to the Netherlands for every detainee at the UN Detention Unit is [350 euros]. Information based on personal discussion of the author.

271 Shane Darcy & Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (Oxford University Press 2010), p.330 ("First, the old version of Rule 65 has been criticized from a human rights angle, something which can be said to have negatively affected the Tribunal's image and reputation"), On the occasion of a conference organized by the Humanitarian Law Centre Belgrade in November 1998, Krstan Simić, an attorney from Bosnia criticized the lack of clear definition of the required exceptional circumstances. He concluded that the approach to the detention issue was the cause, in his view, "of the negative attitude towards the Tribunal.

272 Matthew DeFrank, "ICTY Provisional Release: Current Practice, a Dissenting Voice and the case for a Rule Change", 80 (2002) Texas Law Review, p, 1429 referred to the excessive length of pre-trial detention as to one of the most enduring criticisms of the Tribunal. He, however, rejected the idea that the amendment was a consequence of violations of customary international law or a reaction to the human

of two inmates in 1998,[273] one being a suicide.[274] The HRC and the ECtHR had both strongly underlined the exceptional character of pre-trial detention in a number of cases.[275] Several ICTY Judges showed concern with regard to the length of the trials and the lengthy periods of detention for the accused.[276] Judge Robinson explicitly linked the amendment to a "conflict with customary international law as reflected in the main international human rights instruments".[277]

At least two arguments can be made in favour of the hypothesis that the ICTY was in its decision to delete the exceptional circumstances criterion being responsive to Strasbourg case law. The first is that the exceptional circumstances criterion was initially only deleted for ICTY proceedings on European soil while the identical provision continued to

rights jurisprudence. In support he cites Patricia Wald & Jenny Martinez, "Provisional Release at the ICTY: A Work in Progress", in *Essays on ICTY Procedure and Evidence* (Richard May et al. eds. 2001), p. 233 note 65 ("The Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the ECtHR approach in full with a presumption of release..), Andrew Trotter, "Innocence, Liberty and Provisional Release at the ICTY: A Post Mortem of Compelling Humanitarian Grounds in Context", Human Rights Law Review (2012), p.21 ("This isolated problems of the reversed onus, [..] residual discretion to detain..[..] along with de facto and de jure tiers as the case progresses in the requirements for provisional release, have comprised the adherence to human rights standards that might be expected of a prominent international tribunal.).

[273] *Prosecutor v. Kovacevic*, Order Terminating the Proceedings against Milan Kovacevic; 24 August 1998.

[274] CC/PIU/327-E, Accused Slavko Dokmanovic found dead in his cell, ICTY Press Release, 29 June 1998.

[275] Article 9(3) ICCPR: "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." as interpreted for example by Human Rights Committee see General Comment No. 8 ("pre-trial detention should be an exception and as short as possible". Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/Rev.6, 12 May 2003, p. 130; the ECtHR in *Stögmüller v. Austria*, 1602/62, 10 November 1969, para 4 considering detention prior to conviction as a "serious departure from the rules of respect for individual liberty and of the presumption of innocence").in Ilijkov v. Bulgaria, 33977/96, 26 July 2001 ("Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases").

[276] Sixth Annual ICTY report, 28 July 1998- 31 July 1999, page. 11 para. 13. "[s]ince the accused is generally in custody from the time of his arrest or voluntary surrender until the final disposition of his case, long trials result in lengthy periods of detention for the accused and also affect other accused in custody awaiting trial

[277] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, para. 2. Others, such as Judge Wald sustained that the Tribunal had rejected the adoption of the ECtHR approach with a presumption in favour of release. See Patricia Wald & Jenny Martinez, "Provisional Release at the ICTY: A Work in Progress", in *Essays on ICTY Procedure and Evidence* (R. May et al. eds. 2001), p. 233 note 65 ("The Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the ECtHR approach in full with a presumption of release.). See also Footnote 211.

apply before the Tribunal for Rwanda (ICTR) until 2003.[278] Secondly, the pertinent *Iljikov* judgement by the ECtHR later become one of the most frequently cited Strasbourg case in ICTY proceedings.[279] Although it was not officially published until 2001, the ICTY was very likely aware of the developments and the string of case law leading to the relevant dicta of *Iljikov* where a similarly restrictive national release practice from Bulgaria was found to contravene the ECHR.[280] Lastly, the *ad hoc* Tribunals detention regime was since the Rome Conference of 1998 subject to direct comparison with the much more liberal detention regime of the Rome Statute. In conclusion, it is argued that a combination of factors led to the deletion of the exceptional circumstance criterion. Practical or pragmatic reasons certainly did play some role, but a considerable part of this change of paradigm is also to be attributed to the formally not binding but strongly persuasive authority of the Strasbourg court's jurisprudence.

11. The Human Rights Compatibility of a Detention Regime Limiting Release to Exceptional Circumstances and the Reversal of the Burden of Proof Regarding Humanitarian Situations?

The compatibility of two features of the pre-amendment provisional release mechanism will in the following be tested against international customary law as "reflected in the main international human rights instruments".[281] The initial question concerns the legality of the shifting of the burden of proof to the defendant regarding the existence of

[278]*Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, 18 March 2008, p. 7 ("Until the revision undertaken on 27 May 2003, Rule 65 (b) of the ICTR Rules of Procedure also established that "Release may be ordered by a Trial Chamber only in exceptional circumstances [..]".)

[279] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson; *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, ICTY-IT-01-47-PT, Decisions granting Provisional Release to Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, 19 December 2001 ("The Trial Chamber referred to the Judgement rendered by the European Court of Human Rights on 26 July 2001 in the case *Ilijkov v. Bulgaria* and held that "[a]ny system of mandatory detention on remand is *per se* incompatible" with Article 5(3) of the ECHR"); *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, ICTY-IT-99-37-PT, Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release, 26 June 2002.

[280] See for instance *Letellier v. France*, 12369/86, 26 June 1991; *Clooth v. Belgium*, 12718/87, 12 December 1991 or *Muller v. France*, 21802/93, 17 March 1997 all cited in *Iljijov v. Bulgaria*, para.84.

[281] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, para. 2.

exceptional circumstances.[282] This assessment is followed by the question of whether a mechanism that effectively reduces release to humanitarian reasons may be found compliant with principles of international human rights law.

11.1. The "Particular Knowledge" Principles Established in *Celebici* and its Application to Humanitarian Reasons

In *Celebici*, the Chamber was confronted with one accused advancing the plea of diminished responsibility and limited physical capacity as mitigating factors.[283] The Trial Chamber held that every criminal system would have to start from a presumption of sanity. It opined: "Accordingly, the facts relating to a special defence raised by the accused are those peculiarly within his knowledge and should be established by him. In other words, he is to rebut the presumption of sanity".[284] The Trial Chamber reverted to the English Homicide Act according to which the issue of diminished mental responsibility is to be raised as a matter of defence with a standard of proof on the balance of probabilities. The Trial Chamber held this to be compatible with the general principle that the "burden of proof of facts relating to a peculiar knowledge is on the person with such knowledge or one who raises the defence".[285] In the case at hand, the deciding Trial Chamber was ultimately not sufficiently persuaded of the accused's diminished responsibility.[286] The Prosecution did not adduce any evidence. *Schabas* when analysing this case from the perspective of the prohibition of reverse burdens of proof under Article 67 ICC Rome Statute concluded that in ICC proceedings it would likely be sufficient for the accused to raise reasonable doubt as to his or her mental condition[287] which then would have to be actively disproven by the Trial Chamber.[288]

[282] This to some extent anticipates the second Chapter of this dissertation that assesses the overall legality of reverse burdens of proof regarding the main detention grounds inherent to Rule 65, the risk of escape and interference with witnesses and/or victims.

[283] *Prosecutor v. Delalić et al*, ICTY-IT-96-21-T, Judgment, 16 November 1998, paras. 1157-1160. Sub-Rule 67(A)(ii)(b) refers to special defences available to the accused, including that of diminished or lack of mental responsibility.

[284] Ibid 1158.

[285] Ibid. para. 1172.

[286] Ibid. 1186.

[287] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Press 2010), p. 816 (Commentary to Article 67 Rome Statute). He further also does not exclude the more "extreme hypothesis" being that the Prosecution would be under an obligation to establish sanity. He remarks that this could not have been the result intended by the drafters of the Rome Statute.

This would correspond to an evidential burden as opposed to a persuasive burden of proof.[289]

11.2. Humanitarian Reasons and Unfitness to Stand Trial as "*quasi-*" Evidential Burdens of Proof?

The argument being raised herein is that if one considers the persuasive part with regards to humanitarian reasons as being negligible, the burden of proof in exceptional circumstances applications is *de facto* closer to an evidential burden of proof than to a proper (and from a fair trial perspective more problematic) persuasive burden of proof which obliges the person concerned to properly persuade the deciding organ as opposed to merely providing the relevant evidence.[290]

The answer seems affirmative in relation to release motions following a death case in the family, a fact that not only amounts to a particular peculiar knowledge of the defendant, but also a scenario where practically no persuasive element is required: the only fact the accused has to prove is that the person has indeed passed away, the sufficiently close family tie and the time and location of the funeral.[291] Where the motion is about the ill-health of a close family member, the Court must equally start with the presumption that the concerned family member is in a normal state of health as long as it is not informed otherwise. Again, the Court has no way of accessing (confidential) medical records of third persons and places its decision entirely on official medical certificates.[292] The persuasive part is hence negligible, particularly where time is typically of the essence, meaning that the Prosecution and/or Trial Chamber will not have time to order a counter

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[288] Ibid.
[289] See the discussion in the second Chapter; other typical evidential burdens of proof are alibi, self-defence or duress.
[290] For a more detailed debate concerning evidential and persuasive burdens of proof please revert to the Second Chapter of this dissertation.
[291] See the decision granting release in *Josipovic* which limited to stating the fact that the Trial Chamber had been informed by the accused that his mother had died and that the funeral would take place at a time and location specified and further that he had surrendered voluntarily and had been a role model prisoner; *Prosecutor v. Kupreškić et al*, IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipovic (Request for Permission to Attend Funeral), 6 May 1999.
[292] See *Prosecutor v. Kordić and Čerkez,* ICTY-IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release, 14 September 1999 ("NOTING that the Clinical Hospital Split has issued a certificate on 2 September 1999 confirming that the condition of his father is life-threatening and the prognosis is uncertain.).

expert report. More complex is the case where the health of the accused itself is concerned that might warrant release. Should it be sufficient for the defendant to raise doubt as to the compatibility of his or her health status with continuous detention or should he or she be under the obligation to prove such fact on the balance of probabilities? Contrary to the situation of family members, the courts are in the position to have both access to - and even the responsibility to - monitor the health of the detainees. At the same time must the general presumption clearly be that medical issues can be treated inside the prison medical units and that releases of a prisoner for such purpose are exceptional.

The fact that the burden of proof in such matters before the ICTY continues to rest on the defence was confirmed in a decision in *Hadžić* of October 2015 following a defence request to declare the accused unfit to stand trial.[293] *Hadžić* had already been provisionally released five months earlier to Serbia[294] following expert reports ascertaining continuing growth of existing tumours and related thereto a limited remaining life expectancy.[295] The Trial Chamber cited jurisprudence from *Strugar* opining that the test was whether a defendant can "exercise effectively his rights in the proceedings against him"[296] and that "the accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence".[297] In contrast, before the ICC, the defendant's fitness to stand trial was discussed in *L. Gbagbo.* While the Prosecution argued that the party alleging unfitness should bear the burden of proof, and that the

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[293] *Prosecutor v.Hadžić,* ICTY-IT-04-75-T, Decision on the Continuation of Proceedings, 26 October 2015.

[294] *Prosecutor v. Hadžić*, ICTY-IT-04-75-AR65.1, Decision on Urgent Motion for Provisional Release Filed on 28 April 2015, 21 May 2015.

[295] *Prosecutor v. Hadžić*, ICTY-IT-04-75-T, Decision on the Continuation of Proceedings, 26 October 2015, para 13. Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015, p. 5.

[296] P*rosecutor v. Strugar* 26 May 2004 Decision, para. 35.

[297] *Prosecutor v. Hadžić*, ICTY-IT-04-75-T, Decision on the Continuation of Proceedings, 26 October 2015, para 13. Decision on Defence Motion for Medical Examinations in Serbia and Motion to Cancel or Defer Medical Examinations (confidential), 19 June 2015, para. 42 citing *Strugar* Appeal Judgement, para. 56. Definition of Black's Law Dictionary, 7th edition (1999). The balance of probabilities is defined under preponderance of the evidence: The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. See Hadžić Decision, Dissenting Opinion Judge Burton Hall, para. 16 ("I am satisfied that it is more likely than not that Hadžić does not have the mental or physical capacity to understand the details of the evidence").

standard of proof should be on the "balance of probabilities", the Chamber rejected the notion that the burden of proof laid with one party.[298] Instead, it reasoned that the parties were simply there to assist the Chamber reach a decision based on medical expert witnesses.[299] In support of this more inquisitorial approach, the Chamber noted the experts were appointed by the *Chamber* and that they were questioned in a method that was decided upon taking into account the fact that their role was to assist the Chamber to discharge its obligation under Rule 135(1) of the ICC Rules of Procedure and Evidence.[300] As regards the standard of proof, the Chamber did not explicitly endorse the test of "balance of probabilities" but instead referred to the text of Rule 135 requiring the Chamber to be "satisfied" that the accused was unfit to stand trial.[301] On 27 November 2015, Trial Chamber confirmed that L. Gbagbo was fit to stand trial.[302] While the formal approaches of the ICTY and the ICC in the application of the burden and standard of proof continue to be distinct, the difference is in practice less significant. In either case, the decision will be based on medical expert reports and expert testimony rather than on legal *persuasive* argumentation. The principle of equality of arms (i.e. financial means) regarding access to specialized medical experts is less relevant given experts for both sides are appointed by the Registry.[303] The starting presumption is in both procedures that a defendant is fit to stand trial.[304]

In conclusion, the imposition of a reverse burden of proof in matters relating to the existence of exceptional circumstances *per se* seems to be overall justified and not problematic from a human rights point of view. For reasons demonstrated, such practice can neither be considered as overly burdensome nor to require great persuasive effort on behalf of the

[298] *Prosecutor v. L. Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC-02/11-01/11-286-Red, 2 November 2012, para. 56
[299] Ibid
[300] Ibid.
[301] Ibid.
[302] *Prosecutor v. L. Gbagbo*, ICC-02/11-01/15-349, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015, paras. 38 & 43.
[303] *Prosecutor v. Hadžić*, ICTY-IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, para. 10.
[304] Requests to take measures to alleviate the defendant's requirements are more frequently granted. For instance, in the trial of *R.Mladic* the Chamber ordered the trial sitting schedule to be reduced from five days per week to four days to accommodate the defendant's medical conditions *Prosecutor v. Mladić*, Reasons for Decision on the Future Trial Sitting Schedule, IT-09-92-PT, 17 September 2014, para.5.

defendant. Practical differences to the ICC, where the reversal of any burden of proof to the detriment of the defendant is prohibited, can be considered negligible, therefore not effectively putting a defendant before the ICTY seeking release based on humanitarian grounds in a comparatively worse position.

11.3. The Human Rights Compatibility of Limiting Release to Exceptional Circumstance in View of the Principles Established in *Ilijkov?*

Arguably the most frequently cited Strasbourg case in motions for provisional release before the *ad hoc* Tribunals was *Iljikov v. Bulgaria* (2001), where the ECtHR pronounced itself on the human rights compatibility of a particularly restrictive pre-trial detention regime.[305]

11.3.1. The Merits of the Case before the ECtHR

Mr. Ilijkov was arrested and detained for about three years for fraud charges punishable under Bulgarian law with a sentence exceeding ten years. Regarding the grounds for the continued detention, the Bulgarian Supreme Court held that pre-trial detention was mandatory in such severe cases unless "it was clear beyond doubt that there was no danger of the accused's absconding or re-offending".[306] This could be the case where an "accused was seriously ill, elderly or in any other condition which excluded the danger of his or her absconding or re-offending".[307] The presumption of detention was only rebuttable in "very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded due to serious illness or other exceptional factors".[308] The existence of such exceptional circumstances was to be proven by the accused.[309]

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[305] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001*; inter alia* in A. Klip and G. Sluiter, *Annoted Leading Cases of the International Criminal Tribunals* (Intersentia 2005), p. 52; V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights* (Nijhoff 2008), p. 598.
[306] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, para. 43.
[307] Ibid, para. 43.
[308] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, para. 83.
[309] Ibid.

The Strasbourg Court, apart from re-iterating that the gravity of charges was insufficient to justify longer periods of detention[310], opined that:

> "The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. **Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention."**[311]

And further with respect to a shifting of the burden of proof to the defendant:

> "Moreover, the Court considers that it was incumbent on the authorities to establish those relevant facts (remark: referring to the "existence of concrete facts outweighing the rule of respect for individual liberty").[312] **Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention**, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases."[313]

The Bulgarian statutory provision of the criminal procedure code as interpreted by the Bulgarian Supreme Court effectively applied a very restrictive definition of the detention grounds in such serious cases. They were a) to be proven by the defendant and b) only stood a chance in exceptional circumstances, such as in situations where the defendant "was seriously ill, elderly or in any other condition which excluded such risk".

The ECtHR reproached the Bulgarian authorities primarily for its rigid application of the statutory presumption, which prevented it from sufficiently addressing the "concrete

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310 Para. 81. Court cited *Ječius v. Lithuania*, no. 34578/97, § 94.

311 *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, para. 84. Judgment deducted this finding from *inter alia*: *Letellier v. France* judgment of 26 June 1991, Series A no. 207, paras. 35-53; the *Clooth v. Belgium* judgment of 12 December 1991, Series A no. 225, para. 44; the *Muller v. France* judgment of 17 March 1997, Reports of Judgments and Decisions 1997-II, paras. 35-45; the above cited Labita judgment, paras. 152 and 162-165; and the above cited *Ječius v. Lithuania*, paras. 93 and 94). The highlighting is that of the author.

312 *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, para. 84 citing *Contrada v. Italy* , 27143/95, 24 August 1998.

313 *Ilijkov v. Bulgaria,* 33977/96, 26 July 2001, para. 84.

relevant facts" of the situation of the defendant.[314] Such a practice of almost mechanically relying on the set criteria of exceptional circumstances amounted, in the assessment of the Strasbourg organ, to a quasi-mandatory detention regime incompatible with ECHR principles. Moreover, the Court held that the shifting of the burden of proof was only justifiable in "strictly defined cases". As such, in *Contrada*, the application of the Italian courts of a similar presumption against release was seen justified as the authorities laid down in sufficient detail the danger Mr. Contrada posed as senior member of a criminal organization.[315]

11.3.2. Assessment and Relevance for the ICTY Practice?

Both the Bulgarian and the ICTY system consider it justified that a person accused of a serious crime must have the persuasive burden of proving that they ought to be released. In both systems, the presumption against release weighs heavily in the assessment of the risk of flight. What is peculiar to the ICTY is that the exceptional circumstances criterion is not assessed jointly with the risk of escape, but *separately* as an additional tier. As a consequence, the high burden of rebutting the flight risk is not sufficient without the existence of objective exceptional circumstances and *vice versa*. Key aspects of the mechanisms before the ICTY will in the following be compared to relevant aspects of the Bulgarian criminal procedure as applied in *Iljikov*.

i) Omission to Sufficiently "Justify" the Imposition of a Reverse Burden of Proof

As opposed to the Italian authorities in *Contrada*, their Bulgarian counterparts in *Iljikov* failed, apart from invoking the fact that the applicant was accused of a serious crime, to establish any additional circumstances that may – at least temporarily – justify a presumption of detention or a reverse burden of proof applied to the detriment of the defendant. On the basis of this criterion, the practice before the ICTY was *prima facie* compliant with ECHR standards as provisional release decisions typically referred to the

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[314] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, paras. 87& 46-47. The arguments forwarded in the applicants defence motion dated April 1996 (inter alia that he had returned voluntarily from abroad when the investigations started, the lack of prior criminal convictions or his family and permanent residence) were rejected on the basis that "the applicant's arguments could not, under the settled practice of the Supreme Court, serve as a basis for a decision to release him.".

[315] *Contrada v. Italy*, 27143/95, 24 August 1998, para. 58.

conditions under which the Court operated and to the serious crimes it adjudicates when justifying its deviation from standard pre-trial practices. Further, despite the fact that any motion for provisional release could have been rejected after having established a lack of exceptional circumstances, at least a rudimentary assessment of the individual situation of the applicant in relation to the risks of escape and witness intimidation was carried out.[316]

ii) Failure to Substantiate Detention Grounds Leading to a Mandatory Detention Regime

The Bulgarian system was considered in its rigid application to be a system of mandatory detention due to the fact that no discussion into the specific circumstances of the case had taken place. Instead, the exceptional circumstance criterion was applied in a rigid manner regardless of other factors concerning the person, such as family, job, voluntary surrender or a possible cooperation with the Prosecution. This must be differentiated from the ICTY in its pre-1999 practice. While a discussion of the individual circumstances of the applicant has in most decisions taken place, this was done so only in the respective assessment of the risk of flight and/or risk of witness interference, but not in the establishment of the exceptional circumstances requirement. In essence, the risks of absconding or witness interference were indeed examined at a stage where, *stricto sensu,* the deciding organ could have already rejected the motion after finding that no exceptional circumstance existed. The psychological factor played a key role. Following the decision on the exceptional circumstance criterion, which in retrospect was a comparatively technical exercise and was in accordance with the wording of Rule 65 (B), typically discussed as the first point[317], the assessment of the remaining criteria inevitably

[316] *Prosecutor v. Zejnil Delalić et al,* ICTY-IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, 25 September 1996, page 3. (Sub-rule 65(B) establishes the criteria which must be satisfied before a Trial Chamber can authorise the release of an accused pending trial. These criteria are fourfold, three of which are substantive and one procedural. **They are conjunctive in nature** (highlighting of the author), and the burden of proof rests on the Defence. Thus, the Defence must establish that there are exceptional circumstances, that the accused will appear for trial, and that if released the accused will not pose a danger to any victim, witness or other person. Additionally, the host country must be heard. If any of these requirements are not met, the Trial Chamber is not authorised to grant provisional release and the accused must remain detained.)

[317] The wording of Rule 65 (B) of the Rules in its pre-1999 version mentioned the exceptional circumstance criterion before the risk of absconding and the risk to witnesses and victims.

was heavily influenced by the decision on the first criterion.[318] It is argued that such an approach rendered the genuine assessment of the detention grounds as provided under Rule 65 (B) impossible. To illustrate, one may imagine what would have been the public response to a decision finding that no risk of absconding or witness intimidation exists, but nonetheless denying the release based on the lack of exceptional circumstances. Exactly such scenario although fully compliant with Rule 65 would have taken the detention mechanism of the pre-1999 ICTY *ad absurdum*. Therefore, the mechanical assessment of exceptional circumstances in provisional release motions must be defined as a *de facto* mandatory detention regime as provided in the *Iljikov* case.

iii) More Rigid Definition of Exceptional Circumstances by the ICTY

Although both the mechanisms in the Bulgarian procedure as well as the one before the ICTY refer to "exceptional circumstances", they have a distinct connotation. The ICTY never provided a definition, but it can be deduced from the rich jurisprudence that only the attendance of funerals, the visiting of ailing family members as well as medical issues incompatible with any form of detention ultimately qualified as such. The Bulgarian Supreme Court found that release was justified where the applicant was "seriously ill, elderly or in any other condition which excluded the danger of his or her absconding or re-offending"[319] thereby linking the state of the accused to the concrete risk of absconding and not, in contrast to the ICTY's approach, by assessing the health condition from the point of view of incompatibility with any form of detention, a much higher threshold.[320] From this point of view, the definition of the ICTY applied concerning exceptional circumstances was a stricter one. Similarly, whereas an accused under the Bulgarian regime successfully convinces the Judges of a lack of possibility of absconding

[318] See *Prosecutor v. Zejnil Delalić , Zdravko Mucić, Hazim Delić and Esad Landzo*, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996. In this decision the Exceptional circumstance criterion is, in accordance with the wording of Rule 65 (B), discussed first (in paras. 19-31) and subsequently the risk of escape (paras. 32-33) and the risk of witness intimidation (paras, 34-35); *Prosecutor v. Kordić & Čerkez,* Decision on Joint Defence Motion Requesting Provisional Release, 22 March 1999; (NOTING ALSO the arguments of the Prosecution that (a) the accused have not demonstrated exceptional circumstances; (b) the other conditions under Rule 65 have not been satisfied; (c) discovery in this case has been thorough and does not give rise to an exceptional circumstance,).
[319] *Ilijkov v. Bulgaria,* 33977/96, 26 July 2001, paras. 43.
[320] An elderly person, although perhaps unlikely to planning an escape or another crime must not be necessarily dependent on constant serious medical treatment which it cannot receive in prison.

benefits from pre-trial release until the beginning of trial, the time of release before the ICTY was only "provisional" that means only as long as strictly necessary for the attendance of the funeral or the medical treatment. If the Bulgarian approach was held to be in violation of the ECHR as amounting to a system of mandatory detention it is suggested that the even more stringent test before the ICTY must *a fortiori* equally qualify as a system of "mandatory detention".[321]

Judge Robinson, in comparing the two systems, concluded that a presumption of a risk of escape for those accused of serious crimes, as in *Iljikov*, was less strict than a judicial body allocating the burden of proof on a defendant, ultimately holding that both systems were incompatible with customary international law.[322] Conversely *DeFrank* disagrees and sees no incompatibility.[323] In his view, Rule 65 never operated under the assumption that the accused would abscond. Instead, he held that given the lack of police force, the burden should more appropriately lie with the defendant to demonstrate the fact that he or she would not abscond. This approach should not be followed. The Tribunal did in several decisions stress the increased incentive for absconding where the defendant risks a heavy penalty[324] and moreover, pre-trial detention would rarely be necessary were it a comparatively easy task to re-arrest an absconded person. Scarce resources and the

[321] See *inter alia*, A. Klip and G. Sluiter, *Annoted Leading Cases of the International Criminal Tribunals* (Intersentia 2005), p. 52 stressing the similarity to the situation in Ilijkov and the pre-amendment Rule 65 (para. 8).
[322] Robinson Dissenting Opinion 8 October 2001.
[323] Matthew DeFrank, "ICTY Provisional Release: Current Practice, a Dissenting Voice and the case for a Rule Change", Texas Law Review 80 (2002), p. 1446.
[324] *Prosecutor v. Limaj et al*., ICTY-IT-03-66-AR65, Decision on Limaj's Request for Provisional Release, 31 October 2003, para. 30 ("It is evident that the more severe the sentence which an accused faces, the greater is the incentive to flee. As the Trial Chamber relied on the seriousness of the charges against Limaj in addition to several other factors, it did not err in taking this factor into account. Furthermore, this approach is not inconsistent with the ECHR jurisprudence."). It is, however, true that in some earlier decisions the ICTY has refused to argue in this way. For instance, *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, IT-99-37-PT, Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release, 26 June 2002 ("The Trial Chamber refused to consider the Prosecution's argument that the likelihood that the accused will face long prison sentences would prevent them from appearing for trial. It rejected the assertion that such an eventuality should lead to a presumption that they will not. Referring to the ECtHR in the Ilijkov case, it attached importance to the will of the accused to make themselves available for trial.). For the ICC see *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para. 18 ("The very long prison sentence that Dominic Ongwen may face in case of conviction constitutes a strong possible incentive to abscond, increasing the risk of flight").

requirement for state cooperation are also not uncommon for national courts.[325] The Bulgarian provision presumes that a person charged with a serious crime is (more) likely to abscond and following an escape might be successful in evading justice. The ICTY system, by establishing that it has no means of enforcement, rendering a (re-) arrest more difficult, implies that a person may likely try to abscond; otherwise no police enforcement would be required. In fact, from this point of view the ICTY argumentation can be considered more reproachable as the defendant is paying the price for a yet incomplete system.

11.3.3. Release only for Reasons Detached from the Right to Liberty or the Presumption of Innocence

The practice of the ICTY in its initial phase until the end of 1999, not only in theory, but also *in concreto,* effectively proved to be a system of mandatory detention or in the words of Judge Robinson a "general detention regime".[326] None of the four persons released were placed at liberty merely for the consideration that detention should be the exception in pre-trial proceedings. Under the ECHR, release granted on humanitarian grounds or the unfitness of the accused to stand trial do not fall under the right to be released of Article 5(3) ECHR as corollary of the respect for individual liberty, but under other Articles of the Convention, presented below.

11.3.3.1. Visit of Funerals and/or Ailing Family Members: Article 8 ECHR

The right to visit ailing family members or to attend funerals is provided for under Article 8 ECHR - Right to a private and family life. This was confirmed in a series of cases against Poland where the respondent State was found to be in violation due to broadly denying prisoners such rights. In *Ploski* (2003), a convicted prisoner was denied the right

[325] Andrew Trotter, "Pre-Conviction Detention in International Criminal Trials", II (2013) Journal of International Criminal Justice, p. 365. ("Many domestic jurisdictions are also under-resources in this respect and depend heavily upon guarantees from third parties".).

[326] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion Judge Robinson, cited in *M.* DeFrank, p. 1444. *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, ICTY-IT-01-47-PT, Decisions granting Provisional Release to Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, 19 December 2001 ("The Trial Chamber referred to the Judgement rendered by the European Court of Human Rights on 26 July 2001 in the case *Ilijkov v. Bulgaria* in which the ECtHR held that "[a]ny system of mandatory detention on remand is *per se* incompatible" with Article 5(3) of the ECHR");

to attend the funeral of his parents. While the right to attend the funeral of a relative was not an unconditional right, any refusal must be considered as "necessary in a democratic society".[327] In *Czarnowski* (2009*)*, the Court confirmed the prior dictum and held that "problems of a financial and logistical nature caused by escorted leaves including the shortage of police and prison officer" was not *per se* a sufficiently compelling argument to refuse such escorted leave.[328] In *Giszczak* (2012), the same was upheld with respect to visiting a dying child.[329] It was held in *Galić* that by granting release in special circumstances, the Tribunal was indeed fulfilling "its obligation to respect his private and family life"[330] as opposed to safeguarding the accused's right to be presumed innocent until proved guilty. Attending funerals or visiting ailing family member constitutes in many countries valid grounds for convicted prisoners to request temporary release at a stage where the presumption of innocence ceased to exist.[331] The Special Court for Sierra Leone (SCSL) which operates under Rules of Procedure based on that of the *ad hoc* Tribunals, held in *Brima* that an application to visit the grave of the deceased mother was - due to the permanent monitoring and degree of restriction of liberty - not to be classified as provisional release under Rule 65, but instead as an order for modification of the special measures of detention of an accused outside the Detention Facility under Rule 64.[332] Therefore, not the Trial Chamber, but the Registry (with approval of the President) was competent to grant such a request.[333]

[327] *Płoski v. Poland*, 26761/95, 12 February 2003, paras. 38-39.
[328] *Czarnowski v. Poland*, 28586/03, 20 April 2009, para. 32.
[329] *Giszczak v. Poland,* 40195/08, 29 February 2012.
[330] *Prosecutor v Galić*, No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić (23 March 2005) at para. 18.
[331] See for more detail Chapter III.
[332] The SCSL refers to Rule 65 as Bail. It reads: Rule 65: Bail *(amended 7 March 2003)* (A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber. (B) Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.
[333] Special Tribunal for Crimes Committed in Sierra Leone (SCSL) *Prosecutor v. Brima et a*l, 04-16-T, Decision on the Defence Motion for the Temporary Provisional Release to Allow the Accused Santigie Borbor Kanu to Visit his Mother's Grave, 18 October 2005, para. 12.

11.3.3.2. Release due to Incompatibility of Detention: Article 3 ECHR

The second ground for release deemed to meet the exceptional circumstance criterion was the existence of medical conditions which could not be treated at the detention unit and were moreover seen incompatible with any form of detention.[334] This right primarily touches upon the right to a fair trial under Article 6 and/or Article 3 ECHR. Every accused has the imminent right to answer his case and to effectively participate in the proceedings;[335] where an accused is constantly under pain or medication, this right is deemed to be lacking. The ICTY held that these provisions require that a defendant must have the *capacity* "to participate in the proceedings and sufficiently exercise the identified rights, i.e. to make his or her defence".[336] The ICC in *Gbagbo* concluded that in the absence of this capacity, the proceedings would have to be adjourned.[337] In respect of Article 3 ECHR, the ICTY granting release in *Talić* found, with reference to a Strasbourg case (*Mousiel*), that denying release to a person "on the verge of death" would allow a situation to develop to be considered inhumane".[338]

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[334] *Prosecutor v. Đorđe Đukić,* ICTY-IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, page 4 ("Considering that the extreme gravity of the medical condition of General Đukić is not compatible with any form of detention and that the palliative care which his condition requires, or will require, justifies a different environment.").

[335] *Stanford v. United Kingdom*, 16757/90, Judgment, 23 February 1994, para. 26; see also ECtHR, *SC v. United Kingdom*, 60958/00, Judgment, 15 June 2004, para. 29. Although the Strasbourg Court requires a relatively high bar when determining unfitness to stand trial, it held that in serious cases not all the rights of the defendant can be exercised by a legal representative.

[336] *Prosecutor v. Strugar*, ICTY-IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 37.

[337] *Prosecutor v. L. Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in proceedings before this Court, 2 November 2012, ('Pre-Trial Decision on Fitness') ICC-02/11-01/11-286-Conf, para. 43. "[T]he concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights".

[338] *Prosecutor v. Brdjanin & Talić*, ICTY-IT-99-36-T, Decision on the Motion for Provisional Release of Momir Talić, 20 September 2002. See *Mouisel v. France*, 67263/01, 21 May 2003 at para 38: "The Convention does not contain any provision relating specifically to the situation of persons deprived of their liberty, let alone where they are ill, but it cannot be ruled out that the detention of a person who is ill may raise issues under Article 3 of the Convention (see *Chartier v. Italy*, no. 9044/80, Commission's report of 8 December 1982, Decisions and Reports (DR) 33, p. 41; *De Varga-Hirsch v. France*, no. 9559/81, Commission decision of 9 May 1983, DR 33, p. 158; and *B. v. Germany*, no. 13047/87, Commission decision of 10 March 1988, DR 55, p. 271)".

11.3.3.3. Concluding Remarks: Equivalent to a System of Mandatory Detention

The mere result that none of the persons was released during the first five years of the existence of the ICTY does not necessarily indicate an incompatibility with developed human rights principles. The "extreme gravity of the offences"[339] attributed to most defendants and the "unique circumstances under which the International Tribunal operates"[340] may have indeed (at least for an initial period) objectively provided sufficient justification warranting against release in most national jurisdictions.[341] Problematic was in particular the psychological effect the exceptional circumstances criterion had effectively added to the equation. The fact that the motion for provisional release was decided on the basis of the exceptional circumstances criterion effectively prevented an objective and unbiased asessment of the actual risks of escape and witness interference. *Affectus punitur licet non sequitur effectus!* A violation in procedure rests a violation regardless of whether this added barrier (of demonstrating exceptional circumstances) has in practice effectively prevented – otherwise possible - releases or not. In other words, even where there was no causality between the burden of demonstrating exceptional circumstances and the subsequent denial of release (e.g. because the situation would not have allowed for releases due to a lack of cooperation by the Former Yugoslav Republics), the denial of a proper assessment as such already violated the rights of the defendant.

12. Assessment of the Current Release Practice at the ICC

From a human rights perspective, the ICC pre-trial detention regime can be considered an exemplary model for any legal system and particularly for international criminal courts

339 *Prosecutor v. Mucić et al.*, ICTY-IT-96-21, Decision on Motion for Provisional Release filed by Hazim Delić, 24 October 1996.
340 Ibid.
341 Shane Darcy & Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (Oxford University Press 2010), p. 329. The two authors explicitly mention only the detention ground (known in the Netherlands and France, for instance) of "serious risk of social disturbances".

and tribunals.[342] Yet, since the first accused was arrested and transferred to the ICC detention in March 2006 the Court has in over one decade of operation not released a single person charged with core crimes of the Statute against whom an arrest warrant had been issued initially.[343] Meanwhile, the ICC found arrest not necessary in at least six cases. It appears that this early bifurcation establishing two categories of accused, those that can benefit from pre-trial liberty (summons to appear) and those who were found to require an arrest warrant, in practice bars the chance of subsequent interim release for those initially considered dangerous or uncooperative.

12.1. Experiences at the ICC with the Summons to Appear Mechanism

To date summonses to appear were issued regarding accused from Kenya (Uhuru Muigai Kenyatta, William Samoei Ruto and Joshua Arap Sang)[344] and Sudan (Abu Garda, Abdallah Banda and Saleh Mohammed Jerbo Jamus)[345]. All three Kenyan cases meanwhile collapsed. Already in March 2015, the proceedings were terminated against Kenyatta *inter alia* due to repeated witness interference.[346] In April 2016, following a political campaign of Kenya against the ICC, the case against Ruto and Sang was also terminated.[347] From the three accused from Sudan, one accused has passed while in liberty (Jamus), against one accused (Abu Garda) the charges were not confirmed, and a third (Banda) is still at large since September 2014 after having initially appeared

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[342] Andrew Trotter, "Pre-Conviction Detention in International Criminal Trials", Journal of International Criminal Justice, II (2013) p. 358-59 ("The ICC approach to provisional release is [compared with the ICTY practice] markedly more preferable from a human rights perspective.").

[343] The first arrest warrant was issued against Thomas Lubanga on 10 February 2006 and unsealed on the occasion of the accused's arrest and transfer to The Hague on 17 March 2006. See https://www.icc-cpi.int/drc/lubanga, retrieved 16 May 2017.

[344] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, 8 March 2011.

[345] List of Defendants summoned to appear, https://www.icc-cpi.int/Pages/cases.aspx#Default, ICC case database, retrieved 16 May 2017.

[346] BBC, Uhuru Kenyatta: ICC trial witnesses withdraw, 18 July 2013, retrieved online 28 January 2016: http://www.bbc.com/news/world-africa-23359940 ("Shortly after Mr Kenyatta was elected, the ICC dropped charges against one of his co-accused, Francis Muthaura, because some witnesses were too scared to testify and another had recanted his statement. The prosecution say they still plan to call 30 witnesses but the BBC's Anna Holligan at The Hague says that with each new withdrawal, the case against Mr Kenyatta is being further jeopardized.") *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015.

[347] On 5 April 2016, Trial Chamber V(A) decided, by majority that the case against William Samoei Ruto and Joshua Arap Sang is to be terminated. This decision may be subject to appeal.

voluntarily in the Pre-Trial stage of his case.[348] Therefore, from the six cases where an accused benefitted from a summons to appear, none of them ended with a final judgement. This record is certainly a setback for future decisions to issue summonses to appear. Particularly the Kenya cases demonstrated the risk of various forms of witness intimidation where the accused persons remain influential political players while standing trial.

12.2. Release following Detention only for Accused in Contempt Proceedings

In October 2014, the Single Judge released the four defendants in the *Bemba et al.* contempt case finding that interim release after a detention already exceeding one year was necessary in view of safeguarding the proportionality between the detention and the penalty expected for the underlying offences against the administration of justice.[349] Although the decision was embraced by many and an ICC press release the same day solemnly proclaimed that "[a]t the ICC, detention is the exception and not the rule"[350], the decision to release was later overturned, even though the Court decided not to issue new warrants for arrest.[351] Already in 2009, the progressive decision of a Single Judge to release Bemba was overturned at the appeals stage.[352] In this view, it must be concluded

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[348] ICC database, https://www.icc-cpi.int/darfur/banda#icc-timeline, retrieved online 16 May 2017.

[349] *Prosecutor v. Bemba et al.*, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-703, 21 October 2014, page.4.

[350] ICC-CPI -20141021-PR1053, 21 October 2014, Bemba, Kilolo et al. case: ICC Pre-Trial Chamber II grants interim release to four suspects, ICC Press Release.

[351] *Prosecutor v. Bemba et al, ICC-01/05-01/13 OA 5, OA 6, OA 7, OA 8, OA 9,* Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, para 57 ("However, given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision"). The Appeals Chamber had Appeals Chamber refused to grant suspensive effect which the Prosecution requested when appealing the decision to release the defendants. *Prosecutor v. Bemba et al,* ICC-01/05-01/13 OA 9, Decision on the Prosecutor's urgent request for suspensive effect of the ^^Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" of 21 October 2014, 22 October 2014, para. 7.

[352] *Prosecutor v. Bemba*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631-Red, 2 December 2009, paras. 107 – 108.

that persons charged with core crimes of the Rome Statute were until that day only released for guarded visits of funerals[353] and even the release of those accused of contempt of the court (where the maximum sentence is five years imprisonment)[354] was overruled. In trying to find possible explanations for such rigid practice, one discovers that the psychological barrier the ICTY faced in its first decade currently still applies to the ICC, namely a situation in which the degree of criticism does not allow the Court to take risky decisions that might bring the Court into disrepute. Some more technical obstacles to the granting of conditional releases are discussed in the following.

12.3. Main Obstacles towards a More Progressive Practice of Pre-Trial Release?

The ICC has over the years identified the problems of long trials and imminent periods of detention as a priority it needs to address. But even with a changing mind-set of the Judges, practical obstacles exist that often prevent release. Despite concerns of varying levels of cooperation of states in the former Yugoslavia, the ICTY could rely on that those states to accept their nationals during release periods. In the current ICC proceedings, release to the situation countries is often not possible due to political instability, the long distance, and related logistical difficulties. Instead, it must be the aim of the ICC to convince states in proximity to the Court to be willing to host defendants standing trial for international crimes. The willingness of Belgium to accept, on a case per case basis, defendants on its territory may be an important first step in this direction.[355]

12.3.1. Lack of Willingness of States to Host Defendants Standing Trial

The lack of States demonstrating a willingness to host defendants is considered among the biggest practical obstacles to a more liberal release practice. Already during the ICTY trials, the Netherlands strictly opposed any form of release of defendants standing trial

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[353] *Prosecutor v. Bemba*, ICC-01/05-01/08-437-Conf Decision on the Defence's Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, ICC-01/05-01/08, 3 July 2009; *Prosecutor v. Bemba*, ICC-01/05-01/08-1099-Conf Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, ICC-01/05-01/08, 12 January 2011.

[354] Article 70(3) of the ICC Rome Statute.

[355] ICC Press Release: Belgium and ICC sign agreement on interim release of detainees, ICC-CPI 20140410PR993, 10 April 2014.

before the ICTY. This was also the case before the ICC, when in 2009 a Single Judge granted Bemba release even though none of the six states nominated by the defendant agreed to host him or guarantee his appearance at trial.[356] The Single Judge nonetheless ordered Bemba's release because in her view the conditions for detention were no longer met,[357] a decision that was later overturned by the Appeals Chamber in part also due to the lack of Member State co-operation and the failure by the defendant to identify a state into which the defendant would be released.[358] In the *Bemba et al.* contempt case this issue was mitigated by the fact that most of the defendants held passports or resident permits of European countries.[359] Hopes for future improvement developed when Belgium, in April 2014, became the first country that entered into an agreement declaring its willingness to receive detainees of the Court on its territory on a temporary basis and under conditions established by the competent chambers.[360] The possibility and effectiveness of an electronically monitored house arrest will be discussed in the third Chapter.

12.3.2. The Issue of Asylum of Defendants before the ICC

Asylum never became an important matter in ICTY proceedings, neither in relation to witnesses or acquitted persons.[361] It became more of an issue before the ICTR, where at

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356 *Prosecutor v. Bemba*, ICC-01/05-01/08-475, 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', 14 August 2009, para. 90.

357 *Prosecutor v. Bemba*, ICC-01/05-01/08-475, 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', 14 August 2009, paras. 55 (quoting *Prosecutor v. Bemba*, 01/05-01/08-403, Decision on Application for Interim Release, ICC-, 14 April 2009, para. 49) and 77, noting the decision to release or detain is not discretionary.

358 *Prosecutor v. Bemba*, ICC-01/05-01/08-631-Red, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', 2 December 2009, paras. 107 – 108.

359 *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-703, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu and Narcisse Arido, 21 October 2014

360 Press Release: Belgium and ICC sign agreement on interim release of detainees, ICC-CPI 20140410PR993, 10 April 2014.

361 Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford Press (2015), p. 1096 and 1097; Joris van Wijk and Marjolein Cupido ("Testifying behind bars- Detained Witnesses and

least one person acquitted before the ICTR was later granted asylum in Tanzania (Ntagerura)[362] and in respect of post-conviction asylum (non-refoulement) when Sweden in 2004 became an enforcement state of ICTR prison sentences (Bagaragaza).[363] Recent developments before the ICC have lead to the increase in significance of this issue, and in view of the general sensitivity of the "asylum debate", may lead countries to close their borders for defendants standing trial in The Hague. In May 2011, a total of four witnesses in the cases of *Katanga* and *Lubanga* have claimed asylum in the Netherlands; a fact that created tensions both within the Netherlands and between the Netherlands and the Democratic Republic of Congo.[364] Lambi Longa, a witness in the *Lubanga* trial appealed to Dutch domestic courts and the ECtHR requesting asylum, ultimately receiving secondary protection by the Amsterdam district court.[365] In May 2015, Ngudjolo Chui claimed asylum in the Netherlands following his acquittal.[366] The claim was been rejected and Ngudjolo was transferred to the DRC in May 2015. Although, effectively the possibility that an accused is awarded asylum while on interim release in the Netherlands or another ECHR state is rather slim – the fact of being accused of an international crime is a widely recognized reason to ban a person from claiming asylum[367]- two scenarios

Human Rights Protection", University of Amsterdam (2011)) report the isolated case of detained witness Dragan Opacic whose request for asylum was rejected. At the same time it is a known fact that several witnesses benefitted from re-location programs upon their testimony.

[362] Jurist Commentary, 17 December 2008, "Justice for Rwanda: ICTR Achievements and Challenges", http://www.jurist.org/forum/2008/12/justice-for-rwanda-ictr-achievements.php, retrieved online 16 May 2017. The ICTR was seated in Tanzania, the asylum was granted in 2004.

[363] There are public reports of at least one released ICTR prisoner applying for asylum in Sweden (Michel Bagaragaza, February 2011), see http://www.justiceinfo.net/en/component/k2/en-en-021211-ictrbagaragaza-genocide-convict-bagaragaza-released-from-jail-in-sweden-1487014870.html?Itemid=102, retrieved 16 May 2017.

[364] Dersim Yabasun and Mathias Holvoet, "Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility", (2013) 13 International Criminal Law Review, p.726; 742-744.

[365] Irving Emma, "The Legal Limbo Continues: Update on the Detained Witnesses at the ICC, Research Project on Shared Responsibility in International Law", October 2013, retrieved online http://www.sharesproject.nl/the-legal-limbo-continues-update-on-the-detained-witnesses-at-the-icc/.

[366] The asylum claim was later rejected and Ngudjolo was deported to the Democratic Republic of Congo. See International Justice Monitor, 13 March 2015, https://www.ijmonitor.org/2015/03/asylum-proceedings-in-the-ngudjolo-case-what-happened-in-the-dutch-courts/, retrieved 16 May 2017.

[367]("Exclusion from asylum of suspected war criminals has also been supported by the UN General Assembly in the Declaration on Territorial Asylum and in Resolution 3074 (XXVIII) on principles of international cooperation in the detection, arrest, extradition and punishment of war criminals."), UN General Assembly, Res. 2312 (XXII) (ibid., § 643) and Res. 3074 (XXVIII) (ibid., § 644). Cited in International Committee of the Red Cross, Rule 158. Prosecution of War Crimes, retrieved online: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

may nonetheless exist where asylum could become an issue. First, it may happen that a case collapses while an accused is temporarily released[368] and second, defendants in contempt cases may have increased chances of being successful in asylum proceedings. Overall, the matter of asylum in ICL primarily concerns witnesses from conflict zones testifying in the Netherlands rather than accused benefitting from (or seeking) interim release.

12.3.3. Financing Pre-Trial Liberty?

In national criminal procedures, a person on a summons is typically not entitled to any financial support while he or she awaits trial. One of the reasons militating for a summons is to prevent the accused from losing his or her job. Defendants in the Austrian system, upon making a request to be released under electronic monitoring, must demonstrate income and contribute to the house arrest by paying a daily fee for the costs of monitoring.[369] The situation before the ICC must be assessed differently. None of the accused can be expected to find work in the Netherlands while preparing the trial. Despite this fact, in cases where some form house of arrest was granted before the ICTY (*Blaskic*) or the ICC (*Bemba et al.*), the defendants were expected to largely self-finance their stay in the Netherlands. This is problematic from a point of view that it may bar impecunious defendants from pre-trial liberty.

12.4. Concluding Observations: Outlook for the ICC Pre-Trial Detention Regime?

With regards to the pre-trial detention mechanism at the ICC, three main issues pertinent to international criminal proceedings were identified which may explain its dire record of release from detention. The two factual obstacles relating to a lack of willingness of countries in proximity to host defendants standing trial before the ICC on the one side, and the sensitive matter of asylum on the other, cannot be considered truly insurmountable. After Belgium has set the example, a number of other countries are

[368] In practice, the ICC may issue an arrest warrant before dismissing the charges facilitating the transfer back to the state of his or her nationality.
[369] See Article 173a Austrian Law of Criminal Procedure (StPO) in combination with Article 156b (2) of the Austrian Law on Enforcement of Prison Sentences (StVG). The granting of alternative means is conditioned upon the concerned person having a regulated personal situation. Further Article 156b (2) stipulates that the accused must contribute to the costs of electronic monitoring.

likely to follow this example and the development of a unified and clear approach to requests for asylum concerning those accused of crimes before the ICC appears not impossible. Concerning the third aspect, the fear that a possible escape of an accused may critically taint the entire court, the only cure will be ultimately the number of trials completed and verdicts rendered by the Court.[370] Until that date, the accused standing trial before the ICC are effectively in a worse position if compared to those in the later ICTY cases, where at least a provisional release of 1-2 weeks or longer was possible, but also in comparison with most domestic criminal jurisdictions which have statutory time limits regarding the maximum duration of pre-trial detention, and are in addition under the scrutiny of international and regional human rights courts.[371] To mitigate the adverse effect of detention on defendants, the approach of the ICTY should be adopted and granting temporary limited periods of release, for instance during court recesses or trial breaks, should be made possible. It is argued that a defendant in the middle of his or her trial and who is isolated for a considerable amount of time from his or her contact network poses a reduced risk of escape compared to a person on a regular summons to appear.

Despite all the difficulties and challenges, the ICC should re-consider its strict approach regarding release from pre-trial detention not only in order to meet its own standards,[372] but also in view of its recognized responsibility to "set the standards"[373] for other hybrid

[370] The quote originates from the English case *of R v Sussex Justices*, Ex parte McCarthy, 1 KB 256, [1923] All ER Rep 233, 1924, Lord Hewart CJ: "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". It is noted that the context of the original dictum was a slightly different one as it dealt with the question of the consequences of a member of the bench having a conflict of interest. The case developed the principle that the mere appearance of non-impartiality would be sufficient to overturn a decision or judgement rendered under such circumstances.
[371] See for instance Austria, where pre-trial detention is limited to a maximum period of two years even in case of the most serious crimes.
[372] *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Judgments on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015 para. 43 affirming that the provisions of the ICC Statute governing provisional release "must be interpreted and applied consistently with 'internationally recognised human rights', pursuant to Article 21(3) of the Statute.
[373] Jens David Ohlin in Goran Sluiter et al.(eds) *International Criminal Procedure: Principles and Rules* (Oxford 2013), p. 66.

criminal tribunals or domestic criminal courts in the adjudication of the most serious offences.[374]

13. Concluding Remarks of Chapter One

Lex est ratio summa, quae jubet quae sunt utilia et necessaria, et contraria prohibit - Law is the highest form of reason, which commands what is useful and necessary and prohibits the contrary.[375] Pre-trial detention not warranted by the risk of flight, the safety of witnesses and/or victims, or other strictly defined justified reasons equates to an anticipated punishment of a person that is benefitting from a right to liberty and the presumption of innocence until proved guilty. Three different existing approaches to pre-trial detention at the two current leading international criminal courts were analysed for their compatibility with international human rights standards. The practice of pre-trial detention before the ICTY in its early practice was found to be almost a textbook example of a system that viewed pre-trial detention as the rule and release as the rare exception. It required from the defendant not merely to prove the elimination of all release-related risks, but additionally the existence of a life threatening medical condition of the defendant or the (expected) death of a close family member, both requirements clearly outside of the influence of the defendant. A similar system applied by domestic authorities in Bulgaria in relation to crimes punishable with sentences exceeding ten years was found to violate core principles of the ECHR.[376] Comparing the two systems, it

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[374] William Schabas/Yvonne McDermott in Otto Triffterer/ Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court* (3rd edition 2016, Beck, Hart, Nomos), (2016), p. 1652 ("Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in the respect of fundamental human rights"). Matthew DeFrank, "ICTY Provisional Release: Current Practice, a Dissenting Voice and the case for a Rule Change", 80 (2002) Texas Law Review 1457 in relation to a suggested rule change at the ICTY ("Changing the rule would help forestall growing criticism of the Tribunal.[..]. In addition, the Tribunal can have a significant influence on countries attempting to reform domestic judicial practices.).

[375] B. Gardner (editor), *Blacks's Law Dictionary*, Seventh Edition, 1999, Legal Maxims, page 1653.

[376] *Ilijkov v. Bulgaria* was often cited in ICTY motions or commentaries because of the fact that the circumstances were very similar to the practice before the ad hoc Tribunals, however, it is not to be seen as an isolated case but as a result of a string of pre-trial detention judgements which were decided on the principle that the gravity of the crime alone shall not be sufficient to justify longer periods of detention. The ECtHR in Iljikov itself concludes that "the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand". See *Ječius v. Lithuania*, no. 34578/97, 31 July 2000, para. 94. It equally corresponds to Article 9 of the ICCPR which states that "It shall not be the general rule that persons awaiting trial shall be detained in custody".

was established that a person seeking release from the ICTY was in a considerably less favourable situation, pointing to the conclusion that the pre-1999 mechanism of the ICTY was a violation of established human rights principles. The ICTY provisional release mechanism following the deletion of the exceptional circumstances criterion in 1999 gradually developed into a progressive practice providing most of the defendants with a realistic chance of being granted temporary release. This happened despite the fact that the legal framework of the release mechanism was maintained, insofar as the right to a periodic review of the detention remained absent and the onus of proving the existence of the circumstances warranting release continued to be on the defendant (the legality of which will be examined in the following Second Chapter). In respect of the third mechanism assessed, that of the ICC, quite the opposite statement can be made. While the ICC framework provides four different ways according to which a defendant may be released from custody, as well as strict rules for periodic review, in practice not a single person accused of core crimes of the Rome Statute was to date released following an initial arrest. Whether the ICC will follow the example of the ICTY and undergo a paradigm change and mature into the first international criminal court with a progressive and (fully) human rights compliant pre-trial detention practice remains to be seen over the coming years. A promising new development in this regard is certainly the possibility of electronically monitored house arrests in neighbouring countries, perhaps tipping the balance towards release in cases “on the edge” between release and detention. An assessment of the effectiveness of this instrument will be provided in the Third Chapter. As only a competent external human rights body could intervene in cases where a Trial Chamber improperly refuses to release a defendant, this question will be analysed in the Fourth Chapter.

CHAPTER TWO: The Legality of Reversing the Burden of Proof in International Criminal Law with European Human Rights Principles?

Arguably the most controversial aspect of applications for provisional release before the ICTY until this day is the fact that the defendant is burdened with the onus of proving that he or she will not escape and not pose any other risks warranting for custody. Related questions of a *de-facto* reversed persuasive burden of proof arise also in release motions before the ICC and in many national criminal jurisdictions relating to pre-trial detention for those accused of the most serious crimes.[377] The main practical consequence of imposing the burden of proof on the defendant is that in situations where the deciding organ is uncertain (i.e. 50:50), the benefit of doubt as manifested in the principle of *in dubio pro reo,* otherwise in criminal proceedings squarely in favour of the defendant, does in such cases apply to the detriment of the defendant when he or she is exceptionally under the obligation to provide - and importantly also to substantiate - evidence. The right of the defendant to have the burden of proof on the Prosecution and the related benefit of doubt in his or her favour is considered one of the corollaries of the presumption of innocence.[378] More precisely, when arguing motions for release, while proving the existence of a certain fact or event may be challenging, proving the *non-existence* of such a fact is typically even more demanding.[379] This is what a defendant was forced to do in ICTY provisional release motions concerning the risks of escape and witness intimidation. As a corrective, and in order to avoid creating a *probatio diabolica*[380] or an impossible proof for the defendant, the burden of proof is lowered

[377] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Press 2010), p. 815 (Commentary to Article 67 Rome Statute) argues that the burden of proof de facto remains on the defendant in custody. The Austrian Supreme Court (OGH) 15Os22/00, 2 March 2000 described the strict examination of pre-trial liberty in cases of serious crime to a "form of a reverse burden of proof " ("nach Art einer Umkehrung der Beweislast".

[378] *Barbera, Messegue and Jabardo v. Spain*, 10590/83, 6 December 1988, para. 77.

[379] See *W. v. Switzerland*, 14379/88, 26 January 1993 dissenting opinion Judge Pettiti: ("[…] require the detainee to prove that he will not abscond, a negative which is virtually impossible to prove.").

[380] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p.94.

insofar as the latter must "only" prove such matter on the balance of probabilities (i.e. 51:49) and not beyond a reasonable doubt. Whether the right to be released pending trial can be also derived directly from the presumption of innocence is, although often invoked including in ICTY and ICC jurisprudence, less straight-forward (see the discussion in Section A).[381]

The imposition of the burden of proof on the prosecuting organ is one of three central principles emanating from the presumption of innocence. The *first part* of this Chapter will assess the respect for those three main principles in the current practice of international criminal proceedings with a focus on reverse persuasive burdens of proof. As it was already established that the practice of the ICTY applied reverse burdens of proof, the *second part* examines, by reverting to the jurisprudence of the ECtHR, whether such a deviation may exceptionally be justified and may be overall compliant with key human rights principles. The ECtHR has engaged into critical assessments of legislation imposing reverse legal burdens of proof; in *Iljikov* the Court negated the compatibility of the imposition of a reverse burden of proof in pre-trial detention matters with ECHR principles unless the reasons for such a reversal were sufficiently justified.[382] It has, however, not provided any further guidance for such an exercise.[383] Therefore, the closest interpretation from an ECHR perspective is to examine the cases decided before the Strasbourg Court in matters of reverse burdens of proof in (stricter) substantive law

[381] See the following debate. While the one side argues that the question whether an accused would flee must be seen independently from his or her innocence; the opposite argument is that long periods of detention insinuate a connection between "guilt" and the accused and further it insinuates that the accused would abscond, tamper with evidence or even re-commit a certain crime for which he or she is presumed to be innocent. Stuckenberg sees this question as „problematic", he balances the "similarity to a criminal sentence" with a "different purpose of pre-trial detention", in any case he concludes that the maximum period of pre-trial detention as well as the detention ground of "repetition of the commission of a crime" were amended (respectively deleted) due to the presumption of innocence. Carl-Friedrich Stuckenberg, Die normative Aussage der Unschuldsvermutung (1999) 111 ZStW Heft 2, p. 432..

[382] *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001, para. 84 ("Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention (see the Contrada v. Italy judgment of 24 August 1998, Reports 1998-V, §§ 14, 16, 18, 23-30, 58-62), the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.").

[383] Instead it merely referred to *Contrada* where the Court stressed the fact that a member of a criminal organization was of great danger for witnesses. For a stricter assessment negating the compatibility of a reverse burden of proof in detention matters, see Judge Pettiti (dissenting opinion) in *W. v. Switzerland*, 14379/88, 26 January 1993 ("One cannot indeed reverse the burden of proof and require the detainee to prove that he will not abscond, a negative which is virtually impossible to prove.").

matters and apply those principles by analogy to the procedural law applied in pre-trial matters.[384] In cases such as *Salabiaku* for instance, the Court considered a reverse burden in statutory provisions of substantive law permissible and its application justified under the condition that notably the principle of proportionality was duly respected and the respect of effective defense rights continued to exist.[385] The aim is to establish a valid pattern against which the human rights compatibility of any reverse burden mechanism can be tested, notably that of the provisional release regime before the ICTY. In the *third section* of this Chapter, the ECHR compatibility of the Austrian system of pre-trial custody for those accused of the most serious crimes, which operates on a similar presumption against release, will be assessed. This complements the research at the level of the ICTY and the ICC with regards to pre-trial detention insofar as in future an increased number of international crimes is expected to be adjucated before domestic courts. Finally, the *fourth* and last section compares the excessive length jurisprudence pertinent to Article 5 ECHR – right to be tried within a reasonable time - of the ECtHR and compares it with the frequently long periods of detention for those standing trial before the ICTY and the ICC.

A. The Presumption of Innocence: Origin and Relevance in Pre-Trial Detention Matters

"*It is better that ten guilty persons escape than that one innocent suffer"* is a legal *maxime* attributed to William Blackstone (1723-1780).[386] This principle became known as the 10:1 ratio or *Blackstone ratio.*[387] In recent history, while the principle was generally

[384] This step is based on the assumption that rules relating to substantive law are subject to a stricter assessment than those applying to procedural law. Hence what is legal in substantive law matters shall equally be compliant in procedural law matters.
[385] Principles deduced from *Salabiaku v. France*, 10519/83, 7 October 1988.
[386] Blackstone's formulation, Wikipedia, https://en.wikipedia.org/wiki/Blackstone%27s_formulation as expressed in the Commentaries of the Laws of England: Blackstone, William, Commentaries on the Laws of England, facsimile edition with introductions by Stanley N. Katz. (University of Chicago, 1979), Already Traianus is quoted that it is better to acquit a guilty defendant than to convict an innocent, Digests 48,19,5, cited in Car Friedrich Stuckenberg, „Who is Presumed Innocent of What by Whom?" (2014) 8 Criminal Law and Philosophy, 311.
[387] William Laufer, The Rhetoric of Innocence, 70 Wash. L. Rev. 329, 421 n.17 (1995) as cited in A. Volokh," n-Guilty Men", 146 University of Pennsylvania Law Review 173 (1997), p. 173.

upheld, the ratio was subject to interpretation. The number of guilty persons to be found acceptable varied between “a few”,[388] “some”,[389] “several”,[390] “many (particularly more than eight)”,[391] or “a considerable amount”.[392] In another application of the same principle the balance to be struck was between “some guilty ones” and “many innocent”[393] or a “considerable number of guilty persons” and an “appreciable number of innocent man”.[394]

By *argumentum e contrario* one may be tempted to define the limits of this rule where a law or procedural standard allows for every convicted but innocent person, twenty or even fifty guilty persons to be let free. But the situation is undoubtedly more complex than that. If one agrees that the reasoning behind a high standard for conviction is the idea that no innocent citizen must live with the risk of being wrongly convicted of a crime, this legitimate interest is not served well if the very same individual citizen must face the negative impact and inherent security risks of living in a society where an overwhelming number of criminals go free.[395] As will be shown, the ECtHR Judges did

[388] *State v. Hill*, 40 Ohio App.2d 16, 317 N.E.2d 233, 237 (1963). All the following respective citations in this paragraph taken from A. Volokh (1997).
[389] *Jones v. State,* 230 Ark. 18, 23, 320 S.W.2d 645, 649 (1959); *People v. Oyola*, 6 N.Y.2d 259, 264, 160 N.E.2d 494, 498, 189 N.Y.S.2d 203, 208 (1959).
[390] *Dunaway v. Troutt*, 232 Ark. 615, 626, 339 S.W.2d 613, 620 (1960
[391] Trial of the British soldiers of the 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday evening, March 5, 1770, before the Honorable Benjamin Lynde, John Cushing, Peter Oliver, and Edmund Trowbridge, Esquires, at 96-97 [hereinafter Trial of British Soldiers] (Boston, William Emmons 1824), citing John Adams' argument for the defense, Rex v. Wemms, Dec. 3-4, 1770.
[392] Richard Maloney, “The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?”, 16 B.C. Int'l & Comp. L. Rev. 425, 456 n.211 (1993).
[393] In re Rule of Court, 20 F. Cas. 1336, 1337 (N.D. Ga. 1877).
[394] Henry J. Friendly, “The Fifth Amendment Tomorrow: The Case for Constitutional Change”, 37 U. Cin. L. Rev. 671, 694 (1968).
[395] A similar argument is being invoked with regards to the terrorism debate. There the potentially different gravity of crime plays into the 10:1 ratio. The assumption is no longer that instead of convicting one innocent shoplifter or even one murderer committing a single murder, ten guilty shoplifters/murderers should go free, instead letting one single terrorist free may result in one single attack with hundreds of killed persons. See for instance an interview with then German Minister of Interior, Wolfgang Schäuble who stated that the ten to one rule should not apply with regards to terrorism. In Frankfurter Allgemeine Zeitung,“Schäuble: Zur Not auch gegen Unschuldige vorgehen“, 19 April 2007, retrieved online: http://www.faz.net/aktuell/politik/inland/innere-sicherheit-schaeuble-zur-not-auch-gegen-unschuldige-vorgehen-1434436.html, („Die Unschuldsvermutung bedeutet im Kern, dass wir lieber zehn Schuldige nicht bestrafen, als einen Unschuldigen zu bestrafen“, sagte Schäuble. Er fuhr fort: „Wäre es richtig zu sagen: Lieber lasse ich zehn Anschläge passieren, als dass ich jemanden, der vielleicht keinen Anschlag begehen will, daran zu hindern versuche? Nach meiner Auffassung wäre das falsch.“ Mit einer anderen

consider the risk of "the ten guilty persons going free" presented to society, for instance in cases of drug trafficking where they had to strike the balance between the imminent threat uncontrolled drug trafficking posed to vulnerable parts of society (including children and teenagers) versus the individual liberty of an alleged drug trafficker not to be wrongly associated with a crime merely for being "at the wrong place at the wrong time". It is suggested that the same principles may also be translated into motions for temporary release in cases of murder, terrorist attacks or international crimes. While it can undoubtedly be said that the scenario in which ten defendants later found guilty benefitted from release from pre-trial detention rather than one defendant later found innocent having to spend years in pre-trial custody is preferable, i.e. more compatible with the principle that detention should not be the rule, the risk of escape and evasion of justice must be added into the equation. Will it be acceptable for society where from ten released remand prisoners even only a single one escapes? The last question is particularly imminent with regards to those standing trial for international crimes. What are the risks such a scenario would pose to the entire discipline of ICL?

While it is established that Article 9 ICCPR and Article 5 ECHR warrant against the excessive use of pre-trial detention and prohibit any *de facto* mandatory detention regime, the question whether the right to pre-trial liberty and release is also a corollary of the presumption of innocence is subject to debate. The US Supreme Court argued in *Bell v. Wolfish* that the question whether or not an accused will appear for trial was to be assessed independently from whether the same person is effectively guilty of the charges or not.[396] Similarly, the ICC in the first years of its existence widely abstained from any

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Haltung, fuhr Schäuble fort, „würde ich meiner Verantwortung für die Sicherheit der Menschen nicht gerecht".).

396 *Bell v. Wolfish*, 331 USD 520, 533 (1979) adopted by the Special Court for Sierra Leone, in *Prosecutor v. Norman et al*, SCSL-04-14-AR65, Fofana- Appeal Against Decision Refusing Bail, 11 March 20015, para. 37. Cited in W. Schabas/Y. McDermott in Triffterer/Ambos, Commentary on the Rome Statute of the International Criminal Court (3rd edition 2016, Beck, Hart, Nomos), 1649. *Bell v. Wolfish* equally operated on the basis that the presumption of innocence would only apply to trial stage. With a critical comment Stuckenberg in C.F. Stuckenberg, „Who is Presumed Innocent of What by Whom?" (2014) 8 Criminal Law and Philosophy, 306. ("Hence, neither the opinion of the U.S. Supreme Court that the presumption of innocence operates only at trial, not the opposite view of the ECtHR [..] can be deduced from the "nature" of the presumptions.").

reference to the presumption of innocence in interim release matters,[397] although meanwhile the *Bemba* Appeals Chamber in November 2010, concluded that the periodic review of the detention according to Article 60(3) Rome Statute had to be considered in the context of the presumed innocence of the accused.[398] This corresponds to the approach taken by the ICTY in *Aleksovski*: "Recourse to [detention prior to sentencing] must always be subject to the principles of necessity, suitability and proportionality. These principles are merely the emanation of the presumption of innocence which requires that any limits placed on the freedom of the accused prior to the final sentence must be not only socially necessary but also tolerable."[399] The ECtHR held in *Stögmüller* that prolonged or unwarranted pre-trial detention must be regarded as a "serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction".[400] At least with regards to the Austrian domestic practice, both *Höpfel* and *Reindl-Krauskopf* are skeptical that the right to be released at the pre-trial stage could be derived from the presumption of innocence *stricto sensu*.[401] As this question appears to be subject to debate even among leading experts at the national and international level, the following will primarily revert

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[397] William Schabas/Yvonne McDermott in Otto Triffterer/ Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court* (3rd edition 2016, Beck, Hart, Nomos), p. 1649.

[398] *Prosecutor v. Bemba*, ICC-01/05-01/08 OA 4, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber HI of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para 49, ("It is the purpose of the periodic review under Article 60(3) of the Statute to ensure that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances. Hence, it is an essential procedural safeguard against detention that is not in accord with the Statute and internationally recognised human rights. This procedural safeguard must also be seen in the context of the detained person's right to be presumed innocent"). This was upheld inter alia in *Prosecutor v. Bemba*, ICC-01/05-01/08 OA 10, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo, 5 March 2012, para. 40,78.

[399] *Prosecutor v. Aleksovski*, ICTY-IT-95-14/1-T, 23, Decision denying a request for provisional release, 23 January 1998, p. 4. Similarly, President Antonio Cassese reiterated that the Court had to strike a balance between the human dignity and the presumption of innocence on the one side and the imperatives of security and order on the other hand. See *Prosecutor v. Blaškić*, ICTY-IT-95-14-T, Decision on Motion of the Defence Seeking Modification of the Conditions of Detention of General Blaškić, 9 January 1997.

[400] *Stögmüller v. Austria*, 1602/62, 10 November 1969, para. 4; see e.g., ICTY, *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002.

[401] Personal discussions in May 2017 with Frank Höpfel, Austrian professor of criminal law and former ICTY *ad litem* Judge and Susanne Reindl (-Krauskopf), Austrian professor of criminal law and a leading Austrian ECHR expert.

to the right to be released pending trial enshrined in Articles 5 ECHR and 9 ICCPR and not to the presumption of innocence (Articles 6(2) ECHR and 14(2) ICCPR). The presumption of innocence will be invoked, however, with respect to the right of a defendant in criminal proceedings not to have any burden of proof reversed to his or her detriment.

14. Essential Defence Rights Derived from the Presumption of Innocence

In criminal matters, the presumption of innocence guarantees that every person has the right to be presumed innocent *despite the fact* that investigations are being carried out against them. In order to secure objective investigations and a fair verdict, suspicion against a suspect must be balanced with a presumption in favour of the innocence of the accused. The practical consequences stemming from this presumption can be divided into three main categories: the right to be perceived innocent by the public, the right to an elevated standard of proof, and the burden of proof being on Prosecution with the benefit of doubt in favour of the accused.[402] Each of these rights imply a plethora of secondary concrete positive and negative rights to suspects and accused persons, such as the right of an accused to remain silent, separate detention from convicted prisoners and, as argued for instance by *Schabas*, also the right to interim release pending trial.[403] In the following, these three main categories will be further defined and their impact on international criminal proceedings will be analysed.

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[402] Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press (2003), p. 85; *Barbera, Messegue and Jabardo v. Spain*, 10590/83, 6 December 1988, para. 77. Stuckenberg argues that "the uncertainty concerning the specific rights derived from the presumption of innocence is enormous", in Carl-Friedrich Stuckenberg, Die normative Aussage der Unschuldsvermutung (1999) 111 ZStW Heft 2, p. 423 (Footnote 2). P.425. Stuckenberg cites Manzini who called the presumption of innocence absurd, arguing that if we would really consider a person "innocent" why was one investigating against the same person? (p.428).

[403] William Schabas/Yvonne McDermott in Otto Triffterer/ Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court*, Article 66: Presumption of Innocence, (3rd edition 2016, Beck, Hart, Nomos), (2016), p. 1636. S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford Univ. Press (2003), p. 90,

14.1. Right to be Presumed Innocent by the Judge and in the Public Eye

This set of rights touches as much on psychological as on legal matters. The presumption of innocence secures on a meta-level that a trial does not occur with the "preconceived idea that the accused has committed the offence charged".[404] At stake is the psychological climate surrounding criminal proceedings. Any connotation between the accused and guilt not inherently required to secure the conduct of the proceedings must be avoided. This concerns both the conditions of detention as well as the treatment of the defendant during trial including the trial media coverage. In relation to detention conditions, it is widely recognized that persons standing trial are not under the obligation to work and, where possible, should be detained separately from convicted persons. Concerning the conditions inside of the courtrooms, the ECtHR held that forcing the person standing trial to wear handcuffs or his or her placement in metal or glass cages in the courtroom may be justifiable in exceptional circumstances only. Such measures may amount to a violation of Articles 6 and 3 ECHR where they are used cumulatively and not justified by security considerations.[405] The imposition on prisoners on remand to wear "prisoner's clothing" during a conditional release hearing was seen as not justified by necessity and a violation of the ECHR.[406] The Rules of the ICTY and the ICC provide that means of restraint, such as handcuffs, are only to be used where necessary to prevent escape, self-injury, injury or serious property damage. In the courtroom, such measures of restraint are to be removed.[407] The excessive usage of pre-trial detention can be seen as problematic also from this aspect insofar as it inevitably suggests a bond between the defendant and guilt.[408] Overall defendants in pre-trial detention appear more likely to be

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[404] *Barbera, Messegue and Jabardo v. Spain*, 10590/83, 6 December 1988, para. 77.

[405] Regarding the presumption of innocence, the placing a criminal defendant in a "special compartment" has not amounted to violations in *Auguste v. France*, no. 11837/85, Commission Report of 7 June 1990, D.R. 69, p. 104; see also *Meerbrey v. Germany*, no. 37998/97, Commission decision of 12 January 1998. Security arrangements in the courtroom, particularly unjustified by their cumulative effect, were deemed of humiliating effect both to the applicant and the public and therefore in violation of Article 3 of the Convention in several cases against Russia, recently in *Khodorkovskiy v. Russia*.

[406] *Samoila et Cionca c. Roumanie*, See also Article 33 of the UN Standard Minimum Rules for the Treatment of Prisoners.

[407] Rule 83: Instruments of Restraint of the Rules of Procedure and Evidence, Rev. 50, 8 July 2015. Rule 120 Instruments of Restraint, ICC Rules of Procedure and Evidence.

[408] A defendant walking into the courtroom for his or her trial will give a different impression than a defendant who is escorted into the courtroom by several police guards.

convicted than persons accused of comparable crimes that are released pending proceedings.[409]

The presumption of innocence also entails the right of an accused to objective media coverage. Headlines referring to certain defendants prematurely as "war criminals" or "murderer of village XY" may in fact infringe on the presumption of innocence.[410] At stake is the fairness of trials when public opinion and consequently jurors are at risk of being influenced. International criminal courts deprived of control over external media coverage must at least ensure that its own reporting and coverage provides objective and neutral information "with all discretion and circumspection necessary".[411] Regarding the risk of judges and jurors being influenced in cases involving such serious crimes, the ECtHR was in *Mustafa (Abu Hamza) v. UK* called upon to decide whether a hostile media campaign against the applicant following 11. September 2001 and the denomination of the accused as global terrorist by the President of the United States would necessarily risk the impartiality of a jury. The Court found that no violation occurred as experienced trial judges are capable of insuring impartiality by way of their powers to direct the jury.[412] Judgements before international courts are exclusively rendered by professional judges. Therefore, the risk of undue influence by adverse media campaigns is considerably mitigated compared to the national level where often jurors

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[409] Statistics concerning the percentage of convictions for those in pre-trial detention and such who are not are difficult to deduce due to the fact that the necessity to detain a person does in practice also depend on the likelihood of a later conviction. Where a person is for instance in detention following a confession of guilt, his or her later conviction is not surprising. At the ICC, those cases where the defendants benefitted from a summons to appear all ended without convictions. A different aspect is raised by Andreas Venier who asserts with regards to national (Austrian) proceedings that judges oftentimes measure the sentence against the time the defendant spent in pre-trial detention, sentencing the defendant to a sentence which at a minimum exceeds the time spent in custody. This implies that a defendant not in pre-trial detention in the same situation may have been sentenced to a inferior sentence. in Andreas Venier, *Untersuchungshaft und bedingte Entlassung: Eine andere Kriminalpolitik*, Dowas Jahrbuch 2006, retrieved online http://www.dowas.org/index.php/jahrbuch06/50-untersuchungshaft.

[410] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p.86 ("newspaper titles in which defendents are called "war criminals" or descriptions of the accused as the "Butcher of Omarska" are violations of the presumption of innocence").

[411] *Fatullayev v. Azerbaijan*, *Allenet de Ribemont v. France*, *Garicky v. Poland*. The Outreach Programme of the ICTY released several documentaries of the events in the region as part of the historical record aimed when creating the Tribunal, but refrains from also covering alleged acts of persons still at trial.

[412] *Mustafa (Abu Hamza) v. United Kingdom*, 31411/07, Fourth Admissibility Decision, 18 January 2011, para.39.

participate in the verdicts.[413] In essence, having professional Judges at the international criminal courts as well as internal media offices ascertaining objective coverage of the trials effectively guarantees compliance of such courts with this aspect of Article 6(2) ECHR.[414] Similarly, the detention conditions in the Scheveningen detention unit as well as the course of the proceedings before the ICTY and the ICC itself are aimed to duly avoid any unnecessary (i.e. only where warranted by prerogatives of safety and security) connotation between the defendants and criminal guilt.

14.2. Right to an Elevated Standard of Proof

The ECtHR posited in *C. vs. United Kingdom* that unlike civil proceedings where the standard of proof can be one of "balance of probabilities", criminal matters require the establishment of guilt "beyond reasonable doubt".[415] For the *ad hoc* Tribunals, Rule 87 (A) of the Rules stipulates that for a conviction, guilt "beyond reasonable doubt" must be proved. For the ICC, Article 66(1) of the Rome Statute provides that "the Court must be convinced of the guilt of the accused beyond reasonable doubt".

14.3. Imposition of the Burden of Proof on the Prosecution & Benefit of Doubt in Favour of the Defendant

In criminal matters, the onus of proof lies with the Prosecution.[416] *Schabas* defines this as one of the most relevant corollaries of the presumption of innocence.[417] The Prosecution must convince the Court that the accused is guilty; it should not be the obligation of the

[413] Compare the finding of the Strasbourg Court in *Craxi v. Italy* and *Mircea v. Romania* that professional judges, unlike members of a jury, dispose of appropriate experience and training enabling them to resist any outside influence.
[414] The Defence in *Tadić* in its closing arguments had argued that several witness declarations were invalid on the ground that their perception of the events was distorted through broad media coverage. The Chamber rejected this argument invoking that media coverage is common in criminal trials. Salvatore Zappala*,* *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p. 86.
[415] *C. against the United Kingdom*, 11882/85, Admissibility Decision, 7 October 1987.
[416] C.F. Stuckenberg, „Who is Presumed Innocent of What by Whom?" (2014) 8 Criminal Law and Philosophy, 311 ("the burden of proof always rested on the prosecution since antiquity - ei incumbit probatio qui dicit, non qui negat").
[417] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Press 2010), p. 815 (Commentary to Article 67 Rome Statute); W. Schabas/Y. McDermott in Triffterer/Ambos, *Commentary on the Rome Statute of the International Criminal Court, Article 66: Presumption of Innocence*, (3rd edition 2016, Beck, Hart, Nomos), (2016), p. 1636

defendant to prove his or her innocence. It necessarily follows therefrom, that if the Prosecution is unable to produce sufficient evidence to satisfy the required standard of proof, this fact should be to the benefit of the defendant. The defendant benefits from existing doubt as expressed in the legal *maxime* of *in dubio pro reo.*[418] *Stuckenberg* convincingly opines that the "non-proof of guilt does not imply proof of innocence because of the further possibility of *non-liquet*". In his view, the presumption of innocence is expressed by the "assimilation of proven innocence and insufficient proof of guilt".[419] Article 66 of the Rome Statute further specifies that "everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law" whereby the "the onus is on the Prosecutor to prove the guilt of the accused" and Article 67 Rome Statute prohibits the imposition of any burden of proof to the detriment of a defendant.[420] While the onus regarding the overall guilt hence remains on the Prosecutor, concerning the decision of the necessity of pre-trial detention, the accused is effectively deprived of the benefit of doubt.

Concluding remarks: The first two rights attributed to any defendant by the presumption of innocence were overall sufficiently complied with both before the ICTY and the ICC. The third identified aspect, the imposition of the burden of proof on the prosecuting organ, was arguably not respected in terms of the pre-trial release mechanism, at least before the ICTY.[421] It remains to be assessed whether such a deviation was overall justified by the specific conditions the ICTY faced and whether remedies were found to

[418] Human Rights Committee, General Comment N. 13, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument.

[419] Carl.-Friedrich Stuckenberg, „Who is Presumed Innocent of What by Whom?" (2014) 8 Criminal Law and Philosophy, p.304.

[420] *Prosecutor v. Bemba*, .ICC-01/05-01/08, Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,", 15 June 2009, para 31: "Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings, including the pre-trial stage."

[421] Besides in motions for provisional release, also in the question of unfitness to stand trial and in matters of early release reverse burdens of proof existed in ICTY proceedings. The unfitness to stand trial was discussed in the first Chapter and it was concluded that due to a lack of persuasive elements such a construct was unproblematic. Early release motions do not fall under the category analysed here as they are no longer covered by the presumption of innocence.

apply the reverse burden of proof inherent to Rule 65(B) in a human rights compliant manner.

B. The Legality of Reversing the Burden of Proof in the Strasbourg Jurisprudence?

The following will introduce two different categories of burdens of proof inherent to the Common Law system. This is of relevance as the ICTY Rules of Procedure and Evidence were drafted predominantly in light of Common Law principles.[422] The main part will analyse the ECtHR Jurisprudence relating to reverse burdens of proof.

15. Attribution of the Burden of Proof: Weighing Interests of Law Enforcement against Defendant's Rights

At its core, both the presumption of innocence and the reverse burden of proof serve to achieve the same purpose, namely to implement a "fair balance between the general interest of the community and the personal rights of the individual".[423] Generally when weighing the harm caused to both the defendant and society by (the risk of) erroneous acquittals and that of erroneous convictions, the presumption of innocence firmly tips the balance in favour of the defendant's interest in not being erroneously convicted.[424] It goes without saying that any curtailment of the presumption of innocence with a reverse burden, while inevitably increasing the risk of wrongful convictions, at the same time

[422] Vladimir Tochilovsky, "Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals", 2009 Vol. 46 (3), Cambridge University Press, pp. 343-360. The practice of its application by many continental Judges led to the shift towards a more Civil Law approach.

[423] *Brown v. Stott* [2003] 1 A.C. 681,704 per Lord Bingham. See further at page 722, per Lord Hope. See also Kebilene [2000] 2 A/C/ 326, 384, per Lord Hope. All cited in David Hamer, The Presumption of Innocence and Reverse Burdens: A Balancing Act, Cambridge Law Journal, 66/1, 2007, p. 147. *Prosecutor v. Blaskić*, ICTY-IT-95-14-T, Decision on Motion of the Defence Seeking Modification of the Conditions of Detention of General Blaskić, 9 January 1997 in which First ICTY President Cassese summarized the underlying problem as relating to the question where to strike the balance between two occasionally opposing interests, namely, the "right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and the presumption of innocence" on the one hand and the "imperatives of security and order" on the other.

[424] David Hamer,"The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007, Cambridge Law Journal, p. 148.

almost certainly also *de*creases that of erroneous acquittals.[425] Therefore, in order to justify the imposition of any reverse burden by a legislator it must *a priori* be established that, as is argued by *Hamer*, the decrease in erroneous acquittals will be (in relation to that of erroneous convictions) not only "far greater", but will also bring along "a significant improvement in expected accuracy overall".[426] Then in a second step, the proportionality between the imposition of a reverse burden and the defence rights are to be assessed.

16. Persuasive versus Evidentiary Burdens of Proof

In Common Law jurisdictions, two different concepts of burdens of proof exist. The *evidential burden* in the Common Law adversarial trial requires that the Prosecution adduce evidence sufficient to satisfy the sitting bench or jury so that they are certain beyond reasonable doubt of guilt on the specific count of the indictment. A defendant in criminal matters not adducing any exonerating evidence, while not getting automatically convicted, nonetheless considerably increases the risk of a conviction. When the accused raises a defence such as (in-) sanity, self-defence, duress or alibi, he or she will thereby undertake an *evidential burden* also referred to as the risk of non-production of evidence.[427] When raising these points, it must in most cases be sufficient for the defendant to introduce at least some *prima facie* evidence which contradicts the theory of the prosecuting organ. Once such reasonable doubts are validly raised, the duty shifts back to the Prosecution to validly disprove the forwarded evidence – where it relates to matters establishing the guilt of the defendant – in accordance with the required *beyond reasonable doubt* standard.

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[425] Ibid.
[426] D. Hamer, "Probabilistic Standards of Proof, Their Complements, and the Errors that are Expected to Flow from Them", 2004 1 U.N.E.L.J. 71, 87-95; D. Kaye, "Naked Statistical Evidence"(1990) 89 Yale Law Journal, 601. Both cited in David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007Cambridge Law Journal, p. 148.
[427] Fleming James, "Burdens of Proof", 47 Virginia Law Review (1961) p. 55.

The *persuasive burden of proof* or legal burden of proof[428] assists the deciding organ, Judge or jury in criminal proceedings to decide a matter which otherwise would be an unclear or *non-liquet* situation. If the deciding organ is in doubt, the matter is then resolved to the detriment of the party having the burden of persuasion. In *Fleming*'s view "[a] concept of the risk of non-persuasion seems to be inseparable from any system wherein issues of fact are to be decided on any rational basis by human beings".[429] Whereas the allocation of such persuasive burdens is common in private law disputes[430], it is controversial in criminal law. Where a defendant does not adduce evidence despite carrying the persuasive burden of proof, the deciding Judge or jury will in most cases have no other choice than to decide in the respective matter against the defendant.

The main practical consequence arising thereof is the different manner in which the person having the burden of proof must rebut the same. In matters of an evidential burden, the defendant in a criminal case has solely the (*quasi*-) obligation to raise a possibly exculpatory matter, which must then in turn be actively negated by the opposing Prosecutor beyond reasonable doubt.[431] Contrary to this, a defendant under the obligation of a reverse persuasive burden must actively prove a certain fact on the *balance of probabilities.*[432] The higher standard that must be met by an accused could mean that in certain instances, a defendant is convicted despite having managed to raise reasonable doubt before a jury on certain facts, while not being to prove these facts on the balance of

[428] David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007 Cambridge Law Journal, p 143.
[429] F. James, "Burdens of Proof", 47 Virginia Law Review (1961) p. 52.
[430] For Austria, see notably Article 924 Austrian Civil Code (ABGB) establishes the presumption that a defect that is discovered in a newly purchased product within six months of purchase had already existed prior to sale (i.e. a manufacturing defect). As a consequence, the seller has the persuasive burden to prove that such a defect was caused by the purchaser or third party after the product was sold. If the purchaser fails to establish this fact, he or she must replace the product or compensate the purchaser. Article 7 of the Austrian Law on Product Liability (Produkthaftungsgesetz-PHG) provides that a manufacturer or importer that claims not to have introduced a certain product is under the obligation to provide evidence as to such fact. For joint stock companies, Article 84(2) Aktiengesetz obliges the managing board member to prove that he or she has applied the diligence of a careful and conscientious manager. See C. Fritz, „Der GmbH-Geschäftsführer, in SWK Steuer und Wirtschaftskartei", 83. Jahrgang, Linde (2008), p. 247-48. It is subject to debate whether an analogous application also exists concerning a managing director of a limited liability company.
[431] *R v Davies* [2002] EWCA Crim 2949.
[432] David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007Cambridge Law Journal, p 143.

probabilities. Such scenario was deemed incompatible with the presumption of innocence in the English case of *R v. Lambert*, where a provision formulated as a persuasive burden was, as a remedy, interpreted as a mere evidentiary burden.[433]

As a general rule for criminal proceedings, reverse evidential burdens are widely considered unproblematic from a presumption of innocence perspective,[434] while persuasive burdens are subject to strict review and are, in general, only compatible with human rights or ECHR principles where the presumption was proven to be confined within reasonable limits.

17. Reversal of Onus of Proof in the Case Law of the ECtHR

The ECtHR was confronted with such practice in a number of cases. Notably in *Salabiaku v. France (1988)*[435] (regarding a customs violation), *Pham Hoang v. France (1992)*[436], *Falk v. Netherlands (2004)*[437] and more recently, *Grayson and Barnham v. UK (2008),*[438] the Court seemingly recognized reversals of the burden of proof within certain boundaries. These cases will be analysed to deduce the Court's reasoning and make more broadly valid claims. For this purpose, these cases will be confronted with cases where the Court found such reverse burden to be in violation of the presumption of innocence, such as *Telfner v. Austria* and *Salabiaku v. France (*concerning the charges of drug trafficking). The majority of cases decided before the ECtHR in this aspect related to regulatory proceedings with a criminal law component, such as customs law or traffic offences. With regards to core criminal offences, such as drug trafficking or drug dealing, the standard applied was considerably more constraint. The following will attempt to deduce key characteristics shared by the cases held to be compatible with the presumption of innocence.

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[433] *R. v. Lambert* [2002] 2 A.C. 545, the House of Lords
[434] Kebilene [2000] 2 A.C. 326, 379, per Lord Hope, Lambert [2001] UKHL 37, [2002] 2 A.C. 545, at [37] per Lord Steyn.
[435] *Salabiaku v. France*, 10519/83, 7 October 1988.
[436] *Pham Hoang v. France,* No. 13191/87, 25 September 1992.
[437] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004.
[438] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008.

17.1. Presumptions applied in the Combat against Drug Trafficking: *Salabiaku, Pham Hoang v. France and Grayson and Barnham v. UK*

17.1.1. *Salabiaku*: Importing of Drugs as a Criminal and Customs Offence

The leading judgement in the matter of reversal of burden of proof is *Salabiaku v. France* (1988). The applicant went to an airport in Paris to pick up a parcel that was supposed to be sent to him containing, according to Salabiaku, food samples. The luggage did not carry any name tag. When leaving the airport through the "Nothing to declare" channel, the customs police stopped Salabiaku and found several kilogram of drugs inside this parcel. A few days later another parcel containing foodstuff, this time properly addressed to Salabiaku, was found at Brussels airport to where it had been erroneously sent.[439] The French Appellate Court gave the applicant the benefit of the doubt concerning his criminal responsibility, but sentenced him to a fine for smuggling, a customs related offence. In order to rebut the presumption established in the Customs Code, the defendant had to establish the "absolute impossibility of knowing the contents of the package".[440]

In essence, the case dealt with the question of attribution of proof regarding the mental elements in relation to the applicant passing the customs zone with a luggage containing illegal drugs. Was the burden of proof on the applicant to actively demonstrate (and not just raise this matter as would have been in the case of an evidential burden of proof) that he had erroneously picked up the wrong luggage? Or was it the obligation of the prosecuting organs to fully prove his intention? The case was particularly complex as an identical parcel had been (mistakenly?) delivered to a different airport. The French Court of First Instance had initially found the applicant guilty of both the criminal and the customs offence and sentenced him to two years of imprisonment (criminal law offence) and 100.000 Francs (customs offence).[441] The Court of First Instance saw it established that Salabiaku had showed no signs of surprise when the drugs were discovered and that the other parcel had arrived in Brussels under "insufficiently clear circumstances".[442]

[439] *Salabiaku v. France*, 10519/83, 7 October 1988, paras. 8-9.
[440] *Salabiaku v. France,* 10519/83, 7 October 1988, para. 19.
[441] *Salabiaku v. France*, 10519/83, 7 October 1988, para. 13.
[442] *Salabiaku v. France*, 10519/83, 7 October 1988, para. 13.

The Paris Court of Appeal subsequently acquitted him of the criminal offence. In its reasoning, the Court while duly noting the fact that he had taken possession of a heavy piece of luggage without a name tag, for which he possessed neither the key to the padlock nor the corresponding luggage ticket counterfoil, held that a mix-up of the parcels was "not impossible" and applied the benefit of doubt in favour of the applicant.[443] The fine for the customs offence of smuggling prohibited goods was upheld.[444] The pertinent provision of the customs code reads: "*any person in possession of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him"*.[445] The Court appraised that Salabiaku did not follow warnings by an airport official not to take possession of belongings without being certain of his ownership nor did he verify the content of the parcel before passing customs. The applicant appealed against the judgement invoking an "almost irrefutable presumption of guilt".[446] According to the pertinent French case law, the offender needed to adduce evidence to demonstrate a "force majeure" situation leading to a person genuinely not knowing the content.[447] The French government emphasized that the customs provision, while it contained a presumption of liability, did not contain a presumption of guilt.[448]

The Strasbourg Court posited that although presumptions of fact or of law were not uncommon to any legal order, in criminal proceedings such presumptions had to remain within certain limits.[449] Within these limits, States may criminally punish objective facts irrespective of guilt and/or negligence,[450] which would correspond to a standard of strict liability. The presumption of innocence was maintained wherever a state remains within certain boundaries, duly considering the importance of "what is at stake" while "maintain[ing] defence rights".[451] In the particular case, the Strasbourg Court found no

[443] *Salabiaku v. France*, 10519/83, 7 October 1988, para.14.
[444] *Salabiaku v. France*, 10519/83, 7 October 1988, para.14.
[445] *Salabiaku v. France*, 10519/83, 7 October 1988, para.14.
[446] *Salabiaku v. France*, 10519/83, 7 October 1988, para.15.
[447] *Salabiaku v. France*, 10519/83, 7 October 1988, para.19.
[448] *Salabiaku v. France*, 10519/83, 7 October 1988, para. 24.
[449] *Salabiaku v. France*, 10519/83, 7 October 1988, para.28.
[450] *Salabiaku v. France*, 10519/83, 7 October 1988, para.27.
[451] *Salabiaku v. France*, 10519/83, 7 October 1988, para.28.

violation insofar as the French Courts had distinguished between the criminal and the quasi-criminal customs offence insofar as they concern the consequences for the applicant and had importantly not applied the imposed presumption “automatically”, which would correspond to strict liability[452], but rather, duly left the concerned persons with means of defence for his or her exculpation.[453]

17.1.2. *Pham Hoang*: Presumptions Applied in the Combat against Dealing with Drugs

In *Pham Hoang v. France* (1992), the French authorities applied a different presumption of the customs code relating to the seizure of illegal goods, according to which “the burden of proving that no offence has been committed shall be on the person whose goods have been seized”.[454] Pham Hoang was on the driving seat of a car when two persons carrying several kilos of heroin approached the car.[455] Police arrested these persons as they were about to place the drugs into the car.[456] Pham Hoang although he had denied any involvement was convicted of unlawfully importing prohibited goods and jointly with the other offenders, sentenced to a considerable fine corresponding to the value of the smuggled goods.[457] The Appeal Court held that it had been proven that he was driving the persons carrying the drugs. His defence rights were maintained as he could have claimed force majeure. In its reasoning, the Appeal Court also referred to the problems of serious drug consumption as “a scourge affecting young people more particularly and which is spreading alarmingly” and held that the provisions of the customs code were an appropriate response.[458]

The ECtHR opined that defence rights were available to the defendant, who could have rebutted the presumption by demonstrating that he had “acted from necessity or as a result of unavoidable mistake”.[459] The ECtHR saw it as established that Pham Hoang had

[452] *Salabiaku v. France*, 10519/83, 7 October 1988, para.29.
[453] *Salabiaku v. France*, 10519/83, 7 October 1988, paras.29-30.
[454] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 21 citing Article 373 of the French customs code.
[455] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 9.
[456] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 14.
[457] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 16.
[458] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 16.
[459] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 34.

used his car to drive a major drug dealer that day and that his physical possession of the drugs was only prevented by the intervention of the police "thus for reasons beyond his control".[460] His conviction of the attempted customs offence was upheld by the Strasbourg Court.[461] In view of the ECtHR, the French Court had not automatically relied on the presumptions created in the relevant provisions of the Customs Code and thereby not violated the presumption of innocence. [462]

17.1.3. *Grayson and Barnham*: The Burden of Proof Regarding Proceeds of a Crime

In a more recent decision on this matter, the Court was confronted in *Grayson and Barnham v. UK* (2008) with presumptions concerning the proportion of the offence in drug related offences. Grayson had been convicted of the intent to supply 28 kilograms of pure heroin seized at his arrest and sentenced to 22 years imprisonment.[463] Barnham was convicted of plans to import large quantities of marihuana.[464] In both cases, the Judges were satisfied that the applicants had prior engaged in drug trafficking and that the money seized - in both cases one million British pounds each - was presumed to have also originated from drug businesses.[465] The British government, in its submissions, emphasized that such judgments were to be seen in view of a necessity to "combat the serious problem of drug trafficking, by punishing convicted offenders, deterring other offences and reducing profits available to fund future drug-trafficking ventures".[466] Both applicants proved to be unable to rebut the presumption that the seized money originated from illegal activities. After the Prosecution duly established that the accused had received several payments within the last years exceeding over one million British pounds, the burden of proof shifted to the accused, which now had to rebut the assumption by proving, on the balance of probabilities that the money originated from a different source of income. The Strasbourg Court opined that placing the onus on the applicant to establish the source of money or assets was not a violation of fair trial rights

[460] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 35.
[461] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 35.
[462] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 36.
[463] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, para. 6.
[464] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, para. 12.
[465] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, paras. 8,14.
[466] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, para. 32.

where the guilt of the applicant of a major offence of drug trafficking had been proven.[467] The ECtHR found that this fell into "the applicants' particular knowledge", hence the "burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true".[468] Germany had also planned such a reverse burden of proof concerning proceeds of crime in the mid-1990s but ultimately decided against it. German Prosecutors and legislators later regretted this move and currently (2016) to some extent call for the imposition of a reverse burden of proof in drug trafficking matters, as the lack of such a procedural tool makes Germany highly attractive for criminal organizations.[469]

17.2. Presumptions in Traffic Offences and Parking Fines: *Falk v. Netherlands*, *O'Halloran and Francis v. United Kingdom* and *Krumpholz v. Austria*

In *Falk*, the applicant was sentenced to pay a fine of approximately 100 euros for failing to give way to a pedestrian at a crossing.[470] In his appeal, the applicant named another person as the person driving his car. The named person was at the time of the incident declared bankrupt.[471] The Dutch Road Traffic Act stated that where the identity of the actual driver could not be established, the fine was to be imposed on the registered owner of the vehicle, unless that person could demonstrate that the vehicle was used by another person against his or her will or that the vehicle was commercially hired out.[472] In return, such a fine would not be recorded in the criminal records.[473] The Supreme Court of the Netherlands had already, in an earlier decision concerning the proportionality of the

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[467] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, para. 46.
[468] *Grayson and Barnham v. United Kingdom*, No. 1995/05 and 15085/06, 23 December 2008, para. 50.
[469] Der Spiegel, „Verbrechen lohnt sich - bald nicht mehr?", 16 October 2016, retrieved online 26 June 2017:„[D]ie Schwachstellen des Rechtsstaats sind seit Jahrzehnten bekannt. Die SPD formulierte bereits 1994 einen Gesetzentwurf zur Abschöpfung illegaler Gelder. Kernstück des Vorhabens war die sogenannte Beweislastumkehr. In diesem Fall müssten Verdächtige belegen, dass sie ihr Vermögen legal erworben haben. Können sie den Beweis nicht erbringen, zieht der Staat das Geld ein. Das Gesetz ist nie verabschiedet worden, obwohl die Sozialdemokraten sieben Jahre lang an der Macht waren." Title of the newspaper article: Crime pays-off. Experts criticize the fact that up to EUR 100 billion of money originating from crime circulates in Germany. In many cases convicted persons can access vast amounts of money following their release from prison. Many voices call for a change of the German legislation. http://www.spiegel.de/panorama/justiz/gesetzesvorhaben-verbrechen-lohnt-sich-bald-nicht-mehr-a-1116783.html.
[470] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 2.
[471] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 2.
[472] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 3.
[473] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 3.

Traffic Act, stressed the importance of the detection of minor traffic offences with the aid of technical equipment as well as the "factual impossibility" to trace with certainty the person driving.[474] The Court of Appeal specified that in cases where a realistic opportunity of stopping the driver exists, the presumption should not apply.[475] The ECtHR held, in light of *Salabiaku*, that the right of an accused to have the onus of proof reversed was not absolute and that a balancing test between the importance of what is at stake and the rights of the defence was to be undertaken[476]; in other words, the means employed had to be "reasonably proportionate to the legitimate aim pursued".[477] The Strasbourg Court accepted that the rule was implemented in order to secure effective road safety by ensuring that traffic offences would not go unpunished while at the same time its enforcement not creating an "unacceptable burden on the domestic judicial authorities".[478] The registered owner was not deprived of any means of defence as he could establish that the car was used against his will or commercially hired out or that the police in the concrete case had a realistic opportunity to stop the car and enforce the fine.[479] The ECtHR in sum found no violation of Article 6(2) ECHR in the obligation of the registered car owner to – provided the statement of Falk was accurate and he was not driving himself – assume the responsibility for his or her decision to allow another person to use his or her car.[480]

Faced with similar problems, the UK and Austria took alternative approaches. Instead of applying a reverse onus of proof, both countries created an obligation for the registered owner of the vehicle to provide information as to the person driving. Failure to do so would otherwise result in the owner being charged with the offence of not disclosing such information.[481] In *O'Halloran and Francis v. United Kingdom* the majority of the 15

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[474] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, pages 3-4; Decision of the Supreme Court of 16 February 1993 as cited in the Judgment.
[475] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 5.
[476] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 7.
[477] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 7 citing *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002 para. 113.
[478] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 8.
[479] This fact possibly proves to be of little relevance where the applicant denies to have been driving the car.
[480] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004, page 8.
[481] *O'Halloran and Francis v. United Kingdom,* No. 15809/02 and 25624/02, 29 June 2007, para. 25.

Judges of the Grand Chamber of the ECtHR found no violation of the presumption of innocence or a possible infringement on the right to remain silent.[482] In *Krumpholz*, Austria conversely was found to have violated the presumption of innocence in a similar situation. The Austrian system had gone one step further by concluding that a registered owner deciding to remain silent as to the person effectively driving and not submitting any other exculpating evidence could be punished for the underlying (speeding) offence *per se.*[483] The ECtHR notably also criticized the fact that a hearing would only take place if the applicant so requested, therefore not merely shifting the burden of proof, but also the responsibility of conducting proceedings to the accused. For this the Austrian court was found to have unduly waived its right to assess the credibility of the applicant.[484] The validity of presumptions that parking violations were attributable to the registered owner of a car who is unwilling or unable to name the driver was meanwhile upheld by the Strasbourg Court.[485]

17.3. Reverse Burdens in Tax Legislation and Administrative Law

Reverse burdens of proof applied in tax law regulations have been held compatible with the presumption of innocence.[486] For instance, the burden of the taxpayer to rebut the imposition of tax surcharges amounting to a percentage of tax revenue set by the tax authorities was seen as compatible with the ECHR in *Västberga Taxi Aktiebolag and Vulic v. Sweden.* In these cases, the ECtHR held that the defendants were not left without any means of defence as they could have put forward grounds for reductions and adduced supporting evidence (even though the Court admitted that rebutting the tax authority's

[482] *O'Halloran and Francis v. United Kingdom,* No. 15809/02 and 25624/02, 29 June 2007, para. 65.
[483] *Krumpholz v. Austria*, No. 13201/05, 18 March 2010, para. 38. ("For reasons which remain unclear, the authorities chose to prosecute the applicant for the underlying traffic offence, namely speeding".). In the Circumstances of the Case it was held that this presumption originated from case law of the Austrian administrative court "which had considered that in a case in which the registered keeper of a car did not disclose the driver's identity and did not submit any exculpating evidence in his defence, the authority could reasonably conclude that the keeper himself had been the driver." See para. 13.
[484] *Krumpholz v. Austria*, No. 13201/05, 18 March 2010, para 41.
[485] *J.P., K.R. and G.H. v. Austria*. 15135/89, 15136/89 and 15137/89, 5 September 1989, para.2.
[486] *Jussila v. Finland*, No. 73053/01, 23 November 2005, para 49. The imposition of fines amounting to 10% of the amount was seen to justify to treat this case as criminal, para. 43; *Janosevic v. Sweden*, No.34619/97, 21 May 2003; *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002, para. 122.

decision was difficult in practice).[487] The ECtHR in its decisions emphasized the importance of tax revenues for the functioning of a state, a system that would not work without a form of sanction against the provision of incorrect and incomplete information by the taxpayer.[488]

Likewise, reverse burdens of proof were upheld by ECtHR in two cases against Austria concerning administrative law provisions with quasi-criminal components. In *Blum*, the applicant was obliged to demonstrate the legality of the employment status of two persons working on his property who fled in the course of a work inspection from his premises. The Strasbourg Court held that this was justified after a *prima facie* case had been established against the applicant by the inspectorate that legitimately called for an explanation by him.[489] In *Müller*, the Austrian administrative law principle that where a person contravenes a prohibition, his or her negligence is presumed, was equally not found incompatible with the presumption of innocence.[490]

17.4. Limitation to the Legal Construct: *Telfner v. Austria*

In *Telfner*, a pedestrian was hit by a car in the early morning hours. The slightly injured person was able to note both the model and the car's plate number, but was unable to identify any characteristics relating to the driver. When police came for an inspection the same morning, Telfner had seemingly not yet returned home and the mother of the applicant as the registered owner of the car claimed that she had not been driving.[491] According to observations by the local police, Telfner was in fact the main user of the car.[492] During the proceedings, the applicant pleaded not guilty, while both his mother and his sister, who occasionally used the car, refused to testify. The applicant was found guilty of negligent bodily harm and sentenced to the payment of a fine.[493] The Austrian

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[487] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002, para. 114.
[488] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002, para. 115.
[489] *Blum v. Austria*, 31655/02, 3 May 2005, para. 28.
[490] *Müller v. Austria (no.1)*, no. 12555/03, 5 January 2007, para. 34 (Article 5(1) of the Code of Administrative Offences). ("The Court notes that section 5 § 1 of the Code of Administrative Offences contains a presumption that a person who contravened a prohibition has acted at least with negligence, unless he or she is able to show that no fault lies with him or her.").
[491] *Telfner v. Austria*, 33501/96, 20 March 2001, paras. 7-8.
[492] *Telfner v. Austria*, 33501/96, 20 March 2001, para. 8.
[493] *Telfner v. Austria*, 33501/96, 20 March 2001, paras. 9-10.

government, in its response to Strasbourg, invoked that the Court had in prior cases accepted legal presumptions and moreover stressed that the defendant was "given ample opportunity to defend himself and to refute the evidence adduced at the trial or to produce evidence in his favour".[494] The ECtHR concluded that the case was in fact not about a presumption of fact or law; instead what it reproached the Austrian Court of was that it requested the applicant to provide an explanation without having first established a convincing case against him which would "call for an explanation" by the defendant thereby justifying the shifting of the burden of proof to the defendant.[495]

18. Established Principles Deduced from the Strasbourg Jurisprudence and its Application to ICTY Practice

The cases presented above have shown that the Strasbourg Court recognizes in certain situations the lack of alternatives to legal presumptions of "guilt" shifting the burden of proof to the defendant. In criminal matters, such a mechanism must remain within certain limits and be applied in the most restrictive manner. It appears that in order for such a legal presumption to be compatible with the presumption of innocence in criminal matters in particular, four core characteristics must be met. The starting point is in all cases the existence of an atypical or peculiar situation characterized by "particular circumstances" to which the defendant has directly or indirectly contributed through negligent (or intentional) behaviour. Moreover, the imposition of the reversed burden of proof must be justified as being both the *ultima ratio* to secure the proper functioning of effective law enforcement and in addition further concern a legal sphere of imminent interest to the general public (e.g. the fight against drug trafficking). The reasoning of shifting the onus of proof being the overall greater accuracy in judgements, it is equally a *conditio sine qua non* that in the overwhelming majority of cases, the burden is construed in a manner to fall on a defendant with "special knowledge" who knows the real situation allowing him or her, at least if innocent and genuinely interested to contribute to the finding of truth, to rebut the burden with relative ease. Where in exceptional cases the burden of proof falls on a person that does not dispose of the "special knowledge"

[494] *Telfner v. Austria*, 33501/96, 20 March 2001, para.14.
[495] *Telfner v. Austria*, 33501/96, 20 March 2001, paras.17-19.

necessary to present the truth, such a defendant will consequently face difficulties rebutting the onus of proof. As a safeguard for such cases, the principle of proportionality between the overwhelming interest of society and the particular consequences faced by the individual warrants *firstly* that such a defendant still has reasonable chance to make his or her innocence plausible and *secondly* that the maximum sentence imposed on a person based on a reverse burden of proof is confined within limits.

18.1. "Particular" Situation Caused by Intentional or Negligent Behaviour of the Defendant

In all the above discussed cases before the ECtHR, the person to whose detriment the burden of proof was subsequently reversed had in one way or another contributed to their situation, either through proven criminal intent (e.g. *Grayson and Barnham, Västberga Taxi Aktiebolag and Vulic v. Sweden*) or proven negligent behaviour (e,g. *Salabiaku*, *Phom Nang* and *Falk*). The particularity of the situation lied in the fact that, the Prosecution was practically deprived of any other means, at least in proportion to the importance of the alleged criminal infractions, to establish the required proof from without this support (see for this aspect also the second criterion).[496]

Regarding the *level of responsibility*, Salabiaku for instance, either knew the real content of the parcel he carried through the Green Customs channel or he was genuinely unaware. If he knew the content of the parcel, his act consisted of a criminal intent. In the alternative, the reproachable negligent behaviour was objectively established once he passed the customs zone after ignoring the warning to verify ownership and content of the parcel. The practice of customs legislation imposes on persons importing goods a special duty of care, namely to ascertain that the customs formalities have been duly

[496] *Salabiaku* can be seen as a primary example of such a difficulty. Charging a person for drug trafficking in a case where a parcel seemingly in nobody's custody crossed the Mediterranean would be highly burdensome. To positively establish the intent to traffic and knowledge of carrier of the illegal substance from a plain level would require a full and lengthy investigation in cooperation with the authorities of the country of origin. Even with such an effort, the chances of success, that is shedding light into the situation, would be everything but predictable.

complied with.[497] In *Pham Hoang*, it had been duly established by the Court that the applicant had, on various occasions, been driving a notorious drug dealer before being captured.[498] Such practice can be considered negligent. In *Falk,* the applicant was negligent at least to the extent that he drove the car himself. A person lending his or her car to a bankrupt person must be prepared to incur the financial damage, notably in cases of road fines or accidents.[499] Further, negligence could be construed where he did not verify whether the person was in possession of a valid driving licence[500] or the person had a record of reckless driving. In *Telfner* the key difference, as will be argued, was that the Austrian court was unable to establish a *prima facie* case against the defendant, notably whether the applicant had been driving or not.

In *Salabiaku,* it was held that it was not *per se* prohibited to "penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence".[501] Nonetheless, by emphasizing in its reasoning that the French courts actively established a number of facts indicating negligence of the applicant instead of simply relying on the strict liability provision of the customs code suggests that the ECtHR requires some form of negligent behaviour to be established.[502] The domestic courts had in all the cases established some sort of *prima facie* case of what had happened

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[497] Typically passengers when entering a customs zone are required to expressly confirm that they are not importing any illegal goods. Moreover, airline representatives as a rule ask whether the respective luggage one wishes to check-in was packed by the passenger himself or herself and whether he or she had left it unattended since then.

[498] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 35.

[499] If such a person is stopped by traffic police and cannot pay the fine, the car of the registered owner may under certain circumstances be confiscated until the payment of the fine.

[500] Not enough details are provided in the Judgement. Under German law, for instance, the person making his or her car available has the obligation to verify whether the person is in possession of a valid driving licence. ("Zwar muss der Fahrzeughalter, der einem anderen ein Kraftfahrzeug zur Führung überlässt, grundsätzlich vorher prüfen, ob dieser im Besitz der erforderlichen Fahrerlaubnis ist. Hierbei sind an seine Sorgfaltspflicht strenge Anforderungen zu stellen„). KG Berlin 3. Strafsenat, (3) 1 Ss 340/05 (86/05), 16 September 2005.

[501] *Salabiaku v. France*, 10519/83, 7 October 1988, para. 27. This dictum was reiterated in *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002, para. 112 ("In respect of the applicants' first contention, the Court notes that Swedish tax surcharges are imposed on objective grounds, that is, without any requirement of intent or negligence on the part of the taxpayer. As the Court has previously held (see the *Salabiaku v. France* judgment cited above, p. 15, § 27), the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.").

[502] Concerning the compatibility of Article 392(1) of the Customs Code with the principles of the Convention the ECtHR reiterated that it was not called upon to to consider such a fact in abstracto. *Salabiaku v. France*, 10519/83, 7 October 1988, para. 30.

and who acted with negligence.[503] This is to a certain extent comparable to what *Hamer* refers to as the gravamen of the offence. He compares the examples of two erroneous murder convictions; one based on a mistake of identity and the other one on a flawed assessment of an invoked insanity defence.[504] While the possible conviction of an entirely innocent person of murder would be unquestionably socially inacceptable, the consequence of a conviction of an insane person for murder but whose sanity was misinterpreted would be comparably less striking both for society as well as for the person facing the consequences. What concerns the second aspect, namely the creation of a situation with *particular circumstances*, all the situations were characterized by the existence of an alternative version of the facts - offered by the defendant - which cannot be fully disproven by the prosecuting organ, despite strong evidence suggesting the culpability of the defendant.

18.2. *Ultima Ratio*: Reverse Burden Indispensable for Effective Law Enforcement

The presumption of innocence requiring both the requirement of an elevated standard of proof to be met by Prosecution or court and the imposition of the burden on the accusing or judging party shall safeguard a deliberate asymmetry implemented to safeguard the rights of an accused. A reverse burden may hence only be considered justified where the Prosecution would find it exceptionally difficult to prove guilt in accordance with the usual standard, whereas an innocent defendant would in the majority of the cases be able to discharge the reverse burden much more easily. In *Grayson,* it would have been disproportionate require the police to examine in detail the origin of the revenues dating back to years of financial transactions, compared to the accused, who merely had to provide a plausible (legitimate) source for the income on a balance of probabilities. It would have been close to impossible for police to fully prove that Falk was indeed driving himself, while he could with relative ease present evidence of an alibi for his whereabouts or named the person that was driving the car. Even the defendants in *Salabiaku* and *Pham Hoang* could have presented plausible arguments in support of their

[503] This was different in the case of Telfner, where the ECtHR reproached the Austrian authorities that they have not created a prima facie case which called for an explanation by the defendant.
[504] David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007 Cambridge Law Journal, p 152.

defence. In all these cases, the defendant was practically the only person capable of contradicting the existing objective evidence and hence was in closer proximity to crucial evidence than the prosecuting organs. This to some extent corresponds to the dictum of English law adapted by the ICTY in Celebici regarding the question of unfitness to stand trial (discussed in Section 11.1) where it was held that the "burden of proof of facts relating to a peculiar knowledge is on the person with such knowledge or one who raises the defence".[505] Therefore it can be seen as justified that a defendant becomes in the interest of justice subject to a special duty to cooperate with law enforcement and exceptionally carries the persuasive burden of proof.

18.3. *Proportionality*: Presumption must Balance what is at Stake for the Society as well as the Defendant

It is a constant dictum of the ECtHR in relation to any presumption in criminal law that its Member States „are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved".[506] Both the existence of an overriding policy and the potentially adverse consequences for a defendant are two essential variables that must meet the proportionality test. The risk of a threat to a core field of the public order is a pre-requisite for any imposition of a reverse burden on the defendant. Cognizant that chances of wrongful convictions are thereby increased, the lawmaker must mitigate the magnitude of the injustice potentially suffered by (innocent) individuals for the sacrifice of society.

a) Level of Threat to Society?

The argument of threat to a core field of public order, safety or health is certainly established in respect to the consumption of illegal drugs, but also regarding the operations of customs systems and the enforcement of traffic codes. Already in 1969, an English Court called upon to decide whether travellers caught with drugs claiming that they had been placed in their belongings without their knowledge, held that imposing an

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[505] Ibid. para. 1172.
[506] *Janosevic v. Sweden*, 34619/97 , 21 May 2003, para. 100.

obligation on the Prosecution to disprove the knowledge of the traveller would turn the criminal code into a "drug peddlers' charter".[507] In *Pham Hoang,* the national Court referred to drug consumption as "a scourge" which is "spreading alarmingly" and held that the provisions of the customs code were an appropriate response.[508]

A customs system can only operate effectively if the offender faces a realistic chance of not only being detected but also facing prosecution in relation to this illicit act. Where the customs authorities are faced for every case in which an illicit good is detected with the burden of opening a full-scale investigation as to the effective ownership of the suitcase/bag, its work would be unduly burdened. What is at stake if a customs regime is working ineffectively is nothing less than the protection of a country or customs union from the import of dangerous and illicit substances, such as narcotics, weapons or even dangerous substances. In *Västberga Taxi Aktiebolag and Vulic*, the ECtHR held that a "toothless" tax system could not guarantee the well-functioning of a state.[509] In *Falk*, the effective monitoring of road safety is at stake, as every road offender who is not stopped could invoke another person as driver.[510] Furthermore, the burden of the police obliged to investigate the actual perpetrator of each traffic offence would be onerous. *Hamer* considers such "pragmatic proof arguments" justified in regulatory offences under the condition that the stakes are moderate and they serve to decisively assist a "resource-strapped" regulator.[511] At what point the "stakes" become disproportionate will be discussed below.

b) Consequences faced by the Perpetrator?

Salabiaku was convicted to a fine of approximately 100.000 French Francs (roughly at the time the equivalent of EUR 15.000), and *Pham* (jointly with four other perpetrators)

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[507] *Warner v. Metropolitan Police Commissioner [*1969] 2 A.C. 256 per Lord Guest; He Kaw The v. The Queen [1985] 157 C.L.R. 523, 562 per Wilson J. diss.; Lambert [2001] UKHL 37, [2002] 2 A.C 545 at [871], [192], [194] per Lord Hutton diss.; *Sweet v. Parsley* [1970] A.C. 132, 157 per Lord Pearce. As cited in Hamer, p. 163.
[508] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para. 16.
[509] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002, para. 115.
[510] Not to mention that this would create an unintended incentive to drive away from enforcement in the aftermath of a traffic violation.
[511] David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007Cambridge Law Journal, 159.

received a fine of several million Francs.[512] This seems certainly necessary in view of the vast profit spans in drug trafficking. But for the same reason, pecuniary fines might not always be deterring enough, rendering prison sentences unavoidable. The length of a prison sentence, particularly where society tacitly accepted the increase of the risk of mistaken convictions by imposing reverse burdens, must be limited so that those in risk of being convicted on an erroneous verdict do not suffer in a disproportional manner. The cases discussed before the ECtHR dealt with "quasi-criminal" offences (customs, tax, or road offences) which typically exclude *a priori* long prison sentences. In *Salabiaku*, the defendant was in first instance convicted to a two years prison sentence, but acquitted on appeal before reaching the ECtHR. In *Grayson and Barnham*, the presumption was a factor in the determination of the scale of the offences, which certainly had an impact on the sentence. In English law, reverse burdens were seen to contravene the presumption of innocence with regard to serious drug offences punishable with life imprisonment[513] or membership in a terrorist organization punishable with ten years imprisonment[514], while they were upheld in less serious cases, such as drunk driving[515] or bootlegging CD's.[516] As to the maximum sentences, it will be argued that prison sentences of up to six months, and in exceptional circumstances of even one year, will still be considered as compatible with the ECHR principles.[517] When assessing the gravity of the crime, the "social stigma" of a certain offence/ crime must also be among the factors to be considered apart from the amount of the fine or prison sentence. As such, a criminal record or a professional ban as a consequence of a conviction could render an otherwise modest sentence disproportional.[518] In essence, the sentence must be proportional both in absolute terms and also to the level of threat to society it is seen essential to combat. Concerning proportionality, drug trafficking and grave customs offences are on the upper echelon, whereas tax and administrative offences should have a much more restricted margin.

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[512] *Pham Hoang v. France,* No. 13191/87, 25 September 1992, para.12.
[513] [2001] UKHL 37, [2002] 2 A.C. 545, at [20], per Lord Steyn.
[514] [2004] UKHL, 43 [2006] A.C. 264 at [51] per Lord Binghham
[515] Sheldrake v. DPP [2004] RTR 240
[516] Johnstone [2003] UKHL 28 [2003] 1 W.L.R 1736.
[517] This is derived not least from the fact that the non-payment of fines may be equally converted in prison sentences.
[518] David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act", 66/1, 2007Cambridge Law Journal, p 151.

18.4. Presumption must be Realistically Rebuttable

In all the above-mentioned cases, the burden of proof weighing on the persons was not insurmountable. *Salabiaku* could have invoked *force majeure*, namely that somebody else had manipulated the content of his parcel or a similar scenario. For *Grayson and Barnham*, proving the origin of the money from any other source would have been sufficient. *Falk* similarly was provided with the opportunity to invoke *inter alia* that another person was using his car without his consent.[519] It is of the essence that defence rights must not cease to exist insofar as the person presumed guilty must have – in case of his or her innocence – realistic chances to rebut the presumption. The ECtHR was cognizant that there might be cases, such as in *Salabiaku*, where it will be particularly difficult for the defendant to rebut such a presumption. Two safeguards exist: firstly, in cases (of reverse burden of proof) some form of negligent behaviour was required for a conviction; and secondly, contrary to the Prosecution, the defendant was only under the obligation to persuade the Chamber on the lower standard of the balance of probabilities.

19. Application of the Developed Criteria to the ICTY Practice

In *Krajisnik*, upon rejecting a motion for provisional release, the Trial Chamber held that placing the burden of proof upon the defendant was not in breach of international customary law in circumstances where the accused is charged with serious crimes. It observed that the Tribunal had no enforcement mechanism and that release carried the potential of putting witnesses at risk. These factors warranted to "lend further weight to the placing of the burden of proof upon the accused".[520] In the following, the above developed principles will be applied by analogy to the release mechanism at the *ad hoc* Tribunals.

[519] *Falk v. The Netherlands*, No. 66273/01, 19 October 2004. Section B.

[520] *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 13.

19.1. Intentional or Negligent Behaviour of the Defendant Resulting in a Situation with *Particular Circumstances*

The *particularity of the pre-trial detention regime* before the ICTY as opposed to a domestic system of remand detention lies in the nature of the crimes as well as in the fact that the defendants are tried far away not only from the venues where the crimes occurred and where the accused normally reside, but that the Tribunal does not exercise any legal or factual control over these territories. This fact touches upon at least three important aspects: *arrest*, *credibility of the court* and the *impact on the affected area.*

i) Difficulties of Arrests before the ICTY

Voluntary surrenders were the exception at the *ad hoc* Tribunals. In most cases, arrests were lengthy processes requiring diplomatic skills, financial incentive or some other form of leverage to ensure cooperation by the affected States to surrender their nationals (sometimes even perceived heroes).[521] In some cases, risky operations were required to secure arrests, and in at least one case, armed resistance by an accused even led to casualties.[522] The at times hostile climate in some of the key affected areas made re-arrests of defendants less likely.

ii) Issue of Credibility of the *ad hoc* Tribunals

ICL is still a nascent discipline and despite all efforts and partial successes, a heavily criticized area. The ICTY, which has been particularly criticized in relation to its long and costly trials (e.g. in 2004 the costs of the two ad hoc Tribunals accounted for about 15% of the total UN budget)[523] faced pressure from the international community, who

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521 Former President of the FRY Milošević was transferred to The Hague following the promises of considerable foreign aid by the United States. See Y. Beigbeder, International Criminal Tribunals: Justice and Politics, (Palgrave Macmillan 2011), p.61. The EU membership negotiations with Croatia only entered into the final phase (immediately) following the arrest of Ante Gotovina. The arrests and transfer to the ICTY of Mladic and Hadžić were made a condition for EU membership talks with Serbia. See Sanja Kutnjak and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford University Press 2011), p.117.

522 During one such operation in July 1997, one indicted, Simo Drljača, the chief of police of Prijedor, was shot resisting his arrest. See Hagan, *Justice in the Balkans: Prosecuting War crimes in the Hague Tribunal* (University of Chicago Press 2003) p. 108.

523 Yves Beigbeder, *International Criminal Tribunals: Justice and Politics,* (Palgrave Macmillan 2011), p.82 (the annual budget of both courts for 2004 was about a quarter of a billion US dollars, the courts at its

from early 2000 propagated the downsizing and fading out of the Tribunal.[524] To make matters worse, Karadžić and Mladić two of the most notorious accused remained at large until 2008 and 2011 respectively. In this political climate, the ICTY understandably preferred to avoid at all costs any controversial headlines, such as the absconding of a person arrested and subsequently released pending the pre-trial phase.[525]

iii) Impact on the affected areas

Apart from the risk posed to witnesses and victims which is an explicit criterion of Rule 65 setting the conditions for provisional release, the impact on the affected region is also a factor to be taken into account. The return of an accused to his native village or neighbourhood may indeed be a highly intimidating factor to potential witnesses. In *Haradinaj*, it was credibly argued by the Prosecution that even where it was assured that he would not pose a direct threat to witnesses, his "mere presence may have a "chilling effect" on whether witnesses would testify.[526] In conclusion, considering the release of a person suspected of international crimes poses a variety of risks which create a form of particular circumstances.

With regard to the *contribution of the defendant* to this situation by at *least negligent behaviour*, it is worth recalling that prior to any arrest and detention of an accused, the Prosecution has to issue an indictment which must be confirmed by at least one ICTY

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peak employed more than 2000 people). In defence Beigbeder compares the costs of such a trial with a complex Mafia case or that of the Oklahoma bomber Timothy Mc Veigh and comes to the result that the money spent was comparable.

[524] Completion Strategy: The three-phase plan was endorsed by the UN Security Council in resolutions 1503 and 1534. It envisioned completion of investigations by the end of 2004, completion of all first instance trials by the end of 2008, and completion of all work in 2010. (Source ICTY webpage, http://www.icty.org/en/about/tribunal/completion-strategy).

[525] Yves Beigbeder, *International Criminal Tribunals: Justice and Politics*, (Palgrave Macmillan 2011), p.73 ("The United States was particularly insistent in asking the Tribunals for an "end-game", bolstering its demands with allegations of excessive costs, mismanagement and even corruption. The United Kingdom and France supported the United States. The Europeans were then focusing on the newly created ICC and seemed to lose interest in the "costly and ineffective" tribunals").

[526] *Prosecutor v. Haradinaj, Balaj and Brahimaj*, ICTY-IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 47. Although the Appeals Chamber did ultimately not recognize such "abstract" risks without any concrete evidence presented as insufficient to prevent the release of the applicant. See *Prosecutor v. Haradinaj, Balaj and Brahimaj*, ICTY-IT-04-84-AR65.1, Appeals Chamber Decision on Ramush Haradinaj's Modified Provisional release, 10 March 2006,("If it were, it is doubtful that provisional release would ever be granted"), para. 46.

Judge and which requires reasonable suspicion in the form of a *prima facie* case against the defendant[527]. The fact that the ICTY procedure requires an indictment as a pre-requisite for the issuance of an arrest warrant can be seen to protect the interest of a defendant and is a major difference from ICC proceedings or most domestic criminal proceedings, where defendants are indicted only at a later stage.[528] Confusion with regard to identity, as in *Telfner*, is excluded, as the arresting states have the duty to conduct identity verifications.[529] The other reproach in *Telfner* that the (Austrian) prosecuting organs have not established a *prima facie* case which may call for an explanation by the respondent[530] does equally not apply to the ICTY mechanism in view of the described procedure. It will hence be argued that the high threshold of an indictment by an international criminal court justifies the claim that in the vast majority of cases, an accused person was – either due to his or her rank or otherwise – to some extent involved (without deducing any presumption of criminal guilt) in the crimes that were being committed. It is admitted that deducing that such actors have negligently contributed to such acts can be construed as equally tipping to a certain degree towards presuming guilt. At the same time, it is not unreasonable to state that where there have been [alleged] atrocities committed, those in leading positions – and exclusively those should be tried before international criminal courts – are somewhat presumed to be the authors of those crimes. While they get the benefit of being in powerful positions they also face the burden attached from being in such leadership positions. By being accused of having committed the "most serious crimes of mankind", the defendants through their acts either effectively contributed to the creation of the *ad hoc* Tribunal or (those accused of having committed crimes after its creation) acted with the knowledge of the possibility of being tried by an international tribunal.

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[527] Rule 47 ICTY Rules of Procedure and Evidence; particularly (A), (B) and (G). Version following Rev. 50, 10 July 2015.

[528] Article 61 of the ICC Rome Statute: Confirmation of Charges before Trial. In *Prosecutor v. Charles Blé Goudé* for instance the defendant had his first apperance following his arrest on 27 March 2014 and the charges against him were confirmed on 11 December 2014, i.e. around eight months after his arrest.

[529] For Austria, see Article 16(2) of the Austrian Federal Law on the Cooperation with the Tribunal. ("Should significant doubts arise as to whether the arrested person and the person sought are one and the same, appropriate enquiries shall be made or the International Tribunal shall be requested to submit additional material.").

[530] *Telfner v. Austria*, 33501/96, 20 March 2001, paras.17-19.

19.2. *Proportionality*: Presumption must Balance what is at Stake for the Society as well as for the Defendant

The stakes are high in relation to suspects of international crimes. In the worst case, witnesses or victims could be endangered, even killed while the accused could escape. The latter would not only prevent justice from being rendered in respect of the alleged crimes, what is just as important is that the entire Tribunal would arguably suffer a substantial loss of credibility and with it, the entire system of international criminal justice.

Importantly, the presumption is not used in establishing the guilt of defendants. Quite to the contrary, their guilt must be proved beyond reasonable doubt, a fact that led to a number of acquittals. Instead, the presumption is used against the right to be released from detention, which no matter how important is not an absolute right. Importantly, the inconvenience of time spent in (pre-trial) detention is mitigated by the fact that in case of conviction, such time is fully deducted from the sentence in case of a subsequent conviction.[531]

19.3. Presumption must be Realistically Rebuttable

At least following the removal of the exceptional circumstance criterion in late 1999 and the easing of relations between the Tribunal and states in the affected region, a large number of defendants at the ICTY could establish the required conditions despite the reversed onus of proof. The fact that the reversed burden of proof was not the single decisive factor preventing provisional or interim release is demonstrated in ICC proceedings, where despite the prohibition of any reverse burden detrimental to the accused, no defendant accused of crimes under the Rome Statute was from 2002 until early 2016 granted interim release following an initial arrest warrant.

[531] See ICTY Rule 101 (D) Rules of Procedure; Article 78(2) ICC Rome Statute ("the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court [..]"). Time spent on provisional release is not being deducted.

19.4. Ultima Ratio: Reverse Burden Indispensable for Effective Law Enforcement

Perhaps most controversial is the question whether the shifting of the burden of proof was indeed necessary to transfer an otherwise unsolvable burden from the Prosecution to the defendant. The main requirements to be fulfilled, the danger of absconding and the risk posed to witnesses and victims, will be assessed separately.

19.4.1. Assessment of Risk of Absconding under Domestic and International Criminal Proceedings

In his dissenting opinion in *W. v. Switzerland*, Judge Pettiti found clear words to describe the reverse burden of proof regarding the risk of escape: "One cannot indeed reverse the burden of proof and require the detainee to prove that he will not abscond, a negative which is virtually impossible to prove. That would be to add a further exception to Article 5 [ECHR], as only imprisonment removes all danger of absconding".[532] It is subject to examination whether there are any substantial distinctions between the establishment of detention grounds in typical domestic criminal proceedings and such before international criminal courts? If so, a reverse onus might be justified by the "special conditions" international criminal courts operate under.

The most important reason for detention both in domestic and international proceedings is the risk that the suspect seeks to evade justice by absconding.[533] When deciding upon the need for detention in domestic proceedings, the Judge particularly examines the overall level of integration of the suspect within society, such as family ties or the financial situation of the defendant and weighs this against the accused's interest in evading justice. Such information will, in domestic trials, be available to the Judge through information provided by public authorities and/or registers. In international proceedings, the situation is naturally different; the accused being tried outside of his home country will only exceptionally have any ties with the host country, information

[532] *W. v. Switzerland*, 14379/88, 26 January 1993, dissenting opinion.

[533] For the domestic practice see the statistic for Germany, where in the year 2006 risk of escape was invoked in 93.1 % of all cases, compared to risk of collusion (Verdunkelungsgefahr) in 5,9%, and risk of re-commission of crimes in 9.2% of the cases. See Country Report, An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, JLS/D3/2007/01, page 17

which the court in cooperation with the host country could obtain and consider. It would be unreasonable to burden the Court, in addition to its core work, also with investigations concerning the family situation of applicants for provisional release, the number and age of existing children, his or her living situation, or existing assets. Hence, for matters of practicability it seems inevitable that the accused first establishes the facts that, in his or her view, may mitigate the risk of absconding before the Court considers the most relevant points and conducts its own research to verify the presented claims. Such a special duty to "cooperate" laid on the defendants cannot be held unreasonable. The same holds true in respect of personal guarantees, which necessarily must come from the accused. In the case of *Šešelj*, the Trial Chamber *proprio motu* established that the conditions for provisional release were met, but in view of the accused's refusal to provide personal guarantees, the initial decision to release the accused was later revoked.[534] Concerning governmental guarantees, it can be equally argued that the accused, being in contact with the consular section of his home country, can more easily evaluate whether his home country is willing to issue guarantees with a view of effectively monitoring his presence during release and securing his return to The Hague. This corresponds to the dictum in *Grayson and Barnham* as to the nearer proximity of the defendant to the disputed facts; the true source of origin of the money had justified that the accused should in this particular situation be faced with a heavier burden of proof than the Prosecution.

While the argument that the realities of the situation before the ICTY did at least to a certain degree warrant for the defendant to demonstrate the fact that he or she will not escape once released, the ICTY Trial Chambers did with regards to the risk posed to victims and witnesses deviate from the explicit wording of Rule 65(B), placing at least a partial burden of proof on the Prosecution.

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[534] *Prosecutor v. Šešelj,* ICTY-IT-03-67-AR65.1, Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015, para. 17. Decision to Release Šešelj: *Prosecutor v. Šešelj*, ICTY-IT-03-67-T, Order on the Provisional Release of the Accused Proprio Motu, 6 November 2014, p. 4.

19.4.2. Risk posed to Witnesses and Victims: Re-Reversal of the Burden of Proof?

Contrary to the risk of absconding, the danger posed to witnesses and victims requires background information typically available to the Prosecution, who is in charge of the overall case management. On the occasion of a motion for provisional release presented by *Pavkovic*, the Trial Chamber first noted a variety of "practical problems posed by the format of Rule 65".[535] The Chamber argued that the accused could not meaningfully assert that he will not pose a threat or danger to a victim in the absence of concrete indications of such danger by the Prosecution. The Chamber further argued that it would prefer that the onus be on the Prosecution to demonstrate that the accused would not appear for trial and pose a danger.[536] If an accused convincingly argues that he will not harm any victims or witnesses while the Prosecution does not indicate its own evidence that witnesses A, B and C are particularly endangered due to facts X and Y, the Trial Chamber, who typically does not conduct its own investigation, has to rely upon the material presented by the parties in accordance of the general adversarial nature of provisional release hearings. In such case, the only factor to be considered is whether the assertion of the accused is trustworthy; the situation of witness A, B or C would not be subject of debate. At least with a view of the danger to witnesses, a balanced approach seems to have been reached through the jurisprudence, namely that after the accused asserts that he poses no risk, the burden of proof shifts to the Prosecution to demonstrate that such a risk indeed exists.[537] In *Ljubičić*, the Trial Chamber held that the Prosecution did not sufficiently support its asserted claims with evidence. The Chamber held that no concrete danger could be identified and that the assessment under Rule 65 could not be done only in *abstracto.*[538] This was confirmed in *Stanisić*, where the Appeals Chamber posited that the "Prosecution has failed to provide any evidence showing that the accused would pose a concrete risk of harm to victims and witnesses upon release. No

[535] *Prosecutor v. Milutinović et al,* ICTY-IT-05-87-PT, Second Decision on Nebojsa Pavković 's Provisional Release, 18 November 2005, para.10.
[536] *Prosecutor v. Milutinović et al,* ICTY-IT-05-87-PT, Second Decision on Nebojsa Pavković 's Provisional Release, 18 November 2005, para.12.
[537] F. Gaynor, "Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia" in Jose Doria et al (eds.), *The Legal Regime of the International Criminal Court: Essays in the Honour of Professor Igor Blishchenko*,Nijhoff (2009) p. 196.
[538] *Prosecutor v. Ljubičić*, ICTY-IT-00-41-PT, Decision on the Second Application for Provisional Release, 26 July 2005, para.29.

information has been provided showing that he has influenced or threatened them in the past or intends to do so in the future".[539] Moreover, an Appeals Chamber in *Haradinaj* found that although *stricto sensu* the burden was on the defendant to demonstrate that he would not pose a risk to witnesses, "in the past the Appeals Chamber has demanded that the Prosecution present at least some evidence that the Accused poses a danger, at which stage the Burden is on the Defence to refute it".[540] In summary, the burden of proof as interpreted by jurisprudence is first on the accused to demonstrate *prima facie* that he will not pose any risk to witnesses or victims. In a second step, the Prosecution must indicate and provide evidence as to why the particular accused is dangerous in the particular situation under the given circumstances. It is against this evidence that the accused has the burden to demonstrate the contrary, the standard of proof required lying somewhere between the balance of probabilities (51:49) and beyond reasonable doubt.[541]

19.5. Interim Conclusion

In *Cf. McIntosh v. H.M. Advocate*, the English Court developed the following scheme when assessing whether the presumption of innocence was confined within reasonable limits: *"(1) What do the Prosecution have to prove in order to transfer the onus to the defence? (2) Does the burden imposed on the accused relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or to which he has ready access? (3) What is the nature of the threat faced by society which the provision is designed to combat?".*[542] The principles applied in the English case widely correspond to what was independently deduced from the leading ECHR cases examined above. The Prosecution must in any event at a minimum establish

[539] *Prosecutor v. M.Stanisić*, ICTY-IT-04-79-AR65.1, Decision on the Prosecution's Interlocutory Appeal of Mico Stanisić's Provisional Release, Appeals Chamber, 17 October 2005, para.27 as cited in F. Gaynor (2009), p. 196.

[540] See *Prosecutor v. Haradinaj, Balaj and Brahimaj*, ICTY-IT-04-84-AR65.1, Appeals Chamber Decision on Ramush Haradinaj's Modified Provisional release, 10 March 2006, para. 41.

[541] *Prosecutor v. Simatović,* ICTY-IT-03-69-PT, 28.07.2004, para.32; *Prosecutor* v. *Ljubic□ić,* ICTY-IT-00-41-PT, 26.07.2005, para.29. Note however that where Trial Chambers have gone so far as to transfer the onus to the prosecution their decisions have been overturned on appeal on that basis: *Prosecutor v. Pavković,* IT-05-87-AR65.1, 1 November 2005, para. 11; *Prosecutor* v. *Prlić,* ICTY-IT-04-74-AR65.1, AR65.2, AR65.3, para.27.

[542] *Cf.McIntosh v. H.M. Advocate* [2003] 1 A.C. 1078, PC, where Lord Hope emphasised (at [46]) as cited in John Frederik Archbold, *Criminal Pleading, Evidence and Practice* 16-106, (Sweet &Maxwell 2012).

that the person incurring the burden of proof has contributed to a certain situation by acting either intentionally or at least negligently (see 18.1. above). The second criterion above relates to the special duty of cooperation of an accused person once it is reasonably to be expected that a certain information is in closer proximity ("peculiar knowledge") to him or her than to the prosecuting organs (see 18.2.). The threat to society was seen as a pre-condition for considering the imposition of a burden of proof upon the defendant (18.3.). Not explicitly mentioned in the English law case, as opposed to the above developed ECtHR scheme, is the fact an innocent defendant must be in a position to realistically rebut any such presumption. (18.4).

As it is undisputed that the imposition of a reverse burden of proof is a deviation from the general rule, it is not surprising that particular circumstances were required in order to justify such a practice. Before the ICTY, the exceptionality of the situation was tied to the foundation of the Tribunal and its heavy reliance on Member State cooperation. The other factors were the public interest in the functioning of the system on the one hand and as a safeguard for the defendant certain mitigating factors such as the continuance of defence rights, the possibility to realistically rebut the presumption and a limitation as to the gravity of the consequences faced in exchange for being denied an ordinary prosecution case. The illustration was made in this Chapter that the four essential "difficulties" that were shared by the legislators and prosecution bodies in the cases in which the ECtHR found the imposition of a reverse burden of proof to be compatible with the presumption of innocence applied to a large degree also to the pre-trial mechanism in place at the ICTY. It can therefore be said that the pre-trial detention mechanism according to Rule 65(B) was not a violation of the presumption of innocence as expressed by the leading human rights court in the world, the ECtHR.

20. The ICC Rome Statute and the Right of the Defendant not to have imposed any Reversal of the Burden of Proof

In the Rome Statute, Article 67 provides that the accused has the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal"[543]. This principle applies to any interim release decision, regardless of whether the decision is triggered by the obligation to periodically review detention in accordance with Article 60(3) Rome Statute or whether the decision is in response to a motion for interim release by the defendant invoking changed circumstances in accordance with Article 60(2) Rome Statute. In the past, concerns were raised insofar that in practice, however, and despite the wording after an initial decision justifying an arrest warrant the onus to prove changed circumstances shifted to the defendant. Notably, *Schabas* in his ICC Commentary (first edition, 2010), expressed concerns as to whether in Article 60(2) or 60(3) motions, in cases where no evidence of changed circumstances is produced, "there is a presumption in favour of the *status quo*, which means the burden falls to the detained to produce new evidence challenging the earlier ruling".[544] This would correspond to some form of reverse burden of proof. This argument will be assessed in the light of recent ICC jurisprudence.

20.1. Burden on the Prosecution in relation to the Initial Arrest Warrant and the Periodic Review of Detention by the Pre-Trial Chamber under Article 60(3)

It is worth recalling that an accused can appear before the ICC in two ways, either voluntarily based on a summons to appear or, if the conclusion is reached that the accused would decide not to appear, following the issuance of an arrest warrant. The Trial Chamber must issue such warrant for arrest after having examined the application and the evidence as well as other information submitted by the Prosecutor and if it is satisfied that an arrest of the person appears necessary in accordance with the requirements of Article 58(1)(b). Likewise, the Prosecutor may submit an application requesting the issuance of a summons to appear in accordance with Article 58(7) Rome

[543] Article 67(1)(i) Rome Statute.

[544] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 724 and 727.

Statute or for both an arrest warrant and a summons cumulatively.[545] In either case, the burden of proof must be on the Prosecution, because the defendant is at that stage typically unaware of the proceedings against him, not least where – as is often the case – the indictment is sealed.

Following an arrest and detention, the Trial Chamber is required to periodically, at latest every 120 days, review *proprio motu* whether the conditions initially warranting against (interim) release are still applicable or whether changed circumstances allow for release.[546] The precise scope of the periodic review was for a long time uncertain and although it gradually developed in the jurisprudence, its practical consequences appear to remain blurred. The *crux* was whether the Prosecution and ultimately the Trial Chamber would meet their obligation by simply discarding the "alleged new circumstances raised by the detained person"[547] (while at the same time being able to otherwise rely on prior findings which were not subject to challenge) or whether the defendant was entitled to an entirely new assessment of the defendant's situation *ab initio*?

The Appeals Chamber in *Bemba,* in November 2010, was confronted with this question. Bemba had appealed on the ground that he was denied a *de novo* examination and assessment of the facts before ruling on the continued detention, by explicitly invoking Article 67 of the Rome Statute.[548] This judgement clarified two essential points. Firstly, the decision widened the reviewing obligation of the Prosecution and Trial Chamber insofar that it confirmed that the role of the defendant in the review process was a passive one. While the Prosecution was obliged for each review to "make submissions as to

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545 *Prosecutor v. Ahmed Muhammand Harun and Ali Abd-al-Rahman*, 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

546 Rule 118 RPE; The ECtHR has found that the review of the situation of detention of prisoners on remand demands for short intervals (*Bezicheri v. Italy*). Periods of every six months were deemed compliant with Article 5(4) ECHR. Jochen Frowein & Wolfgang Peukert, *Europäische Menschenrechtskonvention* (Engel Verlag 2009), p. 129.

547 *Prosecutor v. Bemba Gombo*, Appeals Chamber ICC-01/05-01/08 OA 4, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", 19 November 2010, para.40.

548 *Prosecutor v. Bemba*, ICC-01/05-01/08 OA 4, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 9 November 2010, para. 23,24.

whether there has been any change in the circumstances that previously justified detention" and "bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release"[549], the defendant could or could not make submissions. The Chamber in reaching its decision shall "weigh the Prosecutor's submissions against the submissions, if any, of the detained person. The Chamber must also consider any other information that has a bearing on the subject. Finally, in its decision on review, the Chamber must clearly set out reasons for its findings".[550] Secondly, the Prosecution and Chamber would not have to enter into an *ab initio* assessment and repeat its prior findings, but instead focus its substantiated assessment on whether in view of all the new facts and information received (through Defence, Prosection or *proprio motu*) the conditions for detention continue to be met.[551]

Five years later, the decision in *Ongwen* from November 2015 further clarified the duty of the Trial Chamber in this respect. It reiterated that the burden of proof was on the Prosecutor and that a Trial Chamber had the obligation to determine anew into the existence of facts justifying detention.[552] The fact that the burden of proof also factually rests on the Prosecutor can be derived from the same decision, where the Single Judge explained that he did not enter into an assessment as to the existence of the third detention ground (risk of re-commission of crimes) due to the fact that the Prosecutor, who bears the burden of proof despite the decision being triggered by the Defence, did not argue that this condition was met.[553]

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[549] *Prosecutor v. Bemba Gombo*, Appeals Chamber ICC-01/05-01/08 OA 4, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", 19 November 2010, para.51.

[550] Ibid, para. 52.

[551] Ibid, para. 53.

[552] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para 7. Citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07 OA 4, Judgement In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision if Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para. 10. The Single Judge, however, argued that this referred exclusively to the existence of detention grounds and not to the finding on reasonable suspicion. *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, paras. 7,11, 13.

[553] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para. 14.

What, if any, was the impact of the above discussed dicta in *Bemba* and *Ongwen* on the concerns invoked by Schabas earlier in 2010 that in cases where no evidence was presented, a presumption of the *status quo*, meaning detention, would exist? For illustrating purposes, one may assume a simple scenario. Defendant A from country B was arrested due to risk of not appearing at trial and obstruction of the investigation. The arrest warrant was based on the fact that country B was not offering the necessary guarantees to re-arrest A on the one hand and that a crucial witness X was yet to testify. On the occasion of a periodic review on 1 January 2017, this was widely held to be still the case. In March 2017, country B following a regime change begins cooperating with the ICC and in April 2017 the crucial witness X finished testimony. On the occasion of the next periodic review on 1 May 2017, these issues are discussed. Even where the defence decides not to make any submission, the Prosecution is obliged – as held in the *Bemba Appeals Chamber* – to report "any change in the circumstances that justified detention" and "bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release".[554] The Chamber in its substantiated decision must duly consider those facts and also any other information it receives. The fact that the Prosecution has the duty to present any new evidence practically excludes the risk of non-production of evidence. The decision in *Ongwen* not to enter into an assessment (i.e. striking out) of the detention ground of continuing commission of the crime due to the fact that the Prosecutor, who has the burden of proof, did not present any evidence, confirms the practical adherence to such an approach. Hypothetically speaking, where the Prosecutor decides not to present any evidence for any of the three detention grounds, the defendant would be released.

20.2. Burden of Proof in Applications for Interim Release *proprio motu* of the Defendant under Article 60(2)

Applications under Article 60(2) for interim release can theoretically be introduced whenever the applicant considers that changed circumstances warrant his or her release. Such a procedure – while not reversing the burden of proof – may objectively warrant some safeguards to avoid overburdening the workload of the Pre-Trial Chamber.

[554] *Prosecutor v. Bemba*, ICC-01/05-01/08 OA 4, para. 51.

Allowing a Chamber to summarily dismiss the review application was upheld with a view to avoid the Chamber from having to repeatedly review and repeat the dictum of an earlier ruling on release once it has been determined that there are no changed circumstances. In other words, the Chamber "is not required to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions".[555] For example, in the fifth decision on *Ntanganda's* provisional release, the Pre-Trial Chamber noted that "none of the parties and participants [had] submitted that there were changed circumstances warranting a modification of the Fourth Interim Release Decision", and that "the Chamber is not aware of any changed circumstances that have transpired which would now render necessary a modification of its prior ruling".[556] Accordingly, the Chamber was able to swiftly rule that the applicant was to remain in detention, without further analysis of his case. This ability to summarily dismiss an application for release is regarded as an "appropriate safeguard to avoid frivolous or repeated applications being made on this issue by either side".[557] This dictum was upheld by the Pre-Trial Chamber in *Ongwen* as being the approach set by the Appeals Chamber in *L. Gbagbo*, however, such approach was deemed "at best negating the *ex-novo* character of the determination under Article 60(2) Rome Statute."[558] Conversely, if the Chamber determines that changed circumstances exist, it will then need to consider the impact of those changes on the factors that formed the basis for the decision to keep the person in detention.[559] This requires an assessment under Article

[555] *Prosecutor v. Gbagbo*, ICC-02/11-01/11-808, Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, 11 March 2015, para. 24.
[556] *Prosectuor v. Ntaganda*, ICC-01/04-02/06-477, Fifth decision on Mr Ntaganda's interim release, 26 February 2015, para. 13.
[557] Karim Khan, "Article 60: Initial proceedings before the Court", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (C.H.Beck 2008), p. 1165
[558] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the "Defence Request for Interim Release of Dominic Ongwen", 27 November 2015, para 11 with critical remarks of Judge Tarfusser ("this approach, at best negating the *ex novo* character of the determination under Article 60(2) of the Statute with respect to the conditions under Article 58(1)(a) of the Statute, has nonetheless been validated by the Appeals Chamber") citing *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11, Judgement on the appeal of Mr. [..] against the decision of Pre-Trial Chamber I of 13 July 2012, 26 October 2012.
[559] *Prosectuor v. Ntaganda*, ICC-01/04-02/06-477, Fifth decision on Mr Ntaganda's interim release, 26 February 2015, para. 10.

60(4) or Article 60(2), with the latter involving an assessment against the criteria outlined in Article 58(1).[560]

20.3. Concluding Remarks on the Compatibility of the ICC Detention Regime with Article 67 of the Rome Statute

The most recent ICC jurisprudence duly considers Article 67 of the Rome Statute and does not reverse the burden to the detriment of a defendant seeking release. It was in fact never invoked that this had happened with regards to the initial review of the detention grounds justifying the issuance of an arrest warrant. Practice confirms that such first reviews entail lengthy and detailed documents. Concerning the periodic review decisions necessary to extend the title for detention, it is to be differentiated. Where the assessment is due to the obligation of the Pre-Trial Chamber to periodically review the necessity of detention (Article 60(3)), the Prosecution has the burden of proof and must actively demonstrate the lack of changed circumstances regarding every aspect the detention of the defendant is based upon. The review shall encompass any other relevant information related to detention or release.[561] Conversely, where the decision is triggered following a motion by a defendant claiming changed circumstances (Article 60(2)), it is considered sufficient for the Trial Chamber to actively address and decide upon the explicitly invoked changed circumstances. What concerns the facts not being explicitly addressed by the defendant seeking release, a *de novo* assessment of such facts would in this situation be overly burdensome and as it would *de facto* amount to a further *proprio motu* review, in contrast to the spirit of the Statute and Rules warranting such review every 120 days.

Interim Conclusion: The Compatibility of the Pre-Trial Detention Systems of the ICTY and the ICC with the Main Principles Emanating from the Presumption of Innocence

From the three main prerogatives stemming from the respect for the presumption of innocence, both the UN *ad-hoc* Tribunals and the ICC are fully in compliance with

[560] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 724

[561] *Prosecutor v. Bemba*, ICC-01/05-01/08 OA 4, para. 51.

regards to the increased standard of proof to be applied in the determination of guilt in criminal matters as well as what concerns the overall treatment of the accused in accordance with the presumption of innocence. The third prerogative, the right not to have the burden of proof reversed to the detriment of a defendant, was more uncertain and therefore required an in-depth assessment.

As demonstrated, at least in proceedings before the *ad hoc* Tribunals, the applicant seeking provisional release faces the burden to adduce evidence demonstrating that he or she will not pose any danger to witnesses or victims and will, if released, appear for trial. This is an unusual onus in criminal matters, where typically the Prosecution has to establish the facts and evidence whereas the defendant is primarily in the responding position (not least as expressed in the right to remain silent). It has been demonstrated that a reversal of the onus of proof in criminal matters is not *per se* incompatible with the presumption of innocence. Human rights case law in principle recognizes the lack of alternatives to presumptions of law or fact in certain circumstances.[562] Most importantly, the presumption must be justified by a recognized important aim of general interest and the consequence of the presumption, if unable to rebut, must be proportionate thereto. Importantly, the presumption must never be absolute; instead the defendant must have a realistic chance to rebut the presumption. A strict liability not requiring any proof of intent or negligence would unduly infringe on the rights of the person standing trial.

Applying these criteria to the practice of the ICTY, it is argued that the defence rights of the person seeking release certainly do not cease to exist, and compared to certain cases before the Strasbourg Court, rebuttal of the presumption before the ICTY seems to be less burdensome. The presumption is further justified by an aim of general interest, namely the adjudication of the most serious crimes as well as the protection of innocent witnesses and victims. Whether the reversal is absolutely necessary to guarantee the sound work of the Court (particularly in its current operating mode) could not be fully established: regarding the risk posed to witnesses and victims, the effectiveness of this practice has been questioned by a Trial Chamber, and it seems a middle way sharing the

[562] See the reasoning discussed above in *Salabiaku v France*.

burden of proof in the establishment of evidence regarding the risks posed to victims and witnesses has been found by way of jurisprudence. What concerns the risk of absconding, it was considered on the whole justified to require the applicant to establish personal and government guarantees and other factors making his escape sufficiently unlikely.

Overall the wording of Rule 65 and the construction of detention as default at the ICTY is a relic from the time the Statute and the first version of the Rules were drafted in 1994. At that time, none of the states of the region were cooperating with the Tribunal, war was ongoing and not even those most optimistic about the Tribunal predicted that it would continue its work beyond the date a lasting peace between the parties was established, not to mention for another two decades thereafter. While in 1994 or 1995 release was not an option by any means, the situation was very different in 2005 and even more so in 2015. It would have been desirable for the drafters to have had the courage on the occasion of the removal of the exceptional circumstance threshold in late 1999, to make a 180 degree turn and completely re-phrase Rule 65. For instance, Rule 65 could have been closer to the spirit of Article 58 of the Rome Statute, making pre-trial liberty the default and placing the onus of proof on the Prosecution to periodically review the situation and adduce evidence as to whether detention continued to be necessary. Perhaps it was considered best not to make a complete paradigm shift, as this would have had the potential to "call a long string of jurisprudence into question"[563] – instead a more liberal practice, one being more widely compatible to modern fair trial rights, was organically developed.

C. Pre-Trial Detention for International Crimes in Domestic Proceedings on the Example of Austria

In the following Section the Austrian pre-trial detention mechanism applicable to most serious crime, notably also international crimes, will be analysed from a human rights point of view.

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563 Andrew Trotter, "Innocence, Liberty and Provisional Release at the ICTY: A Post Mortem of "Compelling Humanitarian Grounds in Context", 2012 Human Rights Law Review, p.21.

21. The Austrian Conditional Mandatory Detention Regime

Reverting to a national pre-trial detention mechanism, as exemplified in the Austrian regime as a *pars pro toto* of a rigid regime with regards to serious crimes, is of interest as an increasing number of international crimes are in the future expected to be adjudicated before domestic courts; just over the past two years, Austrian courts have adjudicated charges of international crimes in relation to Bosnia, Ukraine and Syria.[564] Any assessment of the pre-trial mechanism faced by those standing trial for international crimes would be incomplete without an analysis of this national aspect. In January 2015, new provisions, definitions and sanctions for crimes against humanity and war crimes were introduced into the Austrian criminal code in addition to the already existing provision for the crime of Genocide.[565] This now allows the national Judge to directly apply these provisions as opposed to the past, where such crimes had to be penalized making recourse to "traditional" crimes such as murder, rape or arson.[566] In 1994 when Austria became the first country to try a person for charges of genocide based on the universal jurisdiction principle before a national court outside the former Yugoslavia,[567] the accused was charged for genocide and, due to a lack of a "crimes against humanity"

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[564] Exemplary a trial that started in 2015 in relation to murder in 16 cases during the Bosnian war: http://www.nachrichten.at/oberoesterreich/Kriegsverbrecher-Prozess-in-Linz-Anklage-wegen-16-fachen-Mordes;art4,1535523; http://derstandard.at/2000007850501/Massaker-in-Bosnien-Prozess-um-16-fachen-Mord-in-Linz; In May 2017 an Austrian national accused of having committed war crimes on the territory of Ukraine (killing unarmed prisoners) was extradited by Poland and the trial is scheduled to commence in Wiener Neustadt, Kurier, 31 May 2017, https://kurier.at/chronik/oesterreich/kriegsverbrechen-benjamin-f-bestreitet-vorwuerfe/267.104.474; Several trial were conducted in Austria in recent years concerning the recruitment of Islamic State (IS) fighters, Der Standard, 22 February 2016, http://derstandard.at/2000031549085/Prozessstart-gegen-mutmasslichen-Jihadisten-in-Graz.

[565] The crime of genocide was introduced to the Austrian criminal code in 1974 in implementing the UN Convention on the Prevention and Punishment of the Crime of Genocide. See Marc Pampalk, Madalena Sitzer in Christina Binder C et al., *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010), p.77.; Austrian Official Federal Gazette - BGBl. I No. 134/2013, 29 December 2014; The principle of Legality of the Austrian (and German) penal system required the transformation of the Rome Statute into national Law ("indirect enforcement model"). Instead of inserting the crimes into the Criminal Code, Germany decided to draft a separate International Criminal Law.

[566] Madalena Pampalk, Marc Sitzer in Christina Binder C et al., *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010),p. 78. The authors reached the conclusion that at least with regards to war crimes Austria had not met (prior to the insertion of the new crimes 2015) not fully met its international obligations (p. 79).

[567] Redress Trust, "Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide" (London, Redress Trust 1999), p. 16; Louise Sperl and Jacline Chungong in Ariana Pearlroth, *Universal Jurisdiction in the European Union: Country Studies*, Redress London (2001), p. 2.

or "war crimes" provision, for murder and arson.[568] As will be demonstrated in *Mucić*, who was arrested in Austria without an international arrest warrant but was nonetheless ultimately transferred to the ICTY, it is often dependent on several factors whether a person is tried before an international tribunal or a domestic court. This fact exemplifies why comparable procedural standards at both the domestic and the international level is of utmost importance.

21.1. Introduction

The Austrian pre-trial detention regime for crimes of lower or medium gravity sets a relatively high threshold for detention. It may only be ordered if the (Pre-Trial) Judge can, upon application by the Prosecutor, convincingly demonstrate two things: the existence of reasonable suspicion that the defendant has committed a certain crime and secondly that the situation of the defendant *in concreto* meets the requirements of at least one of the four detention grounds prescribed in the Austrian Code of Criminal Procedure (ACCP).[569] The detention order must positively establish the reasons why more lenient measures are insufficient.[570] With pre-trial liberty as the norm and custody as the exception, the burden of proving the justification of any detention rests squarely on the Prosecution. The equation seemingly changes where it comes to the question of detention of persons accused of the most serious crimes, namely capital crimes where the minimum punishment is above ten years of imprisonment.[571] Perhaps partly also due to the fact that

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[568] Judgement of the *Austrian Supreme* Court, 15O99/94, 13 July 1994 establishing the jurisdiction of a Bosnian national before Austrian Courts due to the impossibility to extradite to Bosnia and Herzegovina, Rechtssatznummer RS0092389; *Republic of Austria v. Cvjetkovic*, Landesgericht Salzburg 31 May 1995: The jury trial ended with an acquittal due to insufficient evidence as none of the prosecution witnesses could identify the accused with sufficient certainty, as found in Louise Sperl and Jacline Chungong in Ariana Pearlroth, *Universal Jurisdiction in the European Union: Country Studies*, Redress London (2001), p. 2. Madalena Pampalk, Marc Sitzer in Christina Binder et al., *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010), p.88 refer to the case of the first (domestic) case dealing with charges of genocide worldwide.

[569] The Austrian Code of Criminal Procedure (ACCP) provides in Article 173(2) the following detention grounds: risk of escape, risk of the commission of a crime and/or of re-commission of a crime, risk of tampering with evidence.

[570] Article 173 ACCP in connection with Article 174(3) ACCP.

[571] Conditional-mandatory pre-trial detention of Article 173(6) ACCP. (all forms of murder as well as the so-called international crimes - genocide, crimes against humanity, war crimes - enter into this category: Murder- Article 75 Austrian Criminal Code: punishable with a sentence from ten to twenty years of imprisonment or life imprisonment; Genocide-Article 321 Austrian Criminal Code: life imprisonment; Crimes against humanity- Article 321 a(1) Austrian Criminal Code: life imprisonment if at least one person

in such cases detention is generally considered more widely accepted, at least for an initial period, the legislator considerably lowered the burden of proof for detaining a defendant, making detention the rule and pre-trial liberty the exception. This mechanism with an effect similar to that of a reverse burden of proof remains controversial from an (Austrian) constitutional and human rights point of view.

21.2. From Mandatory to Conditional-Mandatory Detention

Prior to the reform of the ACCP in 1971, pre-trial detention for crimes punishable with a minimum sentence of ten years imprisonment was mandatory, that is without a legal alternative.[572] In its current form, Article 173(6) ACCP is *conditional-mandatory* (German: *bedingt-obligatorische Untersuchungshaft*), a combination between the ordinary system of detention as *ultima ratio* and the pre-reform provision precluding any alternative to detention. In essence, it provides that in cases of severe crime, pre-trial detention shall be ordered, unless it can be established due to particular – if not exceptional – reasons that all the detention grounds can be excluded.[573] This allows the Pre-Trial Judge to order detention also in cases where in the immediate aftermath of an

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is killed and/or the intention is established to exterminate a community in full or in part and/or to establish conditions that are apt to contribute to their extermination in full or in part.

[572] See official Commentary to the Law Amending Article 173(6) (formerly Article 180(7) ACCP): "Die wesentlichste Änderung, die § 180 StPO erfahren soll, ist die Wiederherstellung der obligatorischen Untersuchungshaft. Die oblig. U-Haft in der heutigen Ausprägung, die in Ansehung bestimmter Deliktskategorien eine Enthaftung schlechthin ausschließt, begegnet allerdings gewissen Bedenken unter dem Blickwinkel der Art. 5 EMRK und 6 Abs. 2". Artikel 5 Abs. 3 EMRK kann nämlich dahin verstanden werden, daß in allen Fällen zumindest die Möglichkeit einer Enthaftung gegeben sein muß, und zu Artikel 6 Abs. 2 MRK, [..], daß eine Haft ohne besondere Haftgrüde vorweggenommene Sühne sei, die nach Art. 6 Abs. 2 MRK jedenfalls unzulässig ist". (This amendment concerns obligatory pre-trial detention. The detention regime in its current form, which categorically excludes any alternatives to detention for a certain category of crime was considered problematic from the point of view of Articles 5 and 6(2) of the ECHR. From Article 5 as this Article may be interpreted that it must in any event exist at least the possibility to pre-trial liberty and Article 6(2) insofar as detention without specific detention grounds would amount to advance punishment"), Bericht des Justizausschusses, 512 der stenographischen Protokolle des Nationalrates XII.GP, Strafrechtsänderungsgesetz, Seite 9. Further the application of „more lenient measures"instead of custody was excluded until a reform in 1993. See E.Foregger/ G. Kodek Strafprozeßordnung , 7th edition Manz 1997, Article 180(1).

[573]Bedingt-obligatorische Untersuchungshaft according to Article 173(6) ACCP: Wenn es sich um ein Verbrechen handelt, bei dem nach dem Gesetz auf mindestens zehnjährige Freiheitsstrafe zu erkennen ist, muss die Untersuchungshaft verhängt werden, es sei denn, dass auf Grund bestimmter Tatsachen anzunehmen ist, das Vorliegen aller im Abs. 2 angeführten Haftgründe sei auszuschließen (text of the current version: Where one deals with a crime, which provides for a sentence of at least ten years, pre-trial detention is obligatory, save for situations where based on particular circumstances all of the detention grounds under para.2 can be excluded").

arrest the existence of detention grounds cannot yet *in concreto* be neither sufficiently substantiated nor completely excluded. The mechanism appears to operate on the premise that from the fact that a person is accused of murder or a crime of similar gravity certain detention grounds may well be presumed, notably the most commonly invoked risk of escape.[574] Although the burden of proof formally remains on the Trial Judge, who must consider all facts available as presented by the Prosecutor, the standard of proof is considerably lowered. The Austrian Supreme Court, in a legal dictum, referred to "a kind of reversal of the onus of proof" as the Court examines under a "rigorous standard" whether specific circumstances could "with close to certainty" exclude the risk of absconding.[575] Deciding on the legality of detention in a murder case, the same Court held that Article 5(3) ECHR and the presumption of innocence would require the Court to abstain from ordering detention at least in cases where certain circumstances "exclude" the risk of absconding or of obstruction of evidence.[576] One commentator summarized the imbalance between the interests of a defendant and that of a prosecuting organ, resulting from the rigid interpretation by the Supreme Court, insofar as "the fact that circumstances that (merely) do not indicate the existence of a detention ground are insufficient to exclude such detention grounds".[577] In other words, it requires from a defendant (or a Prosecutor/Judge) considerably more effort to demonstrate that a detention ground could

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[574] See statistic for Germany, where in the year 2006 risk of escape was invoked in 93.1 % of all cases, compared to risk of collusion (Verdunkelungsgefahr) in 5,9%, and risk of re-commission of crimes in 9.2% of the cases. In 4.6% of the cases the „gravity of the crime" was invoked (however, never as the sole detention ground) See Country Report, "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/01, page 17

[575] Austrian Supreme Court (OGH) 15Os22/00, 2 March 2000, ("nach Art einer Umkehrung der Beweislast" – [in its application] "similar to a reverse burden of proof" reverting to E.Foregger/ G. Kodek Strafprozeßordnung , 7th edition Manz 1997, Comment to Article 180: Bei Prüfung iS Abs. 7 ist unter Anwendung eines strengen Maßstabes zu untersuchen, ob besondere Gründe (Persönlichkeit des Täters, Beschaffenheit der Tat und der Tatumstände) mit einer an Sicherheit grenzenen Wahrscheinlichkeit das Vorliegen eines Haftgrundes ausschließen."- In the examination of 180 para. 6 it is to be examined applying a strict standard whether particular circumstances – related to the personality of the accused, or the circumstances of the crime- can exclude beyond reasonable doubt all of the recognized detention grounds").

[576] Austrian Supreme Court- OGH in 15Os22/00, 2 March 2000.

[577] Andreas Venier, „Bedingt obligatorische Untersuchungshaft" (2000) 11 Anwaltsblatt, p. 686 („Umstände, die Haftgründe lediglich nicht annehmen lassen, sind keineswegs bereits solche, die sie auszuschließen vermögen"), also cited in Eugen Fabrizy, *StPO und wichtige Nebengesetze*, Manz 11 edition, 2011, Article 173(7). The Austrian Supreme Court had dismissed the argument that the accused had been initially released and did not make an attempt to abscond during this period as "this fact could not sufficiently exclude the risk of absconding."

be excluded than it would take to establish the existence of a ground for detention under this provision.

21.3. Debate in Austria as to the Compatibility of the Pre-Trial Mechanism with ECHR Principles

The conditional mandatory pre-trial detention regime and particularly its rigid interpretation by the Supreme Court[578] (as discussed above) have triggered a fierce debate both within academia and among practitioners. *Reindl* considers the provision to be in contradiction with Austrian constitutional law (i.e. Art. 2 of the Austrian Law of the Personal Liberty - PersFrSchG) insofar as that the latter would require the positive determination of detention grounds and not allow for a "mere presumption of the required detention due to the gravity of the crime".[579] In the same direction, *Schwaighofer* holds the starting presumption that the grounds for detention cannot be excluded and that the fact that detention grounds no longer need to be established in a positive manner is incompatible with Article 5 ECHR.[580] *Venier* calls for the deletion without replacement of the provision, which he deems incompatible with principles of both the constitution and the ECtHR jurisprudence, which would require concrete detention grounds, not mere abstract risks.[581] Critical voices include those of *Kirchbacher/Rami*[582] and *Morgenstern.*[583] *Fabrizy* stresses that pre-trial detention also in such cases must remain *ultima ratio* and that application of less intrusive measures must be genuinely examined.[584] Further criticism of the Austrian practice comes from the Open Justice Initiative, an international NGO that cites Austria, alongside with Belgium, South Africa,

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[578] Austrian Supreme Court- OGH 12 Os 134/95, 19 November 1999.
[579] Susanne Reindl, *Untersuchungshaft und Menschenrechtskonvention*, Verlag Österreich 1997, p. 164. Art 2 of the Austrian Law of the Liberty of Person (PersFrSchG), Official Gazzette BGBl.1988/684, 29 November 1988, requires any form of detention to be based on the exhaustively detention grounds formulated under Article 2, the mere presumption that any of the detention grounds exist is insufficient, regardless of the gravity of the crime.
[580] Klaus Schwaighofer, *Die neue Strafprozessordnung: Einleitung - Gesetzestext - Anmerkungen*. Facultas-WUV, Wien 2008, p.
[581] Andreas Venier, *Das Recht der Untersuchungshaft: Tatverdacht, Haftgründe, Verhältnismäßigkeit* (Verlag Österreich 1999), p. 34; Bertel/Venier, Kommentar zur StPO (2012), p. 475.
[582] Kurt Kirchbacher und Michael Rami in Helmut Fuchs und Eckardt Ratz (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, September 2012, Article 173 para.73.
[583] Christine Morgenstern, "Country Report for Austria in An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/01. p.13.
[584] Eugen Fabrizy, *StPO und wichtige Nebengesetze*, Manz 11 edition, 2011, Article 173, para.19.

and a number of Latin American countries as a negative example of a state where restrictive laws promote pre-trial detention for crimes exceeding a certain gravity threshold.[585]

Conversely, the Association of Austrian Judges and Public Prosecutors strongly opposed any calls for "softening" the provision. It instead communicated a statement insisting on the necessity of the conditional mandatory detention, asserting that the often only scarce material available at the initial stage following arrest would not always allow to fully establish the grounds for detention for such serious crimes.[586] To the knowledge of the author, no complaint against the Austrian mechanism of conditional-mandatory pre-trial detention was introduced or decided upon by the Strasbourg Court. The author will therefore engage into an assessment applying the relevant principles developed in the jurisprudence of the ECtHR on pre-trial detention to the Austrian system. The question will be whether the ECHR under certain conditions allows to base pre-trial detention for an initial period on comparably vague and more abstract facts and presumptions.

22. The Austrian Regime of Conditional Mandatory Detention in View of Established ECHR Principles

Article 5(1)(c) ECHR explicitly only provides for two detention grounds justifying an arrest or detention with a view of bringing a suspect or an accused before the competent legal authority: the risk of re-commission of crimes and the danger of escape.[587] Two additional detention grounds were recognized in the jurisprudence of the Strasbourg Court (at least as supplementary) detention grounds: the danger of collusion or risk of suppression of evidence, which is common particularly in the German and Austrian systems, and the risk of danger, found in the French system.

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[585] In the publication" Presumption of Guilt: The Global Overuse of Pre-trial Detention" by the, Open Justice Initiative, September 2014, (p.100). Further, S. Reindl, Untersuchungshaft und Menschenrechtskonvention, Verlag Österreich 1997, page 160-70; Andreas Venier, *Das Recht der Untersuchungshaft: Tatverdacht, Haftgründe, Verhältnismäßigkeit, Springer* 1999, p. 32-34.

[586] Entwurf eines Strafprozessreformgesetzes, Begutachtungsverfahren zu GZ 578.017/10-II.3/2001

[587] Article 5(1)(c) ECHR: "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

The risk relating to the two additional detention grounds lies in the vagueness of the definition. The ECtHR therefore saw it necessary to develop in its jurisprudence certain safeguards such as maximum time limits after which detention could not be based on either one of these detention grounds alone.[588] In the Austrian system, for instance, the detention ground of suppression of evidence/collusion is limited to a maximum period of two months.[589] One possible approach to answering the question of ECHR compatibility of the Austrian pre-trial regime discussed here is by analysing the margin of appreciation the Strasbourg Court allocates to its Member States concerning the rather vague risks that a certain accused in freedom destroys evidence, causes a public disturbance, or poses a risk to the public order. The greater margin of appreciation awarded to a deciding Judge invoking detention predominantly on the basis of such vague risks, the less rigid an assessment by the ECtHR of the Austrian system of conditional obligatory remand detention is expected to be.

22.1. Risk of Disturbance to Public Order under ECHR Standards

One reason for detention under the French system is the risk of (major) disturbance to the public order. In *Letellier* (1991*)*, the Paris Court of Appeal found that a person accused of murder, as an "exceptionally serious criminal offence having caused a major disturbance to public order", represented – *jointly* with the detention grounds of impediment of justice and risk of escaping justice – valid reason for detention.[590] The Strasbourg court, while "accepting that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time",[591] held that the French court system violated ECHR principles by assessing the "*ordre public*" criterion from a "purely abstract point of view", basing the

[588] With regards to the suppression of evidence, it remains unclear whether the Court does indeed accept detention exclusively based on this detention ground alone. See Susanne Reindl, *Untersuchungshaft und Menschenrechtskonvention: der Schutz der persönlichen Freiheit und die Haft im Strafverfahren* (Österreich 1997), p 69. In *G,S & M v. Austria*, 9614/81 , 12 October 1983. Para.119: the Strasbourg Court accepted the danger of collusion as one of several detention grounds when it held that "As long as there is reasonable suspicion in respect of the principal crime, the danger of collusion may therefore provide a legitimate ground of detention under Article 5(1)(c) of the Convention". However, Austria had invoked detention in the case at hand equally on the risk of escape.
[589] Article 178(1) 1 of the Austrian Code of Criminal Procedure.
[590] *Letellier v. France,* 12369/86*,* 26 June 1991, para.23.
[591] *Letellier v. France,* 12369/86*,* 26 June 1991, para.51.

assumption of disturbance on the "gravity of the offence" alone, while at the same time not adequately considering indications warranting release. In *Tomasi* (1992), another terror related case, the Court held that in the case of a terrorist attack "it is reasonable to assume that there was a risk of prejudice to public order at the beginning", but after a while the presumption must disappear and it must be *in concreto* established that the public order remains actually threatened.[592] More recently, in *Bernard* (2006), a case concerning the robbery of explosives in relation to allegedly planned terrorist crimes, the ECtHR held that while, particularly in terrorism cases, the risk of disturbance of public order in relation to the release of the accused may justify detention, it cannot on its own justify *longer* detention periods.[593] It can therefore be concluded that at least in cases of terrorism, the Strasbourg Court accepted, for an initial period, detention based on the vague risk of public order alone.

22.2. Risk to Public Order under Austrian Criminal law?

Concerns as to the conformity with principles of Article 5 ECHR and Article 6(2) ECHR (presumption of innocence) – not least in view that the ECHR in Austria is enshrined in the constitution[594] – led to the abrogation of the mandatory pre-trial detention for severe crimes.[595] However, instead of deleting the entire provision, a compromise was found to

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[592] *Tomasi v. France*, 12850/87, 27 August 1992, para. 91.

[593] *Gerard Bernard v. France*, 27678/02, 26 September 2006, para. 46. The highlighting is that of the author.

[594] 59th Austrian constitutional law dated 4 March 1964 concerning the amendment of the Austrian Constitution in the current version of 1929, Austrian Federal Gazzette BGBl. Nr. 59/1964. Said amendment to the Constitution incorporated the entire text of the ECHR into the rank of an Austrian constitutional law. Die Europäische Menschenrechtskonvention ist gemäß BVG BGBl. Nr. 59/1964 mit Verfassungsrang ausgestattet.

[595] See official Commentary to the Law Amending Article 173(6) (formerly Article 180(7) ACCP): "Die wesentlichste Änderung, die § 180 StPO erfahren soll, ist die Wiederherstellung der obligatorischen Untersuchungshaft. Die oblig. U-Haft in der heutigen Ausprägung, die in Ansehung bestimmter Deliktskategorien eine Enthaftung schlechthin ausschließt, begegnet allerdings gewissen Bedenken unter dem Blickwinkel der Art. 5 EMRK und 6 Abs. 2". Artikel 5(3) EMRK kann nämlich dahin verstanden werden, daß in allen Fällen zumindest die Möglichkeit einer Enthaftung gegeben sein muß, und zu Artikel 6 Abs. 2 MRK, [..], daß eine Haft ohne besondere Haftgrüde vorweggenommene Sühne sei, die nach Art. 6 Abs. 2 MRK jedenfalls unzulässig ist". (This amendment concerns obligatory pre-trial detention. The detention regime in its current form, which categorically excludes any alternatives to detention for a certain category of crime was considered problematic from the point of view of Articles 5 and 6(2) of the ECHR. From Article 5 as this Article may be interpreted that it must in any event exist at least the possibility to pre-trial liberty and Article 6(2) insofar as detention without specific detention grounds would amount to

accommodate both the human rights concerns raised and the voices from Prosecutors calling for an easement of the strict requirements normally applicable to detention on remand. This trade-off resulted in the conditional-mandatory detention regime of Article 173(6) of the ACCP.[596] One of the frequently raised arguments in favour of such provision was the alleged "pressure from the public" in connection with the most serious crimes. That is problematic as public outrage ("großes öffentliches Ärgernis", arguably a slightly lesser form of public disturbance) as a ground for detention was already expressly prohibited in the *PersFrSchG* in its original version from 1862.[597] Although the law in its current version does no longer contain said explicit prohibition, the detention ground of public outrage has not been introduced since as a valid ground for arrest and/or detention and therefore cannot be considered in the Austrian system.[598]

The concern raised by the Austrian Judges and attorneys was that in the immediate aftermath of a crime, in certain cases, not enough information is available on the arrested suspect and the circumstances of the crime.[599] The ACCP requires to either order detention or release the suspect as soon as possible but at the latest within forty-eight hours upon arrest.[600] This is relatively strict compared to the ECtHR drawing the

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advance punishment"), Bericht des Justizausschusses, 512 der stenographischen Protokolle des Nationalrates XII.GP, Strafrechtsänderungsgesetz, Seite 9.

[596] Formerly Article 180(7) ACCP.

[597] Reichs-Gesetz Blatt für das Kaiserthum Österreich, Gesetz zum Schutze der persönlichen Freiheit vom 27. Oktober 1862: „§ 3: Wegen eines durch die strafbare Handlung verursachten großen öffentlichen Ärgernisses kann weder die Verwahrungsstrafe noch die Untersuchungshaft verhängt werden" Seite 253. Following the amendment of the law of 1988 (20 December 1988, BGBl 253 No. 684, which entered into force in 1991) this prohibition is no longer explicitly in force. It must, however, be considered that what is meant by the Austrian "großes öffentliches Ärgernis" (great public outrage or nuisance) is to be categorized below great public disturbance.

[598] Article 1(2) of the PersFrSchG states that no person shall be arrested and/or detained for any reasons other than those explicitly listed in said law.

[599] Vereinigung der österreichischen Richter, Bundessektion Richter und Staatsanwälte in der GOED, Entwurf eines Strafprozessreformgesetzes; Begutachtungsverfahren zu GZ 578.017/10-II.3/2001 to Article 173 („Die Aufrechterhaltung der bedingt-obligatorischen Festnahme ist schon deshalb notwendig, weil den einschreitenden Sicherhietsbehörden in diesem Zeitpunkt meistens derart wenig Erhebungsmaterial zur Verfügung steht, dass sie von der positiven Feststellung der Haftgründe vorerst bei schweren Verbrechen enthoben sein sollen (vgl RV zum Strafrechtsänderungsgesetz 1971, BlgNR XII.GP 25).

[600] Article 174(1) Austrian Code of Criminal Procedure ("In jedem Fall hat das Gericht längstens binnen 48 Stunden nach der Einlieferung zu entscheiden, ob der Beschuldigte, allenfalls unter Anwendung gelinderer Mittel (§ 173 Abs. 5), freigelassen oder ob die Untersuchungshaft verhängt wird.").

maximum time period between three and four days.[601] Moreover, Article 5(1) EHCR appears to allow to base detention solely on the ground of reasonable suspicion. Nonetheless, the Court repeatedly specified that reasonable suspicion is a *conditio sine qua non* for the legality of detention that "is after a certain lapse of time no longer sufficient".[602] The Strasbourg organ never set a concrete time frame, but instead cryptically reiterated on several occasions that such period cannot be determined by days, weeks, months or years but must be assessed on a case by case basis.[603] In *Bouchet,* the Court deemed a period following arrest dating from 8 January to 18 March 1996, nearly nine weeks, as justified based on suspicion alone and as such not subject to an examination by the Court.[604] *Reindl,* with reference to this case, makes a distinction between a shorter and a longer conditional-mandatory detention, whereas in her view for a "short period" a system that bases detention exclusively on reasonable suspicion is likely to be compliant with the ECHR.[605]

From the reasoning of the Strasbourg court in terrorism cases such as *Bernard* or *Tomasi* on the one hand, and *Bouchet* on the other hand, it can be deduced that during an initial period of time, the ECtHR does allow for a vague reasoning to justify a period of initial detention. When dealing with persons accused of international crimes, it would arguably not be difficult for the Austrian Prosecution/Pre-Trial Judge to order detention invoking

[601] Susanne Reindl, *Untersuchungshaft und Menschenrechtskonvention: der Schutz der persönlichen Freiheit und die Haft im Strafverfahren* (Österreich 1997), p.107 concludes that a period of 3-4 days until a first review is overall compatible with the ECHR. See also the ECtHR in *McKay v. United Kingdom* [GC], 543/03, 3 October 2006, para 33, finding that any "periods of more than four days in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations".

[602] *Stögmüller v. Austria*, 1602/62, 10 November 1969, para. 4; *Chraidi v. Germany*, 65655/01, 26 January 2007, para. 36.

[603] *Stögmüller v. Austria*, 1602/62, 10 November 1969, para. 4 ("It is admitted on all sides that it is not feasible to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence.") *McKay v. United Kingdom*, 543/03, 3 October 2006 , para. 45 ("For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a time when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time frame applicable to each case".).

[604] In the case *Bouchet v. France*, n° 33591/96, 5 September 2001, para. 48., the ECtHR held that the reasonable suspicion weighing on the suspect justified an initial detention of about 9 weeks (8 January- 18 March 1996).

[605] Susanne Reindl, *Untersuchungshaft und Menschenrechtskonvention: der Schutz der persönlichen Freiheit und die Haft im Strafverfahren* (Österreich 1997), p. 169. Such an approach would in her view still violate principles of the Austrian constitution.

some form of risk to *ordre public* caused by the release of a person accused of having committed international crimes. As demonstrated above, the Strasbourg court had approved such cases for an initial period of time in cases relating to terrorism. Although the ACCP does not contain such a detention ground, and the inclusion of such a provision would contradict the spirit of the PersFrSchG,[606] it serves nonetheless to demonstrate the overall approach of the Strasbourg court.

More relevant for an assessment is the case of *Bouchet,* where the Court explicitly held that reasonable suspicion alone may be sufficient for an initial period (up to a few weeks). The Austrian system should therefore – notably regarding the adjudication of international crimes – not be *per se* incompatible with principles of the ECHR where (i) the original order for detention establishes reasonable suspicion and at least one ground for detention, even if in the initial period only in a rudimentary manner, (ii) a subsequent order before the "lapse of a reasonable time" extending the pre-trial detention sufficiently outlines the situation considering *in concreto* the reasons for and against release and (iii) substantiating at least one detention ground with concrete facts. This seems to correspond to the Austrian practice thereby encompassing both the indicated necessities of the Austrian Prosecutors and Judges to remain more abstract for an initial period concerning the detention grounds as well as to principles of the ECtHR as outlined in *Bouchet*. The German Code of Criminal Procedure seemingly goes one step further as it exempts for certain explicitly listed crimes the requirement of a detention ground.[607] This provision has meanwhile been interpreted in a constitutionally compatible way by the German Constitutional Court insofar also in such cases, at least a (lesser) degree of one of the

[606] This can be seen from the fact that the version of 1862 explicitly prohibited arrests/detention invoking risks to ordre public. See the ECtHR in *Tomasi*, para. 91: "In exceptional circumstances - and subject, obviously, to there being sufficient evidence (see paragraph 84 above) - this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises - as in Article 144 of the French Code of Criminal Procedure - the notion of prejudice to public order caused by an offence". (Highlighting is that of the author).

[607] Haftgrund der Schwerkriminalität [112 (3) German StPO; („Gegen den Beschuldigten, der einer Straftat nach § 6 Abs. 1 Nr. 1 des Völkerstrafgesetzbuches, [..] oder, soweit durch die Tat Leib oder Leben eines anderen gefährdet worden ist, nach § 308 Abs. 1 bis 3 des Strafgesetzbuches dringend verdächtig ist, darf die Untersuchungshaft auch angeordnet werden, wenn ein Haftgrund nach Absatz 2 nicht besteht"). The listed crimes are genocide, murder, assault with deadly consequences, arson with deadly consequences or the formation of a terrorist organization. The provision was inserted as part of the "Anti-Terror Laws" of the 1970's (see Report "An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/1, page 15)

detention grounds has to be found.[608] In a German genocide case from 2010, the German Federal Court based its decision to detain the accused apart from the detention ground of genocide as a severe crime (*Schwerkriminalität*) also on risk of absconding and the risk of tampering with evidence.[609] The vast majority of the decision extending the detention concerned the argument for reasonable suspicion and only a brief paragraph related to the existing detention grounds and the lack of alternative measures thereto. This suggests that due to the implicit presumption, the requirement for substantiating the detention grounds is as a matter of fact lowered and that the defendant probably has better chances to argue against the reasonable suspicion which could lead to his or her release. In summary, the German model in relation to most serious crimes seems to be based on similar principles as the Austrian conditional mandatory pre-trial detention mechanism.

22.3. Interim Conclusion

Overall, the Austrian system imposes a presumption against release when it comes to crime punishable with at least ten years of imprisonment. From an ECtHR perspective, the Austrian conditional-mandatory detention regime is not in violation of the ECHR where the presumption towards detention is solely applied in the immediate aftermath of a crime/arrest, and where in the subsequent weeks the Prosecution and the Judges engage into a proper assessment of the risks posed by the defendant in view of the specific

[608] Entscheidung des deutschen Bundesverfassungsgerichts- Decision of the German Constitutional Court; BverGE, 19, 342, Beschluß des Ersten Senats vom 15. Dezember 1965, 1 BvR 513/65, („Der neu eingeführte § 112 Abs. 4 StPO müßte dagegen rechtsstaatliche Bedenken erwecken, wenn er dahin auszulegen wäre, daß bei dringendem Verdacht eines der hier bezeichneten Verbrechen gegen das Leben die Untersuchungshaft ohne weiteres, d.h. ohne Prüfung weiterer Voraussetzungen, verhängt werden dürfte. Eine solche Auslegung wäre mit dem Grundgesetz nicht vereinbar" [..]§ 112 Abs. 4 StPO ist in engem Zusammenhang mit Absatz 2 zu sehen; er läßt sich dann damit rechtfertigen, daß mit Rücksicht auf die Schwere der hier bezeichneten Straftaten die strengen Voraussetzungen der Haftgründe des Absatzes 2 gelockert werden sollen, um die Gefahr auszuschließen, daß gerade besonders gefährliche Täter sich der Bestrafung entziehen.“). Schlothauer/Weider, Untersuchungshaft (Muller, 2nd edition 1996) refer to a presumption of detention which may however be rebutted, p. 207 („Allen Einwendungen gegen die Verfassungsmäßigkeit des [..]§ 112 Abs. 3 StPO zum Trotz..[..].. Diese Interpretation hat zur Folge, dass bei dringendem Tatverdacht einer besonders schweren Straftat eine gesetzliche, nach den Umständen des Einzelfalls allerdings widerlegbare Vermutung dafür sprechen soll, dass Flucht-oder Verdunkelungsgefahr besteht“).

[609] German Bundesgerichtshof (BGH) Beschluss vom 17 Juni 2010 ("*Fall Kongo*"), AK/3/10, para. 5. Compare the study from 2007 which concludes that in the year 2006 in Germany in 4.6% of the cases the „gravity of the crime“ was invoked, however, never as the sole detention ground; Country Report, An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, JLS/D3/2007/01, page 17.

circumstances of the case. This right is safeguarded in the Austrian system, where the defendant can appeal to the Supreme Court and request a comprehensive independent assessment of the detention grounds on which the defendant is detained.[610]

23. Right to Trial within a Reasonable Time and Excessive Length of Detention

An issue related to the presumption against release in trials before international criminal courts is the average length of the proceedings. Both factors mutually exacerbate each other creating a situation where a defendant spends on average 3-5 years (ICTY)[611] or even 6-7 years (ICC)[612] in detention prior to his or her verdict. The defendant before the Hague courts is in a less advantageous situation when compared to most national jurisdictions. At the national level, the maximum time limits for each ground for detention is typically limited[613] or becomes with the lapse of time either disproportionate in relation to the expected sentence or, regardless of the gravity of the crime (the expected sentence), becomes excessive *per se*. Conversely, in international criminal proceedings where no statutory sentencing provisions exist, and where every defendant faces sentences from zero years up to life imprisonment, periods spent in pre-trial detention may never become disproportionate.[614] When being challenged with the long periods of detention, ICTY Chambers frequently reverted to individual ECtHR cases in

[610] § 2 GRBG Grundrechtsbeschwerdegesetz- Austrian Law on Complaints Relating to Fundamental Rights. Moreover, the overall time for pre-trial detention is, in case of serious crime, limited to two years (Article 178(2) ACCP). Reindl criticized the fact that this would only take place following a request as opposed to an automatic review. Concern raised in a discussion with the author in June 2017.

[611] Wolfgang Schomburg, "The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights", (2009), 8 (1) North-Western University Journal of International Human Rights (2009), p. 14.

[612] Lubanga (6 years: arrest in March 2006, convicted in July 2012); Katanga (7 years: first appearance in October 2007, convicted in March 2014); Ngudjolo Chui (4 years: arrested in February 2008, acquitted in 2012 and 2015, second instance); Bemba (8 years: arrested in May 2008, convicted in March 2016). The median being 6.25, Info obtained from ICC webpage: ICC Info Situations and Cases.

[613] See above for Austria where the detention must not exceed certain time thresholds, i.e. even for the most serious category of crime, those punishable with sentences exceeding five years the pre-trial detention must not exceed two years. (Article 178(2) ACCP).

[614] For the ICTY Article 24 of the Statute limits the sentence to imprisonment. The Tribunal has handed down sentences varying from five years to 45 years or life imprisonment sentences. At the ICC, Article 77 of the Rome Statute sets the maximum penalty with thirty years or, when justified by extreme gravity, with life imprisonment.

which long periods of pre-trial detention were not considered ECHR violations[615] as well as to the dictum of the Court that the question whether a period of detention was reasonable or not could not be assessed *in abstracto* merely by counting the number of days, months or years.[616] The Strasbourg Court does not issue advisory opinions merely as abstract principles; instead, its findings are based on the concrete facts and circumstances of the cases presented before the Court. While in *Stögmüller* a detention period of two years and seven weeks was considered unreasonable and hence in violation of Article 5 ECHR[617], considerably longer periods in *Wemhoff* (three years and five months) [618] or *W v. Switzerland* (four years)[619] were considered justified and hence not excessive. Factors considered by the ECtHR in its determination were apart from the complexity of the case notably what is at stake for the defendant and whether the delay was caused by the defendant or by the behaviour of the prosecuting organs.[620] As a rule of thumb observers have developed a a 3-5-7 scheme, according to which trials lasting less than three years are typically found reasonable, those lasting between 3-5 years are usually seen still reasonable unless significant delays were caused by the prosecuting organs and finally detention periods exceeding five years are as a norm considered excessive unless the case was particularly complex and/or the delay is widely attributable to the defendant.[621] Cases in which a defendant is in detention are naturally to be assessed more restrictively.[622]

[615] *Prosecutor v. Krajišnik & Plavšić*, IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 15 citing *W v. Switzerland*, No. 91/1991/344/417, 26 November 1992, and *Ferrari-Bravo v. Italy*, No. 9627/81, Comm. Report 13/3/84 (4 years and 11 months of pre-trial detention). William. Schabas, "Synergy or Fragmentation, International Criminal Law and the European Convention on Human Rights", Journal of International Criminal Justice 9 (2011) p. 625 ("The case law of international criminal tribunals is quite rich in references to the jurisprudence of the European Court of Human Rights").
[616] *Chraidi v. Germany*, 65655/01, 26 January 2007, para.35.
[617] *Stögmüller v. Austria*, 1602/62, 10 November 1969, paras. 48 (Facts) & 16 (Law).
[618] *Wemhoff v. Germany*, 2122/64, 27 June 1968 para. 20.
[619] *W. v. Switzerland,* 14379/88, 26 January 1993, paras. 29 & 43.
[620] *Idalov v. Russia*, 5826/03, 22 May 2012, para.86.
[621] Marc Henzelin & Heloise Rordorf, "When does the Length of Criminal Proceedings Become Unreasonable According to the European Court of Human Rights," Vol. 5 (1), New Journal of European Criminal Law, 2014, p. 94.
[622] *Borisonko v. Ukraine*, 25725/02 , 12 January 2012, para. 58: ("It further considers that an accused in criminal proceedings should be entitled to have his case conducted with special diligence, particularly,

23.1. In Search of the Reasonable Time Period Definition

Article 5(3) ECHR provides for the right of a person detained in accordance with Article 5(1)(c) to be "entitled to trial within a reasonable time or to release pending trial". As the Court elucidated *inter alia* in *Wemhoff,* the provision is to be interpreted as the "right to be judged" within reasonable time,[623] as opposed to the English wording suggesting the mere commencement of trial. The relevant period hence stretches from the initial detention until the day when the charge is determined, even if only in first instance.[624] The ECtHR developed a three step test when analysing the legitimacy of detention under Article 5(3).[625] The first criterion is whether reasonable suspicion exists, which after a certain lapse of time must be side-lined by "relevant" and "sufficient" grounds for detention. Even if the Court properly establishes suspicion and at least one detention ground, release must nonetheless be ordered if the authorities fail to apply the necessary diligence or the trial takes excessively long due to other facts.

23.2. Excessive Length of Detention in Terrorism and War Crimes Cases

One of the often raised arguments against applying the principles of the Strasbourg jurisprudence to ICL with regards to the length of detention is that while the latter exclusively deals with the most serious crimes, the jurisprudence of the ECtHR was shaped by the entire spectrum of criminal charges. It is indeed debatable whether the principles established in reference to fraud cases like *Stögmüller* or *Wemhoff* should be applied to cases dealing with, for instance crimes against humanity. Particularly regarding the reasonable length of detention, one should hence revert to cases involving highly complex investigations, a large number of witnesses, international implications

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where he is kept in custody (see *Nakhmanovich v. Russia*, 55669/00, 2 March 2006, para 89 and *Yurtayev v. Ukraine*, 11336/02, 31 January 2006, para.37.").

[623] *Wemhoff v. Germany*, 2122/64, 27 June 1968, para.20. The two authoritative texts in French and English seemingly suggest setting different dates. The English version awards the right to have the trial initiated ("entitled to trial within a reasonable time or to be released pending trial"), whereas the French version entitles the person to be judged within reasonable time ("être jugée dans un délai raisonnable, ou libérée pendant la procedure"). The French version being more "clear and unequivocal" as well as more favourable to the individual was since Wemhoff considered to better reflect the spirit of the Convention.

[624] The cases of *Solmaz* and *Kalashnikov*, The Court posits that a person convicted in the first instance does not fall under the category "bringing a person to the competent court", but after conviction by a Court.

[625] Council of Europe/European Court of Human Rights, 2014- Guide on Article 5 ECHR- Right to Liberty and Security, para. 158.

and increased public interest. The three cases will be analysed below in which the Strasbourg Court was confronted with several of the mentioned aspects: *Jentzsch* (1970) [626] relating to crimes committed by a concentration camp guard, and two terrorism cases, *Tomasi* (1991) and *Chraidi* (2007).

23.2.1. *Jentzsch v. Germany*: Nazi Crimes before the ECtHR

Jentzsch was arrested in May 1961 in connection with crimes committed in an Austrian concentration camp, where he served as a member of the SS in the years 1941-42.[627] In October 1968 he was convicted in first instance for murder in two cases, each involving at least ten victims, and sentenced to life imprisonment. The relevant period of detention to be taken into account in the complaint before the European Commission of Human Rights (i.e. the predecessor of the ECtHR)[628] hence exceeded seven years.[629] As a preliminary question, the Commission Report affirmed that the benefit of the ECHR should also be applicable for the most serious category of crimes, such as war crimes.[630]

In its assessment, the Commission agreed that the alternatives considered by the German courts were not sufficient to effectively balance the risk of escape (bail, reporting to the police, withdrawal of passport or other identity card).[631] In sum, the Commission held, by eight votes to five, that the period of detention, although "regrettably long", did not constitute a violation of Article 5.[632] Apart from the reality of the (Cold War) situation

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[626] Council of Europe, European Commission of Human Rights, Application Number 2604/65, *Heinz Jentzsch v. Federal Republic of Germany*, Report of the Commission (adopted 6th October 1970), para 5.
[627] Council of Europe, European Commission of Human Rights, Application Number 2604/65, *Heinz Jentzsch v. Federal Republic of Germany*, Report of the Commission (adopted 6th October 1970), para 5
[628] Until 1998 applicants did not have direct access to the ECtHR, but had first apply to the European Commission of Human Rights which transferred the complaint to the ECtHR in case the complaint was prima facie well founded. The European Commission of Human Rights was abolished with the reform of the ECtHR in 1998 through Protocol 11 of the ECHR.
[629] Report of the Commission (adopted 6th October 1970), para. 20.
[630] The Commission followed the dictum that had declared admissible the case of Ilse Koch. Yearbook of the European Convention on Human Rights, vol. 5, page 126 (134). It was found that the Convention, with the exception of Article 7, which is expressly excluded in relation to crimes of the Second World War. This dictum was upheld more recently in Papon v. France where it was emphasized that the mere fact that the applicant was prosecuted for crimes against humanity did not deprive him of the ECHR rights. Judgement, 54210/00 [2002] ECHR 623 (25 July 2002) citing Ilse Koch.
[631] Ibid, para 153
[632] Dissenting Opinion by Felix Ermacora holding the view that the length of the period of detention is in itself so great as to be contrary to Article 5(3) and, alternatively, that no sufficient evidence was provided

making a transfer of the proceedings within German cities necessary, no avoidable delay was seen attributable to the German authorities.

The dilemma faced by the German authorities was in many aspects similar to the one faced by the ICTY, particularly in its early years.[633] For instance, the easing of border controls in the 1960s increased the escape to (Latin American) countries refusing to extradite Nazi criminals.[634] Expectations of Germany to deal with its past were high. The country's special duty to prosecute crimes against humanity was taken into account as well as the pressure it faced from the UN and the Eastern bloc not merely to bring to justice the ones responsible but at the same time also to "clarify the whole historical context in order to make a proper assessment".[635] At the same time, the German court was faced with a complex investigation of a crime committed decades earlier in another jurisdiction (Austria) and with witnesses dispersed around the world.[636] The absconding of the defendant would have caused strong reactions throughout the world community, as shown in an earlier Nazi case where the decision by a the Cologne District Court in 1964 to release two accused after six years of detention due to "humanitarian reasons" was met with harsh international criticism.[637]

23.2.2. Terrorist Attacks: From *Tomasi* to *Chraidi*

Tomasi, who was arrested following a terrorist attack killing one person, was until his acquittal detained for five years and seven months.[638] His detention corresponded, as the

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by the German Government as to the necessity and the duration of the transfer of proceedings from Hamburg to West-Berlin and later to Cologne.

[633] See the lack of cooperation of the States in the Former Yugoslavia discussed in sections 8.1. and 8.2.

[634] Ibid, para 159; exactly the same problems, the unwillingness of the Federal Republic of Yugoslavia and the Republika Srpska to extradite their nationals to the Tribunal, were invoked as a major factor weighing against requests for provisional release from nationals of these entities.

[635] Report of the Commission (adopted 6th October 1970), para. 171.

[636] Ibid.

[637] Commission Report, adopted 6 October 1970, page 6 and Footnote 7; The report of the commission refers to, despite criticism by the UN and the Eastern bloc, to harsh critique in the Journal de Droit International (without memtioning the specific volume or year). The Cologne Court in its decision of 9 June 1964 had argued that "detention must be brought to an end it its continuance would break the prisoner's spirit, seriously undermining his will to defend himself and thus cause appreciable harm to his human dignity".

[638] *Tomasi v. France*, 12850/87, 27 August 1992, para. 83.

ECtHR argued, to a prison sentence of approximately ten years.[639] On this occasion, the Strasbourg Court reiterated its dictum that the seriousness of the offence could not justify alone such a long period of detention.[640] Assessing whether the French court acted with special diligence and the required promptness, the ECtHR reached the conclusion that the case could have been considerably shortened in view of the limited complexity of the case.[641] Despite this finding, the conclusions in *Tomasi* overall demonstrate a certain leniency and flexibility concerning the promptness of proceedings in cases relating to serious crime.

This approach was further expressed in *Chraidi,* a later terrorist case. The first arrest warrant was issued in 1986 with charges of multiple killings in connection with a terrorist attack aimed at soldiers at a discotheque in Berlin. Ten years later, the accused was extradited to Germany and from then onwards kept in detention. The German Court found that the detainee's right to liberty could outweigh the public interest as time passed only if an imminent risk of an irreparable damage to his health could be established.[642] The applicant was convicted in 2001 and released early from his sentence in 2005.[643] The German Regional Court admitted that the proceedings lasted an unusually long time and considered this a mitigating factor in its sentencing.[644]

The period of detention effectively lasted five years and six months.[645] The ECtHR took into consideration the "extraordinary difficulties" faced in connection with the complex investigation of terrorist crimes[646] and also accepted that the risk of absconding existed throughout due to the lack of any social ties of the accused in Germany.[647] In assessing the special diligence criterion, the Court highlighted the serious nature of charges

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[639] *Tomasi v. France*, 12850/87, 27 August 1992, para. 87.
[640] *Tomasi v. France*, 12850/87, 27 August 1992, para. 89.
[641] Ibid. para. 102. It was found that the excessive delay was caused by initiating proceedings in a court which lacked jurisdiction; the application of a newly passed law to the case after the applicant had been detained for almost four years. The complexity of the case was questioned given that the investigations had been concluded already six months after the arrest of Tomasi.
[642] *Chraidi v. Germany*, 65655/01, 26 January 2007, para.14.
[643] *Chraidi v. Germany*, 65655/01, 26 January 2007, paras. 16 & 19.
[644] *Chraidi v. Germany*, 65655/01, 26 January 2007, para.16.
[645] *Chraidi v. Germany*, 65655/01, 26 January 2007, para. 33.
[646] Ibid, para. 37.
[647] Ibid, para.40.

requiring the hearing of 169 witnesses as well as the large number of joint-plaintiffs requiring hearings on 281 separate days.[648] Consequently, it was held that delay was not attributable to the German authorities that had demonstrated necessary special diligence throughout the proceedings.[649] The Court reiterated that while in other cases detention on remand exceeding five years consistently constituted a violation of Article 5(3), the present case involved a particularly complex investigation and serious offences of international terrorism causing casualties, making the length of proceedings not unreasonable.[650] *Chraidi* seems, in terms of complexity of the investigation, the number of defence teams involved, and the amplitude of witness reports and testimonies, comparable to an average trial before an international court or tribunal. A further parallel was that the accused was tried in another country, which reduced his chance of pre-trial release due to lack of family ties in the country.

In conclusion, the Court already demonstrated a certain degree of flexibility in *Tomasi,* where it found a violation primarily due to the limited complexity and the delays by the French authorities as opposed to the length of detention *per se*. Said approach was confirmed in *Chraidi*, where the case was undeniably complex and in the lack of any serious mistakes attributable to the German authorities the detention lasting five and a half years was not considered to be in violation of the right to trial in a reasonable time. Hence, even in cases where detention lasts five years or longer the ECtHR makes a violation of the right of trial within a reasonable time dependant on whether the length of the proceedings was caused by the prosecuting state.[651] Where a violation is established, the ECtHR provides the payment of financial compensation as a remedy as opposed to ordering the release of the person from detention.[652]

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[648] Ibid, para.44.
[649] Ibid, paras. 44-45.
[650] Ibid, paras. 46-47.
[651] There were no cases identified where the ECtHR deemed the period of detention to be "excessive" as such, without stating at the same time that the prosecuting organs have, at least in part, contributed to the excessive length.
[652] Not a single case could be identified where the ECtHR ordered the release of the applicant. This may be also partly due to the fact that applications are decided by the ECtHR on average not before 1-2 years following the complaint lodged by the person in detention. Hence, if a person complains after four years of a violation due to "excessive length" of his or her detention, by the time the ECtHR hands down its

24. Release at the ICC upon Passage of Reasonable Time?

Article 60(4) of the ICC Rome Statute provides the Pre-Trial Chamber with the power to release a defendant who is detained for an "unreasonable period" in cases where the long period of detention is attributable to an "inexcusable delay" by the Prosecutor. This means that even if a person is validly detained under Article 60(2), a Chamber can release the person if the two criteria – unreasonable period and inexcusable delay – are conjunctively satisfied.[653] In reviewing the period of a person's detention under Article 60(4), the Chamber should "outweigh the genuine requirement of public interest with the rule of respect for individual liberty".[654] From the wording, it follows that the Chamber still retains discretion whether to release or not. The Appeals Chamber in *Lubanga* rejected a complaint (launched early in the trial) concerning the period of seven months and three days as being unreasonable in view of the *complexity* of the prosecution case.[655] The Chamber had already earlier reiterated that international human rights tribunals would assess the reasonableness of detention in light of the particular features and complexities of a case.[656] *Schabas* criticized the Trial Chamber for this approach as in his view *Lubanga* was a comparably *simple* case predominantly based upon one main charge (i.e. recruitment of child soldiers). Proceedings were instead delayed due to interpretation, victim participation, and other features of international criminal justice. He concluded that if the argument of complexity was considered even in a case such as

judgement the period of pre-trial detention has usually already ended, either due to release or following a conviction.

[653] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824, 13 February 2007, para. 120; Karim Khan, 'Article 60: Initial proceedings before the Court', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (C.H.Beck 2008), p. 1167.

[654] *Prosecutor v. Lubanga*, Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-924, 11 June 2007, p. 7

[655] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824, 13 February 2007, para. 121, 122. The Appeals Chamber had refused to consider also the period spent in detention prior to his transfer to the ICC.

[656] *Prosecutor v. Lubanga*, Decision on the Application for Interim Release of Thomas Lubanga Dyilo, ICC-01/04-01/06-586, 18 October 2006, p. 7.

Lubanga, thus justifying lengthy pre-trial detention, the same argument would apply in the majority of the cases ultimately making the provision toothless.[657]

More recently, in *Bemba et al.* the Appeals Chamber reasoned that Articles 60(2) and (3) were to be interpreted consistently with internationally recognised human rights standards and that, where a period of detention would appear unreasonable, a defendant should be released,[658] not without adding that the risks under Article 58(1)(b) of the Statute were equally to be taken into account such as other relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.[659] In conclusion, since the detention grounds of Article 58(1)(b) were always to be assessed in an application under Article 60(2), a mere lapse of time in detention cannot be on its own a changed circumstance within the meaning of Article 60(3).[660] The potential penalty, however, may be a deciding factor in assessing whether the time in detention is reasonable, and the circumstances of the specific case as a whole will always be the guiding factor.[661] In essence, the chances for a defendant to be released from ICC custody merely on the passage of time are rather unrealistic. For release based on Article 60(2), in addition to the passage of reasonable time, the existence of changed circumstances regarding the detention grounds is also necessary. The threshold for release according to Article 60(4) is high as the Trial Chamber has the final discretion to release a person and may in the vast majority of cases justify detention with reference to the complexity of the cases.

[657] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 729.

[658] *Prosecutor v. Bemba et al*. ICC-01/05-01/13-939, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for Provisional release", 29 May 2015; Prosecutor v. Bemba et al., Judgments on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015.

[659] *Prosecutor v. Bemba et al.*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for Provisional release", ICC-01/05-01/13-939, 29 May 2015, paras. 2;23. This assumes that the condition under Article 58(1)(a) is met.

[660] See *Prosecutor v. Bemba et al.*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for Provisional release", ICC-01/05-01/13-939, 29 May 2015, para. 7.

[661] *Prosecutor v. Bemba et al.*, Judgments on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015, para. 45.

Exceptions may arise in isolated situations where the Prosecutor has indeed beyond doubt "inexcusably" delayed the proceedings, such as in *Barayagwiza* where the accused was seemingly "forgotten" pending his surrender to The Hague.[662] The fact that the Strasbourg Court has in the past showed understanding of long periods of pre-trial detention in cases of terrorism or crimes against humanity does not make the situation more tolerable.

25. Concluding Remarks

Many things seemingly set in stone when this dissertation was started have in the meantime become increasingly relative. Apart from Brexit, notably fundamental human rights seem to have been increasingly subject to partial re-consideration. France and Turkey both (at least temporarily) curtailed essential provisions of the ECHR following terrorist attacks (France, 2015) and an attempted political coup (Turkey, 2016). The deviations from *inter alia* Article 5 ECHR were seen as necessary in order to making arbitrary arrests and detention without proper justification possible.[663] Another recent phenomenon was the large number of European citizens or residents who joined terrorist fighting groups in the war in Syria. Such persons are considered extremely dangerous upon their return to European societies. In Austria, many returnees were charged with the crime of membership in a terrorist organization, but given the lack of evidence that concrete crimes were committed by the accused, longer prison sentences were not possible. In order not to have crimes go unpunished, one proposed legal initiative in Austria demanded that persons that were proven to have been in Syrian territories controlled by the self-proclaimed Islamic State (IS) be in consequence under the obligation to prove that they were not involved in any crimes.[664] The question as to the

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[662] *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, *Appeals Chamber Dec.,* 3 November 1999. Of course the second criterion, the unreasonable length of detention must be cumulatively demonstrated.

[663] See European Journal of International Law Blog (online), "France Derogates from ECHR in the Wake of the Paris Attacks", Published 13 December 2015, retrieved online http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/ and the same source regarding Turkey, "Turkey's Derogation from the ECHR – What to Expect?", 27 July 2016, retrieved online http://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/.

[664] Phillip Aichinger, Die Presse, „Umkehr der Beweislast kaum möglich", 9 March 2015 retrieved 12 May 2015.

human rights conformity of such a reverse burden of proof mechanism was a logical consequence.

Applying the principles developed in this Chapter, it can be said that the difficulty of proving the involvement of an individual in a specific crime in Syria is certainly challenging for a national court thousands of kilometres away (particular circumstances criterion) and the active involvement of the accused would have to be established as a pre-requisite under any circumstances.[665] Secondly, the *ultima ratio* criterion is also met as the punishment for membership in a terrorist organization punishable with a sentence of up to three years has proven widely ineffective to deter those willing to join such an organization.[666] It can be equally convincingly argued that it would be easier for the accused to provide evidence for his "humanitarian" or similar mission than it would be for a distant prosecuting organ to prove an active involvement in crimes; the presumption would hence be realistically rebuttable. The most disputed issue relates to the principle of proportionality. While the punishment of such crimes and the imprisonment of those having committed the most serious crimes is without a doubt vital for the interests of the world community and particularly also for the society into which those persons would return to, the consequences faced by the defendant in case of an erroneous conviction would be seemingly disproportionate. This would be the situation in cases where a defendant is, despite his or her innocence, not in a position to refute the (reverse) persuasive burden of proof he or she faces and is in consequence sentenced to life imprisonment or a long prison sentence. The proposed mechanism in the proposed form is – if one reverts to the examination mechanism elaborated in this Chapter – overall incompatible with the presumption of innocence as applied by the ECtHR.

This Chapter has examined the main corollaries of the presumption of innocence in international criminal proceedings. The overall climate surrounding the proceedings

[665] The criterion of the creation of a *prima facie* case established that may "call for an explanation". *Telfner v. Austria*, 33501/96, 20 March 2001, paras.17-19. Parallels can be also drawn to Grayson & Barnharm, where the ECtHR found that following a criminal conviction (for the possession of drugs), the applicants had the obligation to disclose information as to the origins of money they had received.

[666] It is conceived that the argument of deterrence is necessarily relative where one deals with terrorist crimes (often suicide bombers) or similar acts.

including the court's media reporting was found to be respecting the presumed innocence of an ICTY or ICC defendant despite the existing suspicion and the related initiation of criminal proceedings. Equally, the courts duly respected the right of the defendant in criminal proceedings to be convicted only in case an elevated standard of proof (beyond reasonable doubt) against him or her could be manifested. The compliance of the ICTY and the ICC with the third corollary, namely the right of the defendant that the burden of proof is on the prosecuting organs, warranted for a more comprehensive analysis. Reverting to jurisprudence of the ECtHR and comparing the issues faced by the prosecuting organs in the discussed cases with the challenges the ICTY faced with regards to detention and release of its defendants, it was overall concluded that the mere placing of the burden of proof on the defendant, and more importantly how the matter was addressed in the Trbunal's practice since the 1999 amendment, was overall compliant with the presumption of innocence as manifested in Article 6(2) ECHR and 14(2) ICCPR. With regards to the alleged factual reverse burden of proof in pre-trial detention review motions before the ICC, the new jurisprudence and practice seems to have increased clarity on this matter, insofar as the defendant was attributed a passive role and the Prosecutor was awarded the obligation to actively demonstrate all new evidence both in favour and against the release of the defendant in custody. The third mechanism reviewed, the restrictive (Austrian) practice of ordering pre-trial detention in cases of serious crime was found to be overall ECHR compliant where the presumption in favour of detention is only applied in the first few weeks after a crime has been committed. Finally, it was established that the ECtHR has demonstrated understanding for long periods of detention where a state had to deal with sufficiently complex cases, which would make a hypothetical interference by the ECtHR with regards alleged violations of right to be tried within reasonable time by ICTY or ICC defendants unlikely.

CHAPTER THREE: Alternatives to Pre-Trial Detention in National and International Criminal Law and post-Conviction Release in Austria

26. Introduction

In the previous Chapter, it was concluded that the particular situation in international criminal trials may indeed justify even "regrettably" long periods of detention which would otherwise, and in less complex domestic trials, be considered as both excessive and a violation of the right to be tried within a reasonable time. Nonetheless, this does not disengage the detaining authority, where several instruments offering a comparable level of safety for the conduct of the trials exist, of selecting the one being the least intrusive to the defendant.[667] This Chapter will aim to engage into an assessment whether modern forms of electronically monitored house arrest may offer a form of surveillance that could decisively mitigate the risk of escape and/or the tampering of evidence while at the same time also reducing the adverse effects of custody faced by the defendants. Both the Statutes of the ICTY as well as of the ICC in principle allow for such forms of house arrests. For reasons to be established, *inter alia* relating to the unwillingness of the Netherlands to have indicted war criminals in liberty on its territory, an alternative to detention was only applied in one isolated case before the ICTY. The development of more sophisticated forms of electronic surveillance as well as the expressed readiness of a state in proximity, Belgium, to host defendants standing trial before the ICC are to be seen as steps in the right direction. Whether this will lead to a paradigm change will depend on the question whether such a combination of house arrest and electronic monitoring will prove as a viable third instrument in ICC proceedings in addition to a summons to appear and the issuance of an arrest warrant.

The second part of this Chapter deals with the question of post-conviction release. While the presumption of innocence does no longer apply, humanitarian prerogatives

[667] Roza Pati, "Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization", in Thomas Kruessmann, *ICTY: towards a fair trial?* (NWV 2008) text related to Footnote 3.

warranting for release are to be considered also at this stage. The broad denial of such a right may make the international court as well as the national state jointly responsible for violations of fundamental rights.[668] Moreover, re-integration of the perpetrator into society being an overriding aim of any justice system, some form of integrative release may be introduced from this perspective. This contribution will analyse both the legal framework and the practice of Austrian penitentiaries with prisoners convicted before the ICTY. Parallels between release from pre-trial detention and during post-conviction relate to the special category of international prisoners (i.e. prisoners of the international community). It was argued that the psychological effect of releasing an alleged war criminal that may subsequently abscond could have trivialised the Tribunal, the same could be also said about a national authority deciding to temporarily release a convicted international perpetrator from prison. In both cases some – yet different – form of safeguards exist: while during pre-trial, the hope of a defendant for a final acquittal may be a strong incentive not to escape, at the post-conviction stage any attempt to escape would make the accused no longer eligible for early release after having served two thirds of the sentence.

27. Electronic Monitoring in Pre-Trial Detention

27.1. Legal Framework for Electronic Monitoring in ICL

In the above discussed case *Jentzsch v. Germany*, the applicant was detained for over seven years until his conviction in the first instance.[669] The German Judges dealing with the case in the 1960s duly considered the alternative means to detention available in the German system, but deemed them overall insufficient to effectively prevent a possible escape.[670] The instruments considered were practically identical to the ones available in Germany (or Austria) today. The notable exception is the possibility of electronic monitoring through an electronic bracelet to minimise the risk of escape while on remand

[668] The not unrealistic possibility of complaints to the ECtHR for violations of Article 8 (Right to Family Life) in this context will be discussed in the final Chapter.
[669] Council of Europe, European Commission of Human Rights, Application Number 2604/65, *Heinz Jentzsch v. Federal Republic of Germany*, Report of the Commission (adopted 6th October 1970), para 5.
[670] Ibid.

detention.[671] At the international level, an important additional obstacle to release pending trial before the ICTY and the ICC was until recently the fact that the accused were tried outside of their country and the Netherlands as the host country of the Tribunal strictly opposed any form of release onto its territory.[672] A similar reaction from other countries was demonstrated in the case of *Bemba* where none of the thirteen requested states were willing to accept the applicant.[673] In 2014, Belgium became the first country to declare its willingness for the future to accept ICC indicted persons on its territory possibly paving the path for some sort of monitored house arrest in future.[674] The two above mentioned potential "game changers" have yet to prove their feasibility and effectiveness.

With regards to electronic monitoring, this section will examine the Austrian system of electronic monitoring as applied in pre-trial detention cases. Referring to the Austrian national practice is enlightening mainly for two reasons: Firstly the complementarity principle of the ICC means that Austria will assume first and foremost jurisdiction over international crimes committed by Austrian nationals or persons residing in Austria and secondly, in cases where the ICC could assume its jurisdiction over a person residing in Austria (e.g. in the case of a joinder of trials), the monitoring mechanism nonetheless remains subject to Austrian national law in situations where the ICC either issues a summons to appear or alternatively, where following the issuance of an arrest warrant and initial detention interim release is ordered subsequently.[675] Although electronic house arrest is not explicitly mentioned under the conditions restricting liberty pursuant to Rule

[671] Article 173a Austrian Code of Criminal Procedure, BGBl. I Nr. 64/2010, entered into power on 18 August 2010.

[672] The position of the Netherlands Government was that while it would go along with the decisions of the Tribunal, it would expel any person with no legal permit to stay once no longer under the jurisdiction of the ICTY. See IT-95-14-T, Letter from the Ministry of Foreign Affairs addressed to the Registrar, 18 July 1996 (p.3035-3036).

[673] *Prosecutor v. Bemba*, ICC-01/05-01/08-631-Red, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic, 8 December 2009, p.106.

[674] Belgium & ICC sign agreement on interim release of detainees, ICC-CPI 20140410PR993, 10 April 2014.

[675] Pursuant to Rule 119 (5) ICC RPE, the conditions relating to a summons to appear shall be consistent with the national law of the state recipient of the summons.

119 ICC Rules and Conditions, other forms, such as house arrest, may also be considered where the state of custody provides for such system and its application is not *per se* incompatible with principles of the Rome Statute and international standards of law.[676]

27.2. Electronically Monitored House Arrest in ICL

House arrest may be defined as the mandatory residence at a non-prison facility with varying forms of surveillance. Three main forms of electronically monitored house arrest can be distinguished: (i) the most commonly used form where only the presence of the defendant or prisoner in his or her residence during night hours is monitored through a transponder, (ii) the model with constant 24-hours GPS monitoring allowing for constant real-time surveillance and (iii) the most restrictive form in which the prisoner is located at a certain residence which may only be left for (guarded) short walks or other urgent needs.[677] Typical conditions imposed in provisional (ICTY) or conditional release (ICC) decisions, such as to remain within the boundaries of a municipality or the duty to regularly report to a police station do typically not create situations comparable to house arrests due to the much lesser form of restraint. Conversely, where a person is "released" under mandatory residence and constant guarded surveillance despite a nomination of provisional/conditional release, it may arguably be more appropriate to speak of a modification of detention than of a restriction of liberty.[678] Neither the ICTY nor the ICC have to date released a defendant under the condition of electronic monitoring.

27.3. The Experience with the Imposition of House Arrest in *Blaškić*

The only defendent that had his conditions of detention modified in ICTY proceedings was Tihomir Blaškić, a former general of the Croatian Defence Council (HVO) . Three main factors can be said to have influenced the decision to grant house arrest in *Blaškić*: his *de facto* voluntary surrender (preceding existing obstacles in the Croatian

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[676] Christopher Hall/ Cedric Ryngaert in Otto Triffterer/ Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edtion, 2016), p. 1456.
[677] Eric Maes, Benjamin Mine et al., "Thinking about electronic monitoring in the context of pre-trial detention in Belgium: a solution to prison overcrowding?", 4 2 2012 European Journal of Probation, University of Bucharest, p. 7.
[678] See approach of the Special Tribunal for Crimes Committed in Sierra Leone (SCSL) *Prosecutor v. Brima et a*l, 04-16-T, Decision on the Defence Motion for the Temporary Provisional Release to Allow the Accused Santigie Borbor Kanu to Visit his Mother's Grave, 18 October 2005, para. 12.

constitution)[679], the recent giving birth of his wife[680] and the readiness of Croatia to cover the expenses.[681] Then ICTY President Cassese, deciding on the motion under Rule 64, distinguished three forms of possible detention: ordinary detention, "compulsory residence" and "house arrest".[682] Compulsory residence, in his definition, meant that an accused was not detained, but while free in principle, required to stay at home in order to prevent an accused from escaping or fleeing the country.[683] According to Cassese, this instrument corresponded to provisional release under Rule 65 and was "mainly apt for offences which normally not entail custody and where the risk of absconding or public danger was not great".[684] The possibility of "house arrest" was intended to create a "middle-of-the road measure" between ordinary detention and release with only a low level of surveillance.[685]

On 3 April 1996, Blaškić was granted the modification of the detention conditions and transferred to a residence outside of the prison facility. The accused was granted the right to leave his residence exclusively for the purpose of consulting with his legal counsels and members of the Croatian Consulate and Embassy, as well as his family and friends.[686] The meetings were to take place at the detention unit, and the transfer from his residence to and from the detention would be guarded.[687] Despite this less strict form of detention, the accused filed motions for provisional release in April and December 1996; both were rejected due to a lack of the then required "exceptional circumstances".[688] The

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[679] Initial Indictment, IT-95-14; *Prosecutor v. Dario Kordić, Tihomir Blaškić, Mario Čerkez, Ivan Santic, Pero Skopljak, Zlatko Aleksovski*.
[680] Ibid.
[681] *Prosecutor v. Tihofil Blaškić,* ICTY- IT-95-14-1: before the Presiding Judge (Antonio Cassese), Public Transcript of Hearing 2nd April 1996, page 8.
[682] *Prosecutor v. Blaškić*, ICTY-IT-95-14-1before the Presiding Judge (Antonio Cassese), Public Transcript of Hearing 2nd April 1996, page 10.
[683] Judge Cassese making explicit reference to a similar provision (Art.176) of the Croatian law on criminal procedure.
[684] *Prosecutor v. Blaškić*. ICTY-IT-95-14-1, 3 April 1996, Decision on the Motion of Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, page 8.
[685] Ibid.
[686] Ibid.
[687] Ibid. p.13.
[688] *Prosecutor v. Blaškić*, ICTY-IT-95-14-T, 25 April 1996, Decision Rejecting a Request for Provisional Release, 20 December 1996, *Prosecutor v. Tihomir Blaškić*, ICTY- IT-95-14-T, Order Denying a Motion for Provisional Release. In addition, Blaškić filed several requests for the modification of the conditions of the "house arrest", such as the daily number of hours of exercise in the garden of the residence or the

arrangement with *Blaškić* ended in July 1997 with the scheduled start of the trial. The decision is not publicly available".[689] Possible reasons were – apart from problems of cooperation by Croatia – the considerable costs and logistical effort of the surveillance.[690] Overall, the form of "severe" house arrest as applied in *Blaškić* consisting of permanent surveillance and no unguarded liberty seemingly offers to an accused only marginal advantages over regular detention, whereas the lack of social contact with other inmates may prove at the same time to be harsh in some aspects similar even to a softer form of solitary confinement.[691] Problematic in *Blaškić* was the circumstance that his privilege was conditioned upon the fact that the accused would cover the surveillance costs effectively creating a sort of hierarchy of prisoners.[692] In a second case, (*Plavšić)* house arrest was considered due to the practical issue of a lack of gender separation at the detention unit, but ultimately other solutions were found.[693] In sum, strict house arrest as applied in *Blaškić* provided overall little advantage for a defendant, while having considerable downsides such as increased costs and logistical burdens. For a defendant, the isolation from other prisoners may after a long time have adverse effects.

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amount of family visits See IT-95-14-PT, 26 May 1997, *Prosecutor v. Blaškić*, Decision on the Conditions of Detention of Blaškić. IT-95-14-T, 9 January 1997, *Prosecutor v. Blaškić*, Decisions on the Motion of the Defence Seeking Modification of the Conditions of Detention of General Blaškić and IT-95-14-T, 5 December 1996, *Prosecutor v. Blaškić*, Prosecutor's Response to Defendant's Application for Modification of the Conditions of Detention Pursuant to Rule 64.

689 The report to the UN cryptically mentions as reasons "circumstances beyond the control of either the Tribunal or the host country. A/52/375, S/1997/729, 18 September 1997, para 159.

690 David Scheffer, then U.S.Ambassador, Proceedings of the International Conference on War-Crimes Trials, Conference Belgrade 7-8 November 1998, Humanitarian Law Centre Belgrade 2000, page 31.

691 The fact that he applied for provisional release during this period is further *indicia* that he was not content with this situation.

692 This arguably stands in contradiction to core principles of criminal law and of international criminal courts. To some limited extent the influential position of an accused or his/her wealth can have an effect on his pre-trial regime, namely in the case of the issuance of a bail bond. However, such pecuniary deposit (or government guarantee) is only one among several factors that is considered apt to make an appearance of the accused before trial more likely. However, the wealth of a person shall not provide him with a more favourable detention facility or a larger, more comfortable cell. See also, Rule 3 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal ("Rules of Detention"), in its current version dating from 21 July 2005 (IT/38/Rev.9), which prohibits any discrimination based on, among others, "social origin, property, birth, economic or other status". The Rome Statute of the ICC similarly provides under Article 21(3) that the application of the law must be without any distinction founded on grounds such as "social origin, wealth, birth or other status".

693 *Prosecutor v. Plavšić***,** Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused dated 18 January 2001. *Plavšić* withdrew the request as internal modifications at the UNDU were proposed.

27.4. Summons to Appear Supported by Electronic Monitoring in ICC Proceedings?

The Pre-Trial Chamber may in accordance with Article 58 Rome Statute issue a summons to appear with or without conditions restricting liberty. If it decides that restrictions are necessary to ensure appearance at trial or any other detention ground of Article 58, the judicial instruments restraining liberty of the State of residence of the accused apply. While the compatibility of an electronically monitored house arrest with principles of the Statute and international standards of law[694] will in the following be presumed, the key question will rather be whether such practice provides an effective alternative to detention. To answer this question, the experience from Austria will be assessed.

27.5. Electronic Foot Tag as Execution of Detention on Remand in Austria

Austria adopted legislation to implement the electronic foot tag in 2010, both as a tool to monitor the presence of a convicted prisoner and also as a form of execution of detention on remand (Untersuchungshaft).[695]

27.5.1. Advantages of Electronic Monitoring over Pre-Trial Detention

The many adverse effects of pre-trial detention are uncontested. Studies suggest that lengthy periods of time spent in remand detention have an even more adverse impact on the concerned person than (longer) regular prison sentences upon final conviction.[696] Reasons are manifold; contrary to post-conviction sentences, remand detention usually does not allow for a mental preparation of the detention, the prisoner is left with uncertainty about what awaits him/her or how long he or she will remain in detention. Further, the remand prisoner typically lacks any useful occupation or structured daily schedule, and visits are usually restricted or under surveillance only. In Austria for instance most benefits available in the Law of the Enforcement of Sentences that exist in relation to various forms of short-term releases are *a priori* deemed incompatible with the

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[694] Christopher Hall/ Cedric Ryngaert in Otto Triffterer/ Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edtion, 2016), p. 1456.
[695] Article 173a Austrian Code of Criminal Procedure- StPO.
[696] Andreas Venier, *Das Recht der Untersuchungshaft: Tatverdacht, Haftgründe, Verhältnismäßigkeit*, (Springer 1999), p.21.

purpose of pre-trial detention.[697] For a defendant, detention pending trial may further create a presumption of guilt adversely affecting the course of the proceedings.[698] The adverse impact of remand detention in Austria is mirrored in the suicide rate for the year 2012 when a total number of ten prisoners and one person in placement committed suicide, out of which five were in pre-trial detention.[699] An over-proportionally large number of remand prisoners account only for about twenty percent of all prisoners in Austria.[700]

While the electronically monitored house arrest also restricts freedom to a considerable degree, it nonetheless offers a less intensive form of deprivation than detention, and "not just an easement thereof".[701] It allows the maintenance of family and social contacts, and where the suspect can continue to work, it also mitigates the financial implications for the family of the suspect. It also generally prevents many of the detrimental mental and physical consequences of detention. For the state, the advantages relate to the lower costs for electronic monitoring and that it prevents prisons from overcrowding.[702] Lastly, it

[697]Regarding visits, see Article 188(1)(3). Allenfalls sind bewachte Ausführungen iSd § 98 StVG denkbar. Strittig die Unterbrechung der Freiheitsstrafe nach §99 StVG: bejahend Pieber in Wiener Kommentar StVG §99 Rz 17; verneinend OLG Innsbruck 12.10.2004, 6 Bs 399/04, RIS (zur Frage iZm einer Volksbefragung), Drexler (2014), § 99, Rz 6. Nach Drexler zwar denkbar, aber in der Praxis kein Anwendungsbereich, da diesfalls die Haftgründe zu verneinen wären und die U-Haft aufzuheben wäre; K. Drexler, Strafvollzugsgesetz (StVG), Manz 2014, § 99, Rz 7. Before international criminal tribunals extensive trial preparation might give the defendant a certain daily routine.

[698] Andreas Venier, *Das Recht der Untersuchungshaft: Tatverdacht, Haftgründe, Verhältnismäßigkeit* (Verlag Österreich 1999 (1999), p.23. It relates to the tendency observed that suspects that were in remand detention prior to and during trial are sentenced more frequently to sentences in excess of the time spent in detention than being acquitted or being sentenced to a sentence inferior to the time spent in detention.

[699] Bericht über den Straf- und Massnahmenvollzug 2012 (Auszug aus dem Sicherheitsbericht 2012), Bundesministerium für Justiz, Seite 32.

[700] Bericht über den Straf- und Massnahmenvollzug 2012 (Auszug aus dem Sicherheitsbericht 2012), Bundesministerium für Justiz, Seite 11. Die Suizidrate war somit 2012 bei U-Häftlingen knapp 4-fach so hoch wie bei Strafgefangenen; Bericht, Seite 33. Data on detention pending trial (ICCPR Report regarding Austria 2013: In 2011, prisoners on remand spent an average of 78.6 days in detention pending trial (see 2011 Security Report, p. 96, http://www.bmi.gv.at/cms/BMI_Service/SB_2011/SB_2011_Druckversion.pdf). The percentage of prisoners on remand compared to the total number of prisoners is as follows: in 2011 an average of 1,743 persons were remanded in custody, representing 19.8 per cent of the total average number of 8,816 persons detained (compare 2011 Security Report, p. 93).

[701] Christian Bertel/ AndreasVenier, *Kommentar zur StPO* (Manz 2012), p. 477.

[702] The operation of the currently used electronic foot tag costs around twenty EUR per day, whereas the classic form of detention costs around one hundred EUR.

prevents other adverse effects of detention, such as the phenomenon of prisons being a fertile ground for radical or religious ideologies.[703]

27.5.2. The Current Austrian Model: A Critical Assessment

The Austrian Supreme Court categorized the electronically monitored house arrest - due to the degree of interference caused by the monitoring as well as the social stigma of wearing an electronic foot tag – not as an alternative to detention, but as a "form of execution of the remand detention".[704] This has important ramifications.[705] It makes in the current Austrian system a combination between electronic monitoring and more lenient measures such as bail, periodic reporting or a deposit of the passport (i.e. alternatives to detention), legally impossible.[706] It further considerably narrows its scope of application as it requires as a precondition that the "lenient measures" must be seen insufficient to effectively balance the detention grounds, while the degree of integration of the suspect into society in combination with the (non-permanent) electronic monitoring allow for such degree of pre-trial freedom as opposed to detention.[707] As a result, from 2010 to 2014, electronic foot tags were only granted to persons awaiting trial in 24 cases.[708] The main field of application is in connection with the enforcement of sentences.

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[703] Eine Al-Kaida, die aus dem Gefängnis kommt?, http://www.wienerzeitung.at/nachrichten/oesterreich/politik/731191_Eine-Al-Kaida-die-aus-dem-Gefaengnis-kommt.html.

[704] Kurt Kirchbacher/ Michael Rami, *Wiener Kommentar zur StPO* (Manz 2012) zu §173a Rz 1; B. Hoinkes-Willvonseder, „Elektronisch überwachter Hausarrest als besondere Form der Untersuchungshaft", Juristische Blätter, 7/2011, 472-475. The advantage being for the concerned person that the time under electronic house arrest is being deducted 1:1 (compare England/Wales where days are only recognized at maximum 1:2[704]) from a subsequent sentence in case of later conviction.

[705] A second consequence is that the days spent in electronically monitored house arrest are fully (1:1) deducted from a possible subsequent prison sentence.

[706] As such, a combination of alternatives to detention with a form of "execution" of detention is not foreseen in the Austrian system. More lenient measures pursuant to Article 173(5) Austrian Code of Criminal Procedure

[707] Eugen Fabrizy, *StPO und wichtige Nebengesetze* (Manz 2011), 437; Kurt Kirchbacher/ Michael Rami, WK-StPO §173a, Rz 3.

[708] Die Presse, „Fußfessel für Ex-Chef der Rapid-"Ultras". Oliver P. gehört zu den ganz wenigen, die ihre U-Haft zu Hause absitzen dürfen", 24.4.2014 (online); Bericht über den Straf- und Massnahmenvollzug 2012 (Auszug aus dem Sicherheitsbericht 2012), Bundesministerium für Justiz, Seite 5. As per December 31st 2012, a total number of 203 persons were detained in the form of electronically monitored house arrest, from which only two were remand prisoners. See Bericht über den Straf- und Massnahmenvollzug 2012 (Auszug aus dem Sicherheitsbericht 2012), Bundesministerium für Justiz, Seite 5.

In the form currently applied in Austria, the remand prisoner is expected to work during daytime at a designated workplace, but is restricted during night time to his or her home where a transponder is installed transmitting a signal in periodic intervals to the electronic bracelet. In case the transponder is unable to connect with the foot tag (e.g. due to the absence of the prisoner from the signalling station) an alarm notifies the monitoring body, typically the parole officer responsible for the prisoner. This "traditional model"[709] in Austria does not, in its current form, effectively counter the risk of escape and it is therefore hardly surprising that such a form of monitoring is only in seldom cases considered to be sufficiently proportional to the grounds for detention. Absconding may only be discovered when the signal does not detect the transponder in the foot tag. An escape during daytime, when the person is typically free to go to work, would at the earliest be discovered during the evening hours.

27.5.3. Can Electronic Monitoring Effectively Balance the Risk of Escape?

In this context, as will be argued, the Austrian system today has some room for improvement. As mentioned above, the combination of electronic monitoring and the application of "lenient measures" should be made compatible *de lege ferenda.*[710] Further, the introduction of GPS-monitored foot tags that allow for 24-hours surveillance in relation to remand prisoners would provide several advantages. Importantly the person wearing such a monitored foot tag leaves a trace, which helps locating the person at any given time and as a side effect allows the monitoring of possible prohibited encounters (destruction of evidence or witness intimidation) or the resolution of subsequent illicit acts.[711]

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[709] Eric Maes, Benjamin Mine et al., "Thinking about electronic monitoring in the context of pre-trial detention in Belgium: a solution to prison overcrowding?", 4 2 2012 European Journal of Probation, University of Bucharest, p. 7.

[710] In its current form, Article 173a Austrian Code of Criminal Procedure only envisages the combination of electronic foot tag and the support of a parole officer, but not with lenient measures provided under Article 173(5). The underlying reasoning, as mentioned above, was that electronic monitoring was qualified as a form of (pre-trial) detention and the combination of detention and lenient measures is typically superfluous. This is different regarding electronic house, where a combination with lenient measures, such as the rendering of the passport or the payment of a bail, helps at reducing the risk of escape.

[711] In Germany reconstruction of electronic "traces" have allowed police to identify foot tag holders as perpetrators of property offences. This led to a debate whether such method was in violation of the right not

Both systems may co-exist. In the vast majority of cases the basic form of monitoring is sufficient. While in Austria currently only less than 2% of the persons monitored by the traditional model are in pre-trial detention,[712] in Hesse province, Germany, between 2001 and 2007, in one of four cases the same traditional, (i.e. not GPS monitored) model of foot tags was used with a view of "suspending the execution of an arrest warrant".[713] According to a study from Freiburg examining 13 test persons that were released from pre-trial detention, the success rate was over ninety percent.[714] The 24-hour GPS monitored version should particularly apply in the handful of cases where – as in the case of international crimes – highly complex investigations seem unavoidable. Unless an imminent and grave threat to society (e.g. terrorist attack) is posed, the risk of escape that is typically invoked in such cases could be mitigated with this intense form of monitoring. Having to deal with the surveillance of a limited number of suspects, the police could act strategically by allowing them to be sufficiently close to the relevant person in case he or she decides to abscond. Further, the wider use of facial recognition software in future can be expected to considerably facilitate re-arrests in case of absconding. The vulnerability of this monitoring system lies certainly in the fact that the foot tag could be detached from the person and discontinue sending the coordinates of the person. To counter such a possibility, a system would be necessary that would trigger an alarm as soon as any form of manipulation of the foot tag is initiated and afterwards the process of detachment would have to be lengthy and complex enough so that it would require the manipulator at least the same amount of time until the monitoring police would arrive following the signal. Being deprived of his or her passport, identification document or driving licences, the person would not be able to use a plane or rent a

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to incriminate oneself. A counter argument being that such trace was equally helpful to clear the holder of all suspicions.

[712] As per 31.12.2012, from 203 electronically monitored persons in Austria, only 2 were on remand. Bericht über den Straf- und Massnahmenvollzug 2012 (Auszug aus dem Sicherheitsbericht 2012), Bundesministerium für Justiz, Seite 5.

[713] Helmut Fünfsinn, „Elektronische Fußfessel und Prävention- ein Widerspruch?“, in Kerner Hans-Jürgen u. Marks Erich (eds.) *Internetdokumentation des Deutschen Präventionstages 2010*, page 4; 445 persons received the foot tag, from which 121 were remand prisoners.

[714] Markus Mayer, „Modellprojekt elektronische Fußfessel“, Freiburg 2004, 183 in Helmut Fünfsinn, *Elektronische Fußfessel und Prävention- ein Widerspruch?*, in Kerner Hans-Jürgen u. Marks Erich (eds.) Internetdokumentation des Deutschen Präventionstages 2010, page. One person did, however, effectively escape.

vehicle to plan an escape. Furthermore, increased judicial cooperation within the EU today implies that leaving the territory of Austria does in no way provide the accued with a safe haven in any other Schengen state. States outside of Europe that for a long time refused to extradite (while offering a comparable life standard) have become an exception.[715] In sum, a person planning an escape under such conditions requires at a minimum a team of conspirators, sophisticated logistics and sufficient funds. It doubtful that the vast majority of those accused of war crimes tried in Austria will dispose of any of that. At the same time, the public feels equally protected and satisfied that suspects of such horrendous crimes are not "on the loose" while awaiting trial.

27.6. Interim Conclusion

The increased use of an (improved) electronically monitored house arrest in relation to the most serious crimes both before national courts and before the international courts is to be unreservedly embraced. Many of the adverse effects of detention could be mitigated from a "humane, human rights and ethical perspective" while overall being "more in line with the legal principle of the presumption of innocence".[716] The risk that such electronic monitoring might be used as additive in cases where other restrictions would equally be sufficient ("net-widening effect") can be neglected in ICL, where typically detention is seen as the only option given the gravity of the crimes.

From the three forms of house arrest identified, only one is deemed capable of effectively reducing the risk of absconding. The strictest form of arrest, which only allows for (guarded) walks outside the residence, was applied in one case before the ICTY but soon abandoned. The advantages of such arrest over detention in a prison are questionable and the incurred costs equally reduce it to exceptional cases. The form currently in use in Austria, the "traditional model" where the prisoner is unmonitored during daytime, but required to be present at his residence during night hours, is certainly a prime instrument

[715] Andreas Venier, „Strafprozessrecht: Bedingt-obligatorische Untersuchungshaft, Fluchtgefahr, Kaution", Anwaltsblatt 2000/11), 687 (he remarks that for a long time countries such as Brazil were reluctant to extradite persons requested by other states). See for instance the case of alleged fraudster Peter Hochegger, Kurier, 17 January 2015, https://kurier.at/wirtschaft/wie-ex-lobbyist-hochegger-sein-leben-finanziert/108.514.613, retriebed 22 September 2017.

[716] European Journal of Probation, page 20-21.

for prisoners in preparation of (post-conviction) freedom, but does not in its current form offer sufficient precautions to prevent escape. The version with constant GPS-monitoring is thus the primary option, allowing for relative freedom for the person concerned while reducing the risk of escape to the furthest possible extent. *Bergeron* in his assessment of the feasibility of electronic monitoring of pre-trial detainees before the ICTR comes to the conclusion that such practice might prove as an alternative, however, not without underlining that "GPS seems to be the only option".[717] To increase effectiveness, the ACCP should make a combination of electronic monitoring and the imposition of conditions restricting liberty ("gelindere Mittel") possible *de lege ferenda*.

28. Post-Conviction Release during the Enforcement of International Criminal Sentences in Austria

The responsibility of the international community does not end with the final conviction/acquittal of the defendant; rather, the international mandate of the courts stretches until the release of the convicted person from the prison in the enforcing Member State.[718] For this purpose, both the ICTY and the ICC entered into agreements with States willing to enforce the sentences. Austria has signed enforcement agreements with both the ICTY[719] and the ICC[720]. Due to its geographic proximity, Austria was particularly predestined for the enforcement of sentences of prisoners from the former Yugoslavia (ICTY). In December 2014, the last of a total of six ICTY convicted persons was (early) released from the Austrian penitentiary Graz-Karlau.[721] The decision of the

[717] James Bergeron, "Electronic Monitoring of Pre-Trial Detainees of the International Criminal Tribunal for Rwanda", New England School of Law- Rwanda Genocide Prosecution Project, (retrieved online) 7 May 2002, pages 34-35.

[718] Both the ICTY and the ICC retain the ultimate decision to release a convicted prisoner and conduct reviews of the detention conditions.

[719] Agreement between the UN and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia dated 23 July 1999 (entered into force on 22 August 1999). The ICTY has entered into sixteen enforcement agreements with European countries, in addition to one ad hoc agreement with Germany.

[720] Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court adopted on 27 October 2005 (entered into force on 26 November 2005) (ICC-PRES-A103-AT-05).

[721] Mitar Vasiljević (transferred in 2004, http://www.icty.org/en/press/mitar-vasiljevi%C4%87-transferred-austria-serve-his-prison-sentence), Dario Kordić and Zoran Žigić (jointly transferred in 2006, http://www.icty.org/en/press/dario-Kordić-and-zoran-Žigić -transferred-austria-serve-their-prison-

criminal tribunals not to operate its own penitentiary for international crimes, but instead to use the capacities of a variety of states and inherently also their rules of sentence enforcement is not unproblematic as it unavoidably creates considerable inequalities among persons convicted by the same court (e.g. distance to family, differing "comfort" of cells and facilities between Estonia, Sweden and Portugal).[722] With release from detention as the overriding topic of this dissertation, this sub-Chapter examines to what extent internationally convicted persons serving their sentence in Austria had (ICTY) and should have in future (ICC) a realistic chance to be granted temporary release opportunities under Austrian national law on the enforcement of sentences.

The starting assumption was that due to the gravity and political implications of their crimes, national enforcement bodies would be increasingly cautious and reluctant to grant release for this special category of prisoners. Accordingly, the enforcement agreement between the ICTY and Austria also makes no reference to the possibility of any "temporary release from detention" in the form of outside prison activities. The situation is different with the ICC, where the equivalent agreement not only explicitly prohibits any discrimination against national prisoners of the enforcement state[723], but also sets the procedure in case temporary release is being considered.[724] This suggests that despite the gravity of their crimes and their special status within the Austrian penal enforcement system, such prisoners should not be *per se* deprived of such measures.

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sentences, Dragan Jokić (transferred in 2008, http://www.balkaninsight.com/en/article/icty-Jokić-to-be-released-from-prision): Duško Sikirica and Damir Došen (transferred in 2002, http://www.internationalcrimesdatabase.org/Case/98/Sikirica-et-al/).

[722] It is therefore not surprising that defence counsels keep lists with the enforcement countries that offer the most beneficial post-conviction detention conditions for their clients This information is *inter alia* based on a conversation with Defence counsel Michael G. Karnavas in July 2015 at the ICTY.

[723] For the ICTY, the Enforcement Agreement between Austria and the UN provides under Article 3 that "the conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under Austrian law and shall be in accordance with relevant human rights standards" Article 106 of the Rome Statute reads: "[I]n no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement".

[724] Article 6 of the Enforcement Agreement concluded between the ICC and Austria makes explicit reference to the procedure and supervisory role of the ICC in relation to prison programmes and benefits available under Austrian national law. The procedure is that where such activities are considered the Presidency of the ICC shall be informed of such fact in order to allow the latter to exercise its supervisory function (Rule 211 para. 2 ICC Rules).

28.1. Enforcement of International Sentences in Third Party States

The UN Secretary General in his report and draft of the statutes decided that enforcement should take place outside of the former Yugoslavia[725] and widely governed by the national law of the state of enforcement.[726] This decision was not without controversy. Those convicted by the Nuremberg Tribunal had their sentences enforced in Germany in a prison set up, administered and guarded by the international community.[727] The report of the Conference on Security and Co-operation in Europe (CSCE) argued that the enforcement of the sentences was the right moment for the states in the region to demonstrate their responsibility and determination to sentence these war criminals.[728] Also, concerns as to family visits were raised. Although most of the factors pertinent in 1993 when the decision not to have sentences enforeced in the former Yugoslavia was taken do not apply any longer, and both financial[729] as well as humanitarian reasons (family visits) would favour the enforcement of ICTY sentences in the former Yugoslavia, the Tribunal has to date not reconsidered its approach and hence will not do so before the end of its mandate. Conversely, the ICC, despite also having concluded agreements on the enforcement with third countries, has in December 2015 for the first

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[725] S/25704; Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993, Chapter F, page 30. While the provision excluding the enforcement of sentences within the territory of the former Yugoslavia is mentioned in the report as an explanatory note to the provision, the relevant Article does not expressly exclude such possibility, stating only that of the sentence shall be enforced in a state designated by the International Tribunal.

[726] Exceptions are the provisions regarding pardon or commutation of sentences; Articles 27 and 28; the question of early release is not mentioned in the statute, but falls also in the same category. For instance, Article 8 of the Enforcement Agreement between Austria and the UN deals with the procedure in case of early release, commutation of sentence and pardon in the same manner. The fact that the Austrian Courts are not competent to decide on early release or pardoning is a major deviation from the enforcement of sentences delivered by foreign Courts in Austrian prisons in relation to ordinary crimes (and typically concerning Austrian citizens). In such cases, Austrian law applies regarding the enforcement of the sentence including early release/parole and the right to pardon (Article 67 Section 4 Auslieferungs- und Rechtshilfegesetz/ Law on Extradition and Legal Assistance; BGBl 2011/134).

[727] S. Bienk-Koolman, Befugnis des Sicherheitsrates der VN zur Einsetzung von Ad-hoc Strafgerichten (Lang 2009), p. 70.

[728] Today Organization for Security and Co-operation in Europe (OSCE), S. Bienk-Koolman, Befugnis des Sicherheitsrates der VN zur Einsetzung von Ad-hoc Strafgerichten (Lang 2009), p. 71 commentry to Article 58 of the CSCE draft.

[729] Due to difficulties to finding member states willing to pay for the enforcement of long ICTY sentences, the Tribunal (at least regarding Austria) started to contribute financially to the high costs, Whereas the wording of the original enforcement agreement with Austria provided that the expenses incurred would be carried by the member state exclusively, the ICTY recently agreed to contribute roughly one-third of the total costs of enforcement for new ICTY prisoners.

time, entered into an *ad hoc* agreement with a situation country (The Democratic Republic of Congo) regulating the enforcement of the sentences of *Lubanga* and *Katanga*[730]. In both decisions, a vital factor in the reasoning was that the persons concerned could be in proximity to their respective families.[731]

28.2. The Role of the Prisoner in the Selection of the Enforcement State

Although persons convicted by the ICTY may present their opinion, if the President decides to consult them, they do not have the right to be heard on or influence the selection of the country of enforcement.[732] The Tribunal has in its past decisions considered the geographical distance between the enforcement States and the place of residence of the relatives of the defendant with the aim of facilitating family visits.[733] In at least four cases, prisoners contested the selected enforcement state. Martić and M. Lukić both complained about the distance from Estonia to their home and families.[734] Their arguments were dismissed with reference to a lack of direct petition powers of the

[730] *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision designating a State of enforcement, 8 December 2015. *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision designating a State of enforcement, 8 December 2015. ICC-01/04-01/07-3626-Anx., "Accord ad hoc entre le gouvernement de la République Démocratique du Congo et La Cour Pénale International sur l'exécution de la peine de M. Germain Katanga, prononcée par la Cour" ("Agreement").

[731] In certain cases, however, there may be justified hesitance of serving sentences in states run by former political opponents of the convicted persons.

[732] *Prosecutor v. Žigić*, ICTY-IT 98-30/1-ES, Decision on Request of Zoran Žigić, 31 May 2006; following a Judgement by the Appeals Chamber on 28 February 2005, Zoran Žigić was sentenced to twenty-five (25) years imprisonment. By way of an Order Designating the State in which Zoran Žigić is to Serve his Prison Sentence, dated 12 May 2006 (IT-98-30/1-ES) and under consideration of the place of residence of the family of the convicted, Austria was chosen as enforcing state. By way of a (confidential) Request Submitted to the President of the Tribunal Regarding the Serving of the Remainder of the Sentence of Zoran Žigić in a Different Country, 19 May 2006, the convicted person "proposed a number of reasons for seeking to be sent to a State other than Austria, primarily related to his desire to maintain close contact with his family" (Decision on Request of Zoran Žigić, 31 May 2006, para 1). In the above mentioned decision, the President of the ICTY dismissed this Request clarifying that in accordance with the Practice Direction (paragraph Four) the President has discretionary powers to request the opinion of the convicted person, which the President, having already considered the proximity of Austria to the place of residence of the family of Zoran Žigić, did not consider it necessary.

[733] Practice Direction On the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment (IT-137/Rev.1), in its current version, dated 1 September 2009. Under Article Four, factors such as the marital status of the convicted, the place of residence of his family or his linguistic skills shall be considered.

[734] The case of M. Lukić was insofar special as he became father following his conviction to a life imprisonment and while awaiting his transfer to an enforcement state. The mother of his child was residing in Germany.

convicted person.[735] In *Strugar*, the question arose whether the designation of the enforcing state could be subject to negotiation in plea agreements, a question which was rejected by the Registry with reference to the Secretary General's Report.[736] A different motivation was arguably behind the complaint of Zigić who contested his enforcement in Austria due to the existence of an extradition agreement between Austria and Bosnia, where Zigić was wanted for a prior unrelated prison sentence yet to be served. The request was denied and he was extradited to Bosnia to serve another sentence.[737]

28.3. Liberty Related Programmes and Benefits Awarded to ICTY Prisoners in Austria & Outlook for Future ICC Prisoners?

28.3.1. Release Related Benefits Granted to ICTY Prisoners Serving Sentences in Austria

Practically all of the six ICTY prisoners having served their sentences in Austria between 2002 and 2014 benefitted at some point from outside of prison activities. As all six ICTY convicts were under a ban of residence in Austria and deported upon release, the aim of the release was primarily a humanitarian one as opposed to an integrative one facilitating their integration into (Austrian) society upon release.[738] All of the ICTY prisoners benefitted – "on several occasions" – from *guarded leaves* for medical reasons or for visits to the representation offices of their countries of origin.[739] Another reason for

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[735] *Prosecutor v. Martić*, ICTY-I*T*-95-11-ES, Decision on Milan Martić for Reconsideration of Order Designating State in Which He is to Serve his Sentence, 5 March 2009, para 5. In the Manual on International Criminal Defence: ADC-ICTY Developed Practice, UNICRI 2011, page 195, para 12, the input of the convicted person into the selection of the country of incarceration is described as minimal and characterized by the lack of any appealing power. *Prosecutor v. Milan Lukić ,* MICT-13-52-ES.1, Motion for Reconsideration and Review of Sentence of Mr. Lukić in Estonia and Transfer to The Hague, 9 March 2015, paras. 10 & 16.

[736] *Prosecutor v. Pavle Strugar*, ICTY-IT-01-42 Misc.1, Decision on Strugar Request to Reopen Appeal Proceedings, 7 June 2007, para 28

[737] *Prosecutor v. Žigić ,* ICTY-IT-98-30/1-ES, 31 May 2006, Decision on Request by Zoran Žigić , page 2.

[738] One of the prisoners was extradited to Bosnia were he had an „open" sentence for an unrelated crime. The information regarding the practical application concerning both national and ICTY prisoners resulted from interviews with persons from the Austrian Ministry of Justice as well as the penitentiaries of Graz-Karlau and Krems-Stein.

[739] Article 98 Austrian Law on the Enforcement of Sentences (Strafvollzugsgesetz-StVG) contains two very different scenarios: on the one hand the leave of the penitentiary for the purpose of giving witness testimony in another legal proceeding and on the other the leave for certain important reasons requiring the presence of the prisoner. While the first case serves the interest of justice, the second scenario is only possible upon request of the prisoner and, if granted, limited to a 24-hour period. The costs for the accompanying guard(s) are to be borne by the prisoner.

guarded leave was for the purpose of testifying before another Court.[740] One ICTY prisoner refused to testify before the Tribunal while serving his sentence in Austria, a behaviour for which he was convicted to an additional sentence for contempt of the court.[741]

Concerning *unguarded leave*, Austrian law allows prisoners that are not regarded as particularly dangerous to request the interruption of their prison term for a maximum period of eight days mainly for humanitarian reasons. None of the six ICTY prisoners serving in Austria made any request for such interruption; not least due to the fact that the Austrian law restricts visits of funerals or ailing family members to the territory of Austria.[742] *Unguarded day parole* was awarded to one of the prisoners on several occasions; he was allowed to leave the penitentiary for a maximum period of 12 hours in order to spend time with his family in restaurants or other locations. The remaining five prisoners, according to the responsible officer at the prison of Graz-Karlau, overall maintained only loose family contacts and therefore did not make requests for such day parole. According to the opinion of the officer, the other four prisoners not awaiting extradition would have otherwise had good chances to benefit from parole had they applied. This is in line with the duty of a detaining State to provide the prisoner with adequate contact to the outside world.[743] Article 103 of the European Prison Rules (EPR) similarly warrants for “activities and preparation for release such as prison leave”. A mix between *guarded and unguarded measures* was the granting of daily excursions for recreational purposes, usually accompanied by at least one prison guard. ICTY prisoners in the last year prior to their release further participated in such excursions, such as walking tours around Graz (e.g. to the Schöckl hill in proximity) but also to the pilgrimage site of Mariazell about a hundred kilometres away from Graz.

[740] Article 4 of the Enforcement Agreement between Austria and the ICC which thereby amends Article 98 which only provides for giving testimony in proceedings before Austrian courts.
[741] Dragan Jokić Refuses to Testify, Convicted of Contempt: https://srebrenicamassacre1995.wordpress.com/2009/03/27/dragan-Jokić-refuses-to-testify-convicted-of-contempt/Information obtained during an interview at Graz Karlau in December 2014.
[742] Article 99 StVG- Austrian Law on the Enforcement of Prison Sentences.
[743] Manfred Nowak et al., *All Human Rights for All: Vienna Manual on Human Rights, Human Rights of Detainees,* page 6.

28.3.2. Outlook: Temporary Release Benefits for ICC Prisoners in Austria?

Despite the fact that the ICTY Statute or Rules did not explicitly refer to the possibility of outside of prison programmes and benefits in the enforcement states, the experience from Austria demonstrates that their special categorization as international prisoners did not exclude them from such practice. There is hence no reason why at least the same regime should not, in the future, also be awarded to ICC prisoners. The question is more which other forms of releases provided in the Austrian law of Enforcement could apply to ICC prisoners. Particularly, two additional forms of releases may and should be considered. The first is humanitarian temporary (guarded) releases for the visiting of funerals and ailing family members. In these cases, it should not matter whether the funeral or the person is located in Austria or not, but should rather be focused on whether the logistics allow for such a visit. Against this background visits in other EU countries must not categorically be precluded. This would also be in compliance with Strasbourg law which recognized in *Płoski* and in *Giszczak* the right to attend funerals as an outflow of the right to private and family life.[744] Funerals visits of prisoners on the territory of Austria are quite common events;[745] they are to be granted if the prisoner is not considered dangerous and disposes of the financial resources to pay for his accompanying guards. The second form of release is the possibility for detainees to benefit from unguarded daytime work outside the prison facility in combination with electronically monitored house arrest. Although this may be considered in exceptional cases, ICC prisoners in the majority of cases would not meet the criteria set by the Austrian law which is that a prisoner be integrated into the labour market and disposes of an occupation as well as income to support his living costs, medical insurance and accommodation.[746] Moreover, the penitentiary of Graz-Karlau, where all ICTY prisoners served their sentences, is not equipped with the necessary infrastructure for electronic house arrest.

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[744] *Płoski v. Poland*, 26761/95, 12 February 2003, paras. 38-39; *Giszczak v. Poland,* 40195/08, 29 February 2012.

[745] Interview with a responsible person at the penitentiary of Krems Stein in November 2014.

[746] Article 156c (1) lit. 1 and 2 Austrian Law on the Enforcement of Sentences (Strafvollzugsgesetz-StVG).

28.4. Interim Conclusion

The applicability of existing detention benefits including outside prison activity for international prisoners was considered.[747] While their prominent status, the gravity of their crimes and their lack of integration within the country of enforcement do warrant against outside prison activities, i.e. temporary release from detention, the comparably old age (for the ICTY on average about 60 years old)[748] and the prospect of early release (i.e. after 2/3 of the sentence) render absconding improbable even where those prisoners were unguarded. In retrospect, all of the ICTY prisoners having served their sentence in Austria were allowed to take part in group excursion with accompanying prison guards; all apart from one were in principle entitled to spending up to 12 hours with family or spouses outside of the penitentiary. With regards to ICC prisoners, the practice developed with regrads to prisoners of the ICTY should be continued. In addition, an adaption for the visit of funerals within Europe is hereby suggested *de lege ferenda*.

29. Conclusion

This Chapter reached the conclusion that GPS-monitored electronic house arrest can indeed provide an effective instrument to mitigate many of the adverse effects a defendant in pre-trial detention faces. It may be used both to support a summons to appear in ICC proceedings or alternatively to alleviate the risks of escape and/or to witnesses related to interim release. With Belgium as the first country allowing ICC defendants on its territory the pressure on the ICC to genuinely consider electronically monitored house arrest as an alternative to detention will likely increase in future. The second section of this Chapter evaluated the Austrian practice regarding the release from prison for ICTY convicted prisoners. It was established that no discrimination between national and international prisoners was observed and release for humanitarian reasons

[747] Not examined were such benefits not involving any outside of prison activity, such as the reception of special food and goods (save for alcohol etc., Art 34 StVG), the usage of their own television or radio sets (Art 24 StVG) and similar privileges. Such privileges are unproblematic and are to be granted independently from the nationality of the prisoner or whether a national or international prisoner is concerned.

[748] Hans Holthuis,, Registrar ICTY, Diplomatic Seminar of the ICTY, June 2008, at 3-7.

was possible in exceptional cases. The use of electronic monitoring could in future, similar to the current Austrian practice for national prisoners, also play a greater role in temporary releases from prison of ICC convicted prisoners, for instance for re-integrative purposes.

CHAPTER FOUR: Access to Human Rights Courts for Those Standing Trial before International Criminal bodies

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The previous three Chapters examined the legality of certain elements relating to pre-trial detention from a human rights angle. The first Chapter concluded that the initial pre-trial mechanism before the ICTY conditioning release upon exceptional circumstances presented a deviation from (applicable) internationally recognized and established human rights principles, whereas the later mechanism before the ICTY as well as that before the ICC were overall human rights compliant. In the second Chapter, the legality of a reverse burden of proof in pre-trial detention matters was considered overall justified in light of the principles developed in the case law of the European Human Rights Court. The third Chapter assessed possible alternatives to custody in light of the general principle that among several similarly effective measures, the one having the least adverse impact on a defendant is to be chosen. With regards to post-conviction release in Austria, no systemic violation of human rights was revealed.

The following last Chapter will outline possible scenarios as to the practical consequences arising from a situation where a manifest human rights violation is invoked in relation to a defendant standing trial before the ICTY or the ICC. Could and should the ECtHR or the HRC have the right to examine such situations? Such examination will go beyond (pre-trial) detention related issues and encompass all stages of the proceedings; from the circumstances surrounding arrest in a state (*male captus, bene detentus),* possible violations at the pre-trial and trial stage (such as the denial of release or violations during the gathering of evidence) and fundamental rights violations in connection with the sentence enforcement. Where state cooperation is invoked with regards to the attribution of legal control between the The Hague Courts and the Member States, reference will be made to the cooperation agreements in place between Austria and both the ICTY and the ICC, not least against the background that Austria has arrested and transferred suspects and accused to the ICTY, cooperated in evidential matters in ICC proceedings and enforced ICTY sentences.[749]

30. Introduction

The following scenario: two prisoners on remand invoke human rights violations attributable to the detaining authority: one being a prisoner detained in a penitentiary in a part of Iraq or Afghanistan under the (temporary) governance of the military forces of an ECHR (or ICCPR) Member State and the other one, a person detained on behalf of the ICTY or ICC on Netherlands soil. Following currently applicable Strasbourg (and Geneva) jurisprudence, only the first prisoner would be in a position to lodge a complaint to the ECtHR (or HRC),[750] whereas the complaint of the second person would be rejected due to a lack of "effective control" exercised by an ECHR (or ICCPR) signatory state, under the current state of the law.[751]

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[749] On 18 March 1996, Zdravko Mucić was arrested by Austrian police (ICTY Press Release, CC/PIO/048-E, *International Tribunal issues first indictment dealing with Bosnian-Serb victims,* 22 March 1996*)*; On 25 August 1999, Momir Talić, was arrested in Vienna on the occasion of a conference organised by the Organisation for Security and Cooperation in Europe (OSCE) (ICTY Press Release, JL/P.I.S./432-E, *Statement by the office of the prosecutor of the International Criminal Tribunal for the former Yugoslavia on the arrest of Momir Talić today in Vienna, Austria*, 25 August 1999); Furthermore, Biljana Plavšić was questioned at Vienna airport on 6 May 1998 before departing on a plane to London on the basis of an INTERPOL arrest order (ICTY Press Release, CC/PIU/315-E, *Statement by the Deputy Prosecutor: "Mrs Plavšić has never been indicted*", 13 May 1998; Biljana Plavšić was indicted by the ICTY two years later in April 2000. Further, Austria has to date enforced the sentences of six ICTY convicted persons. In matters concerning evidence, Austria assisted the ICTY on several occasions when several Austrian citizens testified before the Tribunal. Austrian television was the only international station that recorded the shelling of the bridge in Mostar, the tape which was used in the trial *Prosecutor v. Prlić et al*. Most recently Austria assisted the ICC in the Bemba et al. contempt case where bank transfers of the Western Union financial institute were retrieved following a Court order by the Vienna County Court.

[750] Concerning British troops in Iraq see for instance the cases of *Hassan v. United Kingdom*, 29750/09 [GC], 16 September 2014 in which the Court held that the applicant had been within the jurisdiction of the United Kingdom following his arrest by British troops, or *Al-Jedda v. United Kingdom*, 27021/08 [GC], 7 July 2011, where the UK was found in violation for an internment for three years of an Iraqi national. For the Human Rights Committee see General Comment No 31 (2004) ("The enjoyment of Covenant rights is not limited to Citizens of State Parties, but must also be available to all individuals.. who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or *effective control of the forces of a State Party acting outside its territory, regardless* of the circumstances, in which such power or effective control was obtained..") cited in M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", (2005) Vol 99 No.1 American Society of International Law, p.123.

[751] Regarding the ECtHR this will be explained in detail in the following chapter (see notably *Galić & Blagojević*). For the Human Rights Committee this is based on a statement by Committee Member Rivas Posada made on the occasion of drafting the 32 General Comment when he clarified that the ICCPR "was for state parties only, and therefore anything referring to tribunals at international level eclipsed the

While this distinction is in principle not unreasonable as it establishes a clear separation line (between scenarios where the state is predominantly in control and where it is not) and it may seem logic that a state can and should only be held responsible for behaviour it can sufficiently control, the opposing argument is that the mere shifting of responsibilities from a single or a group of states to international organizations should not relieve these states from their otherwise existing human rights responsibilities.[752] While the ECtHR argued in this direction notably in *Waite & Kennedy*, concerning the question of recourse to national courts in an employment law dispute before an international organization[753], the same principles must *a fortiori* apply in cases where international organizations take over some of the most sensitive state issues, namely the prosecution, detention and sentencing of human beings. Moreover, international criminal courts do not act in a vacuum. Accused persons must be arrested by national authorities, Member States assist the procedures by providing evidence against accused persons, and ultimately sentences are enforced in national prisons governed under the laws of the enforcing state.

Cooperation of Member States with the ICTY and the ICC

As the ICTY and the ICC[754] neither control the territory in which they are investigating, nor do they have their own police force as executing organs, they both heavily rely, to fulfil their mandates, on the cooperation of the international community.[755] The first ICTY President, Cassese, famously compared the ICTY to a "giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the state

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mandate of the HRC", cited in E. Schmid, in "A few comments on a comment: The UN Human Rights Committee's General Comment No.32 on Article 14 of the ICCPR and the question of civilians tried by military courts", 2010 Vol 14 (7) The International Journal of Human Rights, p. 1059 and Footnote 7 (p.1067).

[752] This can be derived from the Latin legal principle of *Nemo plus iuris transfere potest quam ipse habet* (No one can transfer more rights than he/she himself has).

[753] *Waite & Kennedy v. Germany* [GC], 26083/94, ECHR 1999, para. 6.

[754] International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). All three will also jointly be referred to as international criminal courts.

[755] Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in Jochen Frowein and Rudiger Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (Vol. 5, 2001) p. 266. Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomac*y (Oxford 2004) p. 115.

authorities; without their help the Tribunal cannot operate".[756] At the same time, it must not be disregarded that the ICC and particularly the two *ad-hoc* Tribunals are powerful actors vested with considerable legal powers by the international community, notably in matters of judicial assistance and arrest.[757] Particularly, those powers on the one side, and the strong dependability on cooperation from the states in the region on the other, led, at times where such cooperation was effectively lacking, to practices on the verge of legality and at times resulting in flagrant violations of the accused's fundamental rights. The fact that a state cooperating with the *ad hoc* Tribunals and particularly with the ICC continues to be bound by its own human rights obligations, such as those of the ECHR or the ICCPR, may become problematic in situations where a cooperation request seemingly collides with a State's obligations under the above-mentioned treaties. Where such a violation has occurred, it remains to be assessed whether the ECtHR may at all become competent and what the appropriate remedy should be in case of a confirmed violation.

Human rights issues also arise pending the proceedings before the international criminal courts. In this respect, the ECtHR repeatedly held that the seat of the ICTY and the ICC on Netherlands territory did not provide sufficient linkage to engage the latter's ECHR responsibilities.[758] Such approach, as will be argued, may no longer be validly invoked where human rights considered customary international law or even *jus cogens* norms are affected. States, who are bound by these norms by virtue of their very existence, must not become exempted from respecting such norms simply by transferring sovereignty to international organizations.[759] The following Chapter is based on the belief that the international criminal courts should for their interest of fulfilling its mandate be subject to (at least a certain degree of) external human rights monitoring. For the following two reasons: Firstly, in view of the relevance and weight the Strasbourg jurisprudence is already attributed in procedural questions before the ICTY and ICC by Defence,

[756] Address of Antonio Cassese, President of the ICTY to the General Assembly of the UN, 7 November 1995.
[757] With regards to arrest, the Tribunals were not only assisted by member states but could also revert to support from non-state entities such as UN or NATO units.
[758] *Galić v. Netherlands*, 22617/07, Decision, 9 June 2009, para. 43; *Blagojević v. Netherlands,* 49032/07, Decision, 9 June 2009.
[759] *Waite & Kennedy v. Germany* [GC], no. 26083/94, 1999, para. 6.

Prosecutors and Judges alike and secondly perhaps more importantly to prevent fragmentation in the jurisprudence relating to international crimes adjudicated before domestic Courts bound by the ECHR or ICCPR on the one hand and those before international courts and tribunals on the other. *Safferling*, although denying the formal subordination of the ICTY or ICC to human rights treaties, concludes that strict conformity with human rights treaties is warranted before the international courts as otherwise "undue discrimination" would occur between those tried before international and domestic courts for often the same criminal event.[760] In this respect, one may consider the case of *Jorgić v Germany* before the ECtHR following the applicant's conviction for genocide by a German court.[761] It was demonstrated that often a variety of factors contributed to whether an accused was tried before a domestic tribunal, including the principle of universality (ICTY) and complementarity (ICC).

A. Human Rights Principles in International Criminal Law Proceedings

31. The Interplay between International Criminal Courts and Human Rights in an Evolving International Legal Order

The question whether there exists some form of binding effect of judgements of human rights courts over procedural issues before international criminal courts must be analysed from at least three main angles: firstly, from the position of the criminal courts themselves, namely the framework of the ICTY and the ICC respectively and their position *vis-à-vis* human rights, secondly, by reverting to the hierarchy of norms in international law and thirdly, by analysing how the leading human rights courts have interpreted their power in dealing with applications originating from international criminal proceedings in the past.

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[760] Christoph Safferling, "International Criminal Procedure and its Participants: An Examination of the Interaction of Judges, Prosecutor and Defence at the Yugoslav Tribunal" (2002) 5 Yearbook of International Humanitarian Law, p.246, he rightly points to the fact that it is often arbitrary whether a certain crime is adjudicated before the international or a domestic court. ("Albeit it is difficult to find a proper dogmatic argument to establish a direct legal subordination of the ICTY to human rights treaties, conformity with human rights is corollary in cases where otherwise undue discrimination would be the effect. This is the case here, as it is often arbitrary whether a war criminal is tried by the ICTY or on the basis of the principle of universality by domestic courts".

[761] *Jorgić v. Germany*, 74613/01, 12 July 2007. Discussed by Madalena Pampalk, Marc Sitzer in Christina Binder et al., *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010), p.83.

31.1. The Different Approach to Human Rights of the ICTY as a Security Council Endorsed Organ versus the ICC as a Treaty Based Court?

Both the relevant UNSC Resolutions[762] and the ICTY Statute remain silent as to which sources of law (and in which order) the Tribunals should apply in their proceedings, namely in matters where the Statute or the Rules provide no explicit guidance.[763] In the first Chapter, two separate findings for both the ICTY and ICC have been deduced from jurisprudence and by interpreting the statutes of the courts. While both the ICTY and the ICC stress the importance of internationally recognized human rights principles in its respective proceedings, their approaches to the binding nature of human rights seems to be crucially different. It appears that the ICTY in its case law considered its own law to precede over the body of established human rights principles in case of conflict, whereas the ICC in its Article 21(3) Rome Statute seems - by requesting the Statute to be interpreted in conformity with (developing) internationally recognized human rights - to establish a primacy of human rights principles over ICC law.[764] The practical effects of these approaches are manifold. With regards to the ICTY, this implies that decisions of the leading human rights courts could never be binding even where in conflict with ICTY law. Conversely, the ICC is in theory expected to closely follow and respect developing human rights principles, such as those created by the Strasbourg court, and interpret its own case law according to them, otherwise risking a violation of its Statute.

31.1.1. The Implications of Article 103 UN Charter in Matters of Member State Cooperation?

31.1.2. The *ad hoc* Tribunals as Subsidiary Organs of the UNSC

The *ad hoc* Tribunals were both created by way of UN Security Council Resolutions; the same is true for the ICTY's first Statute and every succeeding amendment. This mode of establishment provides the ICTY with legally binding force over every UN Member State and legitimates interference in "matters which are essentially within the domestic

[762] UNSC Res 808 (27 February 1993) UN Doc S/RES/808 and UNSC Res 827 (25 May 1993) UN Doc S/RES/827 in relation to the ICTY.
[763] Account must further be taken of the expeditious manner, in which the Statute was drafted, the novelty nature of such criminal Tribunal as well as of the still nascent discipline of international criminal law.
[764] See the discussion in Section 6.2. of the First Chapter.

jurisdiction of any state".[765] Importantly, Article 103 of the UN Charter establishes the primacy of Member State's Charter obligations if they are found to conflict with their obligations "*under any other international agreement"*.[766] Article 103 thereby empowers the ICTY with "superior status under international law".[767] The primacy of Article 103 applies to the acts and decisions of UN organs competent to adopt binding decisions, such as the UNSC acting under Chapter VII.[768] *Zappalà* observes that in such a situation "Member States have no choice other than to comply with the Council's decision and to co-operate with the Tribunals" but equally asserts that even in such situations, nothing would prevent human rights bodies "from reviewing the actions of the individual states, in order to assess whether State authorities have acted properly" respecting both their Charter as well as their ICCPR or ECHR obligations.[769] The question as to the consequences where the effects of a resolution by the Security Council would be violating core principles of EU law was the subject of the *Kadi I* case before the ECJ. While the European Court of Justice confirmed that resolutions taken by the Security Council would prevail *inter alia* due to Article 103 UN Charter over European Union law including "community law of a constitutional nature"[770], it opined that where "constitutional principles of the EC Treaty"[771] (including the protection of fundamental human rights) risk to be violated, the ECJ was in a position to review the effect of the

[765] Article 2(7) *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 28 September 2015].
[766] Article 103 Charter of the UN reads: In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
[767] Gerhard Hafner, "Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed*.) International Law: Theory and Practice*, 1998, p. 652. ("The distinction entails that the two Tribunals, unlike the ICC, enjoy the prerogatives granted under Article 103 of the Charter of the United Nations (henceworth the Charter) which furnishes them with a superior status under international law.").
[768] Bruno Simma, *The Charter of the United Nations: A Commentary* (Third Edition Oxford 2002) p. 1295. Besides the Security Council, also the UN General Assembly arguably benefits from Article 103 whenever it is competent to issue binding decisions.
[769] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), pages 9-10. He concludes that in such a case the member state may eventually even be obliged to pay compensation.
[770] European Court of Justice, *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) C-402/05, para. 276.
[771] Ibid. para. 285.

Security Council resolution (but not the resolution itself).[772] Similar principles were also adopted by the ECtHR in *Nada v. Switzerland* and *Al-Dulimi v. Switzerland* (see 31.3). The above suggests that a member state even where cooperating with the ICTY is not exempted to conduct at least some degree of review of human rights conformity.

With regard to Member State cooperation and judicial assistance, Article 29 ICTY Statute contains the obligations of States to, *inter alia,* arrest and transfer suspects to the Tribunal. Such a provision therefore benefits from Article 103 in that it deprives a non-compliant State of the defence of non-compliance based on any other international (treaty) obligation. Conversely to this, provisions in the Rules, which are drafted by the Judges, only benefit from Article 103 powers insofar as they define the Articles of the Statute.[773] Their amendment-friendly character rightly deprives them of the same weight as rules approved by the UNSC.[774] Austria, cognizant of its obligations to comply with the Resolutions, the Statute as well as the Procedural Rules, adopted in May 1996, the law on the cooperation with international tribunals.[775] In the law's explanatory text, it is explicitly stated that amendments to the procedure might occur through subsequent resolutions or amendments to the Rules, a factor to be duly considered in the application and the interpretation of Austrian cooperation law.[776] The law does not dwell on the question whether UN Resolutions could claim direct effect within the Austrian legal

[772] Ibid. para. 326.

[773] Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", in Jochen Frowein and Rudiger Wolfrum (eds.) *Max Planck Yearbook of the United Nations Law* (Volume 5, 2001) p. 253.

[774] According to Rule 6 Rules of Procedure and Evidence, IT/32/Rev.49 (22 May 2013), every Judge. Prosecutor or Registrar can propose amendment of the Rules which is adopted if agreed by at least ten permanent judges.

[775] "Die Republik Österreich trifft daher die völkerrechtliche Verpflichtung, jene Pflichten, die sich aus den Resolutionen 827 (1993) und 955 (1994) sowie aus den Statuten der Internationalen Gerichte und deren Verfahrensordnungen ergeben, zu erfüllen." Regierungsvorlage: Bundesgesetz über die Zussamenarbeit mit den internationalen Gerichten, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP, p. 10. Bundesgesetz über die Zusammenarbeit mit den internationalen Gerichten, BGBl. Nr. 263/1996.

[776] „Die Zusammenarbeit soll auch nach Maßgabe der Resolutionen des Sicherheitsrates der Vereinten Nationen, des Statuts des Internationalen Gerichtes und dessen Verfahrensordnung stattfinden. Insbesondere bei der Verfahrensordnung, aber auch beim Statut des Internationalen Gerichtes sind Änderungen durch Beschlüsse des Internationalen Gerichtes bzw. weitere Resolutionen des Sicherheitsrates der Vereinten Nationen nicht ausgeschlossen. Soweit die bestehenden Vorschriften ergänzt oder eingeschränkt werden, soll bei der Anwendung und Auslegung dieses Bundesgesetzes auf die geänderte Rechtslage Rücksicht genommen werden", Stenographische Protokolle des Nationalrates XX.GP, p.11.

order, but seems to affirm this question regarding the provisions contained in the ICTY Statute.[777]

31.1.3. The ICC as a Treaty-based Organisation and Its Relations with Human Rights Treaties

The ICC is a treaty-based international organization with currently 123 States Parties.[778] Its legal status depends according to the mechanism the jurisdiction of the ICC over a situation is triggered. Not being a UN organ, the ICC does as such not benefit from Article 103 of the UN Charter.[779] This is certainly true for (the majority of) cases where the jurisdiction of the ICC is triggered by a State or by the ICC Prosecutor *proprio motu*. The situation is, however, different in cases where the jurisdiction of the ICC is triggered by the UN Security Council (UN Security Council Referral, the cases of Libya and Sudan[780]), in such case Article 103 appears to apply similarly to the procedure before the *ad hoc* Tribunals[781], that means that a cooperating state would have to follow requests for cooperation from the ICC even where in conflict with the state's other international (human rights) obligations.[782] The application of Article 103 in such a case is based on Article 30(1) of the Vienna Convention on the Law of Treaties (VCLT).[783] The lack of

[777] "Bewußt läßt Absatz 1 die Frage offen, ob und inwieweit Resolutionen des Sicherheitsrates der Vereinten Nationen unmittelbare Anwendbarkeit im österreichischen Recht beanspruchen können. Von der Begriffsbestimmung des § 1 ausgehend, können aber nur jene Resolutionen des Sicherheitsrates der Vereinten Nationen in Betracht kommen, die sich auf das (jeweilige) Internationale Gericht und dessen Statut beziehen." (ibid), p. 11.

[778] Alain Pellet in Antonio Cassese at al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary: Volume II* (Oxford 2002), p. 1053.

[779] There exists close cooperation between the permanent Court and the UN. The Security Council can for example trigger jurisdiction of the Court.

[780] United Nations Security Council Resolution 1970 (2011), dated 26 February 2011 in which it referred the situation in Libya since 15 February 2011 to the ICC to exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Libya or by its nationals. See https://www.icc-cpi.int/libya; Security Council Resolution 1593 (2005), dated 31 March 2005 referring the situation in Darfur, Sudan since 1 July 2002 to the ICC, see https://www.icc-cpi.int/darfur.

[781] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p.10.

[782] The interesting question would be if Austria could consequently disregard its human rights obligations stemming from the ECHR, as it could arguably in ICTY proceedings, where it was asked to arrest a person from Libya or Sudan on its territory.

[783] Article 30 of the VCLT resolves conflicts arising from successive treaties. In its first paragraph it invokes Artice 103 of the Charter of the United Nations as the primary reference point and only in second place the principles established in Article 30 VCLT. Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, registered ex officio 27 January 1980, United Nations Treaty Series 1980.

Article 103 in standard proceedings before the ICC has great implications if a Member State's obligations to cooperate with the Court are in conflict with the principles of the ECHR or ICCPR, as both are in such case formally on equal footing.[784] In an attempt to avoid such situations, the ICC and the Council of Europe have held several consultation meetings. Additionally, every Council of Europe Member State also party to the ICC was invited to report implications in connection with the Convention arising from the ratification of the Rome Statute.[785] On the occasion of the Second multilateral consultation meeting in 2001, the conclusion reached was that the transfer of jurisdiction to the ICC "may not entirely free a State in a given case from its obligations arising from the Convention".[786] Caflisch, a former ECtHR Judge and expert on relations between the Strasbourg Court and the ICC, concluded that indeed a possible conflict could arise for States Parties to both instruments insofar as certain provisions of the ICC may prove incompatible with principles of the Convention.[787] As both the ECHR and the ICC are international treaties, for a State Party becoming Party to a later treaty (in most cases the Rome Statute in July 1998), a conflict of treaties may arise for this State in situations where the latter contradicts the former (e.g. the ECHR). This could render the violation of one instrument by a state inevitable and trigger its international responsibility.[788] Caflisch suggested a two-pronged solution to this "unsatisfactory" scenario ultimately "limiting the independence of the ICC". Fistly, the ICC should strictly adhere to human rights standards and the ECtHR for its part when having to decide on such a conflict should "do its utmost to avoid rather than to seek confrontation".[789] Such approach can be traced to the principle of systemic interpretation inherent to Article 31(3)(c) of the VCLT according to which the interpretation of a treaty shall take into account "any relevant

[784] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p.10.
[785] Austria responded on 16 September 2003.
[786] Second Consultation on the Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court, Consult/ICC (2001), 14 September 2001, Conclusion no.10.
[787] On the occasion of the Third ICC and ECtHR Consultation Meeting; L. Caflisch, "The Rome Statute and the European Convention on Human Rights", Vol. 23, 2002, Human Rights Law Journal, p. 1,14.
[788] Ibid. citing S.A. Sadat-Akhavi, "Methods of Resolving Conflicts between Treaties", 2001 Geneva, The Graduate Institute of International Studies, p. 66-68.
[789] Lucius Caflisch, "The Rome Statute and the European Convention on Human Rights", Vol. 23, 2002, Human Rights Law Journal, p. 14.

rules of international law applicable in the relations between the parties".[790] As the presumption against normative conflicts is considered an important principle of international law, the mitigation of such conflicts should where possible be the primary aim.[791]

31.2. The Hierarchy of Norms of the International Legal Order: Human Rights, Article 103 UN Charter and Peremptory Norms

While the ICC qualifies as a proper international organization (with supranational elements), the ICTY did not develop its own legal personality distinct from its creating organ: the UN Security Council.[792] It is this bond to the most powerful organ of international law that elevates the *ad hoc* Tribunals not only above the ICC but also above any existing legal obligations arising from international conventions. The following will analyse which legal instruments of the international legal order may be *ultra vires* of international organizations or even the UN Security Council acting under Chapter VII of the UN Charter.

a. Peremptory Norms and Customary International Law and International Organizations

The VCLT provides in its Article 53 that any treaty is void *ipso iure* if found at the time of its conclusion to conflict with a peremptory norm of general international law (i.e. *jus cogens*).[793] Where a *jus cogens* norm emerges *a posteriori*, the initially valid treaty provision becomes equally void.[794] It is widely inferred from these provisions that *jus*

[790] Article 31 (3)(c) Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, registered *ex officio* 27 January 1980, United Nations Treaty Series 1980.
[791] Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006. Para. 37.
[792] Sascha Lüder, "The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice", Vol 84, No. 845, IRRC March 2002, p. 84.
[793] Article 53 Charter of the UN reads: Treaties conflicting with a peremptory norm of general international law (*jus cogens*): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
[794] *Jus cogens superveniens*. Article 64 of the Vienna Convention on the Law of Treaties (1969) reads: Emergence of a new peremptory norm of general international law (*jus cogens*) If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

cogens norms also prevail over Article 103.[795] A state requested to cooperate with the ICTY while having to disregard its ECHR or ICCPR obligations due to Article 103 UN Charter (in a case of conflict), must still not follow such requests where the nature of the request would contravene norms of *jus cogens*.[796] Scenarios may particularly occur in highly sensitive areas, such as requests for arrests. With regard to International Organizations, Article 5 of the VCLT explicitly extends the obligations contained in the VCLT to treaties constituting international organizations.[797] Being created by States themselves, it would be inconsistent if these states could escape their non-derogable obligations by acting as an International (Governmental) Organization.[798] This has been confirmed by the ECtHR in its *Waite & Kennedy* judgement.[799] The internationally wrongful act of the international organization may then constitute a violation of the organization and the state at the same time.[800] While the exact practical consequences deriving from a conflict of Article 103 with *jus cogens* are anything but clear,[801] it can be inferred that both the ICC and the ICTY must respect peremptory norms. Otherwise, at least its cooperating Member States may be held liable before international (human rights) courts.

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[795]Gerhard Hafner"Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed.) *International Law: Theory and Practice*, 1998, p. 657, Ibid Zappalà citing Gerhard Hafner, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p. 6; also Bruno Simma, *The Charter of the United Nations: A Commentary* (Third Edition Oxford 2002) p. 1299.

[796] Apart from the lack of a precise definition of jus cogens the second issue is the question of which organ would in concreto make the determination if jus cogens was violated.

[797]Article 5 - Treaties constituting international organizations and treaties adopted within an international organization, including Article 53 relating to peremptory norms. The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

[798] Andrew Clapham, *Human Rights Obligations of Non-State Actors (Oxford 2006)*, p. 67 and p.110.

[799] *Waite & Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999, para. 67. The Court is of the opinion that where [..] attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.

[800] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), p. 110.

[801]Gerhard Hafner in "Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed.) *International Law: Theory and Practice*, denies that the entire provision of a certain treaty equipped with *jus cogens* becomes applicable, p. 658.

International Organizations as well as Article 103 only encompass written treaty norms and not customary international law. The relationship between treaty law and customary law can be uncovered by the supplementary means of interpretation of the VCLT.[802] According to this, foremost the more recent law ought to prevail; if two laws of the same rank are in conflict, the more specific one takes precedence.[803] In order to override Article 103 of the UN Charter, a conflicting principle of international customary law and/or provision derived from general principles of law must therefore either have acquired such status after the obligation of the Charter *vis-à-vis* the Member State was created or where such a provision constitutes *lex specialis* in relation to a Charter obligation.[804] *Reinisch*, not without stressing the uncertainty in this area, in principle affirms that as a result of their international legal personality, international organizations (including the UN) are bound by human rights norms that are considered customary or general principles of law[805] The fact that "ordinary" international organizations (i.e. who do not benefit from Article 103) are bound by rules of international law (such as customary international law) was expressed by the ICJ in the *Interpretation of the Agreement* case where it held that international organizations, as "subjects of international law", are bound by "any obligations incumbent upon them under general rules of international law".[806] This is based on the principle that a State should not be allowed to circumvent its obligations from international law by acting through international organizations.

Both the ICTY and the ICC must in any event respect human rights norms amounting to *jus cogens*: the ICC because it is a treaty based organization and norms of *jus cogens* are beyond the disposition of the states attributing powers to international organizations; the

[802] Article 32 Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.
[803] Doctrine of Lex specialis derogat legi generali and Lex posterior derogat (legi) priori.
[804] Gerhard Hafner"Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed*.) International Law: Theory and Practice*, 1998, p. 658.
[805] August Reinisch, "The Changing International Legal Framework" in Philip Alston, *Non-State Actors and Human Rights* (Oxford 2002), p. 46.
[806] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 20 December 1980, International Court of Justice, Advisory Opinion, para.37.

ICTY because *jus cogens* is equally considered to stand above Article 103 UN Charter which forms the basis for states to cooperate with the UNSC endorsed *ad hoc* Tribunals.[807]

31.3. The Approach in the Case Law of the ECtHR

In *Zubaydah v. Poland*, the ECtHR has found Poland to be in violation of its Convention obligations for not positively preventing foreign actors from committing human rights violations on its territory, even though no active cooperation (and less so, control exerted) by Polish authorities was asserted.[808] Besides allowing for such rebuttal of human rights compliance, the ECtHR also in its "flagrant denial of justice" test reserves some acting power even in relation to sovereign States or prestigious intergovernmental organizations. Without mentioning *jus cogens* explicitly, the Court thereby suggests that certain norms must be respected by every state, and that it reserves the right to intervene when these are infringed upon. In *Nada v. Switzerland*, the ECtHR followed the reasoning of the ECJ in *Kadi I* when it held that, despite that a certain sanction was imposed by the Security Council, the Swiss authorities were not exempted from verifying the effect of the sanction at the national level and its compatibility with the ECHR.[809] This dictum has meanwhile been upheld by the ECtHR in *Al-Dulimi v. Switzerland*, where the Court held that the Security Council sanctions should have been "applied with a degree of flexibility" by the respondent state.[810] With regards to applications from persons standing trial before the ICTY or the ICC, the ECtHR has to date found ways to demonstrate its lack of jurisdiction. It is argued that it not only did not see the necessity to intervene, but foremost also lacked willingness to impose its viewpoints. A critical assessment of the applications before the Strasbourg Court will follow in Section 33 of this Chapter. The fact that the ECtHR has, following an initial reluctance, at least provided legal reasoning as to why it lacked jurisdiction is laudable, particularly if compared to the HRC, which confronted with individual complaints by persons standing trial before the ICTY, limited

[807] Gerhard Hafner, "Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed*.) International Law: Theory and Practice*, 1998, p. 657.
[808] *Husayn (Abu Zubaydah) v. Poland*, *no. 7511/13*, Fourth Section, 24 July2014, para. 517.
[809] *Nada v. Switzerland* [GC], *10593/08*, 12 September 2012, para. 212.
[810] *Al-Dulimi & Montana Management Inc v. Switzerland*, [GC] 5809/08, 21 June 2016, para. 154.

itself to the statement that the ICCPR "was for state parties only, and therefore anything referring to tribunals at international level eclipsed the mandate of the HRC".[811]

31.4. Interim Conclusion

By way of their establishment under the auspices of the UNSC, the *ad hoc* Tribunals benefit from Article 103 UN Charter. This allows, and even obliges, cooperating states to disregard conflicting international obligations, such as human rights treaties. However, the cooperating Member State is nonetheless bound by its human rights obligations if these effectively amount to *jus cogens* norms. This is mirrored in the consistent jurisprudence of the ECtHR in its attempts to prevent a *flagrant denial of justice*. It is safe to say that every *jus cogens* violation constitutes a flagrant denial of justice. Whether customary international law and legal principles also take precedence over Article 103 is much less clear.

The ICTY is therefore not entirely exempt from scrutiny by human rights courts, such as the ECtHR, even in cases where the Tribunal is acting independently of any Member State's direct effective control. If we consider that Poland was held responsible for the behaviour of foreign agents on its territory ("black sites"), the nexus between the Netherlands as an ECHR Member State and host country to the ICTY, is arguably sufficiently strong to be held accountable for human rights and international law compliance by International Organizations operating on its territory. The same argument will be made with regards to the state that either voluntarily or forcibly transferred criminal jurisdiction over an accused to the ICTY. While the mere fact of UN-membership alone would undoubtedly be insufficient to engage state responsibility, not least due to the fact that the decision was taken by the Security Council and not the

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[811] Cited by Evelyine Schmid, in "A few comments on a comment: The UN Human Rights Committee's General Comment No.32 on Article 14 of the ICCPR and the question of civilians tried by military courts", 2010 Vol 14 (7) The International Journal of Human Rights, p. 1059 and Footnote 7 (p.1067). Posada is said to have made this statement on the occasion of the drafting of the General Comment 32. The HRC was notably confronted with this issue following a complaint by Galić. The HRC never published neither the complaint nor any decision. It is assumed that the HRC denied jurisdiction as the case was also discussed before the ECtHR and due to the fact that the two Human Rights court mutually exclude each other. Despite several attempts by the author to obtain information how the Galić complaint was handled by the HRC, no information in this respect was received (or is publicly available). The information that Galić had equally complaint to the HRC results from the public decision by the ECtHR.

General Assembly, a state's financial contribution to the court or other form of support (e.g. the nomination of a Judge) may create a sufficient linkage and in consequence, establish a rudimentary form of responsibility of such states for the performance of the Tribunal.

These principles also apply to the ICC, as a treaty based organization with voluntary membership and therefore a greater responsibility of the Member States. The difference in the form of creation (i.e. treaty based or created by the UNSC) becomes imminent in matters where a Member State directly cooperates with the ICTY or the ICC, such as in matters of arrest, provision of evidence or sentence enforcement. There again, a state cooperating with the ICTY is not bound by those obligations derived from international human rights treaties in case of conflict (i.e. unless they form part of *jus cogens*) while a state cooperating with the ICC must act in full accordance with its human rights obligations, such as the ICCPR and/or the ECHR. Failure to do so could result in the State refusing cooperation, eschewing its human rights obligations, or result in an overruling by a human rights court. The ICC has eradicated most of the problematic issues initially surrounding the functioning of the *ad hoc* Tribunals.[812] It has done so by assuming its role as a promoter of procedural standards in criminal matters[813], but to a certain extent, of its subjection to human rights bodies.[814]

B. Assessment of the Strasbourg Jurisprudence Originating from Complaints by Defendants from International criminal courts at all Stages from Arrest to Sentence Enforcement

This Section will examine the legal reasoning the ECtHR developed in response to five applications it has to date received from defendants standing trial before the ICTY and

[812] It is not to be interpreted that the *ad hoc* Tribunals were willingly committing human rights violations. However, being a nascent discipline with very few precedents and many unexpected circumstances, the ad hoc Tribunals were effectively faced with situations that would in regular criminal proceedings constitute violations of Articles of the ECHR or the ICCPR.

[813] The Statute and the Rules of Procedure of the ICC are highly human rights cognizant.

[814] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), pages 9-10. He concludes that in such a case the member state may eventually even be obliged to pay compensation.

the ICC. Moreover, the legal framework for cooperation of Member States regarding the arrest and transfer of a suspect/accused will be inspected on the example of the Austrian cooperation laws with a view of identifying possible scenarios where human rights violations may present the affected person with recourse to the ECtHR. This is relevant, as it may directly affect the proceedings before both Hague courts.

32. Arrest and Transfer of Suspects from States to International Criminal Bodies with Special Reference to Austria

The fairness of a criminal trial starts as early as at the arrest phase; grave human rights violations at this stage have the potential to irreparably taint the remainder of the proceedings.[815] It is not surprising that from the three main stages of state cooperation – arrest, provision of evidence, and sentence enforcement – the majority of human rights violations were alleged in this initial phase. The arrest of an accused being "the most intrusive coercive measure in law enforcement"[816] almost inevitably comprises unplanned or unforeseen situations that may translate into human rights violations.[817] In the following, the legal framework relating to arrests and transfer of suspects and/or accused to the ICTY and the ICC will be outlined with reference to the Austrian cooperation agreements. Further, cases where Austria arrested ICTY suspects and accused will be analysed as well as the leading cases before the ICTY and ICTR having dealt with alleged human rights violations at the arrest stage.

As a general rule, where an arrest follows an indictment by the International Court/Tribunal, the duties of the domestic (Austrian) authorities are, apart from physical apprehension, mainly limited to the review of formal requirements and the proper identification of the indicted person.[818] The situation is different where, as it happened in one case in Austria, a person suspected of crimes within the jurisdiction of The Hague

[815]*Prosecutor v Dragan Nikolić*, ICTY-IT-94-2-PT, 29, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 24.

[816] Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, (Oxford University Press 2003), p. 313.

[817] This certainly holds true for arrests of persons who typically do not surrender voluntarily and who, if convicted, long prison sentences.

[818] Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", in Jurgen Frowein and Rudiger Wolfrum (eds.) *Max Planck Yearbook of the United Nations Law* (Volume 5, 2001), 269.

(i.e. war crimes, crimes against humanity or genocide) is arrested by the state's national authorities without a prior existing request. Unless the international courts request transfer within 48 hours, the subsequent detention (or alternatives thereto) is to be based wholly upon the procedure provided by the Austrian Code of Criminal Procedure ("ACCP"). This is apposite due to the level of uncertainty of whether the ICTY/ICC will request the transfer or not. To base a person's sustained detention solely on the ICTY/ICC's order for provisional detention would contradict Austrian domestic law and human rights law, according to which arrest must not only be based upon sufficient evidence, but also be required by at least one of the detention grounds of the ACCP.[819] A major difference between the Tribunals and the ICC in matters of arrest is that, while the ICC has to provide justification concerning the necessity of any arrest (over that of a mere a summons to appear), the *ad hoc* Tribunals operate on the (continued) presumption of justification for such detention in view of the gravity of the crimes.[820] The practical consequences are, however, minimal as the Austrian Law on Cooperation with the ICC in its Article 26(1) explicitly prohibits the investigating Judge from examining the grounds for detention provided by the ICC.

32.1. Austrian Laws on Cooperation with the *ad hoc* Tribunals and the ICC

The obligations of Member States to assist with the arrest and transfer derive from the UNSC Resolutions, Article 29 ICTY Statute and Section 2 of the Rules. While the UNSC Resolutions and the Statute have the force to compel Member States to provide a particular result, they typically do not dictate the means a state has to apply, thereby

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[819] Salvatore. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Pres, (2003) 315; Risk of escape, risk of re-committing a crime or destruction of evidence; among them the right to be brought promptly before the judicial authorities (Article 5(3) ECHR), the right to be informed promptly of the reasons for arrest and detention (Article 5(2) ECHR), the right to challenge the lawfulness of detention (Article 5(4) ECHR).

[820] The *ad hoc* Tribunals were in this context criticized from an Article 9 ICCPR perspective prohibiting arbitrary arrests. Article 55 of the ICC Rome Statute particularly prohibits any arbitrary arrests. Zappala (2003) indicates such issues when stating that "the law and practice of the ad hoc Tribunals seem to make the arrest a purpose in and of itself", p. 313. Further, see August Reinisch as cited in Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in Karel Wellens (ed.) *International Law: Theory and Practice*, 1998), p. 657.

affording the cooperating state a certain degree of flexibility.[821] For the ICC, the equivalent obligations are already outlined in sufficient detail in the Rome Statute. Austria has implemented said obligations into two separate laws: for the ICTY the Austrian Law on Cooperation with the International Tribunals (in the following "AL-ICTY") and the Law on Cooperation with the ICC ("AL-ICC").[822] Both laws have widely similar provisions with respect to arrest procedures. The interplay between the national and international authorities can be – as outlined above – characterized as follows: depending on whether the person was arrested following an arrest warrant from the international court, the procedure is either primarily under the guidance of the International Office of the Public Prosecutor (OTP) or alternatively, of the Austrian national authorities.

The rudimentary nature of Article 29 ICTY Statute allowed the cooperating Member States with a certain amount of leeway, notably with regard to the (pre-trial) procedural rights of the suspect or accused. Austria, when implementing the law, chose within its range of manoeuvre a rather friendly approach based upon the premise that the rights of the accused are best protected by the Tribunal itself and that excessive involvement of the Austrian authorities would serve only to delay the pre-trial process, and would be therefore detrimental to the accused.[823] Certain other countries demonstrated a more Tribunal-sceptical approach. Notably the Swiss, but also the Netherlands, French and Belgian laws provide the concerned person some means of appeal against both the arrest

[821] Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", in Jurgen Frowein and Rudiger Wolfrum (eds.) *Max Planck Yearbook of the United Nations Law* (Volume 5, 2001), p.254.

[822] The Federal Law on Cooperation with the International Tribunals[822] of 1st of June 1996 (BGBl. Nr. 263/1996) and the Federal Law on the Cooperation with the International Criminal Court[822] of 1st October 2002 BGBl. I Nr. 135/2002).

823 Bundesgesetz über die Zussamenarbeit mit den internationalen Gerichten, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP, p. 10. Bundesgesetz über die Zusammenarbeit mit den internationalen Gerichten, BGBl. Nr. 263/1996, comment to Article 16, at p. 17. Eine abermalige Überprüfung des Tatverdachts oder der Haftgründe durch die österreichischen Gerichte erscheint in diesen Fällen nicht mehr erforderlich, sondern würde dem Ziel der raschen Überstellung der gesuchten Person an das Internationale Gericht zuwiderlaufen. Das Gesetz folgt daher den Grundsätzen des Statuts des Internationalen Gerichts und enthält keine Gründe für die Ablenung der Überstellung an das Internationale Gericht. Madalena Pampalk, Marc Sitzer in Christina Binder et al., *Völkerrecht im innerstaatlichen Bereich* (Facultas 2010), p.91 conclude that in particular Austria (and Germany) were supportive of the ICC („dem Gerichtshof wohlgesonnen") and therefore the authors expect a good cooperation between the states and the ICC.

and the decision to transfer.[824] While the examining states are neither entitled[825] nor factually capable of[826] reviewing legal aspects of the arrest warrant or the indictment, in at least one case (*Rukundo v. Switzerland*), a Swiss court made use of this power to engage in an overall assessment of the situation including of the fairness of the proceedings before the ICTR.[827] A number of cases demonstrated the delicacy of arrest practices and their implications for human rights, not least the Austrian arrests in *Mucić* and *Talić*.

32.2. Procedure in Case of No Prior Existing Arrest Warrant

For the Tribunals, the issuance of an arrest warrant is linked to the prior confirmation of an indictment.[828] Where the Tribunal is taken by surprise of the arrest of a suspect, the procedure is based upon Austrian law until the Tribunal either confirms the indictment or requests the provisional transfer. The following three scenarios appear possible:

a. Tribunal denies Jurisdiction: Extradition or National Proceedings

Article 14 AL-ICTY[829] establishes the procedure in which Austrian authorities arrest a person located in Austria who is suspected of criminal offences that may fall within the jurisdiction of the ICTY. In such case, the Austrian Public Prosecutor's Office requests that the investigating Judge questions the suspect and files a report to the Ministry of Justice offering the person's transfer to the Tribunal. Where the Tribunal declines, a possible extradition to the situation country is to be examined and where impossible, national criminal proceedings are to be initiated.[830]

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[824]Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", in Jurgen Frowein and Rudiger Wolfrum (eds.) *Max Planck Yearbook of the United Nations Law* (Volume 5, 2001), p. 275.
[825] Stroh (2001), p.275.
[826] Given the quantity of material contained in a typical indictment and the complex associated knowledge required to assess the legal foundation by a national court without prior experience in such field.
[827] *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, discussed below.
[828] In ICC proceedings the situation is different and an indictment is only issued at a later stage.
[829] Article 23 AL-ICC is the equivalent for ICC proceedings.
[830] Requirement naturally being that the state where the offences were committed has the capacity to guarantee fair trial proceedings and mutual extradition treaties exist. Said conditions were not met in relation to Bosnia and Herzegovina in 1994, which led to subsidiary jurisdiction of the Austrian Courts in

b. Tribunal Ordering the Provisional Detention: Proceedings under Austrian Law

Cases in which the Tribunal requests the provisional arrest of the suspect without immediately ordering his or her transfer are governed by Article 15 AL-ICTY.[831] Procedure in such cases corresponds to inter-state extradition requests.[832] Provisional detention must satisfy all the conditions required under the ACCP, i.e. the Austrian Prosecutor (with assistance from the Hague Prosecutor) must substantiate existing reasonable suspicion and demonstrate the existence of at least one legitimate ground for detention. While the maximum detention periods set in the ACCP apply, the application of more lenient measures as an alternative to detention is to be considered.[833] The full application of the ACCP and ECHR is necessary and justified given that the Tribunal has neither issued an indictment nor immediately requested transfer, which suggests that the Prosecution is still in the process of examining the legal and factual evidence of the case. This may imply that the case is either not particularly robust or the alleged crimes are below the "atrociousness" threshold of the Tribunal, which increases the likelihood of proceedings before a domestic court.[834]

c. Transfer of a Suspect to The Hague for Provisional Detention

No maximum time limits exist for a provisional arrest requested by the Prosecutor in accordance with Rule 40.[835] The Austrian Prosecutor must simultaneously start to prepare for trial and detention and is subject to the maximum time limits Article 178 ACCP sets for detention.[836] Rule 40*bis* vests the ICTY Prosecutor with the power to request transfer and provisional detention at the seat of the Tribunal even *prior* to the issuance of the

accordance with the principle of universality under Article 65 Section 1 lit 2 Austrian Criminal Code. See, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP Commentry to Article 14, page. 16.

831 Article 24 AL-ICC.

832 See, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP Commentary to Article 14, page. 16.

833 Ibid, Commentary to Article 15, p. 17.

834 Ibid.

835 For the ICTY, neither the original version of the Rules of Procedure and Evidence adopted on 11 February 1994 (IT/32, 14 March 1994) nor the 49th Revised Version dated 22 May 2013 (IT 32/Rev.49, 22 May 2013 including amendments of 10 July 2015) set such time limit.

836 For crimes exceeding five years and provided the investigations are complex or voluminous the maximum period the accused can spent in pre-trial detention is two years. Article 178(1) lit 2 Austrian Code of Criminal Procedure. § 178 (1) Z. 2.

indictment if a Trial Chamber Judge confirms a *prima facie* suspicion and considers provisional detention necessary to prevent escape, witness intimidation or destruction of evidence. Rule 40*bis* can be considered a safety net provision for the Prosecution in case national laws warrant for release or a national Judge orders the pre-trial release of the suspect against the will of the Prosecutor. If the indictment is not confirmed within the time limits of Rule 40bis (D), the suspect is to be released. The provisions relating to house arrest and provisional release apply *mutatis mutandis.*[837]

The ICC lacks an equivalent form of provisional detention following transfer to The Hague. However, its provisions regarding provisional arrest[838] provide for the possibility of release from custody. This can be interpreted as implying that, in comparison with the *ad hoc* Tribunals, the periods envisaged are expected to be longer. In theory, the ICC could issue a summons to appear to a person residing in Austria as an alternative to an arrest warrant. In such case, the person would benefit from pre-trial liberty subject to the judicial instruments available under Austrian procedural law.[839]

d. The Procedure in Practice in Case of a Lack of an Arrest Warrant: The Case of Zdravko Mucić

Mucić, who at the time of arrest had already resided in Austria "for several years",[840] was only indicted by the Tribunal three days after his arrest on 18 March 1996 and was not transferred until 9 April 1996.[841] His arrest followed a request for provisional arrest by the ICTY under Rule 40.[842] The lack of a confirmed ICTY indictment explains the active role played by Austrian authorities, who engaged in extensive interrogations of the suspect. The evidence gathered in the initial interrogation by the Austrian police [on 18 March] was later excluded from the evidence for human rights concerns. The suspect had

[837] Rule 40 bis (H) Rules of Procedure and Evidence. Rule 40bis (D) sets a time limit of initially thirty days, which can be extended to a total of ninety days in special circumstances.
[838] Art. 92 Rome Statute, implemented in Article 26(5) AL-ICC.
[839] AL-ICC 26 para. 5.
[840] *Prosecutor v. Zejnil Delalić et al.* ICTY-IT-96-21, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 September 1997, para. 58.
[841] Case Information Sheet, "Celibici Camp" (IT-96-21) Mucić et al.
[842] André Klip & Go□ran Sluiter, *Annotated leading cases of International Criminal Tribunals / Volume 3 The International Criminal Tribunal for Rwanda 1994-1999* (Intersentia 2001), page 12.

waived his right to counsel, a scenario under Austrian criminal procedural law which is not foreseen in ICTY procedures. The defence invoked a denial of the right to counsel, the right to remain silent as well as an inducement to make a confession.[843] The Trial Chamber found that the existence of certain key differences[844] between the Austrian practice and the Tribunal's Rules warranted for the exclusion of the evidence taken during the initial police interview.[845] The ICTY Trial Chamber thereby recognized the infringement upon the suspect's fair trial right by the cooperating Austrian authorities. This case serves as an example where fair trial rights were interpreted by the Tribunals in a more stringent manner than under Strasbourg case law. As the Austrian procedure is considered to be compatible with the ECHR in this respect, no question of ECtHR scrutiny was being raised.

32.3. Procedure in Case of an Existing Arrest Warrant

The situation is quite different where either an indictment (ICTY) or a request for arrest and transfer (ICC) already exist. In this case, only limited provisions of the ACCP relating to remand detention following arrest apply by analogy.[846]

a. Vertical Concept of Surrender

Importantly, once the identity of the suspect is confirmed, the national authorities have no grounds on which to reject the transfer to the Tribunal or the ICC. The obligation to surrender in this case stems directly from the Statutes; Austrian provisions relating to remand detention do not apply. With regards to the ICTY, this curtailment of national safeguards was considered justified in view of the fair trial guarantees offered by the Tribunal. Priority was awarded to the swift transfer of the concerned person to the

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[843] *Prosecutor v. Zejnil Delalić et al.* ICTY-IT-96-21, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 September 1997, para. 8.
[844] As such it was mentioned in para 61: "Whereas the Austrian provision denied a right of Counsel during questioning Rule 42 provided one before questioning. The Austrian provision gives reason why the suspect should not keep silent but should talk to the Prosecution. Rule 42 merely tells you that you are not obliged to talk. The Austrian provision encourages confession in anticipation of a lesser sentence on a possible conviction. Rule 42 does not speak of confession, unless volunteered by the suspect."
[845] *Prosecutor v. Zejnil Delalić et al.* ICTY-IT-96-21, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 September 1997, para. 71 (Disposition).
[846] Article 16 AL-ICTY and Article 26 AL-ICC.

Tribunal.[847] Nonetheless, Article 16(3) Austrian ICTY law does provide for the right to appeal against rulings on detention and transfer under the Law on the Constitutional Right of Appeal [*GrundrechtsbeschwerdeG*].[848]

b. Horizontal Regimes of Extradition

The fact that UN membership itself did not prevent a more proactive approach by cooperating states is demonstrated by the approach taken by Switzerland in particular, and to a lesser extent also by Belgium[849] and the Netherlands[850], all of which engage in some form of "categorization" of the alleged crimes with a view to establishing the jurisdiction of the Tribunal *prima facie.*[851] These countries operate in a more horizontal manner, similar to inter-state extradition practice. The Swiss Cooperation Law[852] provides certain remedies against warrants of arrest and transfer even if such warrants are issued following a request by the Tribunals.[853] It must particularly be established that the alleged crimes fall under the jurisdiction of the Tribunals and that the category of crimes are also punishable under Swiss Law.[854] The examination process benefits from dilatory effect.[855] In *Rukundo v. Switzerland* (2001) a Rwandan citizen made use of this regime and appealed against the Swiss decision to transfer the accused to the *ad hoc* Tribunal for Rwanda. The Swiss Court, before transferring to the ICTR, had to ascertain itself that the *ad hoc* Tribunal for Rwanda operated in conformity with due process rights provided in

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847 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP, p. 10. Bundesgesetz über die Zusammenarbeit mit den internationalen Gerichten, BGBl. Nr. 263/1996, comment to Article 16, at p. 17.

848 For the International Criminal Court, Article 26(9) Austrian Law on the Cooperation with the International Criminal Court,Bundesgesetz über die Zusammenarbeit mit dem International Strafgerichtshof – ZusIStrGH, BGBl I 2002/135.

849 Rule 12 of the Belgian Cooperation Law provides that the "Chambre du conseil" shall verify whether the acts alleged in the warrant fall within the jurisdiction of the Tribunal and whether there has been no mistake as to the person's identity. Such decision can be appealed by both the prosecutor and the concerned person. Further, upon deprivation of liberty, the suspect has further rights to appeal.

850 According to Article 4 of the Netherlands Cooperation Act the District Court in The Hague can reject the warrant to arrest if it cannot establish that the person brought before it is the person whose surrender was sought and in case the Tribunal is "clearly not competent " for the alleged offence.

851 This could have been sensitive particularly in the early years of the Tribunal where the ICTY also tried a number of lower ranking "foot" soldiers without any commanding positions, such as Tadić or Erdemović.

852 Swiss Federal order on cooperation with the International Tribunals of 21 December 1995.

853 Article 14(1) Swiss Cooperation Law.

854 Article 10 Conditions to the Transfer of persons being prosecuted to the international tribunals.

855 Article 14(3).

the ICCPR. The national court thereby indirectly reviewed the procedure before the Tribunal.[856]

c. Transfer to the Tribunal

At the ICTY, the arrested person must be surrendered to the Tribunal no later than 14 days after the order of detention.[857] The ICC does not explicitly set such a time limit; however, it does stipulate that provisional detention "may" end after sixty days, thereby indicating some time frame.[858] Article 26(5) AL-ICC provides for the possibility of the arrested person to apply for release from (provisional) detention in case of urgent and extraordinary circumstances. Transfer to The Hague shall happen by air escorted by Austrian officials.[859] The Belgian cooperation agreement tellingly explicitly requires the transfer of the accused to be in line with both the Rules of the Tribunal and the terms of the ECHR.[860]

d. The Execution of an ICTY Arrest Warrant: Human Rights and the Momir Talić Case

The arrest of Talić[861] ranks among one the most creative and controversial arrests in the era of the Tribunals. Unaware of the existence of a (secret) sealed indictment issued on 14 March 1999 against him, Talić travelled to Vienna where he was arrested on 25

[856] *Rukundo v. Federal Office of Justice*, Federal Supreme Court of Switzerland, 3 September 2001, Appeals Judgment, Case Nos 10.129/2001 and 1.A130/2001; ILDC 348 (CH 2001), annotated by A. Ziegler. Found in d'Aspremont & Broelmann in A. Reinisch, *Challenging Acts of International Organizations Before National Courts* (2010), p. 116.
[857] Article 16 AL-ICTY.
[858] Whereas the conflict on the territory of the former Yugoslavia was limited geographically with a limited amount of actors involved, the establishment of jurisdiction in relation to the International Criminal Court could potentially be a lengthy procedure. Disputes between the country arresting the suspect and the ICC relating to the principle of complementarity could arise. Furthermore, competing requests for extradition could come from certain other countries (country of nationality of suspect, country where crimes were committed etc.).
[859] In compliance with Article 16(4) prohibiting Austrian extradition proceedings from precluding such surrender, the Minister of Justice must nonetheless safeguard Austrian obligations relating to asylum and human dignity. As such, the Minister of Justice shall be entitled to provide a declaration that the person arrested should be guaranteed return to Austria upon termination of the proceedings or upon release from prison.
[860] Article 13 Belgian Cooperation Agreement.
[861] Chief of Staff of the Bosnian Serb Army. Antonio Cassese referred to the arrests of Talić in Vienna (1999) and Gotovina in Tenerife (2005) as the most notable examples of third states arresting and transferring accused to the ICTY. The Oxford companion to international criminal justice (Oxford 2009), page 202.

August 1999 during the coffee break of a conference under the auspices of the Organization for Security and Cooperation in Europe (OSCE) held at the premises of the Austrian Academy of Defence. Talić was transferred to The Hague the same day.[862] Secret or sealed indictments proved as a highly effective tool to counter states' non-compliance in arrest matters. Yet, from a human rights perspective, a number of issues arise in connection with the right of the accused to be informed promptly of the charges.[863] Article 58 of the ICC Rome Statute does not prohibit the use of sealed arrest warrants.[864] In fact, secret arrest warrants seem to be the normal procedure.[865] Equally problematic is that the accused is deprived of his chance to surrender voluntarily. This affects chances of the accused to successfully apply for provisional release from pre-trial detention[866] and deprives him or her of a mitigating factor in sentencing.[867] While indictments in Austrian courts are generally required to be public, one could not reasonably expect the Austrian authorities to have made the indictment public under these circumstances. On a different point one could, however, claim that Austria and the Tribunal engaged into a luring operation of the accused from the FRY into Austria with the sole purpose of his arrest.[868] The ECtHR in *Stockė v. Germany* (1991) critically observed such practice of luring a person out of a certain jurisdiction where aimed at

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[862] Case Information Sheet, "Krajina" (IT-99-36/1) Momir Talić.

[863] Article 21(4) (a) of the Statute is almost identical with Article 6(3) (a) ECHR. Sluiter 2001, pp. 154-155. Both the ICCPR and the ECHR warrant that the person charged is to be informed promptly of the nature of such charges[863] as a distinct right from the right to be promptly informed upon arrest[863]. The interpretation applied in *Dokmanovic*[863] that promptly refers merely to after the arrest cannot be followed for this reason.

[864] Christopher Hall & Cedric Ryngaert "Commentary to Article 58 ICC Statute", in Otto Triffterer/ Kai Ambos *Commentary on the Rome Statute of the International Criminal Court* (3rd edition 2016, Beck, Hart, Nomos), p. 1445 ("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 arrest.").

[865] See *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Mandat d'arrêt à l'encontre d'Ahmad AL FAQI AL MAHDI, 18 septembre 2015, para. 16 stipulating for an ex parte arrest warrant only to be shared with the Prosecutor and the Registrar. (« Les informations présentées au juge unique au sujet des conditions actuelles de sécurité au Mali le persuadent qu'il est nécessaire de délivrer le présent mandat d'arrêt sous la mention « secret, ex parte, réservé au Procureur et au Greffier » à la fois pour faciliter son exécution ainsi que pour garantir la protection des témoins et d'autres sources mentionnés dans la Requête. »).

[866] In *Milutinović*, the circumstances of surrender was seen one of the factors relevant for granting provisional release, *Prosecutor v Milutinović et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 6.

[867] Exemplary, *Prosecutor v Babić*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43.

[868] Colette Retif, "By What Means Justice? The Acceptance of Secret Indictments in the United States and in International Law", 2001 Pace International Law Review, pages 234, 254.

circumventing extradition obstacles. However, the Strasbourg Court did not proclaim a violation by Germany for a lack of sufficient evidence as to its control over the operation.[869] The role played by Austrian authorities in the *Talić* case is even less clear.[870] Nonetheless, this case demonstrates that matters of Strasbourg concern and attributable to a cooperating state may occur at the arrest stage.

32.4. Austria's Responsibility for Human Rights Violations in Cooperation Matters

Rights protected under the ECHR apply to every person located on the territory of a Convention State at the moment of the alleged violation. Exceptions arise where the "territorial" authorities lack any control. Despite the ECtHR finding in *Stephens v. Malta,*[871] that the State issuing a European Arrest Warrant (and not the State carrying out the arrest) is in effective control and thereby primarily responsible for safeguarding the ECHR rights, it may exceptionally also be the case that the state exercising factual control over the arrest and the subsequent detention breaches fundamental rights. This line of argumentation is convincing given that Austria, apart from full effective factual control, retained (limited) legal *de jure* control over certain aspects of the arrest and transfer. Regarding the level of Austria's ECHR responsibility, three potential scenarios were identified:

a. Factual Control of Austria from Apprehension to Transfer

Irrespective of the circumstances of arrest, the police officers apprehending the suspect and/or indicted person are regular members of the Austrian police, whose actions are fully attributable to Austria in cases of human rights violations. Where an indictment exists prior to arrest, the Tribunal and Austrian police will most likely share information and coordinate any action surrounding the arrest.[872] Members of the Prosecution team are

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[869] *Stocke v. Germany,* Series 28/1989/188/24, 1991, para 54. In this case a private plane with the applicant on board (bound from Strasbourg to Luxembourg) was deviated to Germany with the sole purpose of arresting the latter on German soil.
[870] The fact that the accused was flown out the same to the Tribunal, however, suggests a certain degree of preparation of the operation. Another issue was that the accused, as political leader participating at a conference could have attempted to invoke immunity.
[871] *Stephens v. Malta*, No. 11956/07 (2009), para 101.
[872] See, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP Commentry to Article 13, p. 15.

allowed to be physically present and monitor the arrest.[873] Nonetheless, it is argued, that, during arrest, the behaviour of the person being arrested and that of the officers remain almost inevitably unpredictable.[874] In particular, inhuman or degrading treatment in the sense of Article 3 ECHR cannot be reasonably fully excluded *ex ante*. As mentioned above, Austria's possession of effective factual control over the arrest *stricto sensu* could lead to Austria being held responsible for such violations before the ECtHR.

b. Limited Legal Control in Case of an Existing Indictment by the The Hague courts

Austria exercises factual control also in such cases; namely from the moment of first contact with the concerned person until the end of their transfer over to Dutch officials in the Netherlands. Equally, Austria exercises limited legal control. For instance, the agreement explicitly refers to the Law on the Constitutional Right to Appeal [*GrundrechtsbeschwerdeG*] in such cases.

c. Full Legal Control in Case of Subsequent Indictment or Provisional Detention

Austria possesses full legal and factual control in cases where it arrests a suspect that only at a later stage is indicted or requested for transfer by the Tribunal. Until the Tribunal requests transfer of the suspect, a suspect benefits from the entire spectrum of Austria's obligations under the ECHR, notably with respect to violations related to detention under Article 5 and 6 of the Convention.

32.5. Remedies against Human Rights Violations following Arrest

Two main theories were developed in inter-state extradition practices on how to address irregularities in the transfer of a person from the jurisdiction of the arresting State to that of the requesting state. According to the principle of *male captus, bene detentus* (wrongly captured, properly detained), the deciding Court should not be obliged to inquire into the

[873] Article 10(3) AL-ICTY; See, 102 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP Commentry to Article 10, p. 14. In the case of Ante Gotovina's the arrest in Spain was recorded on tape.
[874] See the example of Simo Drljaca, who opened fire at the NATO-led troops confronting him. The peacekeepers returned fire "in self defense" killing Mr. Drljaca, Source: Nato Troops kill a Serbian Suspect in War Atrocities, New York Times, 11 July 1997.

circumstances under which a suspect or accused is brought before it.[875] The converse principle of *male captus, male detentus* is more recent and the result of an increasingly human rights oriented legal order.[876] It requires from the Court not merely to consider irregularities, but also to provide remedy to irregularities in connection with the arrest.

The law of the Tribunals does not explicitly provide for remedies in cases of human rights violations in arrest proceedings. However, the luring of one accused across the Serbian border and subsequent arrest (*Dokmanović),*[877] the forceful abductions by militia groups in *Todorović* and *Nikolić,* as well as the violation of time limits of provisional arrest in *Barayagwiza* triggered a debate within the Tribunals as to appropriate remedies for such violations. Both in *Nikolić* and *Barayagwiza,* the permanent stay of proceedings was considered at least for situations where "egregious violations of the rights of the accused" could be established.[878] In *Barayagwiza,* a Trial Chamber effectively released the accused and proposed to dismiss the charges.[879] Ultimately, published reports of considerable public outrage[880] led to the overruling of the decision[881]. Reductions of sentences as remedies for violations were granted in *Todorović (*through the offering of a favourable guilty plea)[882] and *Barayagwiza.*[883]. For ICC proceedings, Article 85 of the

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[875] See the US Supreme Court in *Ker v. Illinois*, 119 U.S. 436 (1886). Yet complaints could be directed against the jurisdiction executing the arrest.

[876]Christophe Paulussen, *Male Captus Bene Detentus? Surrendering suspects to the International Criminal Court, (Intersentia 2010) p.* 37 traces this principle back to 1991.

[877] Trial Chamber stressed the lack of elements of force or threat and considered, with reference to the *Stocke v. Germany* case, the operation consistent with international law principles.

[878] *Prosecutor v. Dragan Nikolić*, ICTY-IT-94-2-P, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 114.

[879] Ibid, para 106.

[880] Christophe Paulussen , *Male Captus Bene Detentus? Surrendering suspects to the International Criminal Court, (Intersentia 2010),* p. 539. ("Perhaps not very surprisingly, all hell broke loose after the decision was issued".).

[881] *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, *Appeals Chamber Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.*

[882] In *Todorović* the sensitive matter raised was the cooperation of SFOR with "unknown persons" that handed the accused over to the international forces.

[883] As was elucidated in the *Galić* decision, lifetime imprisonment effectively in relation to early release means that the convicted person cannot apply for parole before having spent at least two-thirds of the single most severe sentence expressed in number of years, i.e. 46 years. Hence, he could only apply after 30 years for early release, whereas with the reduced sentence such parole is possible (and is expected to be granted) after 20 years.

Rome Statute provides for financial compensation as a remedy for unlawful arrest.[884] It is therefore reasonable to assume that, even following severe mistreatment during the arrest procedure (e.g. in Austria), neither the ICTY nor the ICC would authorize the release of an accused as remedy. The situation would be different where systematic violations in the methods of arrest were proven by Member States or other international actors acting on behalf (and at least with knowledge of) the ICTY or the ICC.[885]

32.6. The *Naletilić* Case: Challenging the ICTY Jurisdiction before the ECtHR

The complaint of Naletilić to the ECtHR was the first of a total of five complaints from defendants to the Strasbourg organ. Naletilić was arrested in October 1999 by Croatian authorities. While his surrender to the Tribunal was confirmed by both the Croatian Constitutional and the Supreme Court, the Croatian government had originally suspended it in view of the accused's deteriorating health.[886] Meanwhile, criminal proceedings were resumed against the accused in Croatia. Through his complaint, the accused aimed to prevent his transfer to The Hague. The Strasbourg Court denied interim measures and the applicant was transferred to the ICTY on 21 March 2000.[887] His arguments before the ECtHR were three-fold: (i) that the suspension of proceedings in Croatia would necessarily prevent a trial within reasonable time in the domestic proceedings, (ii) that the ICTY was not an impartial and independent tribunal established by law and (iii) that he was subject to a penalty at the ICTY exceeding the maximum penalty allowed under Croatian law (Article 7 ECHR). Naletilić's first argument was dismissed based on the uncertainty of future proceedings; the third on the basis of the exception to non-

[884] In *Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12-301, Décision sur la « Requête en indemnisation en application des dispositions de L'article 85 (1) et (3) du Statut de Rome », 16 November 2015 rejected the request of the applicant for compensation in the amount of approximately EUR 900.000 following his final acquittal as he alleged to have suffered both unlawful arrest and/or detention as well as a grave and manifest miscarriage of justice. The Chamber reiterated that an acquittal does not *per se* entail a miscarriage of justice nor automatically renders prior periods of detention unlawful or wrongful and that the provision allowing for compensation continues to be a controversial one.

[885] For such cases, Zappala suggests the "quashing of proceedings based on arrests inconsistent with individual rights", Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003), p. 72.

[886] *Naletilić v. Croatia* (dec.), no 51891/99, ECHR 2000-IV, Facts. The case further had a political aspect surrounding the Presidential elections in 1998.

[887] ICTY case Factsheet: Naletilić & Martinović (IT-98-34) (*"Tuta and Štela")*.

retroactivity based on the *general principles of law recognised by civilised nations,*[888] enshrined in Article 7(2) ECHR. Finally, and most relevant for this study, the Court dismissed the second argument by holding that although "exceptionally, an issue might be raised [..] where the applicant risks suffering a flagrant denial of a fair trial", this is not so in relation to surrender to an International Tribunal, which "in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence".[889]

Abstracted from the underlying intention not to bind the ICTY by the ECHR, from a purely legal point of view, the arguments presented are less than convincing. All three complaints were addressed in just a few paragraphs, which is concise by the Court's own standards, also given the novel nature of the complaint. Moreover, the finding in relation to Article 7 was subsequently quashed by the ECtHR in *Maktouf and Damjanović v. BH*[890] *(*"unfortunate" and "problematic" and "one the Court should distance itself from").[891] Further, the dictum in relation to the right to a trial within reasonable time is equally debatable. The Court's holding that "the proceedings in Croatia might be continued only in the event the applicant is acquitted by the Hague Tribunal or if the proceedings before the ICTY are stayed for some reason" seemingly mixes two scenarios. Firstly, if the crimes tried before Croatian Courts and the ICTY are related,

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[888] For the ICCPR, see Article 15(2) of the ICCPR; also referred to as the Nuremberg/Tokyo clause as it was seen to justify the creation of the two International Military Tribunals and embed them into the newly established human rights order, see also W. Schabas,, "Synergy or Fragmentation: International Criminal Law and the Convention on Human Rights" (2011) 9 Journal of International Criminal Justice, p. 612.

[889] *Naletilić v. Croatia* (dec.), no 51891/99, ECHR 2000-IV, Facts.

[890] *Maktouf and Damjanović v. Bosnia and Herzegovina,* [GC] no 2312/08 and 34179/08, ECHR 2008 in the Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vuĉinić. Therein, the authors held that Article 7(2), "does not apply when at the material time the conduct was punishable as a crime by national law, but with a lesser penalty than that enshrined in a subsequent law or treaty". (Concurring Opinion, para 10). The concurrent Judges held that the Grand Chamber "should have distanced itself clearly from the *unfortunate decision in* Naletilić " (FN 62 to para 10).

[891] The Constitutional Court of BiH had relied on the Naletilic decision when justifying the application of the newly adopted BiH Criminal Code of 2003 to crimes committed in 1993. While the otherwise applicable 1976 Criminal Code was indeed harsher in containing the death penalty, the 2003 Code had harsher minimum sentences for international crimes. James A. Sweeney, "Non-retroactivity, candour and 'transitional relativism': A response to the ECHR judgment in Maktouf and Damjanović v. Bosnia and Herzegovina", (2014) Diritti umani e diritto internazionale, p. 4-5, He refers to the "unfortunate, but rather insignificant, admissibility decision of the ECtHR in Naletilić v. Croatia". With a view of the result in Maktouf and Damjanović the ECtHR is to blame for the "misleading nature of the *Naletilić* admissibility decision" just as much as the Bosnian Constitutional Court for relying on this "judicial infelicity.

then the entirety of charges would be dealt with before the ICTY and, irrespective of conviction or acquittal, Croatia would lack jurisdiction. Alternatively, where a relation is missing, such as pre-war crimes and international crimes during conflict, Croatia would continue to have (again, irrespective of the outcome before the ICTY) jurisdiction regarding the domestic crimes.[892]

The remaining (unsubstantiated) statement that the Statute and the Rules "offer all the necessary guarantees" should therefore be appraised *cum grano salis*, namely in the light of the above demonstrated superficial assessment of the other legal points discussed in the decision. Yet, the Court only expressly held that *a priori* no "flagrant denial of justice" is to be expected in ICTY proceedings. The flagrant denial of justice test is of course a stringent one[893] and the ECtHR until recently found only two requests for extraditions to be incompatible due to such a risk.[894] Mere irregularities do not suffice. Instead, breaches of Article 6 must be "fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by that Article".[895] In essence, there exists a wide gap between a *prima facie* flagrant denial of justice and a human rights protection equivalent to the level guaranteed by the ECHR.

32.7. Interim Conclusion

When cooperating with the international courts, Austrian police and authorities must fully comply with both its national provisions (as interpreted by the ECtHR) and the laws of the Courts and Tribunals. Violations of ECHR provisions committed by said authorities might provide the suspect or accused with access to the ECtHR, and in the case of a confirmed violation with entitlement to (at a minimum) financial compensation.

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[892] For instance, the case of Zoran Žigić . ICTY Sense Press Agency, "Zoran Žigić does not want to go home", retrieved online on 29.09.2015 (http://www.sense-agency.com/icty/zoran-Žigić -does-not-want-to-go-home.29.html?news_id=16190). "After he served two thirds of the Tribunal's 25-year sentence, former reserve police officer from Prijedor Zoran Žigić was released from an Austrian prison. Though Žigić should return home, he refuses to do so because another prison sentence awaits him in Bosnia and Herzegovina. In 1997, Žigić was sentenced before the military court in Banja Luka to 15 years".

[893] "Right to A Fair Trial- Guide to Article 6 of the Convention (criminal limb)", Council of Europe/European Court of Human Rights, 2014 , para 353.

[894] Ibid, *Case of Soering v. United Kingdom*, *14038/88*, 7 July1989 and *Othman (Abu Qatada) v. United Kingdom*, *8139/09*, ECHR 17 January 2012.

[895] *Othman (Abu Qatada) v. United Kingdom*, *8139/09*, 17 January 2012, para 260.

Violations of the ICTY/ICC laws might taint the remainder of the international proceedings (as demonstrated to some extent in *Mucić*). In case of aggravated violations in the course of arrest, detention or transfer amounting to torture or degrading treatment, both the ECtHR and the Tribunal/Court would assess the situation independently. In the past, the *ad hoc* Tribunals have, in cases considered truly egregious, deliberated even the most drastic consequence, a permanent stay of proceedings. The acts of the cooperating Austrian police could thereby effectively deprive the Courts of subsequent jurisdiction. *In Naletilić,* the access to the Strasbourg Court was relatively straightforward as it dealt with legal acts attributable to the Croatian authorities. The Court rejected the points raised in the complaint in a rudimentary manner seemingly trying to avoid confrontation between the ICTY and the ECtHR.

33. Access to Human Rights Courts Pending Proceedings on the Example of Austria and the Netherlands

Following the transfer of the defendant to the ICTY/ICC Detention Unit in The Hague the cooperation of the Member States is limited, when compared to the arrest stage, and consists primarily of the provision of evidence. This was recently the case in the *Bemba et al*. proceedings, where the Austrian national criminal courts were involved. Other applicants launched complaints against the Netherlands as the host state of the ICTY and ICC for allegedly tolerating ECHR violations on its territory.

33.1. *Bemba et al.* & Austria: Consequences of Not Respecting Austrian Criminal Procedure Law in the Collection of Evidence?

State obligations to cooperate pending trials are primarily related to the provision of evidence, in the form of documents or witnesses. While the State does not exercise any effective control over the accused, violations of the accused's fundamental rights may arise. A recent example is the cooperation of the Austrian authorities in the contempt case against members of the legal team of Bemba Gombo (*Prosecutor v. Bemba et al).*[896] In this case the Prosecution needed key evidence in the form of payment details proving that

[896] Bemba et al. Case, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.

money was indeed paid to witnesses in the Bemba main trial (in exchange for false testimonies). Such payments were processed by an international banking institution seated in Vienna.[897] The ICC Office of the Prosecution consequently made two requests to the Austrian Prosecution in 2012 and 2013 demanding the disclosure of all bank transfers regarding several dozens of persons close to Bemba. The two requests for assistance passed through the Austrian Prosecution and were ultimately granted by a Judge of the Vienna county court for criminal matters. Based on a considerable part on the information obtained through these two requests for assistance granted by the Vienna ourt, arrest warrants were issued and executed against four accused.[898]

This information entered the public domain in autumn 2015 when a representative of the money transfer company testified before the ICC making explicit reference to the requests and the granting orders of the Austrian Court.[899] Due to the fact that the two orders granted by the Austrian Court dated October 2012 and November 2013 respectively were never served to the defendants, an appeal against the two Austrian decisions was still possible.[900] In the two complaints, the defendants invoked several procedural violations of Article 116 of the ACCP pertinent to the opening of bank accounts and bank transfers. In April and May 2016 respectively, the Vienna Court of appeal followed both complaints and held that the requests for assistance by the Austrian Prosecution (and ultimately being that of the ICC Office of the Prosecution) should not have been granted in the presented format by the Vienna Court.[901] The Austrian Court unduly, by not respecting the correct procedure set under the ACCP, ordered the opening of the bank transfers, thereby *arguendo* violating Article 8 ECHR. This demonstrates that

[897] More precisely, the entity of payment provider Western Union dealing with payments inter alia in Africa is seated in Vienna, Austria.
[898] The four accused of Bemba et al case: Aime Kilolo, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido. Bemba Gombo was already in the detention of the ICC.
[899]ICC Public Transcript, ICC-0105-0113 (Case v. Bemba,Kilolo, Mangenda, Babala and Arido), ICC-01/05-01/13/-T-33 ENG RT 02-11-2015-T. . These orders were handed over to the Defence teams of the five accused with the permission of the presiding judge of the ICC Chamber.
[900] Decisions of the Austrian County Court for Criminal Matters under filing numbers: 312 HSt 226/12h-1 dated 15 November 2012 (Granting Order I) and 314 HSt 159/13x dated 20 November 2013 (Granting Order II).
[901] Decision of the Oberlandesgericht Wien - Vienna Court of Second Instance, 19 BS 329/15v, 22 April 2016 regarding the first request for assistance and Decision of the Oberlandesgericht Wien, 20 BS 359/15, 24 May 2016 concerning the second request for assistance.

the ICC must, in its requests for cooperation, fully respect the criminal procedure of the state from which it is seeking assistance and where it fails to do so, a path to the ECtHR is likely to open. In the specific case, the fact that the Vienna Court of appeal quashed the initial decision of the lower court, recourse to the ECtHR was impossible but also unnecessary.

While the defence teams of the five accused requested to strike out the evidence "obtained in contravention of the Austrian criminal procedure code"[902] the ICC Prosecution argued that the only relevant question was whether international human rights law was violated, whereas the question "whether Austrian law may have been violated was not at all probative of this issue".[903] Reference was made by the Prosecution to a search and seizure conducted by national authorities in violation of the Congolese Code of Procedure in the *Lubanga* trial, where the Trial Chamber opined that it was "not bound by the decision of national courts on evidentiary matters" and "the mere fact that a Congolese court has ruled on the lawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court".[904] In support of this argument, the Prosecution further cited *Behrens,* who held that it was certainly not the intention of the drafters of the Rome Statute to burden the Court with "decisions of purely national law" in evidentiary matters unless an *internationally recognized human right* was violated.[905] In support of the admission, the Defence invoked the decision in *Mucić* in which the ICTY excluded evidence obtained in breach of *ad hoc* Tribunal's

[902] *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Jean-Jacques Mangenda's Supplemental Notice of Evidence to be Tendered, 3 February 2016, para. 1: submitting a summary of the proposed expert testimony.
[903] *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, 8 February 2016, para. 3.
[904] *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, 8 February 2016, paras. 1,3.
[904] *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, 8 February 2016, para. 4 citing ICC-01/04-01/06-803-tEN, para. 69.
[905] *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, 8 February 2016, page 2-3, Footnote 2 citing Hans-Joerg Behrens, "Trial Proceedings", in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law, 1999) p. 246. (Highlighting is that of the author).

procedural principles.[906] Ultimately the aim of the defence, the striking out of the (at least with respect to Austrian procedure law illegally) obtained evidence from the records, was rejected and the four defendants in the *Bemba et al.* contempt case were convicted in October 2016.[907] Nonetheless, this situation effectively demonstrated that possible violations of Austrian procedural law might seriously affect international criminal trials.

The situation is different with regards to The Netherlands as the host state, where the territorial link exists between the accused and an ECHR State Party. Three accused before the ICTY and one detained witness before the ICC have attempted to bring their human rights complaints against the Netherlands.

33.2. Netherlands: Territorial Link Insufficient to Establish ECtHR Jurisdiction?

The reasoning of the ECtHR in response to applications against the Netherlands will be examined and its approach compared to its constant jurisprudence, notably in cases where human rights concerns relating to other international organisations were invoked.

33.2.1. *Milošević v. Netherlands*: Exhaustion of Domestic Remedies?

In May 1999, then President of the Former Yugoslav Republic (FRY), *Milošević* was indicted by the ICTY. In April 2001, he was first arrested for corruption charges and following intense pressure by the international community, transferred to The Hague three month later, despite the fact that the Constitutional Court of the FRY had suspended his surrender.[908]

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[906] *Prosecutor v. Delalić* et al., IT-96-21, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997 in Annex A of the Defence Motion in *Prosecutor v. Bemba et al*, ICC-01/05-01/13, Réponse de la Défense de M. Fidèle Babala Wandu à la « Prosecution's Motion to Exclude the Testimony of Witness D22-004 and the Submission of his Report », 8 February 2016. http://www.icty.org/x/cases/Mucić/tdec/en/70902732.htm.

[907] *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido,* ICC-01/05-01/13-1989-Red, Judgement, 19 October 2016.

[908] *Milošević v. Netherlands* (dec.),77631/01, 19 March 2002. Y. Beigbeder, International Criminal Tribunals: Justice and Politics, (Palgrave Macmillan 2011), p.67 ("On 29 June 2001, again following U.S. financial pressures, Milošević was transferred to the Tribunal in The Hague by the government of Serbi led by Zoran Djindjic, without the approval of Kosturica").

Following his transfer, the defendant initiated summary civil proceedings against the Netherlands before the Regional Court of The Hague. He sought an order directed against the Netherlands for his release or, in the alternative, his return to the FRY. He contested in particular the lawfulness of his transfer in view of the lack of agreement between the ICTY and the FRY, along with the Constitutional Court's decision not to extradite. The District Court asserted that the Netherlands had validly transferred its jurisdiction to the Tribunal and that Dutch cooperation was limited to the transport of accused from the airport to the Detention Unit as well as to guarantee their safety.[909] Therefore, the Court held that the Dutch courts have no jurisdiction to decide on release. *Milošević* lodged an appeal against this judgement which he later withdrew. Instead, he appealed directly to the ECtHR,[910] which rejected the application in March 2002 on the grounds that he had not exhausted domestic remedies. The Court held that any remedy "not obviously futile" must be exhausted prior to lodging an application to the ECtHR.[911] It based its dictum on three cases: *Akdivar v. Turkey*, *Epözdemir v. Turkey* and *Allaoui v. Germany*.[912] The following sub section will analyse these cases in order to determine whether the applied *dicta* were indeed representative of the case law applicable at that time, or alternatively whether this rather served as a pretext to strike out such a complex and novel case.

a. Exhaustion of Domestic Remedies in the Case Law of the ECtHR

The obligation of an applicant to exhaust available domestic remedies is a recognized rule of international law.[913] The essence of this principle is to prevent the applicant from bypassing the Member State's highest courts providing remedies to the alleged (ECHR)

[909] The Hague District Court, Civil law division – President Judgment in interlocutory injunction proceedings of 31 August 2001, case number KG 01/975, para. 3.1.

[910] Among others he complaint about the unlawfulness of his transfer with the active connivance of the Netherlands [*Art 5 para 1*]; (ii) that he was prevented to challenge the legality of his detention as he was not allowed to challenge the legality of the ICTY itself. Further, that the only remedy was provisional release [*Art 5 para 4*], (iii) that the procedure before the ICTY was not "fair" as it united (with a view of the Judges amending the Rules of Procedure) "administrative, legislative and judicial functions" [*Art 6 para 1*], (iv) that the sole remedy against violations were those offered by the ICTY itself [*Art 13*].

[911] *Milošević v. Netherlands* (dec.),77631/01, 19 March 2002, The Law, para. 5.

[912] Ibid.

[913] See other international human-rights treaties: the International Covenant on Civil and Political Rights (Article 41(1)(c)) and the Optional Protocol thereto (Articles 2 and 5(2)(b)); the American Convention on Human Rights (Article 46); and the African Charter on Human and Peoples' Rights (Articles 50 and 56(5)).

violation.[914] This corresponds with the purpose of the ECtHR: which is not the punishment of states, but rather, a solution-oriented one to find settlements and induce States to comply. It is also an expression of the subsidiary nature of the Convention mechanism.[915] In *De Wilde, Ooms and Versyp v. Belgium* the ECtHR reasoned that the essential aim thereof was the protection of the national legal order and that consequently, the affected state could waive the benefit of such rule.[916] Equally, the protection of human rights being its fundamental purpose, the Court awards itself with a certain degree of flexibility. In *Ringeisen*, the applicant lodged a complaint with the European Commission of Human Rights several months before the final judgement of the (Austrian) Constitutional Court. The Strasbourg organ held that, while the exercise of "any domestic remedies" was required, international law warrants for a lower degree of formality than national law.[917]

b. Requirement of Availability and Effectiveness

The existence of any remedy must be "sufficiently certain in law and in practice".[918] An applicant has no obligation to pursue a domestic remedy "bound to fail".[919] Against this, the Court held in *Milošević* that "mere doubts as to the prospects of success of a particular remedy, which is not obviously futile" was not sufficient exhausting of domestic remedies.[920] The Strasbourg Court invoked three precedents: *Epözdemir; Akdivar* and *Allaoui*.

In *Epözdemir*, a regular and well established remedy was available under national law, which the applicant decided not to pursue, believing there to be a "practice of non-investigation" of certain political crimes in the South-East of Turkey.[921] The ECtHR was, however, able to point to a number of successful applications in comparable cases.[922] In

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[914] *Case of A, B and C v. Ireland* [GC] 25579/05, 16 December 2010, para. 142.
[915] *Selmouni v. France* [GC], 25803/94, 28 July 1999, para. 74.
[916] *De Wilde, Ooms and Versyp v. Belgium,* 2832/66; 2835/66; 2899/66 , 18 June 1971, para. 55.
[917] *Ringeisen v. Austria*, *2614/65*, 22 March 1971, para. 89.
[918] *Vernillo v. France*, *11889/85*, 20 February 1991, para. 27.
[919] *Allaoui v. Germany* (dec.), 44911/98, 19 January 1999, para. 4.
[920] *Milošević v. Netherlands* (dec.), 77631/01, 19 March 2002, (*Section: The Law).*
[921] *Epözdemir v. Turkey*, *43926/98*, 31 January 2002, para 2.
[922] *Epözdemir v. Turkey*, 43926/98, 31 January 2002, para 4.

Allaoui, the applicant decided not to lodge a constitutional complaint with reference to two other unsuccessful complaints in connection with the deportations of aliens from Germany. The ECtHR proved the facts of the cited case to be decisively different.[923] In the third case, Akdivar sought compensation for the destruction of property by State security forces and did not exhaust domestic remedies, claiming that a State unwilling to stop such practice would not be willing to provide an effective remedy.[924] The ECtHR recognized this claim with reference to "particular circumstances of the case".[925] Decisively, the Turkish Government could not provide a single case where compensation in relation to village destruction was awarded.

c. Cited Case Law as Valid Basis for Milošević Decision?

What is striking about the *Milošević* decision is the lack of any factual or legal debate as to the nature and definition of "certainty" in the context of legal remedies and its chances of success. In contrast to the three decisions cited above, the legal reasoning in *Milošević* is limited to one citation relating to the *mere doubt* dictum derived from the same cases. More importantly, the rulings in all of these three cases have considerably more legal substance in its reasoning. In *Epözdemir,* the Court discarded the key argument invoked by the applicant presenting similar successful applications before Turkish Courts. Moreover, the application in *Epözdemir* was later partly admitted.[926] In *Allaoui*, the mere citation of prior judgements by the German courts (in which the applicant saw his position confirmed) effectively deprived the German Constitutional Court of its right to decide in an ECHR compliant manner in the case at hand. Moreover, the decisions cited were "based on factual situations proved to be different"[927]. Such applications left the ECtHR with almost no choice but to reject such applications. *Akdivar* does not assist the Court, as in this decision, the ECtHR recognized the limited prospects of success and admitted the complaint despite the formal non-compliance. In the cited jurisprudence, the Court applied a flexible approach notably taking into account whether comparable

[923] *Allaoui v. Germany* (dec.), 44911/98), 19 January 1999, para. 4.
[924] *Akdivar et al v. Turkey* (dec,), *21893/93*, 1 April 1998, para..60.
[925] *Akdivar et al v. Turkey* (dec,), *21893/93*, 1 April 1998, para. 71.
[926] *Epözdemir v. Turkey*, no *43926/98*, 31 January 2002.
[927] *Allaoui v. Germany* (dec.), 44911/98), 19 January 1999 (The Law).

applications had a prospect of success in the past. This test was certainly not applied in the complaint of the former Yugoslav President. *English,* when commenting on the *Milošević* case, pointedly remarked that "[w]hilst the prospect of the Strasbourg Court sitting in judgment on the legality and procedures of the ICTY is *improbable*; the likelihood of a Netherlands tribunal doing the same *exists in the realms of fantasy"*.[928] Therefore, the exhaustion of domestic remedies should have not played the decisive role. It may further be argued that the Hague district court, given the importance of such decision for the legal status of international organizations in the Netherlands, had indeed consulted with all legal and political stakeholders in the country, a fact that makes an eventual appeals decision in favour of Milošević less than unlikely.

Moreover, if the purpose of the obligation to exhaust remedies is not to deprive national courts of their power to correct legal flaws or human rights violations committed by lower courts, then the case of *Milošević* before the Dutch Courts is decisively different. The Dutch Court not only made it clear that it did not have jurisdiction, the tie between *Milošević* and the Netherlands is tenuous, insofar as he was neither a Dutch national, nor did he voluntarily reside in the Netherlands. The initial domestic complaint in the Netherlands was effectively directed against the Tribunal and was primarily chosen to prepare a path to Strasbourg.

d. Conclusion

English opens her criticism of the decision by stating that "When faced with difficult questions of comity between international institutions, the Strasbourg Court tends to take refuge in obfuscations". She continues: "[w]hatever one thinks of the individual applicant, it has to be acknowledged that some of his Convention attacks on the constitution and proceedings of the ICTY have some legal force. But instead of a proper reasoned debate on the merits of any of these challenges the Court seems to be falling over itself to find reasons for shutting this particular applicant out".[929] One cannot agree

[928] Rosalind English, "Milošević v. Netherlands, Admissibility Decision Appl. no. 77631/01" One Crown Officer Row – Human Rights and Public Law Update, retrieved online. 30.9 2015, http://www.1cor.com/1315/?form_1155.replyids=689.
[929] Ibid, p. 144.

more with this analysis. Whether the Dutch district court or the ECtHR are indeed the correct *fora* can be certainly questioned, but nonetheless one would expect from the Strasbourg organ to apply equal standards irrespective of whether such decision might create unease among other international actors.

33.2.2. *Mejakić & Fuštar v. Bosnia and Herzegovina*: Cases referred from ICTY to Regional Courts

The cases against Fuštar and Mejakić were both referred in May 2006 from the ICTY to the Special War Chamber in Sarajevo.[930] On 1 June 2007, both filed complaints against Bosnia and Herzegovina before the ECtHR, complaining primarily about the unreasonable length of time spent in pre-trial custody. The complaint to Strasbourg followed domestic proceedings before the State Court and the Bosnian Constitutional Court, thereby meeting the exhaustion of domestic remedies criterion.[931] The ECtHR declared the application nonetheless inadmissible. Without providing further reasoning, the Court held that no indication of a violation existed.[932] As the complaint contained an ICTY component (which would be indirectly subject to ECtHR review), insofar as both were detained in the Tribunal's detention facility prior to trial, this case can be seen as additional evidence of the reluctance of the ECtHR to impose itself on the international criminal courts. Particular in view of the fact that the ECtHR entered into the merits of at least one other case (*Maktouf and Damjanović v. Bosnia and Herzegovina*) that was tried before the Special War Chamber in Sarajevo withough having an ICTY component[933]

33.2.3. *Waite & Kennedy* and *Bosphorus*: Human Rights Scrutiny of International Organizations?

In *Bosphorus*, the plaintiff had leased two aircrafts from the Yugoslav Airlines (JAT). As part of the sanctions regime against the FRY, the UNSC requested States to impound

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[930]This was introduced within the completion strategy of the Tribunal in 2003. According to Rule 11*bis* an ICTY indicted accused may be transferred to regional Courts where (i) it is ascertained that the regional court offers sufficient fair trial guarantees and (ii) neither the gravity of the crimes nor the level of responsibility make such referral inappropriate.

[931] Prosecutor's Fifth Progress Report, 3 July 2007.

[932] The one-page letter was neither translated into English nor published in the ECHR public database. It was requested by the author during a visit to the ECtHR in January 2015.

[933] *Maktouf and Damjanović v. Bosnia and Herzegovina*, [GC] 2312/08 34179/08, 18 July 2013.

aircrafts which had controlling interest by a person or an undertaking in or operating from the FRY. On 28 May 1993, the aircraft was prevented from taking off in execution of an advice from the Irish Department of Transport. On 4 June 1993, the European Communities adopted the Prohibition of Trade with the FRY Regulation 990/93 and four days later, the Irish Minister for Transport officially authorized the impounding. In response to complaints by the affected commercial company, the UN Sanctions Committee requested the aircraft to remain in Ireland. The Irish High Court found, in its Judgment, that the Minister of Transport was bound by the EEC Regulation to impound the aircraft. Matters were brought to the Irish Supreme Court, which referred the question to the ECJ that confirmed that the Minister had been bound by the EEC Regulation.

The Strasbourg Court concluded that the Irish authorities, including its Supreme Court, lacked any discretion in this matter, particularly following the ruling of the ECJ. This fact alone, the Court held, was, however, not sufficient to disburden the Irish authorities of the possibility of an ECHR violation. Responsibility for Convention compliance exists "regardless whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations".[934] The Strasbourg court concluded that transferring part of its sovereignty to international organizations would not (fully) absolve States from their ECHR obligations. Such a result would be "incompatible with purpose and object of the Convention".[935] The ECtHR introduced the following two-pronged test to determine a State's ECHR compliance. Firstly, it must be assessed whether the organization to which a State transferred its sovereignty sufficiently protects human rights in *general.* An affirmative answer would in consequence trigger a presumption of ECHR compliance; however, such presumption could be rebutted in view of the concrete circumstances of the case before the Court. *Bosphorus* held that the European Communities in general provided a human rights protection "equivalent to that of the Convention system", which resulted in a presumption that the acting Member State

[934] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], 45036/98, 30 June 2005, para 153.
[935] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], 45036/98, 30 June 2005, para 154.

(Ireland) had not breached Convention rights, and secondly, that such presumption was not rebutted by the facts of the concrete case.[936]

In essence, the Court considered the possibility of Ireland being held responsible for a Convention violation even in situations where it had *de jure* no margin of appreciation. The Court referred generally to the transfer of sovereignty to international organizations, evidently encompassing a large number of specialized agencies and organizations to which Convention states attribute parts of their sovereignty. The message conveyed to these Member States can be interpreted as the imposition of an obligation to carefully select the organization before transferring state sovereignty and constantly monitor acts of the latter for ECHR compliance. This approach was already developed in the earlier judgement of *Waite & Kennedy,* where it was held that the European Space Agency (ESA) could only claim immunity from the jurisdiction of German courts in relation to its employees insofar as it made "available to them reasonable alternative means to protect effectively their rights under the Convention".[937] In *Bosphorus*, the ECtHR applied the same principles even to the most powerful organ of the UN, the Security Council. While Ireland was considered not to have violated the ECHR, in a more recent case, *Nada v. Switzerland*, the responding state was held to have violated the Convention despite the fact that it merely implemented a Security Council's Resolution regarding a sanctions regime against the Taliban. Switzerland was found to have not sufficiently considered the

[936] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], 45036/98, 30 June 2005, para 166. Para 165 regarding the overall compliance "In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, **"equivalent" (within the meaning of paragraph 155 above) to that of the Convention system**. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community (see paragraph 156 above)." Para 166 regarding the in concreto test "In the Court's view, therefore, it cannot be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the **relevant presumption of Convention compliance by the respondent State has not been rebutted**." (highlighting is that of the author).

[937] *Waite & Kennedy v. Germany* [GC], 26083/94, 18 February 1999, para. 68 ("For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention").

specific facts of the case, i.e. the geographic situation where the applicant resided, thereby violating his rights to family life under Article 8 ECHR.[938]

The Netherlands, in hosting the ICTY or the ICC, and facilitating their operations by providing security and transfer of accused between the detention unit and the Tribunal/ICC, contributes to the operation of those courts. The fact that it does not exercise effective legal control over any of these acts may not validly *a priori* relieve it, as *Bosphorus* suggests, from its obligations under the ECHR. With the *Bosphorus* Judgment, and in view of a general tendency towards increased accountability of non-state actors, the Court realized that its credibility would be tainted if it continued to hide behind overly formalistic legal argumentation in relation to international criminal courts. Realizing that the Tribunals would continue their work for some time, it finally handed down a comprehensively reasoned decision in this matter.

33.2.4. The Joint Admissibility Decision in *Galić* and *Blagojević*

Galić was sentenced to life imprisonment in 2006. A year later, he filed complaints to both the UN Human Rights Committee (HRC) in Geneva and the ECtHR.[939] *Blagojević* lodged complaint to the ECtHR after having been sentenced to 15 years of imprisonment.[940] The Strasbourg Court examined whether the case was attributable to the UN and if, in the alternative, sufficient linkage existed with the Netherlands as host country and the recipient State against which both complaints were directed, to trigger ECtHR jurisdiction.

a. The ICTY as a Subsidiary Organ of the UNSC

[938] *Nada v. Switzerland* [GC], *10593/08*, 12 September 2012, para 195.
[939] *Galić v. Netherlands*, (dec.) 22617/07, 9 June 2009, para 17. Before the ECtHR, he complained about several Article 6 ECHR violations, among others that the Headquarter Agreement between the ICTY and the Netherlands deprived the applicant of access to the Strasbourg Court. No records exist of any decision by the Human Rights Committee. Several emails by the author to the committee were either not answered or did not bring any result. It is likely that he HRC has not answered the complaint following the engagement of the ECtHR and in view that both courts mutually exclude one another for human rights complaints [See Chapter 1].
[940] *Blagojević v. Netherlands* (dec.), 49032/07, 9 June 2009. He complained, *inter alia*, of having been unduly deprived by the ICTY of his right to replace one of his counsels during proceedings.

In its assessment, the ECtHR made reference to *Behrami, Behrami and Saramati*, in which a complaint was brought against KFOR and the UN Interim Administration Mission in Kosovo (UNMIK). *Behrami* related to the explosion of an undetonated cluster bomb, killing the son of Behrami, and consequently raising questions as to the obligations of the respondent parties to supervise mine-clearing operations.[941] The complaint in *Saramati* consisted of time spent by the applicant in pre-trial detention on the orders of KFOR. Both joint complaints were directed against the ECHR Member States that contributed soldiers and personnel to the KFOR and UNMIK missions. The Court found that both entities were either created under Chapter VII as a subsidiary organ of the UNSC (related to UNMIK) or at least under ultimate authority and control of the UN Security Council (KFOR).

The ECtHR, in dismissing the application, reasoned that the UN was not a Member State of the Council of Europe and moreover, that it had a legal personality distinct from those of its Member States. In relation to the UNSC acting under Chapter VII, the Court stressed the primary responsibility of this organ to secure international peace and security and the extensive powers, including the use of coercive measures, conferred to this organ in this respect. It concluded that putting acts of such organs under the scrutiny of the ECtHR would amount to an interference with a "key mission" of the UN.[942]

This dictum of the Strasbourg Court issued in relation to Chapter VII operations *stricto sensu* does, however, not fully fit the characteristics of a criminal Tribunal. While equally created under Chapter VII of the UN Charter, the creation of a Tribunal differs in key aspects from traditional Chapter VII measures.[943] The argument that any effective Chapter VII operation would be made impossible if every person affected by the far-reaching consequences of coercive measures were provided with legal remedy against the

[941] *Behrami, Behrami against France and Saramati against France, Germany and Norway* [GC], 71412/01 and 78166/01 31 May 2007 para 6.
[942] *Behrami, Behrami against France and Saramati against France, Germany and Norway* [GC], 71412/01 and 78166/01 31 May 2007, para 149.
[943] The issues surrounding the creation of the ICTY by way of a Security Council Resolution are manifold. It is widely suggested that the proper way of creation should have be done by involving the General Assembly of the UN. The installation of a Tribunal as a mean to restore peace and security was unprecedented.

UN arguably holds true for coercive measures. The situation is different with regards to criminal courts, where it is difficult to imagine how an additional layer of legal monitoring of an international criminal court would undermine the fulfilment of the mandate of such court. The reasoning of the ECtHR in *Behrami* should, for these reasons, not have been applied to the situation of a criminal tribunal despite having been created under Chapter VII.

b. Jurisdiction of the Netherlands: A Territorial Nexus?

The Court held that jurisdiction of Article 1 of the ECHR had primarily a territorial nexus.[944] In relation to exceptions in criminal proceedings, the Court made particular reference to the NATO Status of Forces Agreement, under which the sending State retains its criminal jurisdiction (including its obligations arising from the ECHR) over its own nationals for acts committed on the territory of a receiving state. As a further example, the Scottish court in the Netherlands ("*Lockerbie* Court") was mentioned.[945] Given these examples, the ECtHR concluded that the mere fact of the Court having its seat and premises on Dutch soil was not sufficient to attribute the complaints to the Netherlands. Whereas the Court thereby effectively denied the benefit of ECHR protection to the applicants, in both examples cited by the ECtHR, the applicants did benefit, directly or indirectly, from ECHR protection. In *Martin v. UK,* it was held that ECHR responsibilities apply whenever national law of a Convention State is applied extraterritorially, as is the case with the jurisdiction over NATO personnel dispatched to a third-party state.[946] Further, the NATO agreement is based on the assumption that the judicial system in a conflict zone is collapsed or is for other reasons unable to render fair trials. Regarding the Lockerbie Court, upon conviction to a life sentence in the Netherlands, the sole convicted person was transferred to a Scottish penitentiary where he made an appearance before the High Court in Glasgow. Here, he argued for his right to

[944] *Galić v. Netherlands*, 22617/07, 9 June 2009, para 43, exceptions were recognized in the ECtHR's jurisprudence in relation to both state immunity and international governmental organizations.

[945] The Scottish court in the Netherlands was a special court seated in the Netherlands but operating under Scots law. The court tried and later convicted two Libyan nationals for their involvement in the bombing of a passenger plane over the Scottish village of Lockerbie. https://en.wikipedia.org/wiki/Scottish_Court_in_the_Netherlands retrieved 7 September 2017.

[946] *Martin v. The United Kingdom*, 40426/98, 24 January 2007.

receive a predetermined date by which he would be eligible for parole. This hearing was required following the incorporation of the ECHR into Scottish Criminal Law. Ultimately, he was granted leave to appeal before the Scottish Court under full ECHR protection.[947]

In conclusion, both main arguments of the decision in *Galić* and *Blagojević* could be challenged to some extent with regards to the scrutiny of the ECtHR over human rights relevant decisions taken before the ICTY or the ICC. This demonstrates that the idea of an additional layer of human rights protection in international criminal proceedings is everything but unreasonable.

33.2.5. The ECtHR and the ICC: The *Lambi Longa* Case of a Detained Witness

The applicant was arrested in Congo for murder charges in 2005. On 27 March 2011, the applicant was transferred to The Hague in order to give testimony as a Defence witness in the *Lubanga* trial. After the completion of his testimony, the applicant lodged an asylum request with the Dutch authorities invoking fear of reprisals in connection with his testimony. Despite asserting that the applicant was not within the jurisdiction of the Netherlands, the Dutch government declared that it would consider the applicant's asylum request, but at the same time requested that the applicant remain within ICC custody pending asylum proceedings. The Hague Regional Court, in considering the case, carefully distinguished the circumstances from those established in *Galić* and *Blagojević* insofar as the applicant, due to his status as a detained witness as opposed to that of a defendant, did neither benefit from the ICC's Statute nor the Rules. As such, it indicated that the territorial nexus between the Netherlands and the ICC could establish the jurisdiction of the Netherlands.[948] After lodging his complaint to the ECtHR – invoking detention without legal basis and lack of legal remedy to challenge the detention – in June 2012, Lambi Longa withdrew his asylum request in September 2012. The

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947 Jim Murdoch,University of Glasgow, "Lockerbie trial: the human rights dimension", 1 May 1999, The Journal of the Law Society of Scotland, retrieved online: http://www.journalonline.co.uk/Magazine/44-5/1001111.aspx.

948 Regional Court of The Hague cited in *Djokaba Lambi Longa v. The Netherlands*, 33917/12, ECHR 2012, para 38.

Strasbourg Court nonetheless decided not to strike out the application since the underlying problem "touches on essential aspects of the functioning of international criminal tribunals having their seat within the territory of a Contracting State and vested with the power to keep individuals in custody".[949]

The ECtHR declared the application inadmissible. The legal basis in the situation at hand was the arrangement entered between the ICC and the Democratic Republic of Congo (DRC). It was incumbent upon the ICC to order protective measures in relation to a possible transfer. Lastly, it reiterated that the ECHR does not include the right to political asylum. The decision of the ECtHR must be seen in the wider context. Following Lambi Longa's application for asylum, several other witnesses followed the same road shortly thereafter. Nonetheless, the legal argumentation of the Court seamlessly follows the unsatisfactory tightrope act performed by the Court in balancing the interests of sovereign international criminal courts and its own established principles on the other. In dismissing the application, the ECtHR negated both its dicta from *Waite & Kennedy* and *Bosphorus*, explicitly relied upon by the applicant.

The dictum of *Waite & Kennedy* was invoked with a view that the ICC could only validly claim immunity where it provided an alternative remedy to a certain situation. Such was not the case in relation to asylum proceedings and the connected unique situation of detention. The ECtHR argued that no legal vacuum existed as the agreement between the ICC and the DRC provided clear direction, namely that the applicant had to return to the DRC following his testimony.[950] *Bosphorus* was invoked as the alternative argument, insofar as the presumption that the ICC offered legal protection equivalent to the ECHR had been rebutted in the concrete case.[951] The ECtHR denied this finding maintaining that the fundamental rights of the applicant were not violated in the case at hand and that the ICC possessed the necessary instruments to safeguard such rights of the detained witness.[952] Further, it is incomprehensible, how the effective control of the Netherlands could not be ascertained despite that the government not only *prima facie* accepted the

[949] *Djokaba Lambi Longa v. The Netherlands*, 33917/12, 9 October 2012, para.57.
[950] *Djokaba Lambi Longa v. The Netherlands*, 33917/12, 9 October 2012, para. 75.
[951] *Djokaba Lambi Longa v. The Netherlands*, 33917/12, 9 October 2012, paras. 65 and 66.
[952] *Djokaba Lambi Longa v. The Netherlands*, 33917/12, 9 October 2012, paras. 78 and 79.

request subject to examination, but also sent *notes verbales* to the ICC requesting the witnesses' continued detention.[953] Interestingly, in October 2013 the Amsterdam District Court granted the applicant complementary protection in the Netherlands explicitly invoking Article 6 ECHR, insofar as that would he have to retutn to the DRC he would risk a flagrant denial of justice. Hence, the District Court – as opposed to the ECtHR – concluded that the responsibility of the Netherlands would begin where that of the ICC ends.[954]

33.3. Interim Conclusion

It was observed that the ECtHR has demonstrated in the applications it has to date received from applicants standing trial before the ICTY and the ICC a certain degree of reluctance to place another supreme court under its scrutiny. The decision in *Naletilić* was characterized by a laconic and controversial reasoning. Due to the fact that the application was directed against the decision taken by the Croatian authorities to transfer the applicant to the ICTY, hence the active involvement by an ECHR member state, the ECtHR could not simply deny that it was *prima facie* competent to impose its judgement. Although several sensitive points were raised in the application, such as the question whether *Naletilić* could validly be sentenced by the ICTY to a higher sentence than the one allowed by the Croatian constitution, the ECtHR showed little interest to examine the issues raised and instead proclaimed the human rights compatibility of the ICTY Statute and the Rules of Procedure.

In *Milosević*, the delicacy for the ECtHR consisted in the fact that the Hague district court did issue itself on the application. The solution found by the human rights court was to

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[953] *Djokaba Lambi Longa v. The Netherlands*, 33917/12, 9 October 2012, para.64; Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine*, Brill (2017) Elisa Ravasi sees this fact as the distinguishing point between this case and the applications of Galić and Blagojević, see Text to Footnote 361.

[954] Irving Emma, "The Legal Limbo Continues: Update on the Detained Witnesses at the ICC, Research Project on Shared Responsibility in International Law", October 2013, retrieved online http://www.sharesproject.nl/the-legal-limbo-continues-update-on-the-detained-witnesses-at-the-icc/. ("[t]he Amsterdam District Court appears to be saying that where the reach of the ICC ends, the role of the Netherlands must begin. In this way, there is no gap in the protection of the witnesses. The Netherlands is not free to claim that the witnesses are solely within the jurisdiction of the ICC, as the *Longa* case seemed to suggest. Rather, where the ICC involvement ends, so does the presumption of equivalent protection. At this point the obligations of the Netherlands are engaged under the ECHR.").

dismiss the application due to the non-exhaustion of domestic remedies. This was done so by bending other cases. where the domestic remedies were effectively not exhausted, to make them suitable for the application by the ICTY defendant. An analysis demonstrated that the cited decisions did not fully support the conclusion reached by the ECtHR and that the decision had to be seen in the light of a certain reluctance by the Strasbourg court to get deeper involved in this already politically sensitive trial. Reluctance to impose its opinion on international criminal courts was also demonstrated in *Mejakić & Fuštar v. Bosnia and Herzegovina*, where the ECtHR refused to go into the merits of the case, whereas it did so in *Maktouf and Damjanović v. Bosnia and Herzegovina*, another case originating from the same War Chamber in Sarajevo but notably without an ICTY history. The fact that the Tribunals continued to operate for far longer than initially anticipated, and the progressive approach taken by the ECtHR in terms of human rights obligations of other non-state actors and international organizations such as in *Waite & Kennedy* or *Bosphorus*, forced the ECtHR to pronounce itself on this matter in a more holistic manner. This was done so in the joint decision in *Galić* and *Blagojević* in the late period of the ICTY. There were some hopes that the ECtHR would re-consider its defensive approach once the first application from the permanent ICC would reach its doorstep. The most recent decision concerning the ICC in *Lambi Longa* indicates, however, that the ECtHR for the time being continues to view itself as an inappropriate forum for assessing human rights violations before international courts and tribunals.

While many of these issues are developing and characterized by a great degree of uncertainty, one consequence appears to be clear: that defendants detained on behalf of the ICTY or the ICC at the UNDU in The Hague do currently (and in near future) not have any realistic hopes for an external assessment of the human rights conformity of their detention. The situation may be different where human rights violations considered more severe (torture etc.) are invoked or where the violations are attributable to a cooperating member state.

34. Post-Conviction Scrutiny and Alternative Remedies to the ECtHR?

34.1. Remedies against ECHR Violations Concerning Enforcement of Sentences

The first interaction between international criminal courts and the ECHR was in connection to a post-conviction matter. R. Hess, after being convicted by the Nuremberg Tribunal, complained that his imprisonment in the Allied Military Prison in Berlin-Spandau effectively violated Articles 3 and 8 ECHR insofar as he remained the sole inmate and was therefore in solitary confinement.[955] The European Commission ultimately denied the jurisdiction of the United Kingdom as it held that the supervision over the prisoners was subject to unanimous decision by all Four Allied Powers and that such joint authority was not divisible into four separate jurisdictions. With a view of assessing the prospects of a complaint by an ICTY or ICC convicted person to the Strasbourg organ, two different scenarios are to be distinguished: cases where modalities of enforcement are contested (or raised in a complaint) are exclusively governed by the domestic law of the enforcement state; hence, the enforcement state is the logical primary recipient of any alleged complaints of such human rights violations. Upon exhaustion of domestic remedies, the detained person has access to the ECtHR.[956] For the ICC, the Rome Statute explicitly prohibits any discrimination of ICC prisoners *vis-à-vis* national prisoners.[957] No justified argument exists to deprive persons convicted by international criminal courts or tribunals from seeking remedy. Primary field of applications would expectedly be violations of Articles 3 (degrading treatment) and 8 ECHR (denial of right to family visits). Where matters relating to the designation of the state of enforcement or to early release are invoked, such complaints are to be directed primarily towards the Tribunals or the ICC. The matter of early release is now widely unified, insofar as release after two-thirds of the sentence is uniformly applied, regardless of the national provisions of the enforcement state.[958] Regarding the designation of an enforcement state, it

[955] *Hess v. United Kingdom* (dec.), 6231/73, 1975.

[956] Claus Kress and Goran Sluiter in Antonio Cassese, *The Rome Statute of the International Criminal Court: A Commentary*, p. 1769 consider this an interesting question, but do not deny such theoretical possibility.

[957] Article 166. para 2 ICC Rome Statute.

[958] The last remaining uncertainty in this field was elucidated by a recent decision in Galić where it was held that early release in cases of life imprisonment can considered no earlier than before the lapse of two-thirds of the single most severe sentence handed down by the Tribunal (i.e. 46 years). Prosecutor v. Stanislav Galić, No. MICT-14-83-ES*, Reasons for the President's Decision to Deny Early Release of Stanislav Galić and Decision on Prosecution Motion* (23 June 2015), para. 36.

undoubtedly has a great effect on the convicted person and his family life whether he will serve his sentence in Portugal, Austria or Estonia, all states that have declared their willingness to enforce sentences. Not surprisingly, several requests for reconsideration and designation of another Member State for sentence enforcement were filed to the President of the Tribunal.[959] The question whether the ECtHR can be seized for such issues is similar to the issues discussed in the prior two chapters. The key question is whether the enforcement agreement entered between Austria and the UN in this regard benefits from Article 103 UN Charter or not. This can be presumed as Article 27 ICTY Statute contains a provision of enforcement of ICTY sentences. However, the wording of Article 27 is of a non-binding nature, merely encouraging states to declare their willingness to enforce sentences.[960] A possible explanation for such hypothesis is the fact that the UNSC draws its powers from its obligation to restore peace and order. Whereas the creation of the Tribunal, and notably the arrest of suspects, was essential to achieving the desired deterrent effect when the pertinent UNSC Resolutions were adopted, the enforcement of sentences cannot be considered to have been equipped with the same level of priority. If one follows this hypothesis, recourse in such matters to the ECtHR would be an option for an international prisoner whenever a cooperating state engages (jointly with the Tribunal) in behaviour not compliant with a state's ECHR obligations, for instance in the designation of an enforcement state particularly distant to relatives and family, engaging the right to exercise family life within the meaning of Article 8 ECHR.[961] The same would be applicable to ICC prisoners. If obligations to enforce sentences benefit from Article 103 UN Charter, an applicant would have to demonstrate that rights amounting to customary international law are infringed in order to stand a chance to complain to the ECtHR.

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[959] *Milan Martić*, The invoked reasons being mainly the distance to family residing in the region and in Western Europe respectively. *Zoran Žigić* . The reason being that Žigić faces additional national charges in Bosnia and Herzegovina and Austria has an extradition treaty with Bosnia.
[960] The sole binding provision relates to early release that remains within the power of the Tribunal Article 27 final sentence and Article 28 (Pardon or commutation of Sentences).
[961] In exceptional circumstances the designation of a certain country might unduly violate the prisoner's right to family contact.

C. Possible Solutions to the Unresolved Situation between the ICTY / ICC and Leading Human Right Courts

The cases discussed above have demonstrated that complaints from applicants standing trial before the ICTY or the ICC have forced the ECtHR at times to revert to creative approaches allowing the human rights court to maintain its position that it was not competent to impose its opinion on proceedings before the two leading international criminal courts. It is expected that with the rise of international criminal law, both at the domestic, the international and in mixed-formats many more applications will reach the ECtHR or also the HRC. This may even place these human rights bodies into a situation of unease insofar as their approach towards the two courts may prevent them from adopting a more progressive approach of human rights scrutiny in relation to other international organisations. Two scenarios appear possible to provide an appropriate remedy to this situation.

35. Alternatives to ECtHR Scrutiny in its Current Form?

It is argued that some sort of external human rights examination of international criminal proceedings is necessary in order to avoid fragmentation between proceedings of international crimes at the national level and at the international level before international criminal courts.[962] Moreover, external monitoring or a judicial review could effectively counter continuous allegations of violations of certain human rights in international proceedings and thereby vest the Courts with the full credibility they otherwise deserve. It is argued that many issues should get sorted out as soon as they arise and not only at the end of trial. While entities like civil society and academia do effectively provide some form of oversight, the problem is both the time-delay, which may cause that such finding may not help the individual litigant, and the fact that some sensitive matters are decided in confidential manner and hence beyond the supervision of academia and/or civil society.

[962] This is not least warranted by the fact that it is increasingly random whether a person having committed international crimes is tried before national or international courts.

As the *ad hoc* Tribunals will soon turn off their lights, the focus will be placed on the role of the ICC as the permanent court for international crimes. Two possibilities were identified:

35.1.1. ICC as a Member to the ECHR?

Even if complaints were to be admitted against Austria, Bosnia and Herzegovina, Serbia or the Netherlands in relation to their role in ICTY or ICC proceedings, the responding governments could not validly represent the position of either court. Similarly, in case the court finds that a particular action by the concerned responding ECHR Member State and the ICTY or ICC constitutes a violation of one or several ECHR Articles, the ECtHR would have to hope that the ICTY/ ICC accepts and executes the judgement.[963] Similar considerations were also raised regarding the relationship between the EU and the ECHR, the transformation of the project, however, currently being on hold after the ECJ denied the compatibility of EU law with such an accession to the ECHR (Opinion 2/2013).[964] Alternatively, a solution similar to the one found for the Kosovo Specialist Chamber may become an option, which despite the fact that Kosovo was not a member of the ECHR is nonetheless bound by the law of the ECHR.[965]

35.1.2. Human Rights Committee as an Independent Advisory Committee?

One of the advantages of the ICCPR is that, unlike the ECHR or other regional treaties, it is not limited to a particular geographic region, and with currently 168 State Parties, benefits from close to universal acceptance.[966] It is also, aside from the ECHR, the only important human rights instrument which is enforceable insofar as it accepts individual

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[963] In regular proceedings before the ECtHR the Committee of Ministers would serve to exercise pressure for the member states to implement the judgements of the ECtHR and more importantly amend legislation or legal practices.

[964]http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=160882&occ=first&dir=&cid=240894.

[965] See the Law on Specialist Chambers and Specialist Prosecutor's Office (Article 3): . https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office-3-aug-2015, retrieved 15 September 2017. Further Heinze, The Kosovo Specialist Chambers' Rules of Procedure and Evidence, Blog of the European Journal of International Law, 17 August 2017, https://www.ejiltalk.org/the-kosovo-specialist-chambers-rules-of-procedure-and-evidence/.

[966] Office of the High Commissioner for Human Rights, Status of Ratification Interactive Dashboard, retrieved online, 29 September 2015, http://indicators.ohchr.org/.

complaints. The HRC as its monitoring organ, while much smaller in personnel and number of adjudicated cases, developed fair trial principles very similar to that of those of the Strasbourg Court. The HRC closely monitors the jurisprudence of the ECtHR and hence provides a comparable level of human rights protection.[967] Another advantage of the HRC is that it has a tradition of expert members with prior professional experience in international criminal justice.[968] It is suggested that an executive committee of three HRC experts should be made competent to bindingly decide upon human rights issues arising in ICC proceedings. This HRC panel would act as *amicus curiae* to the proceedings and offer its independent expert opinion on selected critical human rights issues.[969]

36. Concluding Remarks:

This Chapter attempted to point to some of the difficulties arising from the fact that a different level of human rights protection exist at the (European) domestic state-level and at the level of the ICTY or the ICC. This becomes an issue particularly in matters of member state cooperation where both the state and the court act jointly together. Proceedings before international criminal courts, from arrest until either acquittal or post-conviction release, were examined with a view of surveying at what stages a suspect, accused or convicted person could eventually benefit from recourse to the ECtHR. In relation to State cooperation, this is the case whenever Austrian law applies in full, notably at the arrest stage when the Austrian authorities act independently (i.e. without prior warrant of arrest) and at the enforcement stage with respect to the modalities of enforcement. Where the arrest is executed following a warrant issued by The Hague, the role of the Austrian authorities is limited and recourse to Strasbourg is realistically only possible in cases of severe factual mistreatment of the accused. What concerns member

[967] Anne-Marie Slaughter, *New World Order*, 79-81 cited in David Armstrong (et. al), *International law and International Relations*, (Cambridge 2012), p. 183, refers to the "persuasive authority" the Strasbourg Courts exerts on a number of non-European national Courts as well as notably the Human Rights Committee.

[968] Mauro Politi, a current member of the HRC (until December 2018), has served as Judge both before the ICTY and the ICC. http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx, retrieved 19 September 2017. Equally, Fausto Pocar served in the Human Rights Committee from 1984 until 2000 before becoming a Judge at the ICTY from 2000 until 2009. See Biography of Fausto Pocar retrieved online at legal.un.org/avl/pdf/ls/Pocar_bio.pdf.

[969] While this question would trigger a plethora of highly interesting legal questions, it was agreed with the supervisor of this dissertation not to enter into a comprehensive *de lege ferenda* discussion.

state cooperation, it was asserted that requests by the ICTY, due to its creation under Chapter VII of the UN Charter and the benefit of Article 103 UN Charter, were to be executed by member states unless they would be in breach of *jus cogens* or customary international law. Conversely, a state requested to cooperate with the ICC must equally consider its obligations from the ECHR or the ICCPR.

Upon transfer to the detention unit at The Hague, several accused or convicted persons have filed complaints with the Strasbourg Court, all of which were declared inadmissible. A critical assessment of the Court's reasoning allows for the conclusion that the Court was overly reluctant to get into this matter even in cases, such as in the applications of *Milošević*, *Fuštar* and *Mejakić* or *Lambi Longa*, where it arguably possessed sufficient justification to issue its opinion. It is suggested that the Court did so, not because it did not consider itself competent to impose its jurisprudence over another supreme court, but primarily also because it considered the alleged violations not severe enough. Where the ECtHR (or the HRC) would consider core rights to be violated in ICTY or ICC proceedings, boths courts would likely adapt a more offensive approach. Whether it would do so in a public judgement or through other channels, such as in joint-sessions with Judges from the ICTY/ICC or in future the KSC, is to be seen. As a remedy to the solution, it is recommended with a view of future ICC proceedings that an executive expert panel, delegated from the Human Rights Committee, act as a permanent binding organ assisting in human rights related issues. The role of the ECtHR would then be to set the overall guiding principles and act when either ECHR Member States cooperate with the ICC or in cases where, despite all safeguards in place, a flagrant denial of justice may occur.

CONCLUSION

This dissertation examined the compatibility of key aspects of the pre-trial detention regime of the two essential international criminal courts of our time, the ICTY and the ICC, with leading European and International human rights standards. In the process of identifying the *crux* or decisive aspect of provisional or interim release decisions in ICL law both at international as well as on the domestic level, the leitmotif or recurrent theme discovered related to the attribution of the burden of proof between the prosecuting organs and the defendant. Therefore, while the greatest part of the dissertation was dedicated to the issue of the legality of legal presumptions and reverse burdens of proof in criminal law and in pre-trial detention scenarios in particular, other aspects relating to custody such as a possible duty to release in cases of long detention were equally discussed from a human rights point of view. In a second part, alternatives to detention in the form of electronically monitored house arrest as well as the theoretical and practical approach to post-conviction release were discussed, two issues related to pre-trial detention that link Austria and applicable Austrian law to ICTY and ICC proceedings. A final third part sought to find answers to the question of the consequences of established violations of ECHR principles in pre-trial detention matters.

The Human Rights Compatibility of Legal Presumptions and Reverse Burdens of Proof?

While with regards to the pre-trial status of those accused of ordinary crimes, in other words crimes excluding murder and international crimes, a presumption for release exists in most Western European countries, the opposite can be said when it comes to those accused of most serious crimes. Such presumptions may be justified particularly in ICL where the courts deciding on release are dealing not only with adjudication of the most serious crimes, but also with fragile post-conflict societies and often vulnerable witnesses. Notably, the ECtHR accepts presumptions of law and fact, but they must be confined within reasonable limits.[970] Basing the continuous detention of an accused over

[970] *Salabiaku v. France*, 10519/83, 7 October 1988, para.28.

a time period of three or four years on the presumption that he or she will escape or threaten witnesses would therefore be too vague and abstract to be overall fair and just and hence compatible with established European human rights law principles. What does this mean for the attribution of the onus of proof?

The four pre-trial mechanisms assessed in this dissertation all applied, to various degrees, the presumption that detention was necessary to secure public order in the wider sense. The most rigid example was applied in ICTY proceedings up until the amendment of Rule 65 (B) in late 1999 where the accused had to prove not only that he would not escape and/or pose a risk to victims and witnesses, but in addition thereto, had to demonstrate the existence of "exceptional circumstances". Separating the exceptional circumstances criterion from the risks of flight and/or witness intimidation effectively prevented a genuine assessment of the latter risks in a system where all the requirements were cumulatively necessary for the granting of release. The restrictive interpretation of exceptional circumstances limiting release to humanitarian matters outside of the control of the defendant made this presumption of detention practically insurmountable thereby creating a system of *de facto* mandatory detention incompatible with the principles of the ECHR or in fact any other leading human rights convention.[971] In the ICTY release mechanism, following the deletion of the exceptional circumstances criterion, the presumption against release continued to exist insofar as the defendant had to carry the burden of proving the non-existence of the risk of escape and the danger to witnesses. The fact that the accused was obliged to positively prove anything in criminal proceedings is unusual both in the continental as well as in the Common Law systems. Reverting to cases adjudicated before the ECtHR, four main conditions were established that may in certain cases justify such a reversal of the burden of proof: *Firstly*, to justify the shifting of the burden of proof to a defendant, it must be established that he or she either acted intentionally or at least negligently; a confusion of identity or a similar matter must be ruled out. *Secondly*, the act of the defendant must have created a particular situation, meaning that for one reason or another, the evidence is not only closer to the defendant than to the prosecuting organ, but it would otherwise rather be practically

[971] See the dicta in *Ilijkov v. Bulgaria,* 33977/96, 26 July 2001.

impossible for the latter to establish the exact facts of the case without burdening the defendant with reverse burdens of proof. Thirdly, in line with the *ultima ratio* character of such a legal construct, the interest in not letting such offences or crimes go unpunished must be of particularly significant interest to the wider public (e.g. the effective fight against drug trafficking). Only such a higher aim can justify the shifting of the burden of proof towards the defendant, thereby depriving the latter of essential rights emanating from the presumption of innocence. *Fourthly,* because the imposition of any reverse burden of proof necessarily also increases the chance of a false conviction, the principle of proportionality must be respected: the presumption imposed must therefore be realistically rebuttable by the defendant and the maximum threshold of the sentence has to balance the increased risk of wrongful conviction.

Overall, it was argued that the developed principles did overall also fit to the situation of pre-trial detention before the ICTY and were as a result not *per se* incompatible with ECHR principles. The high threshold for an initial indictment before the ICTY practically excluded errors in identity. The particularity of the situation that made the work of the Prosecutors and Judges particularly difficult was characterized by the many issues relating to Member State cooperation faced by the tribunals and it was concluded that the defendant, with a team of legal counsel, (in most cases at least one defence counsel being from the situation country) were often in the better situation to provide the evidence regarding the conditions in the place the applicant sought to be released to. While the public interest to enforce justice and not let international crimes go unpunished is self-explanatory, the principle of proportionality was safeguarded in the ICTY pre-trial mechanism insofar as the presumption was rebuttable in practice (a fact proven by the number of persons released post 1999) and the adverse consequences faced by an applicant failing to prove the requirements of Rule 65 (B) of the ICTY Rules were mitigated by the fact that the days spent in pre-trial detention were deducted in case of a later conviction.

The third system was the system of applications for interim release at the ICC. Although the Rome Statute forbids any reversal of the burden of proof to the detriment of a defendant, it was for a long time subject to debate whether the practice of the finding of "changed circumstances" by the Trial Chamber did not also in practice oblige the defendant to adduce evidence amounting to a change of circumstance. It has in the interim been clarified by ICC Appeals Chambers that the Prosecutor must in its periodic reviews "actively" raise all new evidence, both in favour and against release.[972] The Prosecutor thus bears the onus to prove that no changed circumstances exist as opposed to simply re-establishing its prior findings, while the defendant must not adduce any evidence in his favour. The fourth system of pre-trial detention applicable to those accused of international crimes was the system of domestic courts which was analysed on the example of Austria. The Austrian conditional mandatory pre-trial detention applicable for crimes punishable with a minimum sentence of ten years lowers the burden of proof for the Prosecution when justifying the detention of such an accused. As opposed to specific and concrete facts unambiguously establishing at least one detention ground, the system allows the Prosecutors and Judges, at least for an initial period, to remain comparably vague and abstract regarding the detention grounds and thereby relying on the presumption that applies for severe crime. Despite several concerns raised, a closer analysis of the Strasbourg jurisprudence and structure of the relevant ECHR Articles seems to suggest that the ECHR allows to base detention for an initial period on reasonable suspicion alone (or in jurisdiction where it exists, on the broad criterion of risk of disturbance of public order)[973]. The Austrian system is therefore not in violation of ECHR principles where the Prosecutor and Judges remain less precise and concrete regarding the criteria needed to establish detention for an initial period of four maximum six weeks and only thereafter precisely establishes the reasons justifying detention.[974]

The human rights compatibility of the ICTY and ICC pre-trial detention regimes were hence assessed trying to interpret and apply the guiding principles of mainly ECtHR case

[972] *Prosecutor v. Bemba Gombo*, Appeals Chamber ICC-01/05-01/08 OA 4, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", 19 November 2010, para.51.

[973] In the case *Bouchet v. France*, n° 33591/96, 5 September 2001, para. 48., the ECtHR held that the reasonable suspicion weighing on the suspect justified an initial detention of about 9 weeks (8 January- 18 March 1996).

[974] With critical remarks of Susanne Reindl-Krauskopf who agrees only under the condition that such a review (after around six week at the latest) would be automatically triggered and not upon request by the defendant.

law. It would have increased clarity and ultimately strengthened the prestige of the ICTY and ICC on the international scene had such an examination taken place in the form of an advisory opinion or (binding) judgement before an international human rights court.

The Role of Austrian Law in ICTY and ICC Proceedings

Two situations relating to release from detention were identified in which Austrian national law fully applies: the surveillance of pre-trial detention in case of a summons to appear in ICC proceedings and the law governing detention and release in the enforcement of ICTY and ICC proceedings. At the international level, house arrest was practically excluded due to the position of the Netherlands not to accept any defendants standing trial on its territory other than in detention. The recently expressed willingness of Belgium to accept persons standing trial on its territory could lead to a paradigm change towards an increased use of this form of detention in ICL proceedings.[975] Among the three most widely used forms of monitored house arrest, the GPS-enforced form was found to offer a considerable level of leverage making escape difficult while – contrary to a permanent form of house arrest as in *Blaškić* – offering easement to the defendant. Modern technology would particularly also allow not only to monitor, but also to ban, the defendant from accessing certain areas or locations, a fact that would prove useful in preventing, for instance, the threatening of witnesses. The question of *release from post-conviction detention* in enforcement states was of particular relevance to Austria as it had until December 2014 enforced the sentences of six ICTY convicted prisoners. While the ICTY Statute remained silent as to "out of prison" activities of prisoners, research uncovered that all of the six inmates serving their sentence in Austria had benefitted from escorted excursions for recreational purposes into surrounding parks and forests. Further, one prisoner was in his last year on several occasions granted day parole where he could spend 12 hours with his family unguarded and outside of prison. While this form of benefit should be in any case also available for future prisoners from the ICC, temporary release for humanitarian reasons should also be considered, such as for the visiting of a fatally-ill close relative or of a funeral.

[975] ICC Press Release:"Belgium and ICC sign agreement on interim release of detainees", ICC-CPI 20140410PR993, 10 April 2014.

From a human rights perspective, the fact that none of the ICTY or ICC defendants have to date not benefitted from electronic monitored house arrest cannot be held against either court. However, having an agreement with Belgium in place as well as technically improved forms of GPS-monitored devices being availabe, such a form as an alternative to detention must in the near future be thoroughly considered by the courts, notably the ICC. What concers detention conditions in member states, the examined example from Austria has demonstrated that with regards to ICTY prisoners no discrimination has taken place between them and domestic prisoners and that the benefits comprising unguarded outdoor activities were at least duly considered for this special category of prisoners.

Accountability of International Criminal Courts for Human Rights Abuses?

One of the main findings of the first Chapter of this dissertation was that the initial pre-trial detention regime of the ICTY requiring "exceptional circumstances" to justify release was violating principles of Article 5 ECHR and possibly also the presumption of innocence. It was therefore legitimate to ask what the consequence would have been had this matter been raised before the ECtHR?

As the matter would have only occurred following the transfer of an accused to the ICTY detention unit, it can be assumed that a complaint would have been primarily directed against the Netherlands. The ECtHR, in several decisions, later held that the mere fact that the court had its seat on the territory of the Netherlands is insufficient to hold the authorities of the host state liable for such violation and hence reproach the ICTY procedure to the ECHR Member State.[976] In other cases, the Strasbourg Court chose a more proactive approach and held, in relation to the European Space Agency (ESA), that the courts of the host country would become competent unless the international organization would offer a level of protection at least equivalent to ECHR standards.[977] As opposed to confrontation between the ECtHR – one of the leading human rights courts in the world – and the UN criminal tribunals, one witnessed a victory of "soft power". The widely noted jurisprudence of the ECtHR (and that of its UN Counterpart, the

[976] *Galić v. Netherlands*, 22617/07, Decision, 9 June 2009, para 43; *Blagojević v. Netherlands,* 49032/07, Decision, 9 June 2009.
[977] *Waite & Kennedy v. Germany* [GC], 26083/94, 18 February 1999, para. 68.

Human Rights Committee) became so diametrically opposed to the mechanism in place at the *ad hoc* Tribunals that it ultimately left the ICTY Judges no choice but to delete the "exceptional circumstances" barrier without replacement.[978] At the same time the analysis of the jurisprudence of the ECtHR regarding the pertinent applications demonstrated that defendants (once transferred and) detained on behalf of the ICTY or the ICC at the UNDU in The Hague do currently (and in near future) not have any realistic hopes for an external assessment of the human rights conformity of their detention.

The fact that the Strasbourg Court has so far rejected the complaints of all the applicants detained on behalf of the ICTY or the ICC for lack of jurisdiction can be explained through a combination of two factors: first, the ECtHR is reluctant to impose itself over international criminal courts whose existence and mission it strongly supports; second, and most importantly, it did not consider the substance of the complaints raised against the two courts as "flagrant denials of justice" to the detriment of the applicants. It is argued that the ECtHR would have (rightly) assumed jurisdiction where serious violations of human rights on its territory were to occur. This can particularly be argued following the judgement in *Zubaydah v. Poland,* where the Polish government was found to be in violation of the Convention without exercising any "effective control" or even officially knowing of the existence of "black sites" detention centres on its territory.[979] From a legal point of view, any act of the courts, as international organizations, that would amount to violations of *jus cogens* or customary international law would be beyond the legal scope or objective of such organizations and therefore void as *ultra vires*. What this dissertation has demonstrated was that both courts and particularly the ICC are vulnerable to recourse to the ECtHR when it comes to Member State cooperation. At all three main stages of state cooperation – arrest, provision of evidence, sentence enforcement – national law and ECHR scrutiny are affected. While *male captus* situations were particularly prominent in cases before the *ad hoc* Tribunals, the violation

[978] *Ilijkov v. Bulgaria,* 33977/96, 26 July 2001. See comments inter alia by Judge Robinson, *Prosecutor v. Krajišnik & Plavšić*, ICTY-IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, para. 2. Citing *inter alia* Article 9(3) ICCPR and Article 5(3) ECHR.

[979] *Husayn (Abu Zubaydah) v. Poland*, *no.* 7511/13, Fourth Section, 24 July2014, para. 517.

of procedural human rights in relation to arrests were also invoked in *Mucić* following his interrogations by Austrian police, a fact that ultimately led to the decision of an ICTY Trial Chamber to strike out evidence related to his initial (unlawul) interrogation.[980] Another more recent example was the complaint to the Vienna County Court of appeal regarding the excessive provision of personal data to the ICC in 2012 and 2013 respectively. The Court of Appeal decided in May 2016, that the Vienna County Court was indeed at fault and that the request for assistance from The Hague was not sufficiently specified and should therefore not have been considered by the Austrian court.[981] As the evidence provided concerned crucial evidence in the case of *Prosecutor v. Bemba et al.* the striking out of the evidence would have practically terminated the entire case. This case demonstrated that also recourse to Strasbourg was not an unrealistic scenario, as a this was ultiumately only prevented by the fact that the merits of the complaint were recognized by the Vienna Court of Appeal. At the enforcement stage, several complaints were addressed regarding the selection of a distant enforcement state for prisoners. While such recourse to Strasbourg has only limited chances of success, as the decision is taken by the ICTY or the ICC directly, alleged violations concerning the enforcement of sentences (for instance in Austria) may lead to complaints to Strasbourg. One may think in this context of violations of Article 8 ECHR or any form of excessive restriction.

Guilty until proven innocent was a provocative catchphrase the author considered as part of the title of this dissertation.[982] It referred to the stigmatization that those accused of international crimes often faced in general and to the presumption against pre-trial release in particular. The principles of pre-trial detention were measured against the ECHR as the leading collection of fair trial rights jurisprudence. Apart from the "exceptional circumstances" mechanism in place in the first years at the ICTY that was found to

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[980] *Prosecutor v. Zejnil Delalić et al.* ICTY-IT-96-21, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 8.

[981] Decision of the Oberlandesgericht Wien - Vienna Court of Second Instance, 19 BS 329/15v, 22 April 2016 regarding the first request for assistance and Decision of the Oberlandesgericht Wien, 20 BS 359/15, 24 May 2016 concerning the second request for assistance.

[982] A similar phrase appears to have been used by the author of an article dealing with pre-trial detention before the UN Tribunal for Rwanda: D.J. Rearick, "Innocent until Alleged Guilty: Provisional Release at ICTR" (2003) Harvard International law Journal.

deviate from established principles, the reverse burden of proof was, in view of the working conditions of the Tribunals, considered overall justified. There is hope that new improved electronic surveillance technology and increased international assistance, jointly with an overall mind-set in favour of pre-trial detention among the Judges of the ICC and other of courts currently operating, will lead to an increased record of pre-trial liberty in international criminal justice.

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APPENDIX I: Abstract English

Pre-Trial detention is arguably the most far-reaching interference with the right to liberty of a person standing trial, who is to be presumed innocent. Leading human rights treaties at both international and regional levels hence also warrant for the exceptional character of detention prior to a final conviction. It may only be ordered in case of the existence of a substantiated detention ground; reasonable suspicion or the gravity of the alleged crime alone do not serve as valid detention grounds and may not justify longer periods of detention.

For those accused standing trial before the Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Court (ICC), this presumption of pre-trial liberty only applied in a very limited manner. Particularly in ICTY proceedings, an alternative to pre-trial detention was lacking and in order to be granted a temporary release, it was up to the defendant to discard the existence of any detention grounds. The additional burden to prove the existence of „exceptional circumstances" in the first years of the ICTY was examined and ultimately found to be a manifest contravention of leading human rights principles, notably those of the European Convention on Human Rights (ECHR). While the requirement to demonstrate exceptional circumstances was later deleted, another controversial factor remained in place: the shifting of the burden of proof concerning the non-existence of detention grounds onto the defendant seeking release.

The legality of such a construct, the imposition of reverse burdens of proof onto defendants in criminal law, was thoroughly analysed by reverting to the pertinent jurisprudence of the European Court of Human Rights (ECtHR). Four main guiding principles were deduced from the ECtHR jurisprudence that, where cumulatively met, would exceptionally justify such a reversal of the burden of proof. Further, the pre-trial detention mechanism before the ICC and those in place in Austrian domestic proceedings applicable to (international) crimes punishable with sentences exceeding ten years of imprisonment were examined from a human rights point of view. In both cases, while analogies to reverse burdens of proof were discovered, both systems, as applied in practice, were held not to deprive the defendant of any rights of defence.

The last Chapter posed, against the background of a human rights assessment of the pre-trial release mechanism, the wider question whether a defendant in international criminal law does or should have access to human rights courts in case of a violation of his or her fundamental human rights. This controversial question was affirmed where member states were cooperating with the ICTY or the ICC. Regarding procedural violations before the courts such a scenario is merely imaginable in cases of grave violations of international customary law or *jus cogens*.

APPENDIX II: Abstract German

Die Untersuchungshaft (U-Haft) ist der vermutlich weitreichendste Eingriff in die Freiheitsrechte eines nicht rechtskräftig verurteilten Menschen. Führende internationale sowie regionale Menschenrechtskonventionen bekräftigen daher auch die Notwendigkeit einer restriktiven Praxis im Umgang mit der U-Haft. Eine solche darf, bei strenger Prüfung, nur für den Fall des Vorliegens (zumindest) eines konkret nachgewiesenen Haftgrundes – etwa Fluchtgefahr – angeordnet werden. Begründeter Tatverdacht oder die Schwere der zu erwartenden Strafe im Fall einer Verurteilung ersetzen dabei den Nachweis konkreter Haftgründe nicht.

Für Angeklagte vor dem Jugoslawien-Tribunal der Vereinten Nationen (Jug. Tribunal) sowie vor dem Internationalen Strafgerichtshof (IStGH) gelten diese Prinzipien oftmals nur sehr eingeschränkt. Besonders vor dem Jug. Tribunal fehlt bis heute eine Alternative zur U-Haft, und um (zumindest) eine temporäre Freilassung zu erwirken, liegt es am Antragsteller zu beweisen, dass Haft- bzw. Fluchtgründe nicht vorliegen. Die zusätzliche Verpflichtung der Darlegung „außergewöhnlicher Umstände" seitens des Angeklagten in den Anfangsjahren des Tribunals, um eine Freilassung zu erwirken, wurde aus menschenrechtlicher Sicht analysiert und für inkompatibel mit Prinzipien etwa der Europäischen Konvention der Menschenrechte (EMRK) empfunden. Dieses zusätzliche Kriterium wurde 1999 ersatzlos gestrichen. Die Rechtskonformität der U-Haft vor dem Jug. Tribunal nach der Streichung wurde umfassend bewertet, insbesondere deren rechtliches Charakteristikum: Der Übergang der Beweislast auf den Angeklagten hinsichtlich des Nachweises des Nicht-Vorliegens der Haftgründe.

Diese zentrale Rechtsfrage, nämlich die Zulässigkeit einer strafrechtlichen Beweislastumkehr aus menschenrechtlicher Sicht, wurde unter Herannahme der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) beleuchtet. Es wurden vier Prinzipien herausgearbeitet, bei deren Vorliegen eine solche Umkehr der Beweislast in Ausnahmefällen für zulässig zu erachten ist. Weiters wurden die Regelungen der U-Haft vor dem IStGH sowie der Mechanismus für Schwerkriminalität in der österreichischen Strafprozessordnung aus menschenrechtlichen Aspekten untersucht. In beiden Fällen wurde zwar eine Analogie zu einer Umkehr der Beweislast festgestellt, diese jedoch in ihrer konkreten Anwendung als nicht für unverhältnismäßig empfunden.

Im letzten Kapitel wurde aus Anlass der Prüfung der U-Haft aus menschenrechtlicher Sicht die Frage thematisiert, ob, zumindest bei Verdacht grober Menschenrechtsverletzungen vor den Haager Tribunalen (und Gerichtshöfen), die Anrufung des EGMR möglich sein könnte und sollte. Diese kontroversielle Frage wurde immerhin in Fragen der Kooperation der Mitgliedstaaten eindeutig bejaht. Hinsichtlich Verletzungen vor den Haager Tribunalen selbst wurde diese Möglichkeit für schwerste Rechtsverletzungen des Vökergewohnheitsrechts oder von ius cogens in Betracht gezogen.

APPENDIX III: ***Curriculum Vitae***

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